



Drought and Climate Change in the Environmental Review Process under the National Environmental Policy Act

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National Environmental Policy Act



- Procedural
- Analysis of effects of a proposed federal action and alternatives
- Disclosure and public participation
- Environmental impact statement
- Environmental assessment
- 42 U.S.C. §§ 4321 to 4370f

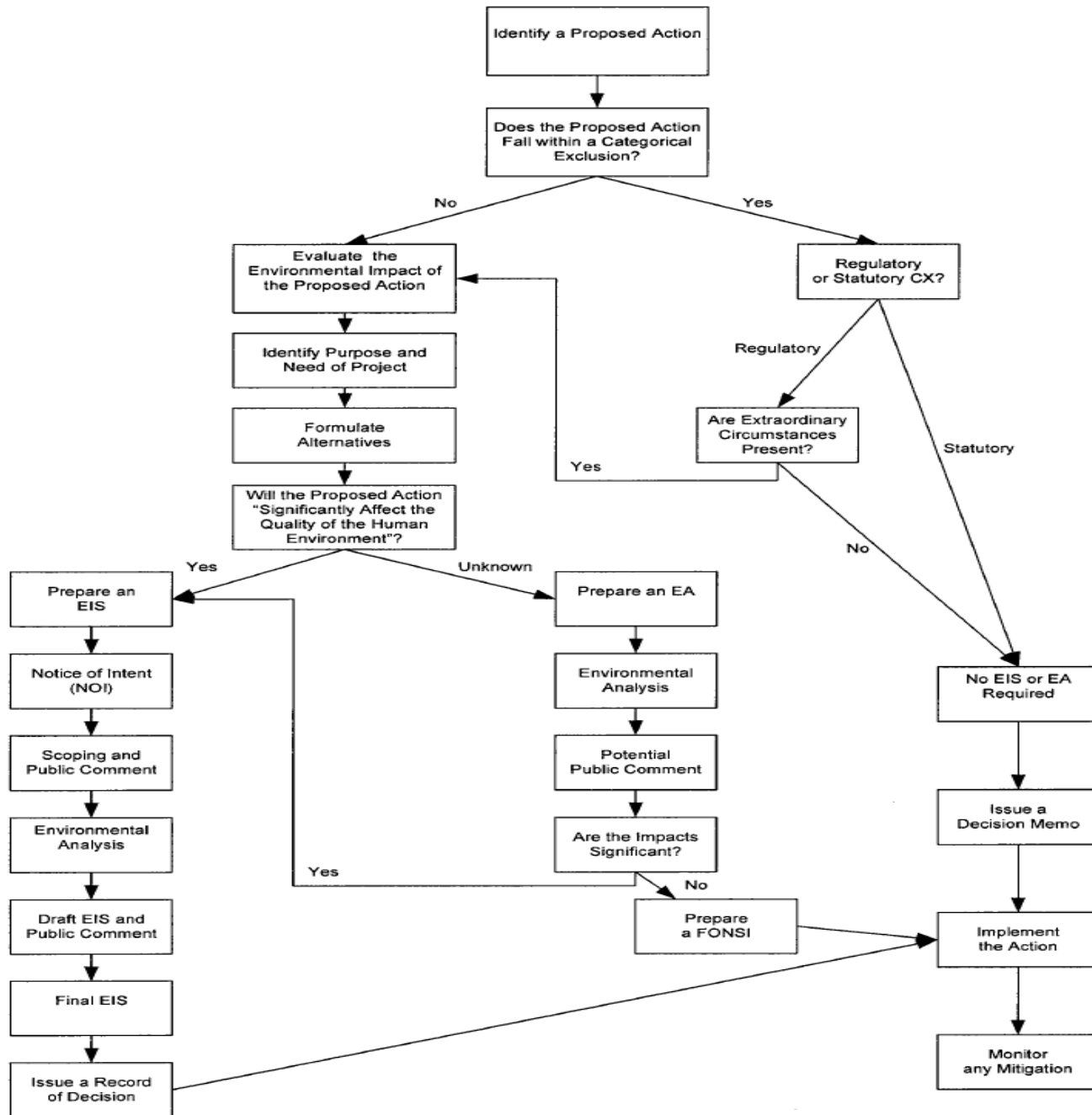
Other Environmental Review Laws



- 15 states have “little NEPA” or SEPAs
- Over 80 countries have environmental review laws modeled on NEPA



The NEPA Process:



The NEPA Obligation



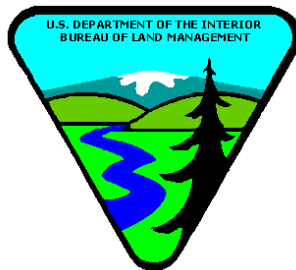
- “Hard Look” requirement
- Reasonably foreseeable effects
 - Direct
 - Indirect
 - Cumulative
- Proposed action and alternatives
- Disclosed in:
 - Environmental Assessment for actions without a significant effect
 - Environmental Impact Statement for actions with significant effects

NEPA Trigger

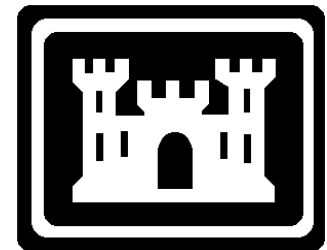


- Proposal for major federal action significantly affecting quality of the human environment
 - Federal permits
 - Federal authorizations
 - Federal decisions
 - Federal regulations
 - Federal funding
 - Federal control

Federal Permits, Authorizations and Decisions



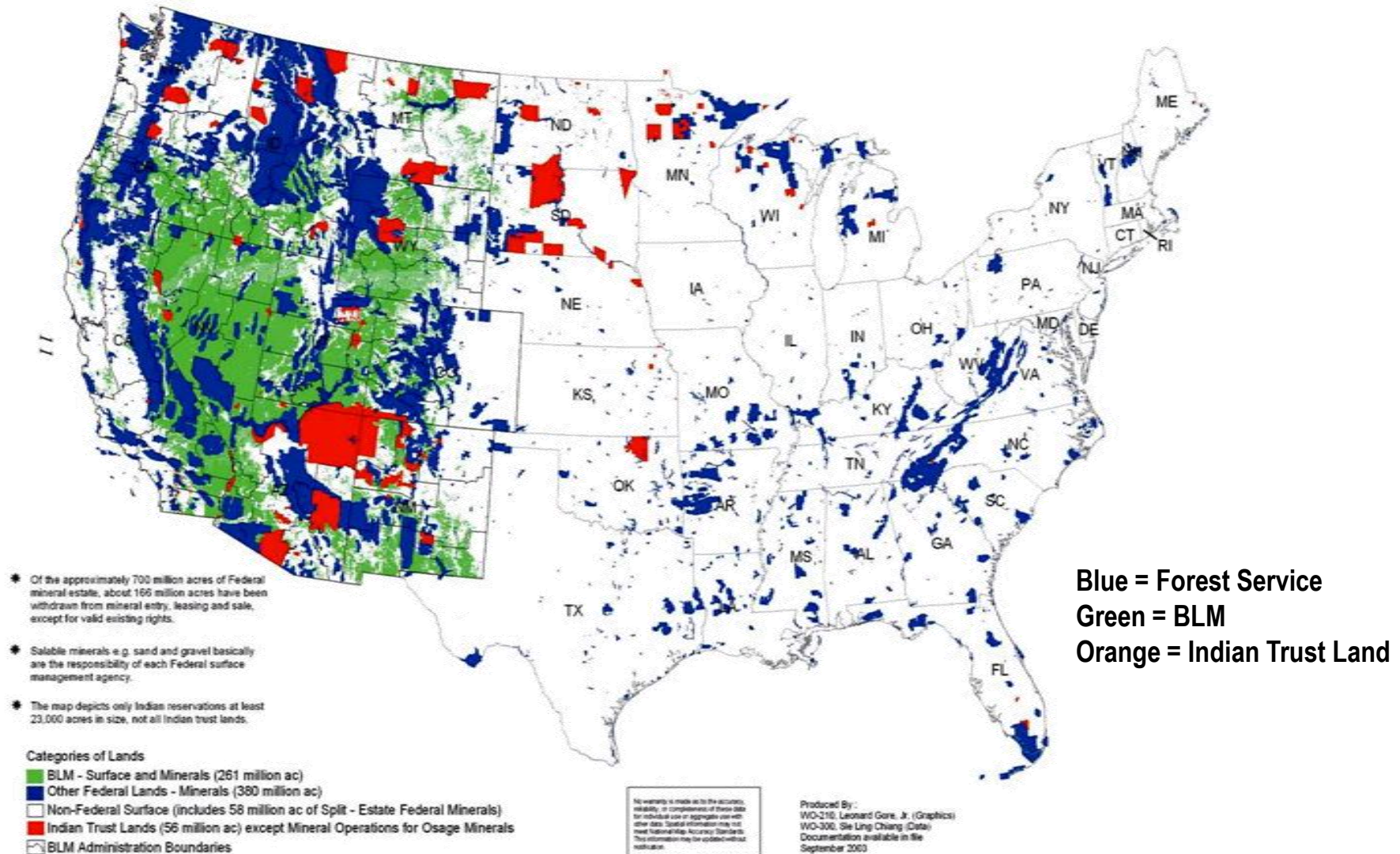
U.S. Department
of Transportation
**Federal Highway
Administration**



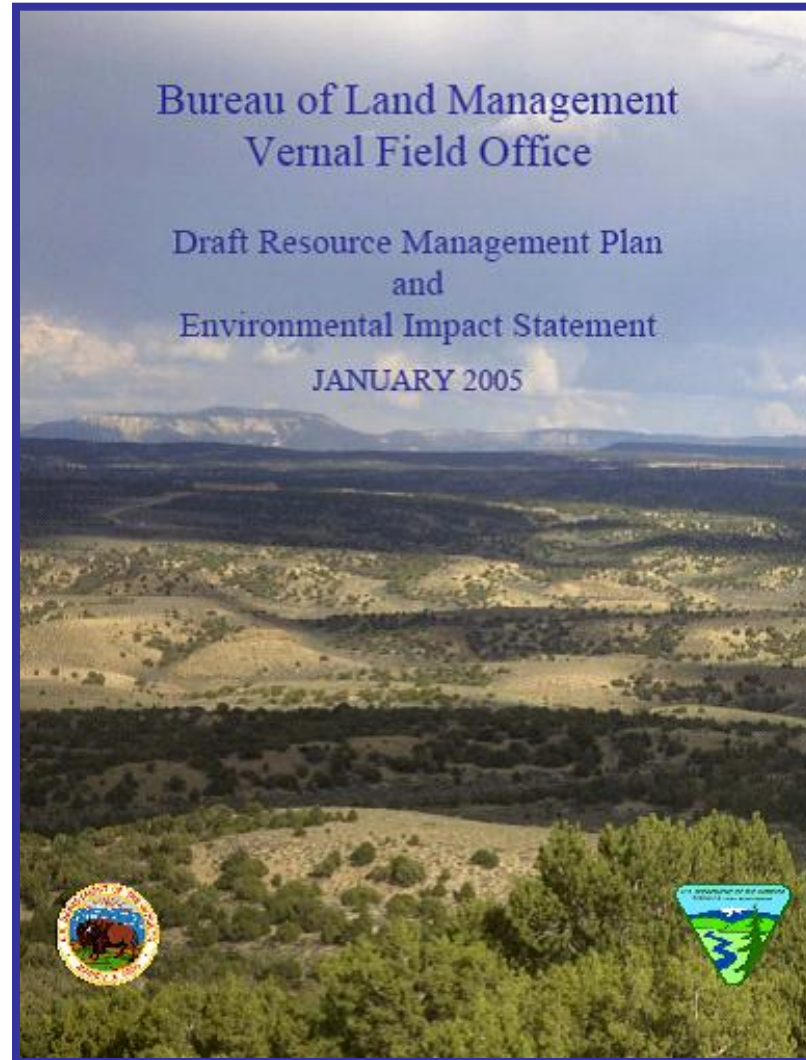
Federal Funding



Federal Lands



BLM and Forest Service Land Use Plans for Federal Lands



Ski Area on National Forest System Lands



Development of Federal Minerals



Pipelines and Rights of Way on Federal Lands



NEPA, Drought, and Climate Change



- Practical Challenges
- Litigation Challenging the Evaluation of Drought & Climate Change in NEPA Documents:
 - litigation about the analysis of the effects of proposed action on climate change
 - litigation about the analysis of the effects of climate change on proposed action

NEPA Challenges In a World Impacted by Drought & Climate Change



- NEPA Obligation – agencies must take a “hard look” at “reasonably foreseeable” direct, indirect and cumulative effects
- Challenge: integrate drought and climate change predictions into the NEPA process
- Specific applications:
 - Water projects
 - Instream flow projections
 - Fire risk
 - Snow-based recreation
 - Wildlife/TES
 - Federal land use plans

NEPA Litigation: Effects of Proposed Action on Climate Change



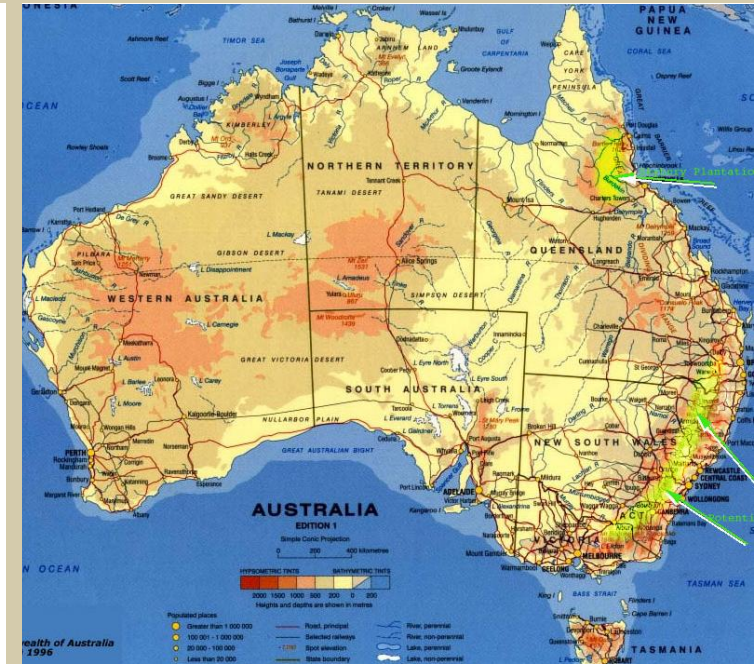
- Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003)
 - EIS for freight rail expansion to WY coal mines
 - EIS set aside
 - Supplemental EIS later upheld



NEPA Litigation: Effects of Proposed Action on Climate Change



- Gray v. The Minister for Planning, New South Wales, Australia (2006)
 - Proposed coal mine
 - 10.5 million tons/yr & 27 million metric tons of CO₂ emissions
 - Environmental Assessment Report set aside



NEPA Litigation: Effects of Proposed Action on Climate Change



- Center for Biological Diversity v. National Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir. 2007)
 - Light truck fuel economy regulations
 - Environmental Assessment set aside



Ninth Circuit on the Obligation to Consider the Effects of a Proposed Action on Climate Change:



- “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”

The Second Wave of NEPA Litigation: the Effects of Climate Change on Proposed Action



- Natural Resources Defense Council v. Reclamation Bd., Calif. Sup. Ct. (2006)
 - Environmental impact report for land development upheld
- Center for Biological Diversity v. Kempthorne, N.D. Calif. (2007)
 - EA for impact of oil and gas development on polar bear
 - Pending



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1. National Environmental Policy Act

- a. NEPA is the central federal charter for the protection of the environment. It declares a “national policy” to “prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. The statute requires federal agencies to consider the effects of their actions before authorizing “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).
- b. The NEPA obligation is procedural rather than substantive. The statute requires analysis, public disclosure, and an opportunity for public comment, but does not require federal agencies to reach a particular decision or even mitigate the effects of their actions.
- c. NEPA requires agencies to take a hard look at the reasonably foreseeable direct, indirect, and cumulative effects of the proposed action, reasonable alternatives to the proposed action, and the alternative of not acting at all.
- d. NEPA’s look-before-you-leap philosophy has proven influential. Since the 1969 enactment of NEPA, over 80 countries and 15 states have adopted environmental review laws based on NEPA.
- e. The NEPA Trigger – “major Federal action”
 - i. federal approval, federal decision, federal permit, federal authorization, federal lands.
 - ii. touchstone: federal control, or federal ability to exercise discretion over the outcome
- f. A federal agency fulfills its NEPA obligation in one of three ways:
 - i. Categorical Exclusion from NEPA for actions that do not individually or collectively have significant impacts.
 - ii. Environmental Assessment and Finding of No Significant Impact for actions that do not cause a significant impact to the environment.
 - iii. Environmental Impact Statement for actions that may cause significant impacts to the environment.
- g. An agency’s NEPA compliance may be challenged in federal court under the Administrative Procedure Act. NEPA has given rise to significant litigation, and judicial rulings have influenced the administration of the statute.
- h. For a detailed summary of NEPA, including observations about the specific application of the statute in Colorado, see Ezekiel J. Williams, The National Environmental Policy Act at pp. 339 to 350, in Environmental Regulation of Colorado Real Property (Steve A. Bain, ed., Bradford Publishing Co. 2007); Ezekiel J. Williams, What Every Land Professional Should Know About NEPA, 53 Rocky Mtn. Min. L. Inst. 4-1 to 4-39 (2007).

2. Drought & Climate Change in the NEPA Process

a. Practical Challenges

- i. The fundamental NEPA obligation is to take a hard look at the reasonably foreseeable direct, indirect, and cumulative effects on the human environment of the proposed action, the no action alternative, and reasonable alternatives. This requires the agency to describe, in the EA or EIS, the environment that will be affected by the different alternatives.
- ii. Drought and climate change pose unique challenges in the NEPA process. How can an agency provide a sufficient description of the environmental “baseline” if the baseline is changing or evolving in unpredictable ways?
- iii. How can an agency conduct a reasonable cumulative effects analysis of climate change?
- iv. The challenge is to integrate the growing drought and climate change modeling and predictions into the NEPA process in a meaningful way, so that agencies can make better decisions.
- v. Colorado specific challenges: NEPA analysis of water projects, federal land use plans, aquatic habitat improvement, wildlife, fire risk, biological resources, snow-based recreation, and energy projects.

b. Litigation Challenging the Evaluation of Drought & Climate Change in NEPA Documents

- i. First Wave: NEPA litigation about the analysis of the proposed action on climate change
 1. Mid States Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003) (federal court invalidated an EIS for a freight rail expansion from Wyoming coal mines to the Midwest due to the failure to analyze the affects of burning more coal on climate change; a curative supplemental EIS was subsequently upheld).
 2. Gray v. The Minister for Planning, New South Wales, Australia (2006) (Environmental Assessment report for a proposed coal mine was set aside because it did not evaluate the climate change impacts of coal use).
 3. Center for Biological Diversity v. National Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir. 2007) (EA invalidated because it did not disclose the impact of greenhouse gas emissions associated with federal fuel economy regulations).
- ii. Second Wave: NEPA litigation about the effects of climate change on the proposed action
 1. Natural Resources Defense Council v. Reclamation Bd., Calif. Sup. Ct. (2006) (Environmental impact report for development project in coastal area upheld although it did not evaluate impact of rising sea levels on project feasibility).
 2. Center for Biological Diversity v. Kempthorne, N.D. Calif. (2007) (ongoing litigation about how climate change will effect polar bear conservation).

Bio of Ezekiel J. Williams

Zeke Williams is a partner with Faegre & Benson LLP in Denver, Colorado. He specializes in energy, natural resources, federal lands, and environmental law and litigation. His practice involves energy, oil and gas development, water quality, federal land use planning, ski area development and operations, and natural resources law and litigation. Zeke has litigated numerous disputes involving the National Environmental Policy Act, Federal Land Policy Management Act, National Forest Management Act, Mineral Leasing Act, Endangered Species Act, National Historic Preservation Act, Clean Water Act, and other laws. Zeke has significant experience with the preparation of, and litigation involving, environmental impact statements and environmental assessments under the National Environmental Policy Act. Zeke advises renewable energy companies, natural resources companies, ski areas, trade associations, and others on how to participate strategically in the preparation of NEPA documents, federal land use plans, and environmental permits that will govern their future actions.

Zeke has taught Natural Resources and Environmental Law as an adjunct professor at the University of Denver College of Law, is a Trustee in the Rocky Mountain Mineral Law Foundation, and frequently speaks and writes on natural resources and environmental law. He graduated with honors in 1994 from the University of Denver College of Law where he was the Articles Editor of the Law Review, and has an undergraduate degree from Montana State University. After law school, Zeke worked as a judicial law clerk for the Honorable Bobby R. Baldock of the United States Court of Appeals for the Tenth Circuit.