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Colorado: A Study in Frontier Sovereignty

COLORADO: A STUDY IN FRONTIER SOVEREIGNTY

By ROBERT L. STEARNS*

COLORADO was until recently our last frontier. This community was described by Major Stephen H. Long in 1820 as "the great American desert" and by Daniel Webster in 1838 as "a vast and worthless area—a region of savages and wild beasts, of deserts, shifting sands and whirlwinds of dust, of cactus and prairie dogs." It has a unique and fascinating history—a history with which many of you are no doubt familiar, but which to some may still be novel. At any rate, the chronicle of the life of a courageous, self-reliant people should prove of particular interest to any and all of us in this day, when we are prone to regard government as a chisel, instead of as a hoe.

Long before the Pilgrims landed at Plymouth Rock or John Smith and his party at Jamestown, that area we now know as Colorado had been claimed by right of conquest and discovery by Francesco Vasques Coronado for his Most Christian Majesty Charles I of Spain. True, it had not been settled or colonized, but it was known about and claimed. But claimed from whom? From its aboriginal occupants who had ranged its plains and hunted in its mountain parks from a time whereof the memory of man, civilized or savage, runneth not to the contrary. But Coronado and his band sought the Seven Cities of Cibola, the untold wealth of mythical Quivira. Instead of fabulous wealth, he found only a prairie ranged with hordes of "hump-back oxen"—the American Bison—and what is now known as Kansas, and returned to Mexico, a weary and disillusioned man.

The apparent failure of his expedition dampened the ardor of other venturesome souls, and the Indians continued to hunt the humped-backed oxen and remained secure in their plains and mountains for another 166 years. In 1706 Juan de Uribarri, a military emissary from the Governor of Mexico, came northeast from Taos, New Mexico, to the vicinity of Pueblo on the Arkansas River, and there, with formal ceremony claimed the land for Philip V of Spain. No doubt of our Spanish heritage can exist if you look at the map of Colo-

*Dean of the School of Law, University of Colorado. This paper was read as an address to the thirtieth annual meeting of the American Association of Law Libraries at Denver. Reprint from *Rocky Mountain Law Review*, June, 1936.

rado. The names of numerous mountains and rivers and seventeen counties are of Spanish origin.

But Colorado was not without rivals for its affections and favors. The eastern part of the state was claimed by France and sold to the United States in the Louisiana Purchase in 1803. The state as now known was thereafter divided between the territories of Kansas, New Mexico, Nebraska and Utah. Then followed a series of claims and counterclaims for control of the region, aggravated by the national issue of whether or not the new area should be slave or free—an almost ironical concept in a community where men were politically free almost to the point of abandonment, but were enslaved to the most relentless of taskmasters, economic necessity.

Such then was the Rocky Mountain region in 1858—an area inhabited by Indians and trappers and by a handful of disappointed gold seekers straggling back from California—an area under the nominal political control of four territorial sovereignties and under the actual governance of none—a bleak mountain and prairie region—a stepchild of four neglectful parents and the ward of a Federal Government already engaged in the birth throes of the deliverance of a nation.

But something happened in 1858—something more significant to this area than the Lincoln-Douglas debates or the Dred Scott decision. A group of gold seekers heading for California led by William Green Russell were lured by rumors of the Pike's Peak region and discovered gold in the barren channel of Dry Creek. George A. Jackson, an amazingly self-reliant man, thawed out the December ice in Chicago Creek near Idaho Springs and panned, according to his own diary, "eight treaty cups of colors." The next spring John Gregory, "a lazy fellow from Gordon County, Georgia," panned an almost unheard of quantity of gold in one of the tributaries of Clear Creek near what is now Black Hawk. The news of these discoveries spread like wildfire, and within the next 12 months 30,000 people came to Colorado.

Now my narrative has not to do with the romance of these discoveries nor with a description of the covered wagons, handcarts and wheel-barrows in which these people moved their worldly goods, but with the most interesting picture of their governance and control. The particular region which

they inhabited was partly Kansas, partly Utah, partly New Mexico and partly Nebraska territories. The inhabitants were free-born Americans from Missouri, Georgia, Illinois, Iowa, Kentucky and wherever not.

After the first fever of discovery was over and the novelty of the situation had worn off, they began to realize that they were a strange and miscellaneous people in a vast and inhospitable land. Here then begins my narrative—a story as old as the Anglo-Saxon race—a story of self-government and the recognition of self-imposed sovereign authority.

Early in the spring of 1859, the urge of government was upon these settlers. In the first issue of the *Rocky Mountain News*, dated April 23, 1859, a record of a public meeting appears, describing a gathering on the eleventh of that month, at which meeting it was unanimously resolved "that the different precincts be requested to appoint delegates to meet in convention on the 15th inst. to take into consideration the propriety of organizing a new state or territory."

On the night before this convention a meeting of the citizens of Auraria (later to be called Denver in honor of the then Governor of Kansas Territory, Brigadier General James W. Denver) appointed delegates to this convention and then proceeded to instruct their delegates as follows:

"Resolved that the delegates be instructed to act in the convention with a view to forming a State government, and that they should let no sectional influences sway them in their deliberations."

The convention met April 15th, according to call, in Wooton's Hall, which was the upper floor of Dick Wooton's store. A committee of credentials was appointed to examine and approve the credentials of the duly accredited delegates. The sentiment of the meeting was practically unanimous for the immediate organization of a new state from parts of Kansas, Nebraska, Utah, and New Mexico territories, without waiting for the expiration of the usual preliminary territorial period.

In the call for this meeting the temper of the people, and an expression of their purpose, appeared:

"Government of some kind we must have, and the question narrows itself down to this point: Shall it be government of the knife and

revolver, or shall we unite in forming here in our golden country, among the ravines and gulches of the Rocky Mountains, and the fertile valleys of the Arkansas and Plattes, a new and independent state? * * * Let us all unite as one in so great an object. * * * It is a glorious cause, and a feeling of pride as well as of duty would lead us to act in it."

The meeting was seriously devoted to consideration of those factors that made statehood necessary, with particular emphasis upon the remoteness of organized efficient civil authority. In order to prevent the discussion from wandering too far afield, the following resolution was adopted:

"RESOLVED, that the discussions of this convention shall have but one object, viz.: the formation of a new and independent State of the Union."

Does this sound like the action of a disorganized group of ignorant immigrants? Is this the picture that the average Easterner has of the conduct of the bearded men in the wild and woolly West? These men were not playing at government. To them it was real and vital. By resolution they defined the boundaries of the proposed new state to include the area that is now Colorado and added thereto a generous slice of Wyoming and Utah and then they resolved "that the name thereof shall be the State of Jefferson."

The meeting had provided for a constitutional convention comprised of delegates to be chosen directly by the people to draft a constitution and make arrangements for the furtherance of the state movement. They fixed the second Monday in May as the time for holding selection of delegates and the first Monday in June as the date of the constitutional convention.

The election of delegates was rather perfunctory, but they were held in most localities and the convention assembled on June 6th with due solemnity. By this time the news of the Jackson and Gregory discoveries had become known and the entire community was in an uproar. Fifty delegates representing 13 precincts convened and the convention proceedings were formally opened with a prayer by a pioneer Methodist clergyman, the Reverend G. W. Fisher. Committees were appointed to perfect the organization. On the next day it was decided that the convention should adjourn until the first Monday in August, in order that additional delegates be

elected and that the people of the region be more fully represented.

Between that meeting and the adjournment thereof to the first of August considerable opposition arose to the state organization plan, due chiefly to the expense such a form of government would entail. It was urged by the opposition that a territory would be better than a state, because most of the expense of territorial organization and maintenance would fall upon the Federal Government.

When the convention reconvened on August first there were 164 delegates representing 46 precincts. This convention was marked by the same degree of solemnity and earnestness of purpose that characterized the earlier meeting. It went through the usual formalities of organization, approval of credentials of delegates, and appointments of committees to handle the details of the convention's business. The problem, of course, was a peculiar one, and in a certain sense the meeting itself was a mild rebellion against the type of political organization then existing.

Before the convention adjourned the following resolution was adopted:

"RESOLVED, That the convention now proceed to prepare a Constitution for the State of Jefferson; and also that the Convention appoint a committee of 13, whose duty it shall be to prepare a memorial to Congress, asking the immediate organization of a Territorial Government for the Territory of Jefferson; and that said Constitution and Memorial both be submitted to the voters within the limits of the State—Territory, on the first Monday of September next for their approval or rejection."

The memorial was prepared and the Constitution which had been under consideration for some time was drafted, and the organic law of the proposed new commonwealth was thus made ready to submit to the vote of the people. Ballots were prepared in alternate forms to be used at the forthcoming election: those reading "For Constitution" providing that they should "be considered a full and complete negative to a Territorial organization"; and those reading "For Territory" providing that they should "be considered a full and complete negative to a State Constitution."

Thus the aim of the convention was to sound out the public sentiment on the question of statehood or territoriality, and take whatever action was supported by the popular will. It was clearly, however, not its intention to abrogate all ties with the existing order. An effort was made to straddle the problem as evidenced by the fact that the delegates decided, if statehood should be defeated at the polls, in September, another election would be held one month thereafter on the first Monday in October, for the double purpose of electing a delegate to the Kansas Legislature and, at the same time, a delegate to Congress to represent Jefferson Territory. This latter representative, as subsequently chosen, was not an accredited representative, but did excellent work in impressing Congress with the earnest desire of the people in the Rocky Mountain region to have a separate political organization carved from the existing four-headed government. At this election, also, it was planned to choose a full complement of state officers. After completing the details of the forthcoming plebiscite, the convention adjourned to abide the outcome of the popular will upon its efforts. Thus, a foundation for a new commonwealth was laid within less than a year from the day that George Jackson panned his "treaty cups" of colors from the ice-bound creek bed of Chicago Creek.

When the popular election was held on the 6th of September, 1859, the result was a serious blow to the friends and advocates of statehood. The apathy of the electorate was just as pronounced then as now. The total vote of the region was but 2,650 votes, divided 2,007 for a territory and 649 for a state. In the mining camps the vote was very light. State-wide political developments were of small concern to the miners. In some of the mountain precincts no vote was taken at all. No doubt the light vote can be accounted for in part by the fact that of the thousands that came to Colorado in the spring and summer of 1859, a great many had gone back to the States, disillusioned and disgusted. The proponents of the statehood plan, who were the more substantial citizens, were disturbed by serious misgivings, occasioned by the continuation of an unorganized community with its attendant evils.

However, since the voters had expressed their preference quite overwhelmingly for a territorial form of government,

the next step was to carry out the popular will. Although the region was still a part of the four territories above named, and so created by acts of Congress, the great mass of the people became quite enthusiastic for an independent territory with a separate group of officers of their own selection. They stimulated their enthusiasm with a strained construction of the Kansas organic act. That act provided that all territory to which the Indian title had not been extinguished should not be regarded as being within Kansas Territory until the occupant tribes should voluntarily consent to have their lands placed under Kansas jurisdiction. Since this had not been done, said the Colorado settlers, all Kansas courts of criminal jurisdiction and courts of appeal were barred from this region. Hence the area of Western Kansas was without the ordinary processes of government. These arguments were convincing to willing ears.

Accordingly, the elections were held on October 3, 1859, and the provisional government convention was held the following week in Apollo Hall in Denver City. In the three-day session the delegates prepared and adopted the territorial constitution, retaining and confirming the name of Jefferson, and defining the boundaries of the territory exactly as they had been for the state.

The intent and purpose of the founders of this new body politic is best expressed in the opening paragraph of the Preamble of the new territorial Constitution. "We, the people of the old region of the Rocky Mountains, grateful to the Supreme Ruler of the Universe for His blessings, and feeling our dependence upon Him for the continuance of the same, do ordain and establish a free and independent government, to continue until such time as the Congress of the United States shall provide a government for us."

The organization, however, did not go through without protest. H. P. A. Smith, one of the vice-presidents of the convention, objected to the organization of the provisional government upon the following very sound legalistic grounds:

"1. We now have all the laws that exist in Eastern Kansas adopted under the Constitution of the United States.

2. We have no legal right to form such a government.
3. This is not called for by the People, nor is it necessary or proper.
4. It will abrogate all legal rights, and throw the country upon the results of a gigantic Vigilance Committee.
5. Before such government can be formed we shall have a proper and legal government from Congress.
6. We have elected a Delegate to Congress, asking for a Territorial form of government, and repudiating at the same time the laws of the United States."

But in spite of Mr. Smith's objections the convention proceeded with its work, and before adjournment nominated an entire ticket of candidates for the territorial offices. A rival ticket was prepared and at the popular election on October 24, the Constitution was ratified by an almost unanimous vote, and the convention slate was elected to office with Robert W. Steele as "Governor" of Jefferson Territory.

From a purely technical and legalistic standpoint the organization may have been irregular, but it was born of the necessities of man for protection against disorganization and its consequences. While it may have been mildly rebellious, it was not, in any sense, treasonable.

The Jefferson legislature met in Denver on November 7, in its first session, and became formally organized. It received the "Governor's" initial message, and proceeded to its business. The business of this unique legislative assembly was to perfect the territorial organization and political structure thus far developed. The work was well conceived and, considering the time and circumstance, was thoroughly executed. The assembly first adopted a civil and a criminal code, each of which were approved by the "Governor" January 25, 1860. The criminal code consists of 487 sections, and constitutes a complete manual of substantive criminal law and of procedure. The civil code consists of 645 sections and covers all essential requirements of civil rights, including corporate organization and management, and the administration of decedents' estates. When viewed in the light of our present-day legislative prolixity it is a model of conciseness. Appended to these two codes is the certificate of the Commissioners appointed to codify the laws, which certificate reads as follows:

"We, the Commissioners appointed to prepare a code of criminal and civil law for the territory of Jefferson, do hereby certify the foregoing to be a code of criminal and civil law prepared by us from the Code of Iowa, as specified by the first General Assembly of the Provisional Government in an act passed for that purpose."

In addition to these codes the territorial legislature passed various general and special acts. The general acts defined the duties of the territorial officers, established a judicial system, provided for revenue, elections, roads, incorporations of towns, etc. They also gave legality to the decisions of the miners' and people's courts, unique institutions, the details of whose operations James Grafton Rogers has so ably discussed.¹ The special acts largely consisted of the granting of charters to essential industries which were being incorporated. Perhaps the most important special act was the consolidation of the Cherry Creek towns into one municipality under the title of "City of Denver, Auraria and Highlands." This was indeed a development because hitherto these communities had been deadly rivals for the favors of the incoming settlers. This consolidation, while not the final act in the establishment of Denver as a single municipality, nevertheless was the beginning of a realization on the part of the residents that there was no occasion for competitive existence.

The last act of the first General Assembly was a joint resolution adopting a territorial seal. This may seem historically unimportant, but it is symbolically significant. The seal was to be two inches in diameter, with a design and inscription as follows:

"The Rocky Mountains to appear in the distance, at their base the foot plains reaching and covering the foreground of the same, on which an emigrant wagon is to be shown with emigrants carrying mining tools; with an inscription around the edge of the same (surrounding the above engraving) 'The Great Seal of the Territory of Jefferson,' and in the upper side of said circle to appear the words 'The People are the government.'"

From the standpoint of librarians and bibliophiles the laws of the Territory of Jefferson present a fascinating and very valuable volume. They were published in one volume

¹*The Mining District Governments of the West: Their Interest and Literature* (1935) 28 INDEX TO LEGAL PERIODICALS AND THE LAW LIBRARY JOURNAL 247; and also a pamphlet, *Proceedings and Papers of the 38th Annual Convention of the National Ass'n of State Libraries* (1934-35), p. 58.

of some 303 pages, printed in Omaha, Nebraska Territory, in 1860 by Robertson & Clark, Printers. It is a very rare and valuable book. There are four copies definitely known to be in existence. One is in the public library in Denver, one in the Colorado State Museum, one in the library at the University of Nebraska at Lincoln, and one in the law library of Harvard University. There is said to be a copy in California, but I do not know definitely of its existence. I have heard of a sixth copy having been listed in a book catalog within the past few years, bearing the list price of \$3,000. There are photostatic copies of this volume in the libraries of the University of Colorado and the State Supreme Court.

Another rare and valuable Jeffersonian document is an eight-page pamphlet comprising the standing rules for the House of Representatives of Jefferson Territory. This was published in Denver in 1859, and the only known copy is in the library of the Colorado Historical Society.

Thus the new *sui generis* political entity started out with all the necessary statutory equipment, but soon found a serious problem in the enforcement of these laws by "authority-lacking executive officers" against those who appeared unwilling to abide by them. A poll tax of \$1.00 was imposed as a revenue measure, but the collection of it was quite another matter. A judicial system was established but the miners preferred the brief and preemptory justice of their own courts, which they continued to maintain. The sanctity of the law depends upon the legitimacy of its source, and as the months rolled on people saw the shadow of the bar sinister across the shield of the new territorial government.

In spite of that fact, "Governor" Steele and the other officers continued to discharge their duties. The population was steadily growing. By the autumn of 1860 a casual census showed the population of the territory at 48,000 people.

As a result of the election on October 22, 1860, "Governor" Steele and several of his associates were returned to office. By that time there was a well developed and outright opposition to the provisional government, and the vote polled by the successful "Governor" was relatively very small. The second general assembly met in Denver on November 12, but the interest in its activities was overshadowed by the startling news

of threatened secession of the Southern States. Nevertheless, the legislature continued to sit in Denver until November 27, when it moved to Golden City, having been seduced by the offer of board "at \$6.00 a week—wood, lights and hall rent free." The remainder of the 40-day session continued under these munificent conditions with barely a quorum of legislators in attendance, and upon the expiration of that period it adjourned quite literally "without day."

But Governor Steele was no quitter. He kept at his post and discharged such duties as devolved upon him for so long as his territorial ship remained afloat. On February 28, 1861, President Buchanan signed the act of Congress creating the Territory of Colorado. There were some who wanted to retain the name of "Jefferson." Other names had been suggested: General Denver had in mind "Shoshone." Others mentioned "Cibola"—the Spanish name for buffalo. Some desired "Pike's Peak," citing Rhode Island as a precedent for this type of name. Others urged that the new state be called "Platte." The original bill called the new area "Colorado," but an amendment changed the name to Idaho, and a further amendment restored the name of Colorado on the theory that many states were named from the great rivers which originated within their boundaries. Senator Gwin of California objected: "It is the handsomest name that could be given to any territory or state," he said, and expressed the desire to reserve the name for the area which later became Arizona.

After the legitimate congressional creation of the Territory of Colorado, President Lincoln was inaugurated, and following his inauguration he designated Major William Gilpin as the first territorial governor. Major Gilpin had long been familiar with this area. His activities in the United States Army had brought him in frequent touch with his new domain, and its residents. He arrived in Colorado on or about June 6, 1861, amid great pomp and dust and circumstance. Not until he arrived, however, did Governor Steele lay down the reins of government. On that day the provisional "Governor" abdicated in favor of the new legitimate ruler. This he did with a dignity and majesty becoming a conscientious executive of a free people. On that day he issued a formal procla-

mation which is of sufficient historical and human interest to be quoted at length.

"By virtue of the authority in me vested, I, R. W. STEELE, Governor of the Territory of Jefferson under the Provisional Government, and in and by virtue of my election by a majority of the People of the then called government of the People of the Mining Region, unrecognized by the General Government, at the base of the Rocky Mountains, on the East and at the center thereof, and placing our confidence in that 'Over-ruling Providence' that has for so long a period of time, steadied us as an American People, through so many difficulties by foes seen and unseen, I therefore issue this my proclamation in view of the arrival of Governor Wm. Gilpin, and other officers of the United States, whom I recognize as being duly in authority. I deem it but obligatory upon me, by virtue of my office, to yield unto 'Caesar the things that are Caesar's' and I hereby command and direct that all officers holding commissions under me, especially all Judges, Justices of the Peace, &c, shall surrender the same and from this date shall abstain from exercising the duties of all offices they may have held under me by virtue of said commissions, and further I advise and recommend to all law and order loving citizens to submit to the laws of the United States and restrain themselves from deeds of violence which so long have made our PECULIAR POSITION almost a bye word in the eyes of the civilized world. Again I advise my fellow citizens who know me 'so long and so well,' to yield obedience to the Laws of the United States, and do it by attending to your proper and legitimate avocations whether Agricultural or Mining.

By the Governor,

R. W. STEELE, Governor.

L. L. BOWEN, Acting Secretary of the Territory of Jefferson.

Done at Denver, this 6th day of June, A. D. 1861."

From this point forward the history of Colorado is more or less orthodox. The state was no longer a frontier. Our "proper and legitimate avocations" are no longer restricted to agriculture and mining. One of our pleasantest occupations is to act as host to convention groups. In so doing, however, we are not unmindful of the observation of Macauley, that "A people that take no pride in the noble achievements of remote ancestors will never achieve anything worthy to be remembered with pride by remote descendants."

We may, therefore, be pardoned if we dwell for a while upon the struggles of the early settlers in a mountain wilderness who founded a great commonwealth upon the principle that "the people are the government."