

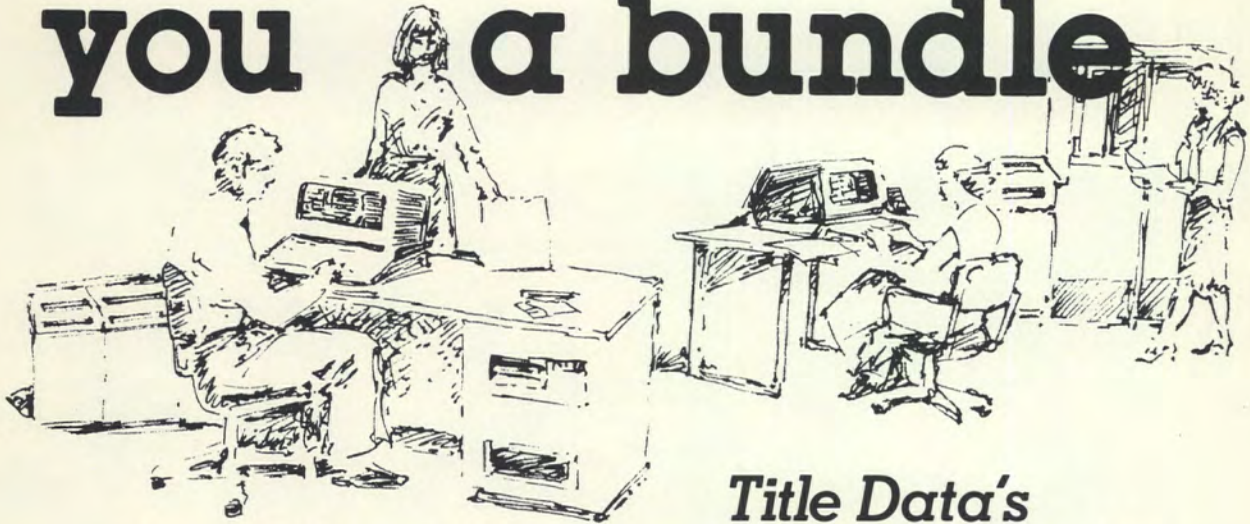
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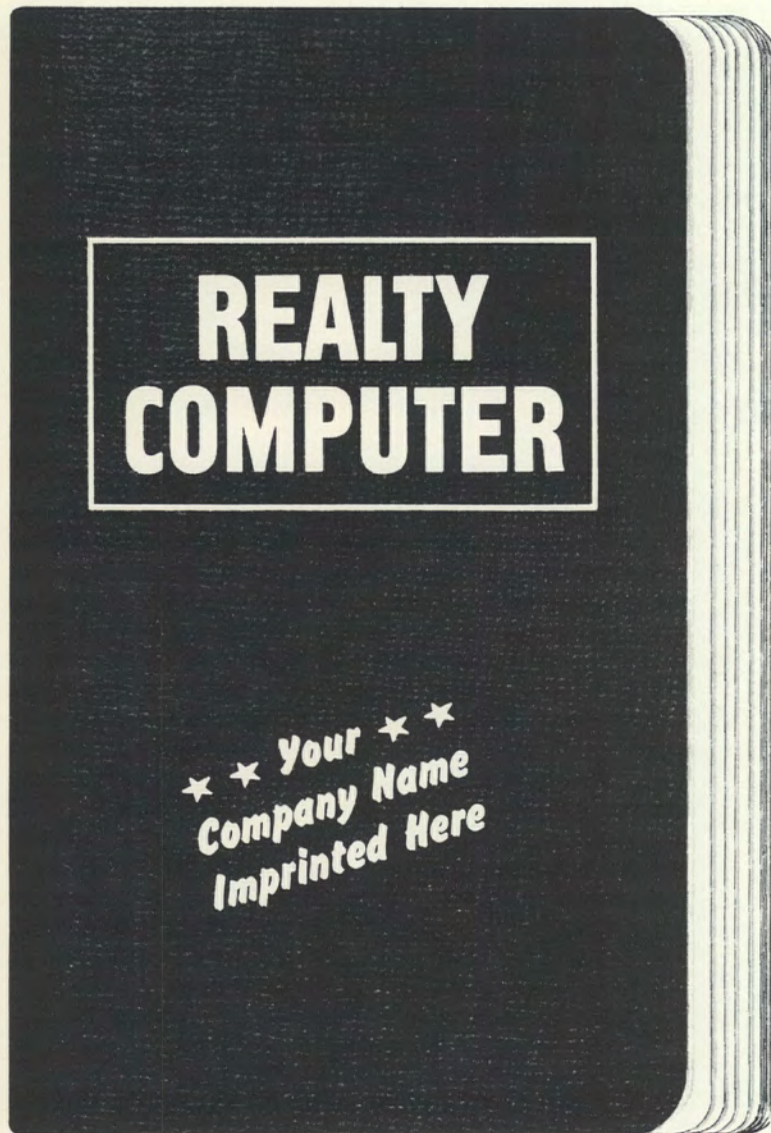
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A Message From The Chairman, Abstracters & Title Insurance Agents Section

Recently, I looked back over ALTA's history to assess where the Association stood in 1955 as compared to where it is now. I found, as you might imagine that I would, that most things are bigger and, we hope, better.

However, one area that is not larger is membership. It was reported to the Board of Governors at the 1955 Mid-Winter Conference in Oklahoma City that our membership was 2,378. At the board meeting in Honolulu last year it was reported that we had 1,986 members—1,902 abstracters and title insurance agents and 84 underwriters. This lower membership count is largely due to mergers and acquisitions by underwriters of agents. We should, however, look around at our state meetings and determine if a state member is qualified for ALTA. If we find qualified state members, we should encourage them to join ALTA.

Probably the most dramatic change in the last 25 years is in the budget. The budget for 1954 was \$83,326. Today (1980) the budget is \$1,309,300.00. This is caused to some degree by the inflation over the last 25 years. Still, ALTA has grown in its activities during this time.

We have a very effective public affairs department which is managed by vice president Gary L. Garrity. Government relations added Mark E. Winter as our "Man on the Hill." David McLaughlin is our vice president in charge of administration. We even have a director of research, Richard W. McCarthy. Maxine Stough is public relations associate and editor of this magazine. Thomas Finley is our new general counsel and brings a very credited background with him. William J. McAuliffe Jr. correlates all their activities. Most of these service areas were not even undertakings of the ALTA as it was in 1955.

The Land Title Institute is now a part of ALTA. The Title Industry Political Action Committee (TIPAC) also was added and developed.

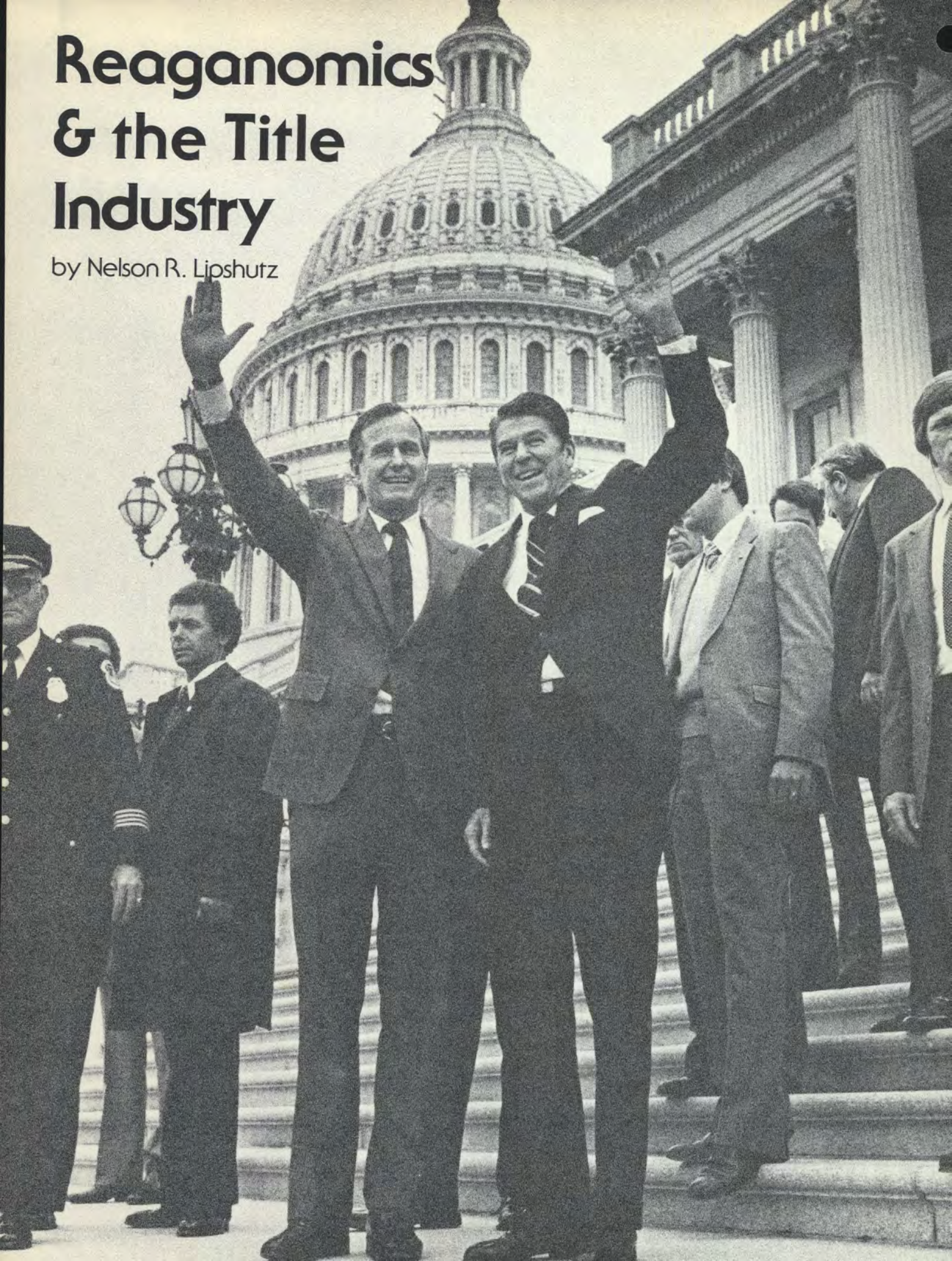
Things have changed, as you can plainly see. They have improved—as well they should. But one area has not changed—that of the caliber of people involved in this great industry. They were tops in 1955, and I have found that they are still tops in 1981.

Looking back over history can be fun; however, the future is important, too. ALTA has the staff and the membership, filled with talented people, to accomplish great things. Jim Boren is providing us with outstanding leadership. If we'll just work together, the future can be ours to mold.

Thomas S. McDonald

Reaganomics & the Title Industry

by Nelson R. Lipshutz



President Reagan's election seems to herald a decisive shift in government economic policy. It is, of course, possible that no substantive changes will occur if reform measures are stifled by a still predominantly Democratic House or short-circuited by the liberal judiciary appointed during the heyday of the Keynesians. Still, it is likely that substantial portions of the Reagan economic program will be enacted into law, and will produce major changes in the environment in which title insurance underwriters and agents must do business.

Interest Rates

The Reagan program will produce a sharp drop in short-term interest rates over the next few months, but will not have much effect on the rates for long-term mortgage money for several years. Short-term rates will decline as the decrease in corporate tax payments produced by more accelerated depreciation schedules and larger investment tax credits increases the volume of internally generated corporate funds, leading to a decrease in the demand for external financing of working capital needs. Further, a significant portion of the increase in after-tax cash flow will be used by corporate treasurers to improve liquidity, and these funds will be invested in cash-equivalent securities, thus further depressing short-term rates.

In contrast, long-term interest rates, including both those on mortgages and on corporate bonds, will remain high for several years. Long-term interest rates are influenced by long-range expectations about inflation, and it will be several years before long-term investors will have developed any confidence that the Reagan program has broken the back of inflation.

While the decline in short-term rates will provide some relief to the thrifts by moderating the cost of six-month certificates of deposit, the cost of multi-year term deposits will remain high, passbook accounts will continue to be unattractive compared to the money market funds, and disintermediation will continue. Further, current governmental concern with potential insolvencies among savings and loan associations and other thrifts will place tremendous pressure on their managements to build up their equity bases through improved profitability, which will keep mortgage rates up even in the face of a declining cost of funds.

Dr. Lipshutz is president of the Regulatory Research Corp., Waban, Mass.

Residential Real Estate Markets

High mortgage rates will continue to depress single-family housing demand, even if variable rate mortgages, renegotiable rate mortgages and other forms of creative financing become the norm. At the same time, the drop in short-term interest rates and the general increase in liquidity will produce a sharp rise in the availability of funds to builders. This combination of circumstances will result in a major boom in residential rental property construction, which will be the primary means of meeting the need for new housing units over the next few years.

Permanent investors will be attracted to residential rental property in part because of the improved depreciation schedule which will be available. This schedule will not only be more favorable than even an aggressive component-life approach under the current rules, but also will be much less subject to successful Internal Revenue Service challenge.

Demand for rental property also will rise due to the impact of changes in personal income tax rates. The 30 percent drop in personal rates also will decrease the tax-shelter value of interest and real estate tax payments when compared to rental payments by 30 percent over the next three years. Savings incentives excluding the first few thousand dollars of interest income from income taxation will render investment in fixed-income securities an attractive alternative to making a down payment on a house, particularly for low equity, potential first time buyers. Therefore, many marginal homebuyers will shift back into the rental market, including both the young without substantial equity resources, and older Americans who might otherwise have purchased a condominium unit purely for tax-shelter reasons. In fact, as the bias toward home ownership produced by the tax code is reduced, condominium *de-conversions* will proliferate.

"Title companies will have available to them the same advantages as other businesses in terms of improved depreciation and investment tax credit schedules, which will increase the attractiveness of introducing automated word processing and automated title search equipment."

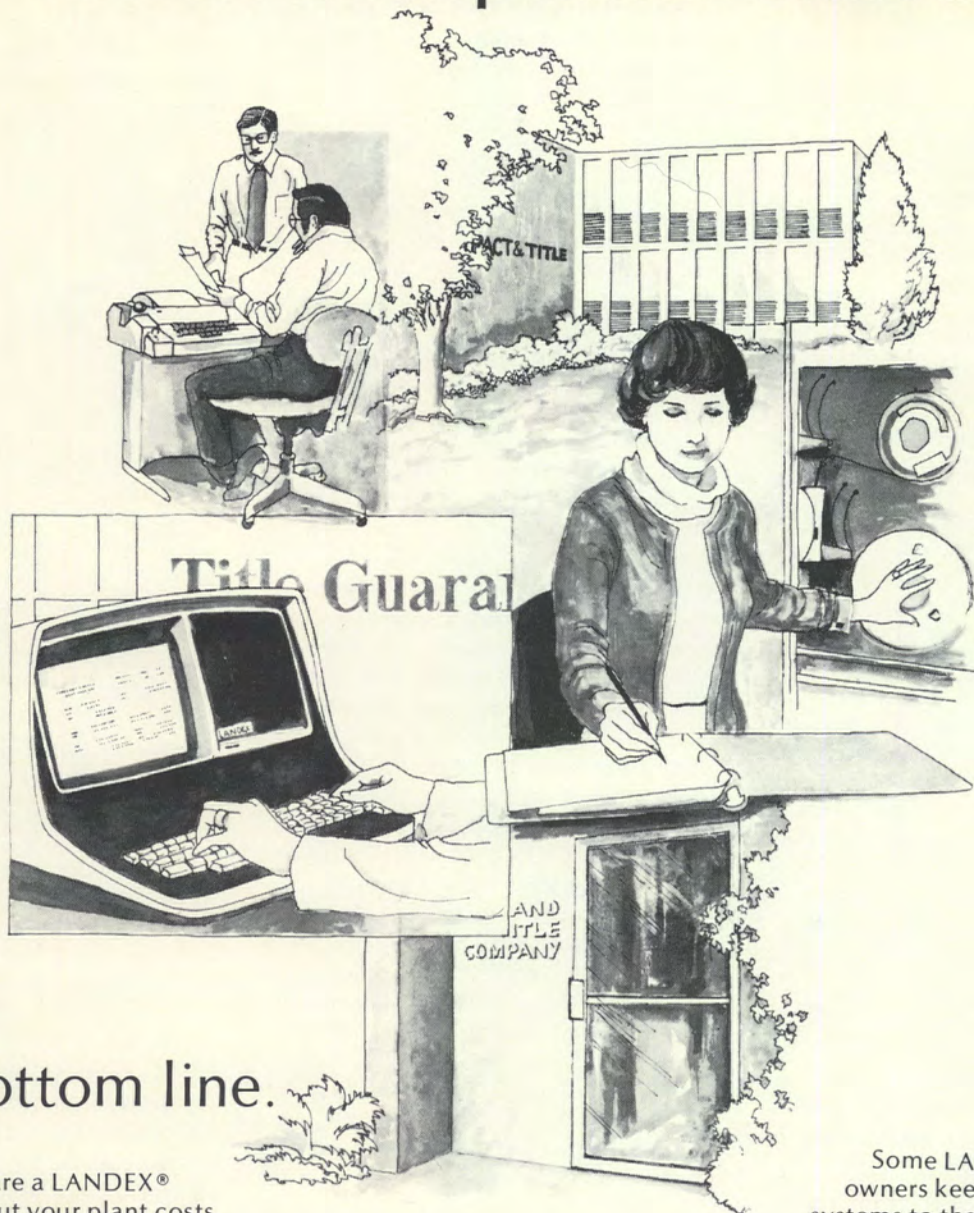
While growth will, of course, continue in the South and Southwest in response to changing demographics, the Reagan program will, paradoxically, prove a boon to the older cities of the Northeast and Midwest, by accelerating an already increasing migration back to the cities from the suburbs. To begin with, the new Administration's energy program will permit a rapid rise in the cost of gasoline, heating oil, and natural gas. Restrictions on auto imports will cause a sharp rise in the cost of automobiles. Government support for home insulation will be ended. The consequent steep rise in the costs of commuting and of maintaining a comfortable lifestyle in the low population density suburbs will produce tremendous pressure for people to move closer to their places of employment and to accept accommodation in higher density, more affordable housing. This need will not be met by a move which stops at the inner suburbs. These inner areas are already highly developed, and cannot handle much higher population densities while maintaining the same level of environmental quality. Further, the inner suburbs are traditionally politically effective in maintaining their quality of life, and so further increase in inner suburban populations will not be significant.

In contrast, the inner cities will be much more receptive to heavy residential redevelopment to rebuild their eroding tax bases. Further, private investors will face much weaker competition from the public housing sector. The rate of growth of federally subsidized housing will drop, rents in subsidized housing units will rise, federal funding for planning and neighborhood groups which traditionally intervene to oppose moderate income development will be cut off, and federal funds for purchasing land for urban parks will no longer be available.

Commercial/Industrial Real Estate

Commercial/industrial real estate markets will be very active. The investment in new productive equipment which will be triggered by the Reagan program will generate concomitant pressures for the acquisition of new, rationalized buildings, many of which will require a change of site. Improved depreciation schedules will also provide a strong tax incentive here. More reasonable attitudes toward environmental regulation and land use will decrease the risks of these new construction projects by increasing the speed with which necessary approvals from all levels of government can be obtained. As corporate profits and cash flows improve,

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the amount of financial leverage prevailing across the economy will decline and fixed charge coverage ratios will improve, further decreasing the risk of lending for this type of construction, and so will encourage continued improvements in lender support for commercial/industrial real estate development.

Federal and State Regulation of Title Insurance

The supply-side philosophy of the new Administration will produce a much more pragmatic approach to the problems of economic regulation, and a great decrease in the anti-business bias which has characterized federal regulation over the past ten years. The question that will be raised by regulators when reviewing any business activity will cease to be "Is it perfect?" and increasingly will become "Does it work?" Efficiency and productivity, rather than social engineering, will be the primary goals of regulatory policy.

The federal government will explicitly divest itself of much of its responsibility for business regulation, turning back that responsibility to the states. Further federal attacks on the states' traditional prerogatives in the regulation of banking and insurance will decline. Interest in the real estate settlement process at the federal level will fade, and control of business practices in this area will be left increasingly to free market forces. Antitrust enforcement policy will focus on the classic problems of price-fixing and bid-rigging, while issues of industrial organization and monopoly will be much less important. Horizontal integration will be more frequently permitted when it can be shown that great efficiencies will result, even if rather high market shares result. Vertical integration, in which different, but related, businesses involved in the real estate settlement process are combined, will frequently go unchallenged by the government.

While the specter of heavy-handed federal intervention will fade, the regulatory postures of state insurance departments will, nevertheless, reflect much of the Reagan economic philosophy. In the area of rate review, regulators will tend to allow more adequate profits in order to motivate investment in productive equipment that can help keep rates to the public down. Rates will be made more and more frequently based on rate of return on equity considerations.

In dealing with trade practices, state insurance departments will need to come to terms with severe budget pressures. Therefore, the thrust of trade practices regulation will be focused on those few

"In other words, the title insurance pie will be a lot smaller, but it will be a lot sweeter, too."

areas where clear benefits can be achieved through rules that are practically enforceable at current or reduced departmental staffing levels.

Title Insurance Operations

Over the next few years, title insurers will face a real estate market in which the total number of closings will remain well below the peak numbers of the 1970s, but in which a much larger percentage of transactions represent large deals which generate substantial profits. In other words, the title insurance pie will be a lot smaller, but it will be a lot sweeter, too. The challenge of the 1980s will be to find effective ways to cut a piece of it.

The physical condition of the public record will decline over the coming months. Federal funding for the improvement of the local recordation system is a prime target for budget cutting and state and local government budgets will not be a fruitful source for such funding. Even the current system will function increasingly erratically as personnel cutbacks are felt in recorders' offices, in tax departments and among court staffs. Full daily take-off plants will become increasingly important in many areas to support adequate searches and examinations, even though the total volume of recordings will remain relatively low.

Both underwriters and agents will face a new balance between capital and labor costs when selecting their office technology. The rate of increase in wage rates will moderate somewhat under the President's policies. Overall, the encouragement of investment will result in a lot of substitution of machinery for people in both the manufacturing and service sectors of the economy, which will tend to push wages lower. (Even strongly unionized trades have already begun to show a new and surprising willingness to forego wage increases as the price of continued employment.) Less restrictive immigration policies will slow the rate of growth in wages in the less skilled trades. And the federal hiring freeze, coupled with similar cutbacks at lower levels of government, will greatly increase the supply of clerical employees most critical for the title insurance industry.

At the same time, title companies will have available to them the same advan-

tages as other businesses in terms of improved depreciation and investment tax credit schedules, which will increase the attractiveness of introducing automated word processing and automated title search equipment.

Title Insurance Marketing

The new Administration's repudiation of the pernicious doctrine that "big is bad" will accelerate the trend toward a truly national real estate market. In particular, lending will become increasingly national. While, as a general rule, protectionism will be on the upswing, America's continuing need for recycled petrodollars will assure foreign banks a continuing welcome. In consequence, regulators will continue to expand the geographic latitude permitted to domestic banks to permit them to compete successfully with foreign depository institutions. Further, continued concern for improving the financial strength of the thrifts will motivate regulatory encouragement of a spate of mergers among the smaller S&Ls. Thus, ever more lending, even for strictly local projects, will be done by large, remote lenders.

The increasing role of national lenders will inject title insurance into many areas of the country in which it has not been used before. Selection of a title insurance company will become an increasingly centralized function, carried out at the headquarters of large lenders serving wide geographic areas. At the same time, there will be a wave of mergers in all other sectors of the economy. Therefore, national account marketing programs will become much more important to all underwriters. Some kind of local presence in any market area will continue to be important. But the traditional flow of locally generated business from branch office or agent to underwriter will increasingly be met by a counterflow of nationally generated business from underwriter to branch office or agent. Business will increasingly be controlled from above rather than below.

A Challenge, Not a Threat

Government has become so important to the conduct of business in America that when the government sneezes, the rest of us get pneumonia. Even the changes produced by President Reagan's attempt to remove government from the day-to-day conduct of business affairs cannot help but produce tremendous changes in the business environment. But the title insurance industry has weathered the vicissitudes of government economic policy for

(continued on page 18)

Oklahomans elected 31-year-old Don Nickles to the U.S. Senate in the 1980 election, sending him to Washington with the largest plurality in the state's history. Meanwhile, farther east in Indiana, Republican Dan Quayle, 33, was ending Democrat Birch Bayh's 18-year career in the U.S. Senate.

Senators Nickles and Quayle typify a new breed that characterizes the wave of freshmen whom this election brought to Capitol Hill. The trend is young—under 35, sometimes even under 30. And, it is conservative. No longer do Republicans have to be 50, wear pinstriped suits and come either from a banking or legal background.

For years at a time during the 1960s, not a single member of Congress was under 30. The 97th Congress has eight. Seven of them are conservative, first-term Republicans. These seven have much in common. With the exception of one, this is their first elected office and all but one defeated Democratic incumbents who had reputations as "big spenders"—using taxpayers' dollars to fund welfare and food stamp programs.

Mr. Winter is ALTA vice president—government relations.

The 97th Congress— A New Beginning?

by Mark Edward Winter

The seven Republicans are: John LeBoutillier (New York), John Hiler (Indiana), Christopher Smith (New Jersey), Vin Weber (Minnesota), David Dreier (California), Jack Fields (Texas) and Steve Gunderson (Wisconsin). These newcomers all campaigned on the Reagan platform—cut taxes, curb government spending and strengthen the national defense.

Other Characteristics

In addition to the Republican youth movement, Congress will have a record number of women—19 representatives and two senators. Also, there are 17 blacks and five hispanics. Although lawyers still form the largest single professional group among members of Congress, representatives and senators with legal training no longer constitute the majority of members. And, in this Congress, businessmen as a group grew to 162 from 156 in the last Congress.

Impressive election victories in several states have given the Republicans at least a six-vote edge in the Senate. Although Sen. Harry Byrd of Virginia was elected as an Independent, in many of the voting situations—particularly on government spending issues—he supports the Republicans. The official Senate tally is 53 Republicans, 46 Democrats and one Independent.

The Democrats remain in control of the House although with a slightly eroded margin of 51 votes. There are 243 Democrats and 192 Republicans. While Republicans fell short in their bid to control the House, they realized a net gain of 32 seats. This takes on new significance in light of the expectation that a coalition of Republicans and Sun Belt Democrats may strongly influence, if not dominate, the legislative agenda before the House of Representatives.

Even though the Republicans did not sweep both chambers of Congress, a majority of the members seem to have embraced the conservative philosophy. Therefore, it is highly likely that the Reagan Administration's legislative agenda will survive.

Legislative Objectives

The economy will surely occupy much of the time and attention of the 97th Congress. The biggest task before this administration and Congress is to put the ailing economy back on its feet.

The push to cut taxes, balance the budget, reduce inflation and increase defense spending will test Congress' will as well as its ability to maneuver through the obstacle course of special interest groups. It is no longer a question of whether gov-

TABLE I

Senate Banking, Finance and Urban Affairs

Republicans (8)

Chairman Jake Garn (*Utah*)
Senator John Heinz (*Pennsylvania*)
Senator John Tower (*Texas*)
Senator William Armstrong (*Colorado*)
Senator Richard Lugar (*Indiana*)
Senator Alfonse D'Amato (*New York*)
Senator John Chafee (*Rhode Island*)
Senator Harrison Schmitt (*New Mexico*)

Democrats (7)

Senator Harrison Williams (*New Jersey*)
Senator William Proxmire (*Wisconsin*)
Senator Alan Cranston (*California*)
Senator Donald Riegle, Jr. (*Michigan*)
Senator Paul Sarbanes (*Maryland*)
Senator Christopher Dodd (*Connecticut*)
Senator Alan Dixon (*Illinois*)

ernment spending programs will be pruned but, rather how sharp the pruning shears will be. Although there is a spirit of economic cooperation among members of Congress, few want their pet projects to be completely wiped off the ledgers.

Other tough challenges facing Congress include the problem of assuring the future stability of the social security system; a decision on how to help the ailing domestic auto industry; a review of environmental, consumer and work safety programs to determine their cost effectiveness, and a movement towards reducing the power and authority of a number of regulatory agencies such as the Federal Trade Commission and the Occupational Safety and Health Administration.

Impact On The Title Industry

The 1980 congressional elections left an imprint on government structures which develop policies affecting financial institutions, housing and real estate. Repub-

lican control of the Senate means a change of leadership for the Senate Banking, Housing and Urban Affairs Committee (Table I). This committee processes RESPA and title insurance-related legislation.

Sen. William Proxmire (D-Wis.) has been replaced as chairman by Sen. Jake Garn (R-Utah). Other election outcomes altering the Senate Banking Committee include the defeat of Sen. Robert Morgan (D-N.C.) and the re-election of Sen. Alan Cranston (D-Calif.). Also, Banking Committee member, Sen. Donald Stewart (D-Ala.) was defeated in his primary and Sen. Adlai Stevenson III (D-Ill.) retired.

Chairman Jake Garn is recognized as sympathetic to open market competition among financial institutions, provided certain safeguards are available. Such safeguards include a rate differential on certificates offered by thrift institutions compared to banks and limiting bank holding companies from expanding into areas that are not financially related such as insurance activities.

With regard to RESPA, Sen. Garn has expressed his desire to review its provisions and the impact the law has had on facilitating residential real estate transactions. It is expected that he will scrutinize the so-called consumer portions of RESPA—namely advance disclosure, the value of settlement booklets and the extent to which consumers shop for settlement services.

At a recent meeting with Sen. Garn, ALTA officials described the anti-consumer and anti-competitive implications associated with burgeoning controlled business. Garn said that he and his staff will review such arrangements in light of scheduled RESPA oversight hearings to be held later in the year.

The McCarran-Ferguson Act, which exempts the "business of insurance" from federal antitrust laws—to the extent that such business is regulated by state law—probably will not be a prime target for repeal or modification during the 97th Congress. A clear signal was given that

Congress plans little change for the regulation of insurance when newly appointed Judiciary Committee Chairman Sen. Strom Thurmond (R-S.C.) eliminated the Subcommittee on Antitrust and Monopoly. This subcommittee would have been responsible for the review of the McCarran-Ferguson Act. With the subcommittee disbanded, there is little likelihood that the McCarran-Ferguson "business of insurance" exemption will be altered.

In The House

The House Banking, Finance and Urban Affairs Committee lost five members—four Democrats and one Republican from its 44-member roster. The most prominent committee member to lose his seat was Thomas L. (Lud) Ashley (D-Ohio), the second ranking member of the committee and the former chairman of the Housing Subcommittee. He was a member of Congress for 26 years and a leading advocate of ALTA's efforts to curb controlled business arrangements.

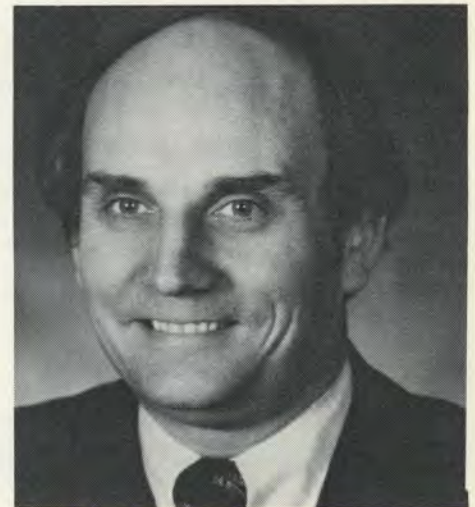
Succeeding Ashley as chairman of the Housing Subcommittee is Rep. Henry Gonzalez (D-Texas). ALTA officials have met with Gonzalez to discuss controlled business. ALTA's position was well received by Rep. Gonzalez who indicated that following his subcommittee's consideration of President Reagan's economic package, he would schedule a day of public hearings on the controlled business problem.

Rep. Gonzalez said that on the merits, controlled business arrangements seem to be no different than blatant kickbacks



Rep. St Germain

"Under Rep. St Germain, it is expected that the committee will focus its attention on the effect money market funds have on attracting money from mortgage lending institutions."



Sen. Garn

"With regard to RESPA, Sen. Garn has expressed his desire to review its provisions and the impact the law has had on facilitating residential real estate transactions."

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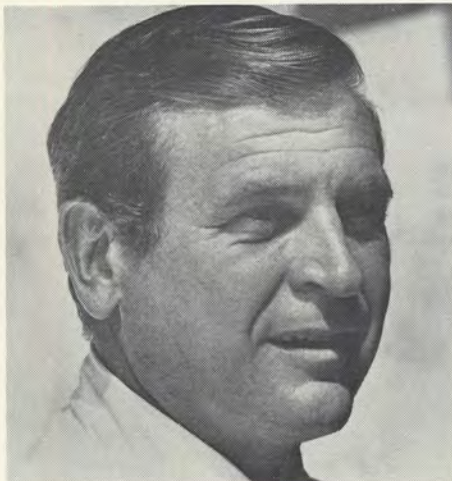
Rep. Gonzalez

presently covered by RESPA Section 8. In addition to his interest in RESPA, he is considered a leading advocate of Hispanic causes in Congress and a principal architect of subsidized housing legislation.

Three Democrats on the House Banking Committee retired. They are William Moorhead (Pennsylvania), James Hanley (New York) and John Cavanaugh (Nebraska). ABSCAM-tainted Richard Kelly (R-Fla.) was defeated in the primary.

The most important change in the House Banking Committee line-up is the election of Rep. Fernand St Germain (D-R.I.) as chairman. Former Chairman Henry Reuss (D-Wis.) gave up the chair to become chairman of the prestigious Joint Economic Committee.

Under Rep. St Germain, it is expected that the committee will focus its attention on the effect money market funds have on attracting money from mortgage lending institutions. He has expressed concern that thrift institutions are no longer the housing mortgage specialists they once were and this structural change could prove disastrous to the housing industry unless other financial intermediaries—banks and/or insurance companies—re-enter the housing market.



Rep. Rostenkowski

There are 25 Democrats and 19 Republicans on this year's House Banking Committee. (See Table II.)

The important Ways and Means Committee (Table III) also has a new chairman. Al Ullman (D-Ore.) was defeated in his re-election effort. Rep. Dan Rostenkowski (D-Ill.) was elected chairman. This

chain of events elevated Rep. Sam Gibbons (D-Fla.) to be the ranking Democrat of the committee. Rep. Gibbons is a good friend of the title insurance industry and can be credited with being a leader in the effort which successfully amended legislation to remove title companies and

(continued on page 18)

TABLE II

House Banking, Finance, and Urban Affairs

Democrats (25)

- Chairman Fernand St Germain (Rhode Island)
- Rep. Henry Reuss (Wisconsin)
- Rep. Henry Gonzalez (Texas)
- Rep. Joseph Minish (New Jersey)
- Rep. Frank Annunzio (Illinois)
- Rep. Parren Mitchell (Maryland)
- Rep. Walter Fauntroy (District of Columbia)
- Rep. Stephen Neal (North Carolina)
- Rep. Jerry Patterson (California)
- Rep. James Blanchard (Michigan)
- Rep. Carroll Hubbard (Kentucky)
- Rep. John LaFalce (New York)
- Rep. David Evans (Indiana)
- Rep. Norman D'Amours (New Hampshire)
- Rep. Stanley Lundine (New York)
- Rep. Mary Rose Oaker (Ohio)
- Rep. Jim Mattox (Texas)
- Rep. Bruce Vento (Minnesota)
- Rep. Doug Barnard (Georgia)
- Rep. Robert Garcia (New York)
- Rep. Mike Lowry (Washington)
- Rep. Charles Schumer (New York)
- Rep. Barney Frank (Massachusetts)
- Rep. William Patman (Texas)
- Rep. William Coyne (Pennsylvania)

Republicans (19)

- Rep. J. William Stanton (Ohio)
- Rep. Chalmers Wylie (Ohio)
- Rep. Stewart McKinney (Connecticut)
- Rep. George Hansen (Indiana)
- Rep. Henry Hyde (Illinois)
- Rep. Jim Leach (Iowa)
- Rep. Thomas Evans (Delaware)
- Rep. Ron Paul (Texas)
- Rep. Ed Bethune (Arkansas)
- Rep. Norman Shumway (California)
- Rep. Jon Hinson (Mississippi)
- Rep. Stan Parris (Virginia)
- Rep. Bill McCollum (Florida)
- Rep. Gregory Carman (New York)
- Rep. George Wortley (New York)
- Rep. Marge Roukema (New Jersey)
- Rep. Bill Lowrey (California)
- Rep. James Coyne (Pennsylvania)
- Rep. Ed Weber (Ohio)

TABLE III

House Ways and Means Committee

Democrats (22)

- Chairman Dan Rostenkowski (Illinois)
- Rep. Sam Gibbons (Florida)
- Rep. J. J. Pickle (Texas)
- Rep. Charles Rangel (New York)
- Rep. William Cotter (Connecticut)
- Rep. Fortney Stark (California)
- Rep. James Jones (Oklahoma)
- Rep. Andy Jacobs (Indiana)
- Rep. Harold Ford (Tennessee)
- Rep. Ken Holland (South Carolina)
- Rep. William Brodhead (Michigan)
- Rep. Ed Jenkins (Georgia)
- Rep. Richard Gephardt (Missouri)
- Rep. Thomas Downey (New York)
- Rep. Cecil Heftel (Hawaii)
- Rep. Wyche Fowler (Georgia)
- Rep. Frank Guarini (New Jersey)
- Rep. James Shannon (Massachusetts)
- Rep. Marty Russo (Illinois)
- Rep. Don Pease (Ohio)
- Rep. Kent Hance (Texas)
- Rep. Robert Matsui (California)

Republicans (12)

- Rep. Barber Conable (New York)
- Rep. John Duncan (Tennessee)
- Rep. Bill Archer (Texas)
- Rep. Guy Vander Jagt (Michigan)
- Rep. Philip Crane (Illinois)
- Rep. Bill Frenzel (Minnesota)
- Rep. James Martin (North Carolina)
- Rep. L. A. Bafalis (Florida)
- Rep. Richard Schulze (Pennsylvania)
- Rep. Bill Gradison (Ohio)
- Rep. John Rousselot (California)
- Rep. Henson Moore (Louisiana)

by Barbara J. Grady

Underground Water Grab Thwarted

Landownership and water use have little connection in the arid west where treasured and scattered water sources are relied upon by users in various locations through a system of appropriation for beneficial use. But rights of landowners to non-tributary underground water was the major question addressed in a landmark Colorado case recently with the denouement of a complicated lawsuit aimed at preventing an attempt

to monopolize the state's unappropriated underground water resources.^{1*}

On Feb. 11, Colorado's 18th Judicial District Judge Marcus O. Shivers denied applications for rights to an annual 1.7 million acre-feet of underground water from four applicants. This water, which represents 554 billion gallons annually, would have been drawn from under three-quarters of Colorado's surface, from beneath lands held in private, state and federal ownership.

"Title people need to be able to give an intelligent no" when explaining to customers why water rights are excepted from title insurance policies, said Larry Fulton, executive vice president and general counsel of Fidelity National Title Insurance Co., Denver, Colo. That is why title people in the west are paying attention to this case, Fulton commented prior to the judge's ruling. Title companies in Colorado and in much of the west except water rights in title policies.

The epic began with an avalanche of applications for rights to underground non-tributary water which arrived in Colorado's seven district water courts on Dec. 29, 1978, the last filing day of the year. The major applicant was John H. Huston, a Denver lawyer and geologist, who sought rights to 1.5 million acre-feet of water annually from a number of underground sources around the state.

Ms. Grady is Title News editorial assistant.

**Footnotes appear on page 18.*



The other applicants were the Nedlog Technology Group, a natural resources development firm based in Arvada; Colorado Pacific Aztec-Colorado Pacific Energy of Colorado Springs, two companies joined for a water development project, and Bob Johnson Jr., a rancher from outside Pueblo.

The goal of all four applicants was to tap unused water which lies trapped in deep underground aquifers or which returns from diverting pipes and wells to underground supplies through seepage. The case was landmark because the applications were the first claims ever made in the state to underground non-tributary water.

When news of the applications reached the public a week after the filings, the attempted control of so much water by a few persons evoked protests from Colorado landowners, commercial and industrial groups, farmers, miners and state officials. Clarence Kuiper, the state engineer, told reporters "It's a raid on the underground water by what appears to be speculators." Thousands of objectors around the state mobilized to file oppositions to the applications.

These opponents feared a water monopoly and injury to the water supplies of senior water rights holders. They also feared that water would be diverted from the already dry state for use in coal slurry pipelines elsewhere. These suspicions

"The applicants sought rights by virtue of the doctrine of prior appropriation to yet unclaimed underground water which was non-tributary, and permission to dig wells in order to develop the underground water."

were kindled by the fact that Huston initially did not disclose the exact uses which he planned for the water. However, he did so several months later after the legislature passed a law requiring this information from applicants.

Presented with the sudden deluge of groundwater rights applications and an equally oppressive pile of opposition filings, the state water courts and the state water engineer moved for consolidation of the applications and their respective challenges into one case to be tried by a single judge. The Colorado Supreme Court ruled in favor of consolidation and appointed Judge Shivers to administer and hear the case.

What Applicants Sought

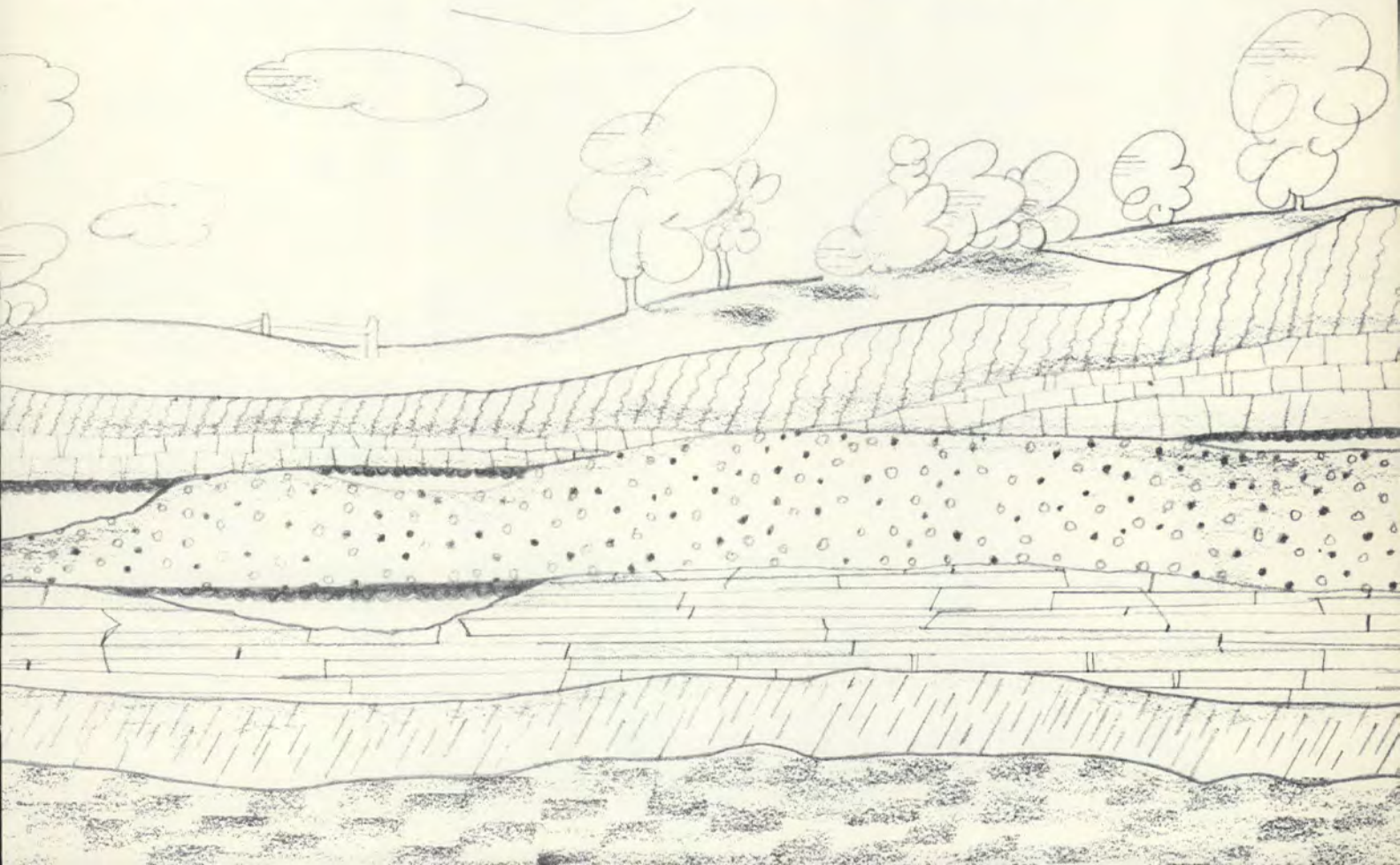
The applicants sought rights by virtue of the doctrine of prior appropriation to yet unclaimed underground water which was non-tributary and permission to dig

wells in order to develop the underground water.

Huston, with two business partners, filed applications for rights to groundwater in several districts. In southeastern Colorado, he applied for rights to 619,000 acre-feet of water annually from deep bedrock aquifers lying 500 to 9,000 feet below the Arkansas River drainage system. These waters are considered non-tributary because the nonporous bedrock prevents the water's movement or seepage to the river system.

Secondly, he sought rights to reclaim unconsumed water from 3,327 existing bedrock wells in the Denver River basin and northeastern Colorado. Huston said he believes that 60 percent of the water pumped through these wells returns unused to underground supplies through leech fields, leaky pipes and ditches. He planned to reclaim this unused water through 385 new wells.

In Colorado's central and western water districts, Huston applied for rights to 702,000 acre-feet of water annually from what he describes as naturally existing underground reservoirs high in the Rocky Mountains. The lawyer-geologist told reporters these reservoirs exist as a result of glacial moraines, which are areas where the residue picked up from traveling glaciers acts as a water retainer. The reservoirs would be tapped in late summer and autumn.



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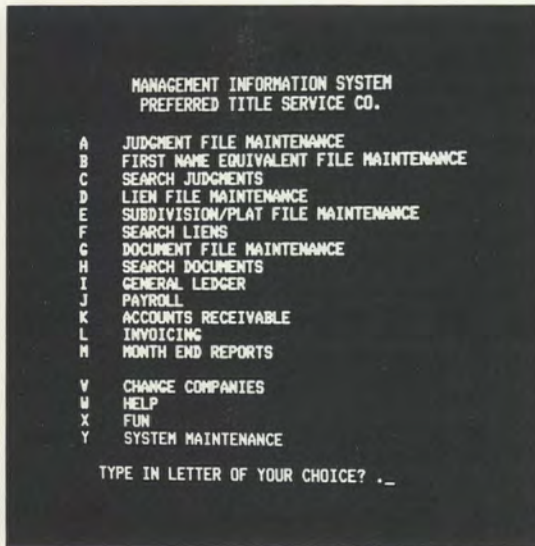
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In each of these areas, Huston would hold, for the moment, the most junior rights of appropriation. Any previously granted rights of appropriation to a particular water source would be satisfied before he could begin to claim his water. However, his critics said his efforts nonetheless represented an attempt to monopolize the state's underground water because it would render new industry or future residential developments dependent on him for their water supply.

Nedlog Technology applied for rights to 220,000 acre-feet annually of water from a large underground natural reservoir on Colorado's western slope. This deeply buried reservoir stretches below Eagle, Garfield, Routt and Summit counties. Nedlog also applied for permits to drill 32 wells, of depths ranging from 480 to 9300 feet.

The Colorado Pacific Aztec-Colorado Pacific Energy companies filed for rights to develop nontributary groundwater under two counties, La Plata and Montezuma, in southwestern Colorado. Applying for rights to a mere 20,000 acre-feet of water annually, the Aztec group told reporters they were caught unfairly in this legal tangle with the Huston and Nedlog parties, maintaining that their request was minor compared with the amounts requested by the others.

The fourth applicant, Johnson, applied for rights to 53 water wells which lie under his own ranch near Pueblo. The water appropriated to him would be 103,000 acre-feet annually.

The four applicants filed for rights to these waters in the stated belief that any unappropriated water that they claimed and put to beneficial use was rightfully theirs under Colorado's doctrine of prior appropriation.

Uses Announced

However, Huston and Nedlog Technology were ambiguous about what uses they planned for the water. When Huston did specify his plans one-half year after filing applications, he described a number of varied objects.

His plans included construction of a hydroelectric plant, making use of the underground water on the state's western slope to generate power for bringing to the surface the deep aquifer well water in the southeast. Water from the southeastern project was to be used for tree farms in connection with the production of wood alcohol or methanol. With the methanol, Huston planned to produce synthetic fuel.

Huston also planned to use the water for real estate development, with water

"The four applicants filed for rights to these waters in the belief that any unappropriated water that they claimed and put to beneficial use was rightfully theirs under Colorado's doctrine of prior appropriation."

being pumped to the developed sites from other locations.

In Colorado, the doctrine of prior appropriation always has been the revered law, first as common law and later statutory law, governing the use and allocation of water. According to state law, "All water originating in or flowing into this state, whether found on the surface or underground, has always been and is hereby declared to be property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with the law."²

A controversial 1973 revised state water statute, however, altered the general reliance on appropriation in the state. In language that is generally perceived to be unclear, the 1973 statute provides that non-tributary bedrock water or water in designated underground basin aquifers, is the property of the landowner that lives above the aquifer.³

While confusion exists over what should be the exact interpretation of the 1973 law, it nonetheless served as a major premise for the arguments presented by the plaintiffs.

Colorado Governor Dick Lamm, who strongly opposed the applications, called the 1973 statute "a time bomb in Colorado's constitution" waiting to be exploded, with this case representing the imminent explosion. He told reporters in April 1979 that he expected the bill's language would have to be resolved through a constitutional amendment.

These applications were the first attempt in the state's history to lay claim to non-tributary underground water. Thus the question raised was one without precedent before the courts.

Huston countered the argument that

"Many of Huston's applications were denied on the grounds that he did not have easements or permission of the landowners to dig wells on their properties."

landownership is necessary to tap underground non-tributary water by his contention that if such were the case, the federal government and big landowners would own much of Colorado's water and state residents would be hard pressed to obtain a thirst-quenching drink of it.

Neither Huston nor his two partners own any of the lands above the underground water he is seeking rights to. Reportedly, he did not intend to acquire leases for the lands above the underground water nor negotiate easements with landowners for development of the water by well construction.

Nedlog Technology and the Aztec group, on the other hand, had either leased properties or negotiated easements with landowners in order to dig wells and otherwise develop the underground water they sought. Johnson owns the land above the water he hopes to tap.

Colorado's traditionally thorough reliance on the doctrine of prior appropriation in water use matters is illustrated by a statutory provision which facilitates development of water sources by the appropriation rights holder. According to the law, "Any person owning a water right or conditional water right shall be entitled to a right of way through the lands which lie between the point of diversion and the point of use."⁴ The law goes on to say that when a landowner refuses to grant an easement to allow for water development, the water rights holder is entitled to condemn land for construction of the ditches and necessary diversion instruments.

Huston relied upon this provision allowing condemnation of land in applying for rights to underground waters and his plans to dig wells. However, in order to dig a well, one must apply for and receive a permit from the state engineer.⁵

The Issues

When the two sides in this water rights battle had assembled their arguments and defenses, the questions brought before Judge Shivers by opponents of the applications were as follows:

- Whether non-tributary waters in Colorado are subject to appropriation. If so, by what authority can these waters be appropriated?
- Whether non-tributary waters outside the boundaries of designated groundwater basins can be appropriated by persons having no property interest in the surface. (Designated groundwater basins are underground reservoirs set aside for certain water allocation procedures.) And whether these waters can be appropriated for use by persons other than the claimant

(continued on page 18)

or those whom the claimant is authorized to represent.

- Whether applications for non-tributary waters can be filed without first obtaining permits for well construction from the state engineer. If so, without first applying for a well permit
- Whether a water rights applicant has a right to reclaim water which infiltrates underground structures when the applicant is not the owner of the structure.
- Whether a decree can be obtained for a right to store tributary water in an underground reservoir created by the impoundment of water behind a naturally occurring glacial moraine.

In ruling on these questions, Judge Shivers denied applications from all four applicants. However, a few applications were sent back to the district water courts for judgment under Shivers' guidelines.

The judge's awaited ruling was that non-tributary underground waters are subject to appropriation. However, he said this right of appropriation is qualified by three items. For one, the state retains an interest in regulating use of this water. Secondly, the person claiming such waters must either own the land above the underground source or have the permission of landowners to develop the underground water. Thirdly, the judge said the applicant to such waters must show that the water will be put to immediate beneficial use.

Shivers said Colorado landowners do not have fee ownership of water found in underground aquifers beneath their property, but they do have certain vested rights to it. These rights are subject to reasonable use.

The authority by which these waters are appropriated is Colorado Revised Statute 37-90-137.

Many of Huston's applications were denied on the grounds that he did not have easements or permission of landowners to dig wells on their properties. The judge said wells to underground aquifers were not the same as ditches, canals and flumes used to divert tributary waters but rather were similar to mines dug to recover underground minerals. As such, the holder of rights to deep aquifer water does not have authority to condemn land in order to dig wells.

Secondly, Shivers said Huston's group did not prove that the water sought in the applications would be put to beneficial use. Instead, it appeared the water applications had speculative purposes the judge said. The applicants did not show that the water would be fulfilling an "ac-

tual need" in that the beneficial use would not be immediate.

In Colorado water law, beneficial uses are considered those for domestic, agricultural, industrial, municipal and recreational purposes.

Huston's applications for rights to reclaim unconsumed water from the 3,327 wells in the Denver River basin and northeastern Colorado were denied on the grounds that developed water, or water accessible only through man-made wells, was rightfully for use by the developer. The applications were denied also because the judge doubted that one could regulate water appropriated precisely enough to assure that senior rights holders would not have water supplies impinged upon.

Many applications from the other applicants were dismissed by Judge Shivers also. With regard to Nedlog Technology's applications, the judge questioned the proposed uses, believing they were speculative in purpose, and said he doubted whether amounts of water appropriated by Nedlog could be monitored sufficiently well to protect senior rights holders.

With the Aztec group's applications, the problem was technical. They had applied for both tributary and non-tributary wa-

ters, while the two kinds of water had to be treated separately by the courts.

Despite the denial of his applications, Huston said he "won his major point" with Shivers' ruling that non-tributary groundwater is open to appropriation. He said that he plans to persist in his attempts to gain rights to the various underground water sources.

Footnotes

¹*Southeastern Colorado Water Conservancy District; Northern Colorado Water Conservancy District; Southwestern Colorado Water Conservancy District, et al., Petitioners, v. John Huston; Alan Leaffer; Wallace Yaffe, d/b/a/ various John Doe and Richard Roe joint ventures; Nedlog Technological Group; Colorado Pacific Energy; Colorado Pacific Aztec; and Bob Johnson Jr., et al., Respondents. 79 C W 1 County of Arapahoe, state of Colorado (consolidated cases, water divisions nos. 1,2,3,4,5,6, and 7.)*

²C.R.S. 37-82-101

³C.R.S. 37-90-107 or S. 213.

⁴C.R.S. 37-86-102 and 37-86-104

⁵C.R.S. 37-90-137

Abstract Company Observes 100 Years

La Crosse County Title Co. in La Crosse, Wis. celebrated its 100th anniversary recently and was treated to a fanfare of publicity.

The La Crosse *Tribune* ran an article tracing the history of the company, the families which founded and carried on the firm and the services the company has brought to the community over the years. A short while later, an advertisement ran, complimented by an article about the company's establishment and its passage through the generations of two families. This article was written by the company's executive vice president William Holstein.

"In the books and files of the 100-year-old La Crosse County Title Co. are bits and pieces of La Crosse history," begins the article by the La Crosse *Tribune* reporter. It goes on to tell, among other things, how the company was started by one father-and-son combination, Josiah L. and Claude C. Pettingell, and has been

Economy—(from page 9)

operated by another father-and-son pair since 1949, Thomas J. and William T.D. Holstein.

operated by another father-and-son pair since 1949, Thomas J. and William T.D. Holstein.

Holstein's article gives further detail on the lives of the four men and on the company's early days.

Thomas J. Holstein currently is president of La Crosse County Title Co.

Congress—(from page 13)

other "seller's agents" from the responsibility of collecting capital gains withholding taxes on the sale of U.S. real estate by foreigners.

New representatives. New senators. New committee assignments. A new beginning. Economic restoration. Military preparedness. Regulatory reform. These are all words which have been used before. Campaign rhetoric and legislative enactment, in many cases, are light years apart. However, it seems as if members of the 97th Congress have yet to be stricken with Potomac fever. Instead, they are dedicating themselves to the complicated and difficult task of restoring economic stability to the country. It is a bitter pill to swallow, but swallow it they must. As one member of Congress said, "No pain, no gain."

Names In The News . . .



Alvin Long



Richard Toft

Chicago Title and Trust Co. has announced that, as part of its strategic planning, it is restructuring and expanding its management to capitalize more fully on its nationwide title operations.

Alvin W. Long, president and chief executive officer of the company, has been elected to the additional title of chairman and chief executive officer of Chicago Title and Trust Co. and also chairman of its title insurance subsidiary, Chicago Title Insurance Co.

Reporting to Long, **Richard P. Toft** has

been elected president and chief executive officer of Chicago Title Insurance Co. and also elected as director of Chicago Title and Trust Co. and Chicago Title Insurance Co. Toft has been vice president and treasurer of Lincoln National Corp., the parent company of Chicago Title and Trust Co.

Robert C. Bates, executive vice president, has been elected to the additional title of general counsel with responsibility for underwriting, claims, corporate legal, and governmental relations.

Richard L. Pollay, senior vice president and Eastern regional manager of Chicago Title Insurance Co., has been elected executive vice president in charge of all title operations.

Bates, Pollay and **John E. Jensen**, executive vice president, administration, will report to Toft.



Robert Bates



Richard Pollay

La Crosse County Title Co., La Crosse, Wis., announced the elections of **Colleen M. Kavanaugh** to senior vice president, **Mary Jo Johnson** to vice president—title insurance, **Marilyn J. Tomten** to vice president—abstracting and operations and **Gerald G. Collins** to vice president—escrow and closing. Kavanaugh, Johnson, Tomten and Collins all formerly were abstracters for La Crosse County Title.

Joseph E. Bankosky, **Robert M. Ballenger**, **Fred L. Jones** and **John T. Eickhoff** of Commonwealth Land Title Insurance Co.'s Indianapolis, Ind., office were promoted.

Bankosky is now vice president and Indiana state manager. Jones and Eickhoff were named assistant counsels and Jones was appointed state counsel for company operations. Ballenger was promoted to assistant vice president.

Commonwealth also announced the appointment of **James Hemphill** as vice president and manager of the Atlantic City, N.J., office. He is a 40-year veteran of the title insurance industry.

Hemphill succeeds **Ray Buckman**, another vice president for Commonwealth, who now handles special projects in the rapidly expanding Atlantic City market.

Insurer's Duty To Defend Examined by Appeals Court

The United States Court of Appeals for the District of Columbia recently has affirmed a decision of the United States District Court, holding that an insurer's "duty to defend" against unenforceability of the lien of the insured mortgage does not require the insurer to defend a challenge to only certain provisions of the deed of trust instrument where the underlying acts and the fundamental cause of complaint arise out of fraud, deceit and breach of fiduciary duty on the part of the insured in negotiating the provisions of the instrument and the underlying obligation. *Wisconsin Avenue Associates, Inc. v. Commonwealth Land Title Insurance Company*, No. 79-2279 (D.C. Circuit), decided October 29, 1980.

The federal action arose out of a suit filed in the District of Columbia Superior Court by members of a cooperative housing association against Wisconsin Avenue Associates, promoters and sellers of the cooperative housing complex and the insured under the title insurance policy. Plaintiffs alleged, *inter alia*, breach of contract and fiduciary duty by Associates on account of acts of self-dealing by its principals while serving on the original

board of directors of the association. In particular, plaintiffs challenged certain provisions of the deed of trust by which Associates held a "wrap-around" mortgage on the cooperative complex as being oppressive and contrary to public policy. The Superior Court declared the challenged clauses of the deed void but otherwise upheld the validity and enforceability of the deed of trust.

Associates, the insured purchase-money lender, requested Commonwealth to defend it in the Superior Court action. Commonwealth declined for the reason that the title, *per se*, was not under attack but, rather, the transactions underlying the note. The policy excluded from coverage "defects, liens, encumbrances, adverse claims or other matters (a) created, suffered or agreed to by the insured claimant. . ."

Thus, the insurer asserted it was not obligated to defend actions arising from wrongful acts of the insured, such as those which formed the basis of the Superior Court action.

Associates thereafter filed suit against Commonwealth in the District Court, alleging breach of contract for failure to

defend and requesting judgment in the amount of costs and attorneys fees assessed against it in the Superior Court suit and its costs and legal fees in defending that action. Associates alleged in its complaint that its security interest represented by the deed of trust was diminished by reason of the unenforceability of the provisions declared void by the court.

Commonwealth moved for summary judgment and the District Court entered judgment on its behalf. The court stated that the gravamen of the Superior Court action was a claim that Associates was guilty of breach of fiduciary duty, fraud and deceit in creating the deed of trust. There was no challenge to the title nor to any matter "even remotely covered by the policy of insurance." Hence, Commonwealth had no obligation to defend Associates. Further, the court pointed out that the invalidation of four of the provisions of the deed was not equivalent to an invalidation of the mortgage lien.

Submitted by *Patricia D. Gurne* of the law firm of *Jackson, Campbell & Parkinson*, Washington, D.C.

Calendar of Meetings

March 25-27

American Land Title Association
Mid-Winter Conference
The Homestead
Hot Springs, Virginia

April 30-May 2

Arkansas Land Title Association
Lake DeGray Convention Center
Arkadelphia, Arkansas

April 30-May 2

New Mexico Land Title Association
Holiday Inn
Las Cruces, New Mexico

April 30-May 3

North Carolina Land Title Association
Litchfield Inn and Country Club
Litchfield, North Carolina

May 3-5

Iowa Land Title Association
Holiday Inn
Amana, Iowa

May 7-9

Oklahoma Land Title Association
Sheraton Century
Oklahoma City, Oklahoma

May 14-15

California Land Title Association
Islandia Hyatt House
San Diego, California

May 14-16

Texas Land Title Association
Palacio Del Rio Hotel
San Antonio, Texas

May 28-30

Tennessee Land Title Association
May 28-31
Opryland Hotel
Nashville, Tennessee

May 31-June 2

Pennsylvania Land Title Association
Shawnee on the Delaware
Shawnee, Pennsylvania

June 7-9

New Jersey Land Title Insurance Association
Seaview Country Club
Absecon, New Jersey

June 22-24

Oregon Land Title Association
Ashland Hills Inn
Ashland, Oregon

June 25-27

Land Title Association of Colorado
Sheraton Steamboat Resort
Steamboat Springs, Colorado

June 28-30

Michigan Land Title Association
Grand Traverse Hilton
Traverse City, Michigan

July 16-18

Wyoming Land Title Association
Ramada Inn,
Casper, Wyoming

August 6-8

Montana Land Title Association
Sheraton Hotel
Billings, Montana

August 6-9

Utah Land Title Association
Elkhorn Village
Sun Valley, Idaho

August 13-15

Minnesota Land Title Association
Holiday Inn
Grand Rapids, Minnesota

August 14-15

Kansas Land Title Association
Holidome
Dodge City, Kansas

August 20-13

Alaska Land Title Association
Juneau, Alaska

August 30-September 1

Ohio Land Title Association
Hyatt Regency
Columbus, Ohio

September 1-4

New York State Land Title Association
The Otesga
Cooperstown, New York

September 9-12

Washington Land Title Association
Thunderbird Motor Inn
Wenatchee, Washington

September 11-13

Missouri Land Title Association
Lodge of the Four Seasons
Lake Ozark, Missouri

September 13-15

Indiana Land Title Association
Merrillville Holiday Inn
Merrillville, Indiana

September 20-23

American Land Title Association
The Broadmoor
Colorado Springs, Colorado

October 2-4

South Carolina Land Title Association
Hilton Head Island, South Carolina

October 15-16

Wisconsin Land Title Association
Pioneer Inn of Lake Winnebago
Oshkosh, Wisconsin

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