FOREWORD

In our first article, Professor Gary C. Bryner examines the Bush energy policy with an eye toward the assumptions that underlie that policy. He posits that the assumptions that underlie alternative approaches to energy policy are critical. If one begins with the assumption that economic growth is the overriding goal, then one must simply learn to live with and adapt to whatever ecological consequences occur. If one begins with the view that ecological sustainability should be the primary goal of policy makers, however, then energy policy must be shaped in ways that are consistent with that overriding imperative. Professor Bryner begins with the view that ecological sustainability should be the primary policy goal of the United States. Because energy production and use have such profound environmental consequences, he argues that energy policy needs to be fundamentally shaped by the goal of ecological sustainability.

The author examines the Bush National Energy Plan and parallel efforts in Congress, and argues that these efforts begin with the wrong question. Rather than asking what is required to ensure a continued supply of fossil fuels at the lowest possible price, he argues that the plan and implementing legislation should begin with the question of what is required to secure an ecologically sustainable future. The article concludes that the Bush administration's prescriptions and recommendations point the nation in the wrong direction, toward maintenance of practices that are no longer ecologically tenable. Given the growing concern with national security in the wake of terrorist attacks in the United States, ecologically sustainable energy policies can also contribute to reduced reliance on imported oil as the nation shifts from fossil fuels to renewable resources that are domestically available.

In our second article, Professor Sandra B. Zellmer provides a decision-making framework for managing cultural resources and accommodating the access and use of culturally important sites on public lands. *Sustaining Geographies of Hope: Cultural and Spiritual Resources on Public Lands* describes the many compelling reasons to facilitate American Indian cultural interests in the public lands, given tribes' unique associations with the land and its resources and the United States' political and legal obligations to tribes. Federal statutes provide for the pro-

tection of cultural resources, and land management laws applicable to National Parks, Forests, and other public lands provide additional authority to accommodate cultural interests. Federal actions that protect cultural resources or allow access to public lands for cultural practices are generally consistent with constitutional requirements as well. Most decisions that prioritize American Indian cultural interests survive traditional Establishment Clause review, as the purpose and effects of such actions are typically cultural, historical, or political rather than religious. Actions specifically designed to accommodate religious interests by lifting governmentally imposed burdens should also survive review so long as they are reasonable measures that reflect sensitivity toward cultural interests while advancing religious freedom and equality.

In our third article, Western Legal Studies Fellow, Tom I. Romero, II examines innovations and transformations in Colorado's legal history. The article focuses on the history of legal struggles surrounding Colorado's waters and lands. Mr. Romero uses those struggles to explore the relationship between the history of the Mile High state and trends and issues in the American West. The article begins by arguing that Colorado plays a vital role in defining and understanding the American West's legal "frontiers." As the nexus of the American West's mountains, plains, and deserts, Mr. Romero contends that Colorado has been the site of many of the region's most crucial legal conflicts. In order to demonstrate his thesis, Mr. Romero turns to a discussion of Colorado's water law and jurisprudence. The author assesses the historic social, cultural, and political challenges and uncertainties created by legal battles over the waters that flow from the state. After exploring the history of Colorado's "uncertain waters," the article examines how legal disputes relating to land—including battles over mineral production and school busing—test the limits of citizenship, democracy, and the rule of law. Mr. Romero concludes that a broad exploration of the legal history beneath Colorado's mountains, plains, and deserts enables us to understand better the past development and future course of American and North American law and jurisprudence.

In our essay, Professor Dale A. Oesterle analyzes decisions made by delegates to the Colorado constitutional convention of 1875–76. Professor Oesterle appraises the delegates' success in their initial drafting strategy of using constitutional language to rein in the state legislature. The delegates to the constitutional

convention penned language that banned government subsidies to private businesses. Yet, Professor Oesterle argues that it is common practice today for Colorado governments—both state and local—to grant subsidies to business operations. *Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies* concludes that the modern practice is not justified by a constitutional amendment, but rather is legitimized by a 1922 Colorado Supreme Court case that turned the state constitution's language on its head.

In our first student article, the author examines the recent controversy over the regulations governing hardrock mining on federal public lands. The regulations underwent significant revision under Secretary of Interior Bruce Babbitt, only to have key portions rescinded when President Bush took office. The comment examines the historical background of the General Mining Law of 1872, its many deficiencies, and failed legislative attempts at reform. The article then analyzes the evolution of the mining regulations, from the initial 1980 regulations, through the Babbitt-era regulations, to the current regulations. The author posits that, in the dearth of legislative reform, the regulations promulgated under Secretary Babbitt provided the most effective means of controlling the environmental degradation caused by hardrock mining. The comment then examines the Babbitt interpretation in detail, including its statutory justifications under the Federal Land Management and Policy Act. The author concludes that the Babbitt regulations should not have been rescinded because they were statutorily justified, within agency discretion, environmentally responsible, and comport with modern federal land management practices. The Babbitt interpretation may provide an important model for the eventual reformation of the mining law.

The author of our second student article examines the plight of the Rio Grande silvery minnow, a small federally endangered fish native to New Mexico. The comment first outlines the ecological damages inflicted on the Rio Grande by years of dam-building and water appropriations. The author then compares New Mexico water law to the federal Endangered Species Act of 1973. The author goes on to discuss the efficacy of the Endangered Species Act as an instrument for ecosystem restoration, with a look at precedents from other river ecosystems. The comment then isolates the issues that have arisen in the silvery

minnow cases, preemptory water rights for endangered species and the value of critical habitat designation. The author gives special consideration to the growing influence of economic factors on the Endangered Species Act, including recent cases that have discussed constitutional takings and the "economic analysis" requirement in critical habitat designation. The volatile political climate surrounding water and endangered species in the West leads the author to the assertion that strong judicial enforcement of the Endangered Species Act will continue to be important in protecting endangered species. The author concludes that the United States Fish and Wildlife Service should strengthen its interpretation of the critical habitat provision of the Act to better protect endangered species by conserving and restoring entire ecosystems.

In our third student article, the author examines patentability issues for DNA sequence information generated by the Human Genome Project (HGP). The comment first looks at the information yielded by the HGP and provides an overview of relevant patent laws. The author examines the United States Patent and Trademark Office's Utility Guidelines and explains that the Guidelines restrict the availability of patents to DNA sequences of unknown function. The effect of the Guidelines is to preclude patentability of most of the DNA sequence obtained from the HGP. Additionally, the patent laws cut off any future attempts to patent these DNA sequences once functionality has been determined. The provisions preclude a specific, powerful type of patent claim, called a composition claim, to DNA sequence from the HGP. The comment argues that biotechnology companies need a powerful property right in their invention in order to raise the large amounts of money it takes to bring a new drug to the market. The author then proposes some solutions. The author argues that the best solution, a Congressionally-created exception, would prevent wholesale patenting of the human genome at the earliest stages of discovery, yet allow biotechnology companies to obtain patents in the future so that they can bring new drugs to market.

THE EDITORS