

**Early in the morning** of July 8, 1884, under the cover of darkness, nine cattlemen-turned-vigilantes led by Granville Stuart descended on a log cabin located some fifteen miles south of the mouth of the Musselshell River in one of Montana Territory's most rugged regions. With rifles in hand, the men surrounded the cabin and waited. At dawn, when one of the occupants, a known horse thief, emerged, the vigilantes ordered him to open the corral and release the horses. He refused and quickly retreated to the safety of the cabin, upon which the vigilantes opened fire. Shots from within the cabin followed, and soon, a full-scale battle had begun. With bullets flying overhead, two of the cattlemen crawled to the building and ignited a blaze that engulfed the cabin and everyone inside. When the shoot-out was over, eleven horse thieves lay dead, killed by bullets or by fire.<sup>1</sup>



Such stories about early Montana vigilante ranchers are legendary—but these stories mask a more complex reality in which cattlemen used both legal and extralegal means to protect their interests. This discrepancy between fact and legend is not surprising given that little has been written about the early history of the stockmen's organizations through which they directed their legislative and vigilante activities.<sup>2</sup> The history of these organizations, detailed here for the first time, demonstrates that although Montana's early cattlemen did resort to violence, they preferred to work within the existing governmental framework rather than outside of it—a conclusion that alters the prevailing perception of early ranchers as vigilantes

as well as notions about vigilantism as one of the primary means used to vent discontent on the frontier.

**S**TOCK RAISING in Montana began in earnest in the 1860s with the mining boom that opened local markets for livestock and meat. Ranches quickly appeared in the valleys closest to the mining settlements as cattle arrived from both the east and the west to meet the growing demand. By the 1870s, Deer Lodge County, the center of stock raising in the territory, was home to some seventy-five thousand head of cattle, and ranching flourished in other parts of western and northwestern Montana as well. The

**Stock raising in Montana Territory began in earnest in the 1860s. Deer Lodge County, with its mining center of Butte, and the Yellowstone Valley near the mines of Emigrant Gulch were two of the territory's earliest ranching centers. According to the photographer's notes, droves of cattle survived relatively mild winters on Major Pease's ranch on the Yellowstone River, pictured at right in 1872.**



W. H. Jackson, photographer, U.S. Geological Survey



W. H. Culver, photographer, MHS Photograph Archives, Helena, 946-297

**By the late 1870s, ranchers, including Granville Stuart and his partners Samuel Hauser, Andrew J. Davis, and Erwin Davis, established operations on the open range in central Montana. Here, in what would become Fergus County, is an 1884 roundup near the DHS Ranch.**



Miles City photographer L. A. Huffman called this undated view *Foreman Telling Off the Men for the Circle*, which described a routine to start the day's work.

number of cattle in the territory doubled between 1875 and 1880, and exports increased sixfold. These trends—combined with such popular pamphlets as James Brisbin's *The Beef Bonanza: How to Get Rich on the Plains* (1881), which claimed investors could

make profits of 25 percent or more in ranching—did not escape the attention of Montana pioneers looking for opportunity.<sup>3</sup>

Granville Stuart, a miner-turned-rancher whose later prominence in territorial affairs would earn him the nickname “Mr. Montana,” was one of those pioneers. In 1879, Stuart and three partners became the first to establish a ranch, the DHS, on the open range in central Montana.<sup>4</sup> Here and on the territory's eastern plains, Stuart and others adapted ranching to the open range. They adopted new herding techniques and began grazing new breeds of cattle—including the fabled longhorns that were pouring in from Texas. By 1880, over one thousand people were engaged in stock raising in Montana Territory. That represented only a quarter of the number engaged in mining at that time, but the figure was nonetheless significant given how quickly the cattle industry had grown.<sup>5</sup>

Even as their numbers increased, Montana's cattlemen were plagued by the problems associated with raising livestock on the open range—range fires,



Longhorns, referred to as “double-wintered Montana-Texans” on this 1891 photograph, adapted well to Montana's ranges, but predators, overcrowding, unbranded strays, disease, and, above all, theft threatened to wipe out ranchers' profits. To achieve systematic solutions to these problems, stockmen looked to the territorial legislature.

C. A. Wiley, photographer,  
MHS Photograph Archives, Helena, 946-267

predators, range overcrowding, the spread of disease, the mingling of cattle owned by different outfits, and competition from sheepmen and settlers. Yet foremost among these threats were horse and cattle thieves, who were particularly troublesome in central Montana. Organized gangs stole from the ranges, manipulated brands, and drove stock long distances—usually across the Canadian border—to sell. Given the scope of this problem, it is hardly surprising that stockmen began to realize the necessity of working together.<sup>6</sup>

### The First Territorial Association

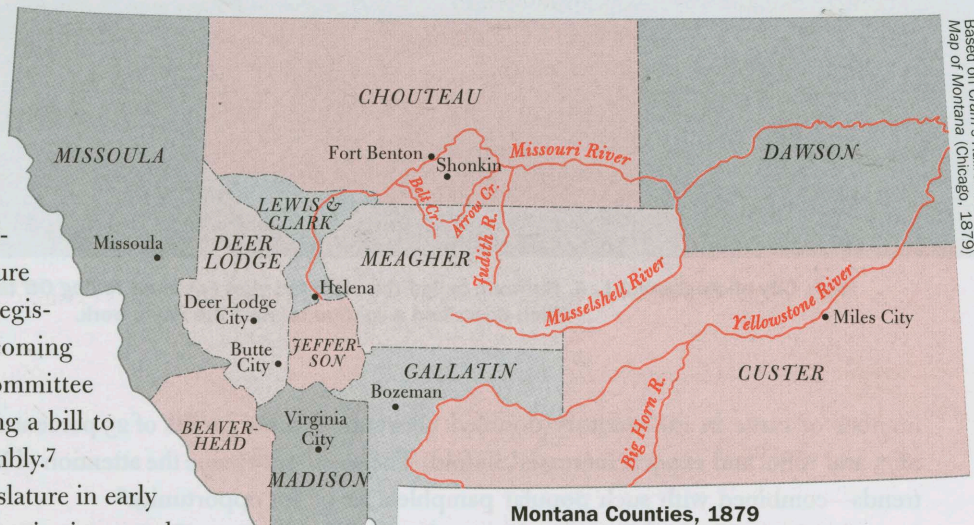
The first documented organizational meeting of ranchers in Montana Territory took place in Virginia City on December 15, 1873, and two other meetings quickly followed. Discussions included such topics as rustling and branding regulations, but for the most part, participants focused on the “necessary steps towards the organization of a stock growers’ association” as a means “to secure proper and necessary legislation” during the upcoming legislative session. A committee was charged with drafting a bill to be presented to the assembly.<sup>7</sup>

Submitted to the legislature in early 1874, this bill divided counties into stock districts and called for joint roundups within these districts as well as the election of stock inspectors. The bill also addressed the problem of strays, requiring that they be branded with the district brand and sold to the highest bidder by the district superintendent. Approved by the legislature, the law became the first to delineate a systematic solution to problems faced by cattlemen.<sup>8</sup>

Despite this success, the organization responsible for drafting the 1874 bill did not survive, and there were no further attempts at organizing for another four years. This hiatus seems odd, particularly in light of the level of collaboration in neighboring territories; the Wyoming stockmen’s association, for instance, exerted strong influence on its territorial government at that time. However, the hiatus might be explained by the absence of serious threats to the industry and

by individuals’ relative isolation, a condition that would change over the next few years.

Montana stockmen again attempted to organize on July 11, 1878, when twenty-two prominent ranchers met and formed the Montana Stock Association of Lewis and Clark County. The body elected Sample Orr as president. Orr, a man well known for his great energy, was the first of a number of like-minded men who worked to unite stockmen in various districts in a common cause. Another prominent spokesman was fellow association member Ross Deegan. Deegan was well spoken, widely liked, and fiercely opinionated. Over the next year, he frequently contributed editorials to the Helena papers that called for the legislature to create a better system for checking brands. Deegan also advocated that hides of butchered animals



be exposed to public view for a specified period of time, particularly at slaughterhouses, where thieves could easily hide the evidence of altered brands. In a January 1879 editorial, he pointedly asked: “Will [our legislators] give us . . . protection, or shall we be compelled against our wishes to become judges and executors of what we deem a proper penalty for the commission of such infringement upon the rights of property?”<sup>9</sup>

Deegan’s plea reveals a number of things about the cattlemen’s early strategy for protecting their interests. Perhaps most striking is his allusion to their willingness to take justice into their own hands. The wording of this threat was meant to underscore the seriousness of the problem yet, at the same time, to emphasize that cattlemen would prefer to use legal

means to solve it. The desire to work within the law—a desire made evident with the first effort to organize in 1873 and reaffirmed continually thereafter by lobbying efforts—was a rational one. The government’s resources not only would help the ranchers protect the ranges but also would underscore the legitimacy of their cause to those in the territory who held a negative view of the cattlemen’s growing power.

Less than a year after the Lewis and Clark County association formed, with conditions continuing to worsen, Montana stockmen held their first territory-wide meeting. Assembling in Helena on January 23, 1879, they debated “until a late hour,” when a committee of eight was finally appointed to organize “a stock growers association for the whole Territory.” It was hardly coincidental that this meeting took place at the start of the legislative session. At a subsequent meeting, the association appointed Robert Ford of Sun River, a freighter-turned-stockman and a man of “rugged and robust physique,” to draft bylaws using those of the Colorado Stock Growers Association as a model. Ford’s bylaws limited membership to ranchers who raised horses or cattle, set annual dues at five dollars, and provided for the formation of “subordinate” organizations. The Territorial Stock Association officially incorporated in July 1879.<sup>10</sup>

The groundwork laid, it remained for the association to encourage the development of subsidiary organizations. One of the first was the Lewis and Clark County Association, which chose to dissolve and apply for a charter from the Territorial Stock Association. The reorganized group boasted a membership of forty. Two other local organizations followed suit, one in Madison County and another in Lewis and Clark, Chouteau, and Meagher counties. As the months passed, however, few other districts responded to the territorial association’s call. The editor of the *Rocky Mountain Husbandman* expressed dismay: “We regret to see the indifference with which the stock men take hold of the project of organizing associations in the several valleys,” he wrote. But the slow response was likely due in part to the busyness of spring roundup rather than to indifference. Moreover, the territorial association itself did little, with the



The Territorial Stock Association incorporated in 1879 with the intent, as president Robert Ford of Sun River told members at its 1880 annual meeting, “to come together and discuss our wants and needs, . . . put them on paper in the shape of a general law, and get our Legislature to pass it.” Ford (standing, second from right) served in the 1881 Council, pictured here.

exception of Deegan’s editorializing, to advertise its existence, and it is likely that those who were aware of the association’s existence were unconvinced—and even suspicious—of what a territorial group that met annually in Helena, hundreds of miles away from their ranches, could accomplish for them.<sup>11</sup>

Although two more cattlemen’s organizations formed that year—one of them put together by the energetic Ford in the Sun River Valley—the results of the Territorial Stock Association’s efforts were disappointing, a reality that its leaders could not help but acknowledge when they gathered in Helena for the annual meeting in early March 1880. The association, admitted President Ford in an address to the forty men in attendance, “has not made the rapid advancement its importance demands and justifies.” He repeated the reasons for a central organization—the need for a system to standardize marks and brands and to track down rustlers—and the means by which these ends could be best attained: “We must organize in every county and district in the territory . . . [We must] come together and discuss our wants and needs, . . . put them on paper in the shape of a general law, and get our Legislature to pass it.”<sup>12</sup>

Following that meeting, the association published a report to stockgrowers once again emphasizing that

the problems ranchers faced could be surmounted only through a legislative campaign, which necessitated organizational unity. In addition, the association offered to distribute “free of charge to all members” a list of all laws affecting them, so that “every stock grower can readily become familiar with all stock laws” without searching through “no less than 8 volumes of the laws of Montana with the risk of missing some very important points.”<sup>13</sup>

By the following winter, cattlemen in districts throughout the territory had begun to heed the territorial association’s call. In Gallatin, Chouteau, and Meagher counties as well as in the Shonkin District, ranchers met and adopted bylaws. By the fall 1881 meeting of the Territorial Stock Association, the trend toward the creation of district organizations—or what the *Rocky Mountain Husbandman* generously called a “movement”—was obvious.<sup>14</sup>

These district organizations developed largely under the direction of prominent local cattlemen who were also members of the Territorial Stock Association,

and the organizations’ goals and their means were the same as those of the parent association. Ironically, this may have caused the demise of the Territorial Stock Association. Increasingly absorbed with the workings of the smaller organizations, local leaders simply had no time to spend on another group, particularly when the local organizations were satisfying their most immediate needs, such as coordinating roundups and distributing brand books.

Consequently, by 1882, Montana’s cattlemen’s organizations had become widespread but decentralized. They acted independently, with no direction from above, a setup that many seemed content to maintain—that is, until rustling activity threatened their livelihoods.

### The 1883 Legislative Session

In 1883, cattle within Montana Territory were valued at more than \$25 million, though, according to some estimates, losses from rustling alone stood at 3 percent annually. Theodore Roosevelt, who owned a ranch

## SHONKIN STOCK ASSOCIATION      BRANDING CORRAL. SPRING COULEE — 1886 —



1 Maj. Thos. A. Cummings	6 Baby Koleberg	11 Timothy E. Collins	16 Geo. W. Frieleds
2 Tom. F. Healey	7 John Lepley	12 Dick Mee	17 Jake Becker
3 John H. Green	8 Col. John H. Rice	13 R. S. Tingley	18 Wm. T. Morrow
4 Sam. Koleberg	9 Malcolm Morrow, Jr.	14 Malcolm Morrow, Sr.	19 Ike Clark
	10 Martin Connolly	15 _____	20 Joe Tatsie
			21 Joe Tromley

In addition to legislative goals, the Territorial Stock Association sought to organize county and district organizations that would work together to track down rustlers and to standardize brands. Among those formed in 1880–81 was the Shonkin Stock Association. The Shonkin District was located south of the Missouri River from Belt Creek on the west to Arrow Creek on the east. The Spring Coulee corral (above) was near the town of Shonkin, about fifteen miles southeast of Fort Benton.

just over the Montana-Dakota border, described the problem of rustling in his autobiography: "Against horse-thieves, cattle-thieves, claim-jumpers, and the like . . . every ranchman has to be on his guard; and armed collisions with these gentry are sometimes inevitable." Granville Stuart claimed that rustlers had become such a threat that one of his wranglers had to sleep in the manger with a rifle just to protect his horses.<sup>15</sup>

With the problem intensifying, the ranchers found they could no longer address it individually. Attempts to track down and prosecute suspected rustlers had proved difficult, both logistically and economically. The thieves had extensive networks that allowed them to steal stock in one region and sell it in another. There was an obvious need for a territory-wide system for recognizing brands as well as for a cadre of investigators to catch those moving stolen stock. Money would be needed to pay these investigators and to prosecute suspects in local courts, which were sometimes biased against cattlemen. In 1883, the stockmen's organizations turned to the territorial legislature for help.

Many of the men who participated traveled long distances to attend the session, which was held from January to March. Three of the eleven men serving in the Council, the upper body of the bicameral legislature, were stock raisers—one of them, Granville Stuart, was Council president—and the proportion of ranchers was roughly the same in the Assembly. Still, success depended on the stockmen's ability to negotiate with the miners and small farmers who made up a majority of the body and whose interests often conflicted with those of the cattlemen.<sup>16</sup>

The stockmen met with initial success in the session, shepherding through several pieces of legislation, including a bill to provide payment for animals killed or injured by the railroads; a bill placing a bounty on bears, mountain lions, coyotes, and wolves; a resolution urging the federal government to provide the Crow and Sioux people living on reservations with supplies equal to their needs so as to eliminate that source of loss; and a bill stipulating that anyone trying to sell beef must preserve the hides for ten days and permit the hides to be inspected.<sup>17</sup>

Most significant, however, was the one bill that

failed. House Bill 49 would have provided for the creation of a board of five commissioners to supervise the interests of the cattlemen and the hiring of six salaried inspectors invested with the power to arrest suspected rustlers, even without warrants. To pay for its provisions, HB 49 proposed a special levy of one-third of a mill (one-thousandth of a dollar) on all taxable property of the territory. The bill passed the legislature but was vetoed by Governor John Schuyler Crosby because of the opposition from miners and farmers, upon whom much of the taxation would fall.

The *Helena Herald* called it both "expensive and unequal in its distribution of burdens and benefits." Governor Crosby, in a letter explaining his reasoning for the veto, questioned the fairness of levying a tax on all property and also emphasized the dangers to personal liberty that came with giving "unsworn" inspectors so much freedom of action.

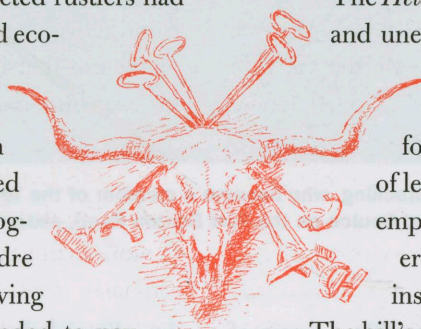
The bill's provisions, he argued, were "suited rather to the exigencies of the past, than to any present condition of the peaceful Territory of Montana."<sup>18</sup>

The failure of HB 49 turned out to have significant consequences. The cattlemen had tried to curb rustling through legal means. They now felt they had no alternative other than to take the law into their own hands.

### Vigilante Summer, 1884

In 1883 and 1884, the eastern part of the territory, particularly along the upper Missouri River, was, in the words of the *Yellowstone Journal*, "overrun with horse and cattle thieves." The *Journal* was not alone in pointing out the problem. Throughout the summer of 1884, articles on the rustling problem appeared in almost every weekly paper. Indeed, it was now so serious that even Governor Crosby—who had only the previous year justified a veto of the cattlemen's bill by pointing to the "present condition of the peaceful Territory of Montana"—noted in his annual report to the secretary of the interior that the "loss by stealing and wanton killing of cattle" had become a serious concern. With rustlers consolidating their operations "into a large and well-organized industry," the law, he conceded, was "utterly powerless."<sup>19</sup>

If the situation was apparent to the governor, it was more than clear to the stockmen. The time had





In 1880, the crew of rancher John J. Stocking, who became a member of the Teton-Marias stock association, rounded up cattle and horses at Bulls Head Coulee on the Fort Benton Road, sixteen miles southwest of Fort Benton.

come to take action. On October 12, 1883, a group of cattlemen met at the Palace Restaurant in Miles City to form the Eastern Montana Live Stock Association, the first move toward centralization among ranchers since the Territorial Stock Association had been founded in 1879. The members (including Teddy Roosevelt) came from all over the eastern and northern parts of the territory as well as the Dakotas. By the following spring, groups were organizing in other parts of the territory as well. Cooperation would allow stockmen in one district to recognize the brand of a stray calf from another district as well as to identify brands on the hides of stolen stock. By pooling their resources, these associations hoped to secure prosecution of rustlers in a way that individuals could not.<sup>20</sup>

The *North West Live Stock Journal* praised the ranchers for their action—and for their restraint: “Now the stockmen are everywhere in line as against lawlessness and theft it is to be hoped that the old prejudice against the ‘cowboy’ will be laid aside. The truth is that cattlemen as a class are law abiding citizens, and they will spend more money and go further to uphold the law than any other men to be found in the country.” The reference to the “old prejudice against the ‘cowboy’” spoke to the view among other Montana residents of the rancher as independent minded and aggressive. In refuting such notions,

the editorial also revealed how the cattlemen viewed themselves—that is, as law-abiding citizens who worked with the authorities rather than against them. Up until this point, cattlemen, despite their threats of violence, had not resorted to lynch law.<sup>21</sup>

That was about to change. On April 20, 1884, a group of stockgrowers from across the territory, 429 strong, met in Miles City. The meeting was turbulent. The participants split into two factions—one in favor of raising a small army to raid rustlers’ hideouts, the other in favor of restraint. Granville Stuart led the conservative faction, despite the fact that he had privately supported more decisive action in the weeks prior to the meeting. At the April meeting, Stuart argued that rustlers were well fortified, their cabins “miniature fortresses.” “[E]very man of them,” he said, “[is] a desperado and a dead shot.” Moreover, he noted that the law would be on the side of the rustlers if any blood were spilled. The meeting erupted when the Marquis de Mores, a good friend of Stuart’s and an owner of a ranch in Dakota Territory, charged Stuart with “backing water.” The marquis’s neighbor, Teddy Roosevelt, offered his support for the aggressive position. Nevertheless, Stuart’s call for caution carried the day, and the majority of those present voted to take no action.<sup>22</sup>

Stuart’s opposition to a strike, however, was apparently a cover—an effort to rein in the group’s

hotheads before they staked out a public position that would have ignited popular criticism. By calling for inaction, Stuart ensured that the cattlemen were on record as being against harsh retribution. His position also gained the advantage of a surprise attack. This strategy became apparent at a meeting held in private at Stuart's ranch only a few weeks later. At the meeting, Stuart spearheaded the planning of a decisive strike against the rustlers.<sup>23</sup>

One of the vigilantes' first targets was a man named Billy Downs, a whisky seller-turned-rustler whose home at the mouth of the Musselshell had become a rendezvous point for shady characters. On the night of July 4, 1884, vigilantes descended upon Downs's small cabin, demanding he account for the twenty-six horses in his corral. When he refused to do so, the vigilantes took him to a grove of trees behind the cabin and hanged him. Over the next few months, Stuart

and some twenty fellow ranchers—"Stuart's Stranglers," as they would come to be known—proceeded to track down and kill at least thirty rustlers (and significantly more than that by some accounts).<sup>24</sup>

Vigilante campaigns were not unusual in Montana or anywhere else on the frontier at this time. On the contrary, vigilantes were often widely respected for upholding justice, an attitude articulated by Teddy Roosevelt in his autobiography: "In any wild country where the power of the law is little felt or heeded, and where every one has to rely upon himself for protection, men soon get to feel that it is in the highest degree unwise to submit to any wrong without making an immediate and resolute effort to avenge it upon the wrong-doers, at no matter what cost of risk or trouble."<sup>25</sup>

Roosevelt's views were shared by many, and not just ranchers. Between 1863 and 1865, for instance, a



Rustling continued to be among the most serious threats to the open-range cattle industry, as rustlers altered existing brands and stole unbranded animals. In the undated photograph above, a wrangler brings a calf to the branding fire.

vigilante committee dealt with the lawlessness of the Virginia City mining camp by hanging Sheriff Henry Plummer, who, with his gang of outlaws, was allegedly at the root of the problem. And in 1882—just two years before Stuart's Stranglers took up arms—two hundred miners in Silver Bow County, the territory's leading mining district, formed a vigilance committee to respond to a wave of midnight burglaries and assaults. Like the cattlemen in 1884, they later claimed their aim was not to defy the law but to uphold and enforce it. In the absence of law, vigilantism worked and was respected by the community, which often benefited from the decrease in crime.<sup>26</sup>

The cattlemen's vigilante campaign of 1884 was different, however—a fact attested to by the vigilantes' conscientious attempts to conceal their activities, first by organizing in secret, and second, by later denying their participation in any such activity. Members of Stuart's gang, many of whom were active in territorial life and government, were extremely cautious later in life about discussing their involvement.<sup>27</sup> The fact that cattlemen were worried about how their activities would be received suggests they realized the public's discomfiture with such actions. Stockmen, after all,

were not organizing vigilance committees for the good of the community; their vigilantism was perceived as self-serving, a means of ensuring greater power over their own industry.

Moreover, Stuart's campaign was more violent than other vigilante campaigns. With at least thirty dead, most killed summarily, this was undoubtedly one of the most concentrated periods of organized violence in western history. Indeed, Roosevelt's account of the events—noteworthy because of his proximity to them and to the people described—disparages the vigilantes for their lack of restraint, even though he agreed in principle with their campaign: "Be it remarked, in passing, that while the outcome of their efforts had been in the main wholesome, yet, as is always the case in an extended raid of vigilantes, several of the sixty odd victims had been perfectly innocent men who had been hung or shot in company with the real scoundrels, either through carelessness or misapprehension or on account of some personal spite."<sup>28</sup>

Given the brutality of these events, the cattlemen-vigilantes' activities during the summer of 1884 must be reconciled with the civil path they had pursued up to that point. They had tried first to address through



Emerson Hough, *The Story of the Cowboy* (New York, 1897), opp. p. 278

In 1883, the territorial legislature passed three bills pertaining to livestock; a fourth bill, which would have allowed salaried inspectors to arrest suspected rustlers, failed. With the failure of the legislation, cattlemen took the law into their own hands, carrying out a vigilante crackdown on ranges "overrun with horse and cattle thieves" in summer 1884. Charles M. Russell portrayed a similar effort in *Looking for Rustlers* (above).

legal means the problem of rustling. Only with that failure did they resort to extralegal means. In the end, their actions gained the sympathy of Governor Crosby, who, in his 1884 report to the secretary of the interior, condoned vigilante activities, arguing: "It became necessary to . . . resort to extra legal means to suppress this dangerous element." In reversing his stance of the previous year, Crosby claimed he had come to see that the government had a duty to "protect this great and much exposed interest, . . . and until it [does], it is useless to complain of these violations of the forms of law, as our people feel that self-protection is the older and stronger law."<sup>29</sup>

As succeeding events would demonstrate, the cattlemen may well have resorted to violence in order to force the government to provide them the legal remedy they had long sought.

### The "Cowboy Legislature" of 1885

Even during the vigilante summer, cattlemen continued to organize in hopes of gaining greater influence in the 1885 legislative session. In April of 1884, a group of stockmen who had just returned from a meeting of the Wyoming Stock Growers' Association issued a call for a July meeting in Helena to discuss forming an association that embraced all Montana cattle ranchers. As before, in pushing for organization, they focused on legislative benefits. The meeting turned out to be one of the most important gatherings of stockmen in the state's history.<sup>30</sup>

Convening at the Helena courthouse on July 28, 1884, forty-two stockgrowers—most of whom were from Lewis and Clark and Meagher counties because the Eastern Montana Live Stock Association had formed the previous year—spent three days discussing proposed organizational structures and the need for legislative action. Benjamin Potts, former territorial governor and a rancher himself, argued that it was the duty of the government to afford protection to cattlemen since so large a portion of the taxable property of the territory was in livestock. Governor Crosby also expressed his support, promising that in the coming session of the legislature, he would do all in his power "toward securing the passage of a proper enactment to that end."<sup>31</sup>

Out of this meeting came the Montana Stock Growers Association. Members elected Granville Stuart president, Benjamin Potts vice president, and

as secretary, Russell B. Harrison (great-grandson of the nation's ninth president, William Henry Harrison, and son of Benjamin Harrison, the twenty-third president). An executive committee composed of one member from each county was appointed. Indicative of the new association's legislative focus were the resolutions that came out of the meeting, including one urging stockgrowers to attend political caucuses to "support and firmly urge the selection of such men for members of the Legislative Assembly as will favor . . . more complete protection [of livestock] from the ravages of thieves."<sup>32</sup>

Stuart became heavily involved in the fall 1884 political campaigns, and in the November elections stockmen gained one-third of the seats in the legislature. This electoral success led to fears among miners and farmers who were convinced that the stockmen intended to pursue legislation to the "detriment and everlasting ruin of all the other industries of Montana." But the stockmen vigorously defended their agenda: "Naturally our sympathies here in eastern Montana are with the stock men," noted one article, "but we have no quarrel with any other interest and have always been opposed to any legislation which will inure to the benefit of one class to the prejudice of another."<sup>33</sup> Success depended on whether their actions would live up to their rhetoric.

After losing his legislative seat to James Fergus, a Scottish stockgrower whose ranch neighbored his own, Stuart had more time to commit to planning the 1885 legislative campaign. In December 1884, he drafted an announcement requesting a meeting of the executive committee of the Montana Stock Growers Association to be held January 12, 1885. Stuart also wrote to the leaders of the Eastern Montana Live Stock Association urging their participation: "We want your Association to cooperate with us and send up as many members as can come for important interests are at stake and we are all vitally interested." Beyond that, he pressed Thomas Bryan, president of that group, to formally affiliate with the Montana Stock Growers Association. "We up here are anxious to consolidate our two Associations," Stuart wrote. "And no matter what may be your decision in the matter, I trust [your members] will all come to help us in legislative proceedings."<sup>34</sup>

Stuart and others also tried to recruit new members by sending out information to ranchers across



Even during the vigilante summer of 1884, stock growers continued to organize in anticipation of the 1885 legislature. In the November election, stockmen gained one-third of the seats. The ensuing "Cowboy Legislature" passed bills that provided for appointment of a territorial veterinary surgeon, the creation of a board of stock commissioners to hire stock inspectors and detectives, and other provisions to protect the industry. Some of the earliest inspectors, photographed circa 1886, are pictured here: (standing, left to right) J. L. Cox, Crow Reservation; Charles D. Hard, Lewis and Clark County; William "Floppin' Bill" Cantrell, Meagher County (a former Stuart's Strangler); (seated, left to right) Harry Lander, Teton County; C. W. Barney, Yellowstone County; Wilson D. "Billy" Smith, Custer County; and Tom A. Matthews, Dawson County.

the territory. "We need some legislation—to protect ourselves against diseases likely to be brought in by [Seattle] and Texas Cattle and I propose to have it at this winters session or know the reason why," he wrote. Organizational efforts paid off: the fourteenth legislative session passed five bills, more than any previous session. Two of these bills would prove to be particularly important in transforming ranching within—and even outside—the territory.<sup>35</sup>

Conrad Kohrs, Stuart's good friend, put forth one of the bills, House Bill 45. Originally from Denmark, Kohrs was bright and knowledgeable about a wide range of topics. His understanding of the problems facing the cattle industry were reflected in HB 45, which provided for the appointment of a territorial veterinary surgeon to investigate all cases of contagious or infectious diseases among livestock. The veterinarian would have authority to order the

slaughter of diseased animals and report directly to the governor. A special tax not to exceed one-half of one mill on the dollar upon assessed value of all cattle, horses, mules, and asses would be used to pay the veterinarian's salary of three thousand dollars per year. Significantly, "any persons not exceeding five hundred dollars in value of horses, cattle, or mules . . . shall be exempt from [this] taxation."<sup>36</sup>

Among the other bills passed in 1885 was one that standardized roundup schedules, thus preventing ranchers from stealing calves by branding early. Yet the most important new law—and arguably the most significant legislation pertaining to ranching passed in the western territories up to this time—was House Bill 57. The bill was similar to the failed 1883 bill in that it allowed the governor to nominate and, with the assent of the legislature's upper house, appoint a board of stock commissioners. This board, consisting

of one member from each of the major stock-raising counties, would “devise and recommend from time to time such legislation as in their judgment will foster this important industry” as well as investigate and prosecute anyone accused of stealing stock or violating stock laws through subordinate stock inspectors and detectives bound by an oath to carry out their duties responsibly. The editors of the *Yellowstone Journal* praised the bill: “Thus it will be seen that the inspectors and detectives will be in reality territorial officers . . . quasi special constables for the purpose of enforcing the stock laws and apprehending violators thereof.”<sup>37</sup>

HB 57 also differed from its predecessor in its tax provisions. In this case, the annual tax was not to exceed one and one-half mills on the dollar “upon the assessed valuation of all cattle, horses, mules, and asses, in their respective counties” with exemptions granted to those who owned fewer than eleven cows and three horses or three mules. This meant that only those benefiting from the bill’s provisions would have to pay, again eliminating sources of discontent among miners and small farmers. The bill passed both houses resoundingly, and the governor signed it on March 14, 1885.<sup>38</sup>

After more than eleven years of lobbying, cattlemen, through unified action, had finally succeeded in getting a law that would protect their interests against

By the end of 1885, cattlemen had consolidated the territory’s local groups into a permanent territory-wide association, the Montana Stockgrowers Association, an organization that continues to this day.

Montana Stockgrowers Association Fifty-fourth Annual Convention program, 1938



rustlers. And the law, which essentially created an arm of the government responsible for protecting stockmen’s interests, proved so effective at deterring rustling that Montana’s cattlemen never again resorted to vigilantism. Not surprisingly, the legislation quickly drew interest from nearby territories. The Wyoming Stock Growers’ Association pushed a similar bill through its state legislature in 1888.<sup>39</sup>

Following the “Cowboy Legislature,” the territory’s two regional associations made good on plans to consolidate. On April 3, 1885, cattlemen from the Eastern Montana Live Stock Association and the Montana Stock Growers Association met in Miles City. Thomas Bryan, still serving as president of the eastern association, opened the meeting by noting that



The last decades of the nineteenth century saw dramatic changes on the range as barbed wire and increasing settlement transformed the cattle industry. L. A. Huffman took this photograph, *End of the Roundup—Pumpkin Creek Pool*, circa 1906.

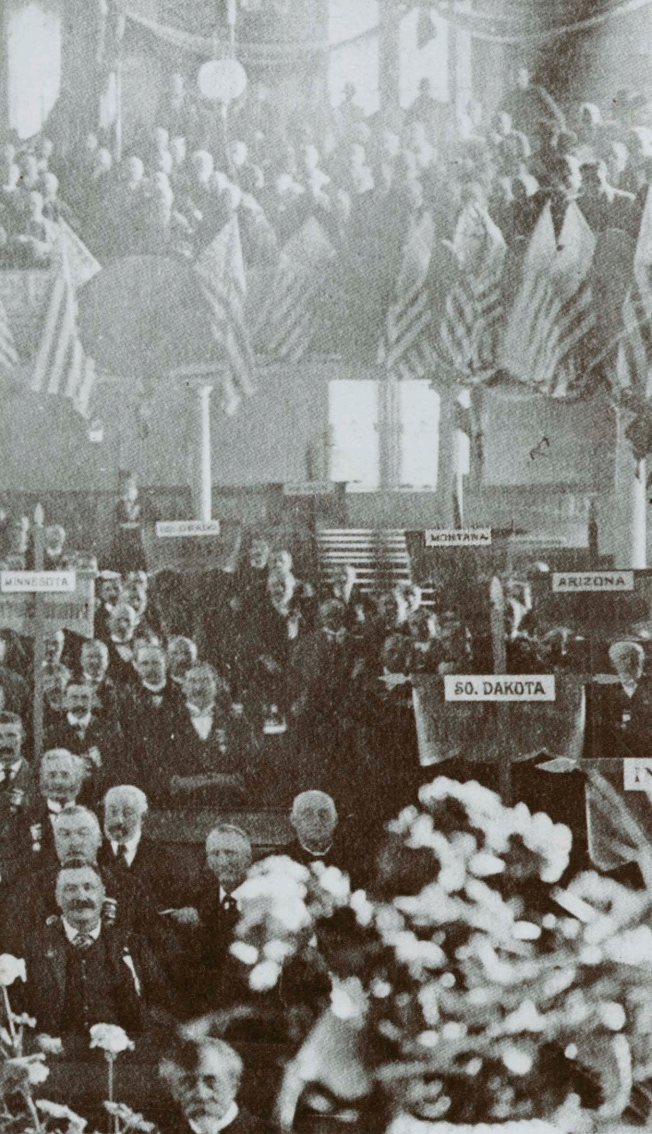


at the first meeting in 1883 there had been just 7 men present. Now there were 150. After Bryan's speech, the entire convention approved the motion to consolidate the two groups. Bryan was elected president of the unified association with Russell B. Harrison (then secretary of the other association) as secretary. Annual dues were set at ten dollars, members of the two older organizations became automatic members of the new association, and semiannual meetings were set for the spring in Miles City and for the fall in Helena. Thus was born the modern version of the Montana Stockgrowers Association.<sup>40</sup>

The year 1885 provides a natural ending point for this story, for it marks the peak of the development of Montana's stockmen's organizations. It also serves as a natural endpoint because ranching itself would soon change dramatically. The next few years, and especially the devastating winter of 1886–87, would reveal many of the underlying weaknesses of the open-

range cattle business—speculative financing, mismanagement, and overstocking among them—and, correspondingly, would hasten the industry's evolution toward newer forms of management and bring an end to the era of the open range and the endless herds of cattle that roamed free on that land.

**A** REVIEW of the events described here supports several significant conclusions. The first is that the cattlemen's uses of legal and extralegal means were intertwined. Indeed, the work of the vigilantes cannot be divorced from the events that preceded or followed it: violence was a response to the failure of the territorial legislature to pay attention to the industry's needs as well as a precursor to legislative action to come. A second important conclusion is that, even though stockmen were willing to resort to violence, they preferred to use legal means, a strategy



This photograph of the 1901 National Live Stock Association Convention, held in Chicago, attests to the level of organization in the industry sixteen years after the creation of the Montana Stockgrowers Association. The Montana delegation occupies the right back corner on the main floor, where its sign can be seen.

argue that violence is justified when legal remedies fail. Rather, they seek to contextualize the vigilantes' activities within a broader pattern of behavior. Indeed, although cattlemen were rash in resorting to violence, they were operating within a system whose laws were too weak, whose capacity to execute those laws was too limited, and which had not yet gained complete authority over the wilderness it had been created to govern. Recognizing these realities, neither the cattlemen's violent actions nor the territorial government's response is particularly surprising.

What *is* surprising is the territorial government's achievements despite these shortcomings. Although the events that culminated in the 1885 legislative successes have often been interpreted as evidence of the cattlemen's dominance over the legislature, the overall significance of these events surely lies in the extent to which the territorial government was able to control stockmen through its ability to tax stock, establish quarantines, and appoint commissioners and veterinarians. This was, in essence, a compromise. By choosing to work within the system, cattlemen boosted public acceptance of their control over the industry as well as gained help in subverting the forces challenging their dominance. In return, the cattlemen became part of the due-process system and subject to its restraints, which, in the long run, legitimized that system by increasing its authority. The resulting transformation, however iterative that process may have been, from isolation to organization, from violence to law, and from wilderness to order in Montana—and, indeed, in the American landscape at large—is the real legacy of this era.

**T. A. Clay** is a graduate of Yale University. "A Call to Order: Law, Violence, and the Development of Montana's Early Stockmen's Organizations" won the 2006 Merrill G. Burlingame-K. Ross Toole Award for best article submitted by an undergraduate or graduate student.

that makes sense given the legitimacy and resources that working under the auspices of the government afforded them. This preference is indicated by the fact that organizational efforts between 1873 and 1885 were fueled by a desire not to legitimize vigilante campaigns but, rather, to pass better laws and carry out existing ones. This is best seen in that even when the vigilantes acted in 1884, only twenty men participated, in contrast to the hundreds who had taken part in creating, growing, and consolidating the numerous district organizations and territory-wide associations. When viewed in context, vigilantism was not as widespread as legend would have us believe. Focusing on the cattlemen's use of violence to the exclusion of their legislative campaigns, as most historians have done, distorts not only the vigilantes' actions but also the larger history of this period.

These points are not intended to justify or defend vigilante activities, for it is highly problematic to

MHS Photograph Archives, Helena, Pnc 93-59

# Sitting Proud

*The Indian Portraits of Joseph Scheuerle*

by Jennifer Bottomly-O'looney

**EXCEPTIONAL** but today little known, artist Joe Scheuerle added his own brand of images to the genre of Plains Indian portraiture. Here he is pictured, second from left, in Browning in 1916 with Frank Eaton, Charles M. Russell, and an unidentified man.

**P**LAINS INDIANS have been popular subjects for artists. Beginning in the 1830s, Karl Bodmer, George Catlin, and others traveled to the West to sketch and paint. Objectivity was the goal of their mostly narrative compositions, which, in many instances, were the first visual records of Plains Indians.

By the late nineteenth century, most tribes had been overwhelmed by westward expansion and confined to reservations. Yet, ironically, as the nation sped headlong into the mechanization of the twentieth century, Americans at large were overcome by a sentimental yearning for a "simpler time," for the era of the cowboy, the Indian, and open space. A new generation of artists was now working in the field, and their work embodied this sort of romantic perspective. Charles Marion Russell, Joseph Henry Sharp, and Henry Farny, in particular, depicted Plains Indians in camp scenes of bygone times—scenes that the artist could not have personally witnessed. The lighting and colors used in these paintings are often quite dramatic, and every action seems larger than life. These heroically styled works tend to focus on Indians as anonymous but integral parts of the environment. Little sense of individuality or personality attaches to any particular figure.



At this same time, photography was becoming increasingly popular and less technically difficult. Numerous photographers—among them D. F. Barry, J. A. Anderson, and W. S. Prettyman—opened studios in towns throughout the plains region. Indians were popular subjects for photographers, much as they had been for Bodmer and Catlin. And like earlier artists, these photographers were interested in documenting daily and ceremonial life in reservation communities. But many Indians also came to the studio to have formal portraits taken of themselves and their families. What drew the Indian to the artist, even as the artist sought the Indian? One can only conjecture, but it may have been that the portrait served as a badge of honor, much like a battle trophy in earlier days. It can also be noted that by the early twentieth century, with the Indian population dropping to its lowest numbers, these portraits take on an air of elegant defiance—as



MHS Photograph Archives, Helena, Pac 99-52 M1

if the Indian is using the artist to make a quiet statement: "We are still here."

It was at this point that Joseph G. Scheuerle (1873–1948) came on the scene. An exceptional but little-known western artist, Scheuerle added his own brand of lively images to the genre of Plains Indian portraiture. His skillfully painted portraits were, in his own words, "all . . . done honestly and carefully from life and on the spot."<sup>1</sup> In many cases, he also documented the circumstances behind the painting by including whimsical sketches and commentary on the reverse of the image.

Scheuerle's earliest years remain a mystery. It is known that he was born to German parents vacationing in Vienna, Austria, in 1873. He and his family immigrated to the United States in 1882, settling in Cincinnati, where he was enrolled in the local school. Because the boy knew no English, the teacher assigned

him a seat in the back of the classroom. From that vantage point, young Scheuerle was free to indulge his passion of drawing without interruption.<sup>2</sup>

As a young adult, Scheuerle attended the Cincinnati Art Academy, where he came under the tutelage of J. H. Sharp and Henry Farny, who would become his lifelong friends. Shortly after leaving the academy in 1896, he was hired as a commercial artist by Strobridge Lithographing Company. There, among other assignments, he produced numerous circus and Wild West posters.<sup>3</sup>

Thousands of Americans were then flocking to the tremendously popular Wild West shows that spoke to the public's romantic view of the American frontier. In 1893, just a few years before Scheuerle began drafting posters in Cincinnati, millions of spectators saw Buffalo Bill's extravaganza during the Chicago Columbian World Exposition. And Cincinnati itself was an annual stop-off for Buffalo Bill and his troupe. The success of Cody's pageant prompted the Cincinnati Zoological Gardens to sponsor its own shows, first in 1895 with a group of Cree Indians, and then a more extravagant event in 1896 with about eighty Sioux from the Rosebud Reserva-

tion. This second encampment lasted three months and provided an excellent opportunity for local artists to meet and observe Indians. It is here, most likely, that Joseph Scheuerle first began sketching Indians from life.<sup>4</sup>

In 1900, Scheuerle moved to Chicago to work for the National Printing Company. In the Windy City, he again had the opportunity to paint portraits of Indian performers. In this case, it was those who traveled with Buffalo Bill's troupe as well as with the 101 Ranch Wild West Show. It was also in Chicago, where he would live through his career, that he met and married Carolyn Lohrey in 1904. A daughter, Margaret, was born to them in July 1906. The family returned to Cincinnati with the advent of World War I and then, in 1923, moved to New York, where Scheuerle began working for the Miner Lithographing Company.<sup>5</sup>

Scheuerle's first documented trip west came in the summer of 1909, when he visited the Pine Ridge Reservation in South Dakota. There he painted two portraits of Red Cloud (Figure 1), the celebrated leader of the Lakota Sioux. Red Cloud was nearing ninety when Scheuerle painted him—he would die just months later, in November 1909—and the artist

noted on the back of one of the portraits: "He was . . . sick & nearly blind. . . . This is the last picture he sat for—I got 2 poses of him—front & side views." Scheuerle admitted that Red Cloud was the "first real big Indian I met" and that the experience was a "thrill." Among others who posed for Scheuerle at Pine Ridge was Standing Cloud. On the back of Standing Cloud's portrait (Figure 2), Scheuerle noted that he had previously painted him two years earlier, in 1907, in Chicago, when the old warrior was touring with the 101 Ranch show.<sup>6</sup>



FIGURE 1 Chief Red Cloud—Ogalala, Pine Ridge, S.D. (1909, watercolor)

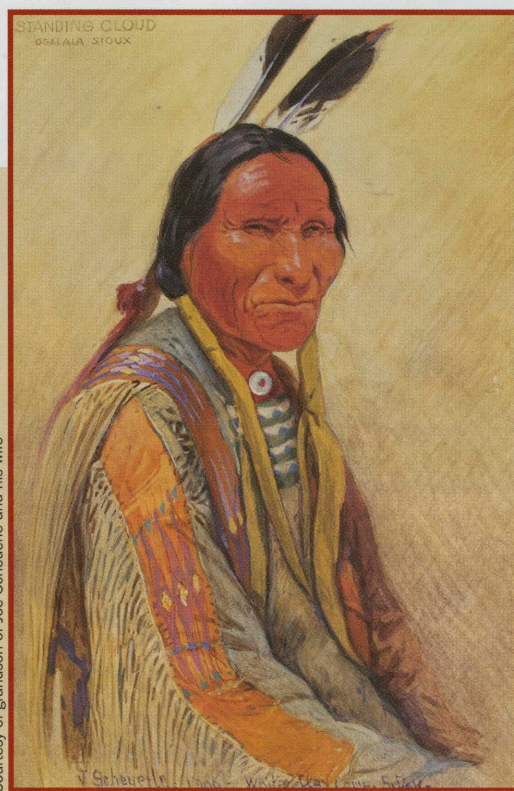


FIGURE 2 Standing Cloud, Ogalala Sioux, White Clay Camp, S. Dak. (1909, watercolor)

Courtesy of grandson of Joe Scheuerle and his wife

Courtesy of grandson of Joe Scheuerle and his wife



Taken collectively, Montana's historic quilts demonstrate the ubiquitous sewing skills that women were expected to acquire, the charitable and political agendas of women's voluntary organizations, the pervasiveness of commercial patterns and fabrics, and Montana women's desire to share national fashion trends. Above, bolts of fabric lie on shelves behind the dry-goods counter in Birney's general store in June 1939.

and, frankly, intimidated by some of the stitchery, but I am dazzled by the colors. I think of a woman driving in a buckboard or a Model T across the grasslands of eastern Montana to discover that the new home her husband has built is a tar paper-covered shanty with a dirt floor, and I picture her hoarding her "pin money" to buy a bolt of Turkey Red calico. I think of a woman in a four-square worker's cottage in Butte, looking out on an alley filled with refuse and laundry made grimy by the pall of smelter smoke and walking to Hennessy's after her husband's payday to buy a piece of fabric figured with brilliant chrome yellow and orange. I think of a woman in the Great Depression sweeping up the aftermath of a dust storm and sitting down for an hour to piece the cheerful pastel hexagons of a Grandmother's Flower Garden. Quilts

are compelling evidence that women created things of beauty in the midst of busy, often difficult lives. Thinking about the choices of color each woman made when she pieced her quilt makes even the most anonymous figures of the past more human, more alive, more accessible to us. Imagination is the passport to the foreign country of the past, and quilts are among our most scenic pathways.

---

**Mary Murphy** is the Michael P. Malone Professor of History at Montana State University-Bozeman. She is author of *Hope in Hard Times: New Deal Photographs of Montana, 1936-1942*; *Mining Cultures: Men, Women, and Leisure in Butte, 1914-41*; and coauthor of *Like a Family: The Making of a Southern Cotton Mill World*.

# A Call to Order

## Law, Violence, and the Development of Montana's Early Stockmen's Organizations

by T. A. CLAY

With cattle roaming the open range, rustling became an expensive problem for stock growers in territorial Montana—one that they tried to solve first through legislation and then took into their own hands. Artist Charles M. Russell portrayed a vigilante confrontation in *Rustlers Caught at Work*.



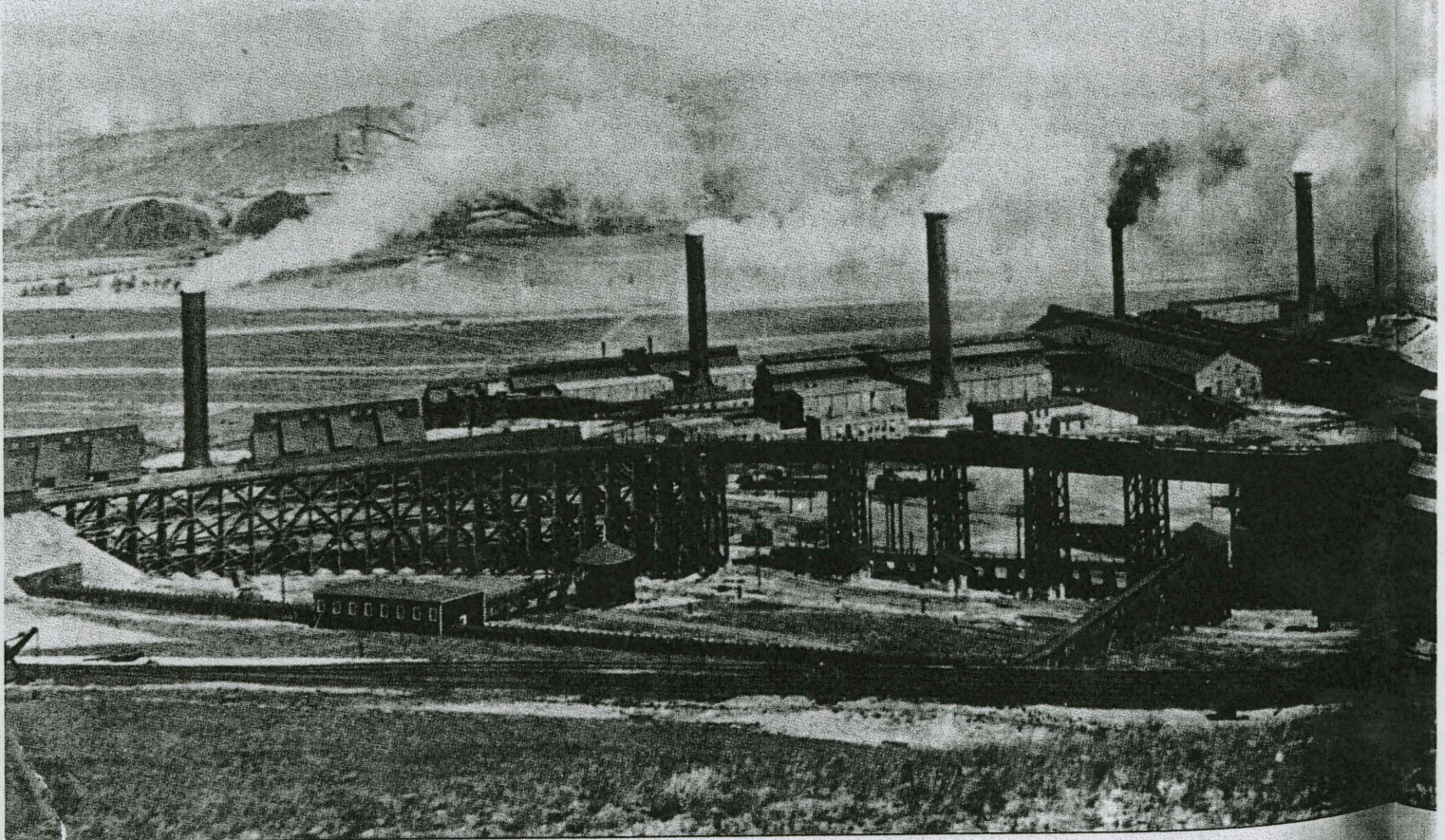
---

# *Was There Arsenic i*

Anaconda Versus th

of D

by G

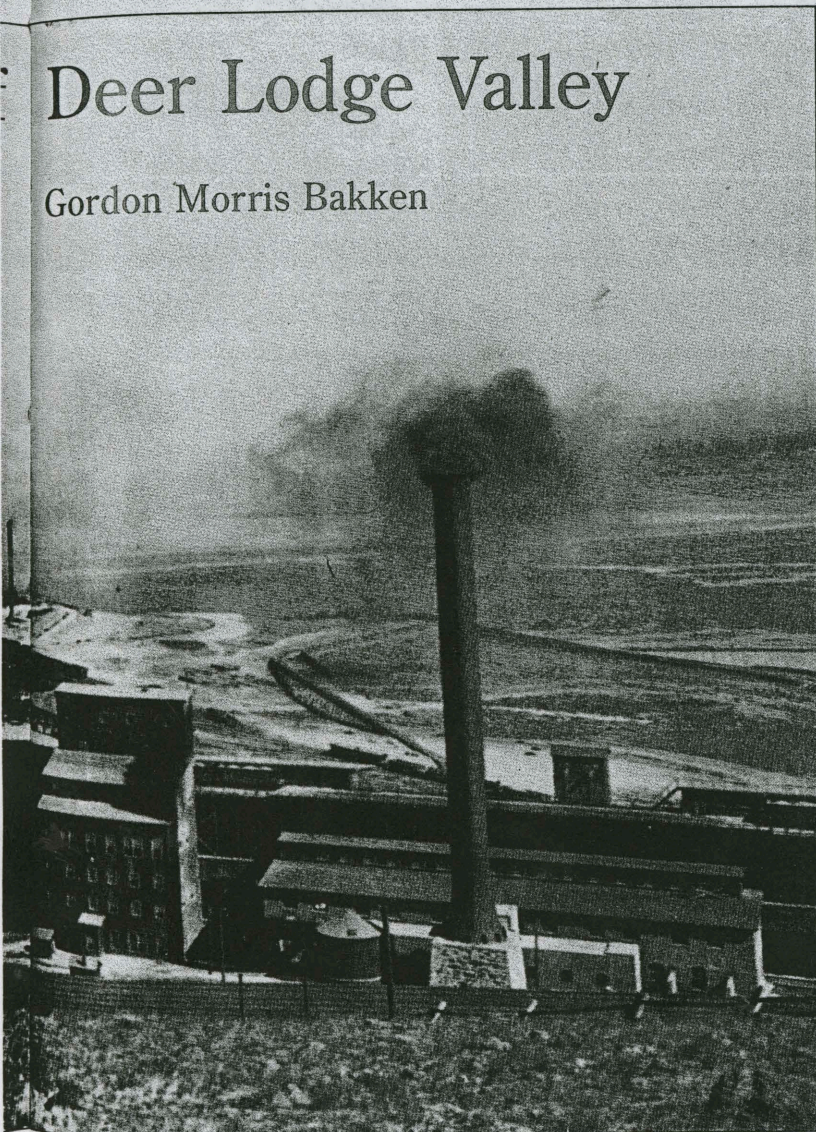


*in the Air?*

the Farmers

## Deer Lodge Valley

Gordon Morris Bakken



Courtesy Bob Vine

Looking north towards the Washoe Reduction Works, about 1903

*T*here was something blowing in the wind and the farmers of the Deer Lodge valley sensed that it was an ill wind. Their crops were failing, their livestock were sick, and the grass, once green, was yellow like the leaves on some of the trees. They looked to the west and saw the three-hundred-foot-tall stack of the Washoe smelter standing over one thousand feet above the valley floor. It was a sign of the times and the prosperity that copper mining promised to everyone in turn-of-the-century Montana. It was also the focus and symbol for what would become a federal court lawsuit leading all the way to the United States Supreme Court.

dust chambers linked reverberatory, roasting building, blast furnaces, and converter plant to the main flue. In a tunnel beneath the main flue and the double flues men scurried about with cars to collect flue dust. All phases of construction had passed through various feats of engineering design. The company also constructed a three-furnace plant to capture arsenic, an increasingly valuable by-product of copper smelting.

The new stack was a wonder in its time. It was so good that Mathewson assured Carl Rasch, United States Attorney in Helena, that "the Washoe Smelter, in Anaconda, is the only one that has taken steps to cope with the smoke nuisance in a proper way." He cited "enormous flues" and "an enormous stack on top of the hill" as proof of the company's efforts to solve the problem. Further, he averred, "we have proved, by analyses of the gases escaping from our chimney, that there is no dust and no arsenic now escaping from same."<sup>3</sup> Science seemed to confirm that engineering had perfected stack design.

Other things, however, were still in the air. Farmers in other states were going to court against smelters and their seemingly perfect science. As Thomas Weir of Salt Lake City reported to Paul A. Fusz of Philipsburg, Montana, in 1903:

damage suits were begun against the Highland Boy Smelter, claiming injury to crops from smoke, and several of these cases have been tried and damages obtained against the Company, for amounts varying from \$600 to \$4,200. I understand there are other cases. This has set all the smelting companies thinking. They are located in the midst of rich agricultural districts. There is no doubt their smoke and dust has done some damage, how much is another question. However, I think it is practically certain that no more smelters will be built in our valley near the site of the present smelters. They will seek a point where their fumes and dust will do no damage.<sup>4</sup>

On June 10, 1904, federal district judge John A. Marshall, sitting in Salt Lake City, handed down a stunning defeat to smelter owners. Marshall rejected the common law nuisance defense that the benefit of the utility's having brought jobs to the valley outweighed the damage the company had done in conducting its lawful business. Marshall continued:

the claim in effect is that one wrongfully invading the legal rights of his neighbor will be permitted by a court of equity to continue the wrong indefinitely on condition that he invests sufficient capital in the undertaking.

I am unable to accede to this statement of the law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail.<sup>5</sup>

The *Highland Boy* decision effectively shut down the Salt Lake smelter industry. The lone exception was the American Smelting and Refining Company's Murray smelter, rescued by a \$60,000 payment to the farmers to get a modification of the decree permitting continued operations.<sup>6</sup>

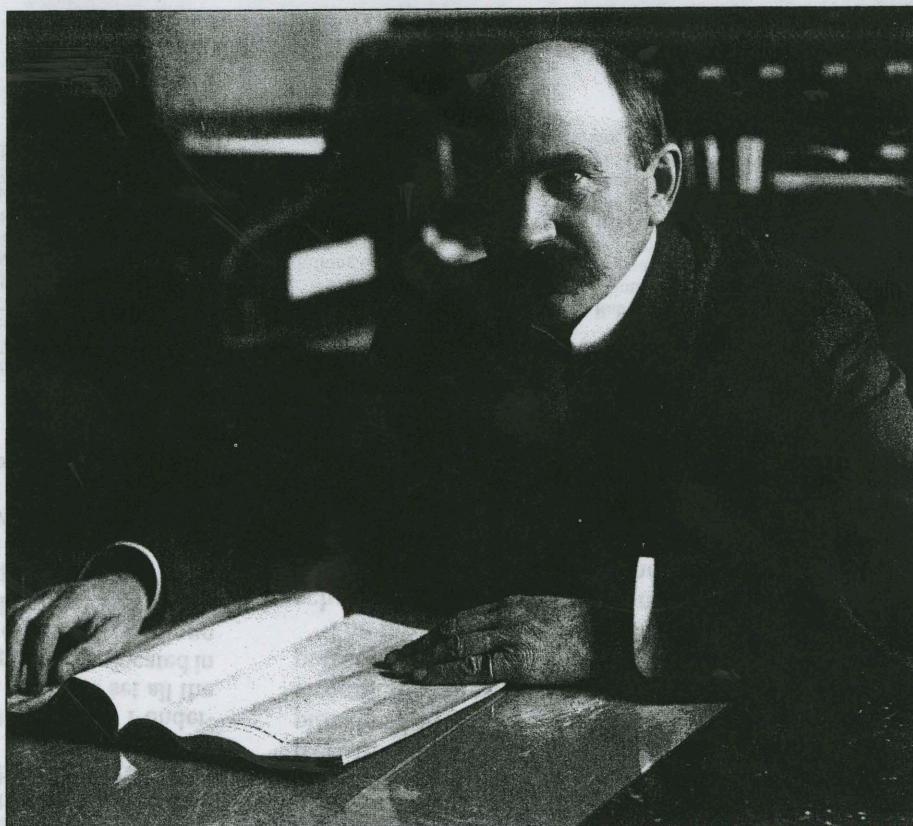
More than Judge Marshall's words were in the wind, more than Anaconda's new stack was in the news. On January 8, 1903, the *Butte Reveille* observed that "it hasn't been a very good year for cows, for the poisonous fumes from the smelter had killed most of the cattle in the valley of the Deer Lodge." But in a December 23, 1904, story titled, "Butte Hill is a Treasure Hill," the *Reveille* observed that prosperity born of the mines and the smelter had brought civilization to the frontier. The *Reveille* celebrated the fact that "the breast high grass has died away from the plain below, the tree, the Indian and the buffalo are gone like the pioneer."<sup>7</sup> Symbols of prosperity and signs of environmental devastation were running together, poised for conflict.

The farmers who gathered at the Willow Glen schoolhouse six weeks later on February 21, 1905, saw the signs and symbols when they created the Deer Lodge Valley Farmers' Association.<sup>8</sup> For months they had been gathering evidence and seeking legal advice on their claims of smoke damage to crops, livestock, and property values. The smelter manager had noticed. Mathewson wrote to John D. Ryan in Butte in 1904:

1. Michael P. Malone and Richard B. Roeder, *Montana: A History of Two Centuries* (Seattle: University of Washington Press, 1976), 157. Most of the narrative that follows is based upon findings of the special master in the case of *Bliss v. Anaconda Copper Mining Co.*, 167 Federal Reporter 342, 348-59 (1909). On Anaconda's corporate transformations, see Michael P. Malone, *The Battle for Butte: Mining and Politics on the Northern Frontier, 1864-1906* (Seattle: University of Washington Press, 1981), 41-47, 137, 205-7. See also Rodman W. Paul, *The Far West and the Great Plains in Transition, 1859-1900* (New York: Harper & Row, 1988), 270-71; and on smelting, James E. Fell, Jr., *Ores to Metals: The Rocky Mountain Smelting Industry* (Lincoln: University of Nebraska Press, 1979).

2. Edward Mathewson to John Robertson, Pueblo, Colorado, July 13, 1903, Box 445, Manuscript Collection (MC)169, Anaconda Copper Mining Company Collection (hereafter Anaconda Collection), Montana Historical Society, Helena (hereafter MHS). Smelter pollution complaints were not new to the copper industry. In 1885, Butte's women protested the "clouds of sulphur smoke which hung over the city Sunday night" killing flowers and plants, Donald MacMillan, *A History of the Struggle to Abate Pollution from Copper Smelters of the Far West, 1885-1933* (doctoral dissertation, University of Montana, 1973), 13.

Edward P. Mathewson,  
manager of the Washoe  
Smelter from 1902 to 1916



MHS Photograph Archives

Mr. Chestnutt, who is a professor in the Bozemen Agricultural Colleges . . . claims to be a botanist and chemist and to have been sent here to look over the situation by some person whose name he did not give, who is supposed to represent numerous ranchers in Deer Lodge Valley. I think this gentleman needs looking after. He has only been in the country a few months, coming here from California, but he seems imbued with the idea that sulphurous gases escaping from smelter chimneys are very dangerous to vegetation.<sup>9</sup>

The farmers' association approached the company asking for relief. The company replied with a request for particulars. On March 4, 1905, the association sent a letter to the company alleging \$1,120,731 in verified claims and offering to sell title to property of claimants for \$918,147. The company did not reply and the farmers sued on May 4, 1905.

Now in the hands of the lawyers, the matter pitted the local heroes of the common man against the company hired hands, or so it seemed. Rather than a stereotypical confrontation, however, what emerged was a century-old tradition for litigating,

as practiced by farmers' association attorneys, clashing with the new science of the twentieth century, as practiced by the company's attorneys and especially by a young, up-and-coming lawyer named Cornelius Kelley.

Two lawyers, Caleb M. Sawyer and Robert Lee Clinton, carried the association's case forward. Sawyer was "known as the poor man's lawyer." Born in East Andover, New Hampshire, in 1854, his family moved to Minnesota two years later. Educated at the Wesleyan Methodist Seminar at Wasioja, Sawyer read law with F. M. Wilson of Red Wing. He won admission to the Minnesota bar in 1887 and moved to Montana the next year. Admitted to the Montana bar in 1889, he opened a practice in Anaconda and served as Anaconda city attorney from 1900 until 1903.<sup>10</sup> Clinton was born in Anderson, Indiana, in 1865, attended Indiana State University at Bloomington for three years, and studied law before moving to Montana in 1890. After admission to the Montana bar, he represented the Missoula Mercantile Company and the First National Bank of Kalispell. Moving to Butte in 1897, he included the First National Bank of Butte as a client. These were men prepared for the bar by college education and reading law in a law

3. Edward Mathewson to Carl Rasch, April 18, 1904, Box 445, Anaconda Collection.

4. Thomas Weir to Paul A. Fusz, July 18, 1903, Box 1, MC19, John R. Lucas Papers, MHS.

5. *McCleery v. Highland Boy Gold Mining Co.*, 140 Federal Reporter 951 (1904).

6. Gary B. Hansen, "Industry of Destiny: Copper in Utah," *Utah Historical Quarterly*, 31 (Summer, 1963), 263-79. See also John E. Lamborn and Charles S. Peterson, "The Substance of the Land: Agriculture v. Industry in the Smelter Cases of 1904 and 1906," *Utah Historical Quarterly*, 53 (Fall 1985), 308-25.

7. *Butte Reveille*, December 23, 1904.

8. MacMillan, *Struggle to Abate Air Pollution*, 129-31.

9. Edward Mathewson to John D. Ryan, July 26, 1904, Box 445, Anaconda Collection.

10. Helen F. Sanders, *A History of Montana* (Chicago: Lewis Publishing Co., 1913), 1373.

office. They were typical of lawyers emerging at the time of the Civil War.<sup>11</sup>

The company had three lawyers, men of the twentieth-century cloth, cut from law school molds and the battles of litigation involving millions of dollars. Lewis Orvis Evans was born in Utica, New York, in 1871 and was educated at Cazenovia. In 1889 he entered the law firm of Word, Smith, and Word and read law there until 1894 when he migrated to Montana. He entered practice in Helena and moved to Butte in 1896 to enter into partnership with John F. Forbis. Forbis and Evans established an outstanding record in handling important litigation and participated in the famous Heinze-Amalgamated battle, which raged in the courts for almost ten years—from 1897 until its final adjudication in 1906. Evans was an expert in mining law with plenty of practical litigation experience.

Daniel Gay Stivers was born at Fort Davis, Texas, in 1869, the son of an army officer. He attended medical school for one year before entering the Columbia Law School in 1891. Stivers was secretary to Montana's congressman, W. W. Dixon, and read law in his Butte law office before admission to the bar in 1895. In 1897 he was deputy county attorney for Silver Bow County and served as a captain in Grigsby's Rough Riders in the Spanish-American War later that year. In March 1899 he became junior counsel for the company, whose star attorney and later its president was Cornelius F. Kelley.<sup>12</sup>

**"C**on" Kelley was the fastest rising star of the "battle of Butte." One historian ably described Kelley as "young, red-headed and gregarious . . . combin[ing] the marvelous gifts of intelligence, cunning, wit, and charm."<sup>13</sup> Born in Mineral Hill, Nevada, in 1875, the son of a miner, Kelley moved to Butte in 1881 when his father became associated with Marcus Daly. He graduated from Butte High School and packed off for the University of Michigan in 1895. Three years later he won his law degree from Michigan, one of the nation's most outstanding law schools in the nineteenth century. Kelley opened practice in Butte in 1898 and won election

to the legislature the same year. In 1898 he became Stivers's colleague as chief deputy county attorney for Silver Bow County. At the century mark, he was the Democratic candidate for Congress.<sup>14</sup>

Kelley quickly caught the Butte legal community's attention. In his first case, his client owned a mining claim and was suing in trespass for damages. Being trained both as an engineer and a lawyer, Kelley constructed a mine model and presented his evidence so effectively that he won the case and won notice for his skill. In 1900 he organized the "Independent Democratic Party of Montana." The next year he was a staff attorney for the company and two years later was the gregarious fast-track attorney in the apex case—the battle for Butte. Kelley possessed a college education in law and science, was gifted in litigation, innovative in the introduction of demonstrative evidence, and honed in courtroom battle.<sup>15</sup>

But Kelley and the company found themselves in federal court rather than in the friendlier local courts. They were in federal court because the farmers got Fred Bliss, a citizen of Idaho and a farm owner in the Deer Lodge valley, to join the suit. Trial before a federal court was required because the 1789 Judiciary Act provided for what was called diversity jurisdiction, which required that, when citizens of more than one state were opposed to each other, the case be tried in the federal courts. When the act was passed originally, the then Federalist-dominated Congress feared that out-of-state litigants would not receive fair dispositions of their claims before local juries in state courts. Juries drawn for the federal court system, lawmakers for the early Republic believed, would better protect the interests of commerce in a republic. The concern for a fair trial in 1905, as it had in the late eighteenth century and as it does today, provided for the diversity jurisdiction of the federal courts.

Kelley and his fellow company attorneys also found their case splashed across the front page of the *Reveille*. "Suit for a Million and a Half Against Amalgamated Copper Co.," the headline blurted. "It is claimed," the paper trumpeted, "that the big stack disseminates the arsenic more freely than the old stacks and that the ranches within the radius of twenty miles are practically ruined."<sup>16</sup> Kelley would have more than the federal courts, 107 farmers, Fred Bliss, and the favorites of the

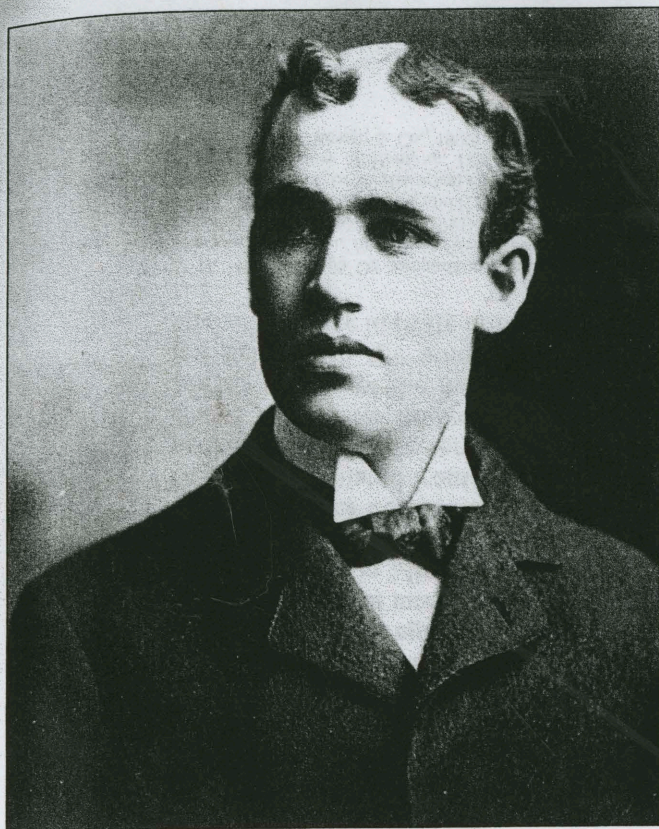
11. Ibid., 1464-65. On comparison with the California bar, see Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln: University of Nebraska Press, 1991).

12. Merrill G. Burlingame and K. Ross Toole, *A History of Montana* (3 vols., New York: Lewis Historical Publishing Company, 1957), 3: 207-8; Sanders, *History of Montana*, 1254; *Progressive Men of Montana* (Chicago: A. W. Bowen & Co., 1900), 152, 437-38.

13. Malone, *Battle for Butte*, 166.

14. *Progressive Men of Montana*, 1601; Tom Stout, *Montana* (3 vols., Chicago: American Historical Society, 1921), 3:987-88.

15. Butte-Anaconda *Montana Standard*, May 12, 1957; Malone, *Battle for Butte*, 159-89. For a journalistic view of the issues, see Ralph H. Wanamaker, "Eggleston of the Anaconda Standard" (master's thesis, University of Montana, 1978); and Daniel J. LaGrande, "Voice of a Copper King: A Study of the (Butte) *Reveille*, 1903-1906" (master's thesis, University of Montana, 1971).



MHS Photograph Archives

Cornelius F. Kelley

local bar to confront. He would have to deal with the press.

How to go about it? The traditions of the nineteenth-century bar would have the five lawyers bring a few witnesses and argue the cause until they dropped from exhaustion. Such were the traditions of men of letters who argued principle more often than technicality. But the legal profession had undergone significant transformation during the nineteenth century. The traditional bar, trained by reading law in a local office, was being replaced by a law-school educated bar that placed as much faith in the science of law and the importance of facts as it did in rhetoric. It was this new breed of lawyer, in the person of Louis Dembitz Brandeis, who produced a technique of argumentation that was based on a collection of social economic data and designed to demonstrate that the cause belonged to his client.<sup>17</sup>

In the famous Brandeis brief presented to the United States Supreme Court in 1908, Brandeis used two pages of legal argument, fifteen pages of state and foreign law precedents, and ninety-five pages of social science data on women in the workplace. Brandeis, representing the state of Oregon, argued that a state statute limiting the hours of women working in factories and laundries was indeed constitutional. The statute was based

16. *Butte Reveille*, April 7, 1905.

17. Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge: Harvard University Press, 1984); Bakken, *Practicing Law in Frontier California*, 18-32; Arthur Selwyn Miller, *The Supreme Court and American Capitalism* (New York: Free Press, 1968), 77.



Stout, Montana, Its Story and Biography, vol. 2 (1921)

Lewis Orvis Evans



A Newspaper Reference Work (1914)

Daniel Gay Stivers

upon the belief that long hours in such workplaces had a detrimental impact upon the health of women. Brandeis had to prove that there was a correlation between the hours worked and women's health. He accomplished this landmark feat with a mass of social science data. For Brandeis, social and scientific data and expert witnesses helped prove that long hours of labor had an adverse impact upon the health of women. For Con Kelley, the same type of evidence would help him prove that

arsenic and sulphur dioxide had not harmed the health of livestock in the Deer Lodge valley.

In addition, for Brandeis, it was a public policy question in support of the authority of a legislature to alter the contract relations of women in the workplace. For Con Kelley, it was a common law proof problem in the seemingly well-established area of public nuisance law. Even if the smoke caused the problems, Kelley could escape liability, or a dreaded injunction, if he could prove that the utility of the company's conduct outweighed the gravity of the harm done to the farmers. Brandeis represented the forces that wanted limitations upon big business on behalf of labor. Con Kelley represented big business and did so before Brandeis even started drafting the famous "Brandeis brief." Both lawyers had precedent from which they could argue the law, and the law would determine the victor. But the results would be different.

The balancing test in public nuisance law put the cards in the company's hands because corporations normally spent more on enterprise than farmers did on their homesteads. But the Utah case was a menace to legal business-as-usual. Here again the structure of federal courts made a difference. Utah was in a different jurisdiction, the eighth circuit. Montana was in the ninth circuit. The rule was that a precedent in one circuit would not bind a court in another circuit. The law and the logic of the law were simple. In both Utah and Montana, the federal courts would be hearing a state law problem brought to them under diversity jurisdiction. State law was unique to each state, and federal courts were to follow the law of the state as best the federal judge could determine its content. The judge would look at the decisions of the state supreme court and if nothing clear appeared, then to the common law. Kelley needed a federal court decision in accord with the common law, not a Utah decision. He needed evidence, scientific evidence, to prove his case. If not causation, then he needed to prove that the company had done all that was scientifically possible, within reasonable economic bounds, to make sure that the smoke was as clean as technically possible.

To meet these challenges, Kelley went Brandeis one better. He assembled the stars of the academic and scientific world to prove that the company was a good corporate citizen and not guilty of violating the common law rights of the farmers.

Mathewson, the smelter manager, and Dr. Duncan McNab McEachran, a McGill University professor emeritus and Canadian government veterinarian, assembled the team and worked with

Kelley in planning the litigation process. Mathewson quickly noted the importance of marrying science with litigation. Writing to Anaconda director John D. Ryan on January 16, 1905, he noted:

There are some interesting points in connection with arsenical poisoning that are extremely puzzling to the best chemists and there are certain questions which should be asked by the defending lawyers of the expert witnesses on the part of the farmers, in regard to arsenic and its poisonous effects; also the methods of determining arsenic in any substance. I have known of cases where good lawyers have won out on account of their knowledge of the chemistry of arsenic.<sup>18</sup>

It was McEachran's job to get the scientists on the team. His pitch to his colleagues in the scientific community was professional. Writing on January 3, 1906, he told one prospective expert:

this suit is a most important one for this State, and the Company will spare no pains or expense in getting at the facts and the best experts obtainable will be employed and it is especially Mr. Mathewson's desire that all reports be made personally and not by assistants as it is the standing and experience of the investigators that will tell in the law courts here.<sup>19</sup>

Mathewson used a similar scientific argument to lure experts. Writing to Ralph E. Smith, a professor at the University of California, Berkeley, in February 1906, Mathewson declared, "*we want facts*. If we are damaging these farmers we want to know it,—if we are not, we also want to know that." In 1906 science was neutral, and the facts scientists produced must be the truth. Mathewson and McEachran were successful in pulling together a massive team of experts with one exception.<sup>20</sup>

The exception was Daniel Elmer Salmon, founding father of the United States Department of Agriculture's Bureau of Animal Husbandry. McEachran used the standard solicitation on Salmon and even asked for his "terms" as an expert, but Salmon would commit only to going to Deer Lodge valley and looking at things for himself.<sup>21</sup> After he had conducted his experiments, Salmon testified for the farmers. Undeterred, Kelley found a way to overcome even this obstacle.

18. Mathewson to Ryan, January 16, 1905, Box 445, Anaconda Collection.

19. Duncan McEachran to Doctor Adami, January 3, 1906, *ibid*.

20. Edward P. Mathewson to Ralph E. Smith, February 24, 1906, *ibid*. On popular belief in scientific knowledge, see Terra Ziporyn, *Disease in the Popular American Press* (Westport, Conn.: Greenwood Press, 1988); John Duffy, *The Sanitarians* (Bloomington: University of Indiana Press, 1990); Robert P. Hudson, *Disease and Its Control: The Shaping of Modern Thought* (Westport, Conn.: Greenwood Press, 1983).

Trial of the case started on December 18, 1905, with the first witness called on the following January 15. The trial was held before Oliver T. Crane, a special master in chancery. Appointed by the federal district judge, a special master has a specific charge relating to the case before the court. His duties include the taking of testimony, the discovery of evidence, and other acts necessary for the performance of his duties. The master is required to prepare a report of the proceedings for the court. In that this was a civil suit with a great deal of technical detail, the use of a master was not surprising, but it did tilt the trial of the case away from the rhetoric of the nineteenth century and toward the science of the twentieth.

The trial's emphasis on technical detail also would tend to quiet the press. A total of 237 witnesses would testify until March 20, 1907. Ultimately, only litigants, their lawyers, and the special master could concentrate on the evidence. The *Reveille*, for example, put its story of the opening day of the trial on page five.<sup>22</sup> As the trial before the special master became long and complicated, the *Reveille* grew bored with the proceedings and consigned its occasional stories to back pages.

The farmers opened with Fred Bliss and an array of grievant farmers and ranchers. All testified to stock losses and dead pastures. Angus D. Smith told of his dairy cows giving no milk and being "psysicked to death." Conrad Kohrs, Montana's leading cattleman, also testified, but he did not run cattle in the valley, and his appearance was considered mere window dressing. The plaintiff's case for damages, with opinions regarding causation, had been made. It was Kelley's turn.<sup>23</sup>

Kelley's rebuttal witness, Patrick T. Sweeney, set the tone for the company. Sweeney testified that he had been feeding hay to his dairy cows and keeping them in the barn in the winter of 1903-1904 and 1904-1905 with good results. The inference was that valley farmers were guilty of poor animal husbandry. Then the question: "Does alkali hurt pastures?" Sweeney, like any farmer, knew that it did and so he testified. Sweeney then testified that there was alkali on the Bliss ranch. He knew this to be so because he had grazed some of his cattle on the Bliss place in 1905, and they had started looking thin and sick. But Sweeney had been a pro-active farmer. Even with the alkali graze, Sweeney was able to produce good-looking cows, and the special master saw them in exhibit 42, a picture of Sweeney's cows.<sup>24</sup> Inference: if

Sweeney could overcome alkali graze, Bliss could, too, unless he was a poor excuse for a rancher.

One after another, Kelley's witnesses strolled over the valley floor finding poor farmers, now plaintiffs, and good farmers, now prosperous. John Shultz, a truck gardener, looked at alleged smoke damage and determined it to be "lack of irrigation." H. A. Conyne, manager of the Anaconda firm of McCallum and Cloutier, produce merchants, listed all the produce, grains, and other products his firm had purchased from numerous farmers between 1902 and 1905 and concluded that the "quality of stuff purchased [was] very good, and [he] saw no difference between the stuff after 1902 and before." In a cross-examination more reminiscent of the trial courts of the mother-lode days, plaintiffs' counsel asked Conyne "if it were true that eggs laid in the Deer Lodge valley were copper coated?" The produce merchant replied that he had never noticed such eggs. So much for the local talent. Now the experts would use science to determine truth.<sup>25</sup>

Professors Robert E. Swain and W. D. Harkins, the plaintiffs' top chemists, opened for the farmers. Swain testified that more than forty-four-thousand pounds of arsenic belched from the stack every day. Kelley attacked Swain's methodology in arriving at this conclusion. W. D. Harkins continued the attack, but Kelley went to the blackboard to give a lesson to Harkins, a University of Montana chemistry professor. The *Reveille* made it page-five news:

The cross-examination of the witnesses by Attorney Kelley was devoted to angles and curves and computations of the relative values of the gas that escaped from the meter which was used by the witness in his experiments at the smelter and that which did not escape.

One side of the room was used as blackboard for the illustration of the mathematical and algebraic and a few other solutions of the various hypothetical problems which were put to the witness by the galaxy of chemical experts, who are assisting Attorney Kelley in the cross examination.<sup>26</sup>

The experts were helping Kelley define what constituted good science, as well as lull the reading public to sleep.

Kelley also attacked the credentials of the experts. A Dr. Faunt testified that he had performed autopsies on 237 animals between 1904 and 1906

21. Duncan McEachran to Daniel Salmon, February 2, 1906, Box 445, Anaconda Collection. On Salmon see *Dictionary of American Biography* (22 vols., New York: Charles Scribner's Sons, 1953), 16:311-12.

22. Butte *Reveille*, January 19, 1906.

23. "Abstract of Testimony," *Bliss v. Anaconda*, vol. 1, pp. 6, 21, Box 21, Anaconda Collection. Conrad Kohrs was a member of the Montana Constitutional Convention of 1889, a charter member of the Montana Stock Growers' Association, and a territorial legislator. See Gordon Morris Bakken, *Rocky Mountain Constitution Making, 1850-1912* (Westport, Conn.: Greenwood Press, 1987), 16, 21, 70, 89.

24. "Abstract," *Bliss v. Anaconda*, vol. 1, pp. 233-50.

25. *Ibid.*, vol. 2, pp. 505, 573; Butte *Reveille*, July 20, 1906.

and had found evidence of arsenic poisoning. Kelley wanted him to produce a copy of his diploma, but the doctor had to confess that his "degree . . . was destroyed in an Indian raid." Although Kelley used his experts to undermine scientific method, his use of character assassination was equally effective. Mathewson was doing his homework. He reported to Kelley that Dr. Faunt's general character,

as given by citizens of this town is that of an anarchist and dangerous man when intoxicated; that he is frequently intoxicated and when intoxicated is often threatening to shoot someone.<sup>27</sup>

Similarly, when Daniel Salmon was on the stand, Kelley went straight for the jugular, impugning Salmon's reputation rather than his evidence. Kelley's first question was why the president of the United States had fired Salmon. Salmon protested, but the *Reveille* ran the episode on page eight as "Dr. Salmon Tells Why He Left Work."<sup>28</sup> Kelley again had achieved advantage.

Kelley was at his best when he used experts to attack experts. Marcus E. Jones, a "systematic and oecological botanist," testified on behalf of the farmers that the smoke damaged plant life and trees. In rebuttal Kelley put Dr. F. W. Traphagen of the Colorado School of Mines on the stand. Traphagen said he found the problem to be alkali, not smelter smoke. Robert Lee Clinton cross-examined Traphagen, using Jones to formulate questions. The headline for the *Reveille* story told it all: "The Smoke Case Grows Weary."

Professor Jones, the botanist expert for the smoke association sat at Mr. Clinton's side. It developed into a mental tilt between the chemical expert for the defendant smelter and the botanist expert for the association.

The special master was impressed, however, noting in the abstract that Jones's methodology had been "so completely exploded by Traphagen and [Dr. Harry] Snyder" that it was of no value.<sup>29</sup>

Kelley then paraded experts. Charles A. Doremus, a New York toxicologist, "took the worst looking herd in Deer Lodge valley for the purposes of analyses" and after scientific experiments, could find no evidence of arsenic poisoning. In fact, the herds looked "very fine" and "perfectly normal." Duncan McEachran, the Canadian veterinarian and company litigation support expert, told of nu-

merous postmortems of livestock and findings of "pleurisy, peritonitis, old age, parasites, abscesses in lungs, strangles, tuberculosis, pyaemia, brain tumors, and occluding aneurisms." The conclusion was obvious: "I have a very strong opinion that it is not caused by smelter smoke or flue dust or arsenic."<sup>30</sup>

Dr. Leonard Pearson, Pennsylvania state veterinarian, confessed that he "had heard a good deal about the bad condition of the livestock in the Deer Lodge Valley and of the death of animals here, and I am expecting to find a very serious situation." Instead, Pearson said livestock in the valley were "quite good." On close inspection, he found that "on many ranches the animals were in prime, irreproachable condition." Those that were not, particularly those on the Perkins ranch that Marcus Jones had investigated, were victims of foxtails. On the Hendrickson's place the cows were victims of alkali. Further, even if arsenic did get into livestock, they "gradually acquire a tolerance for it."<sup>31</sup> Scientific experiments could not be wrong.

To assure close scrutiny of the evidence, Kelley had other scientists verify the findings of his experts. Dr. Harry Snyder, a professor of agricultural chemistry and soils in the University of Minnesota and chemist for the Minnesota Experiment Station, went over the samples Traphagen had analyzed. He concluded that Jones's methodology was "crude and not correct." Clinton objected to the whole line of testimony, but Evans answered with the key to the evidence:

The purpose is to dispute Professor Jones' whole theory or idea, his whole idea that there is an invisible chemical injury, all of his analysis, his examination of the valley, his statements of the history, and particularly that all of his analysis are based, not on a fact, but that they have no foundation in science or common sense or anything else.<sup>32</sup>

The procedure of preparing, or coaching, the experts together was not limited to scientists. As Mathewson told McEachran, the lawyers went along as well:

I went yesterday to section 16, with Lawyers Kelley and Evans and we saw Dr. Theobald Smith [Harvard University] and Dr. [Henry] Gardiner post-mortem two horses and two cows that had been poisoned with arsenic; the animals were

26. "Abstract," *Bliss v. Anaconda*, vol. 3, pp. 731-68; Butte *Reveille*, March 16, 1906.

27. "Abstract," *Bliss v. Anaconda*, vol. 3, pp. 768-69; Edward P. Mathewson to Cornelius Kelley, February 9, 1906, Box 445, Anaconda Collection.

28. Butte *Reveille*, December 21, 1906.

29. "Abstract," *Bliss v. Anaconda*, vol. 3, pp. 793-827; Butte *Reveille*, October 5, 1906.

30. "Abstract," *Bliss v. Anaconda*, vol. 3, pp. 1012-25, 1216-47.

31. *Ibid.*, vol. 3, pp. 1292-1317.

32. *Ibid.*, vol. 4, pp. 1429-40.

33. Mathewson to McEachran, April 14, 1906, Box 445, Anaconda Collection.

34. MacMillan, *Struggle to Abate Air Pollution*, 153.

35. Butte *Reveille*, October 6, November 2, 1906.

36. *Bliss v. Anaconda*, 167 Federal Reporter 342, 343-44 (1909).

pretty lively and had to be shot. The post-mortems were entirely satisfactory and showed just what Dr. Smith predicted. In one case we found arsenic in a cow's stomach but the dose given was something enormous. As I said before the animals were apparently as well as ever before they were slaughtered. The lawyers were very much pleased with their visit.<sup>33</sup>

The coaching, along with scientists corroborating scientific experimental results, presented a united front to the farmers. Attorney Clinton objected to the procedure, calling it "a prepared case read into the record." Reacting to Professor Smith's testimony, he called it "merely the concurrence of dummies."<sup>34</sup> Judge Hunt did not find the objection well-taken.

Was there good science and bad science, or just evidence before the special master? Special master Oliver Crane preferred the views of men from Harvard, the University Minnesota, and the Colorado School of Mines over the views of experts for the farmers. What the farmers' attorneys had failed to do was meet experts with expert cross-examination, to go beyond the trappings of nineteenth-century litigation. Copper-coated eggs played well to juries as an attention-getting phrase, but when science was the focus, it was mere rhetoric.

Kelley also brought visual evidence of science into the courtroom. Henry C. Gardiner, the company's veterinarian, testified that the problem with the plaintiff's cattle was parasites and bacteria. Beyond telling his story, Gardiner "produced 40 photographs" one day and handfuls on others.<sup>35</sup> The microscope's view was now for all to see and for Gardiner to explain. Not surprisingly, the explanation did not include arsenic in the air.

After fourteen months of testimony, special master Crane heard arguments on June 1, 1907, and issued his findings on January 10, 1908. They were not surprising. Yes, there was some evidence of arsenic damage and diminished land values, but the Washoe smelter people had done all that was practical to control pollution. If the smelter closed, Butte mining would stop, and the land of the farmers would depreciate "greatly in excess of the damage they would sustain by reason of the continuance of the smelter."<sup>36</sup>

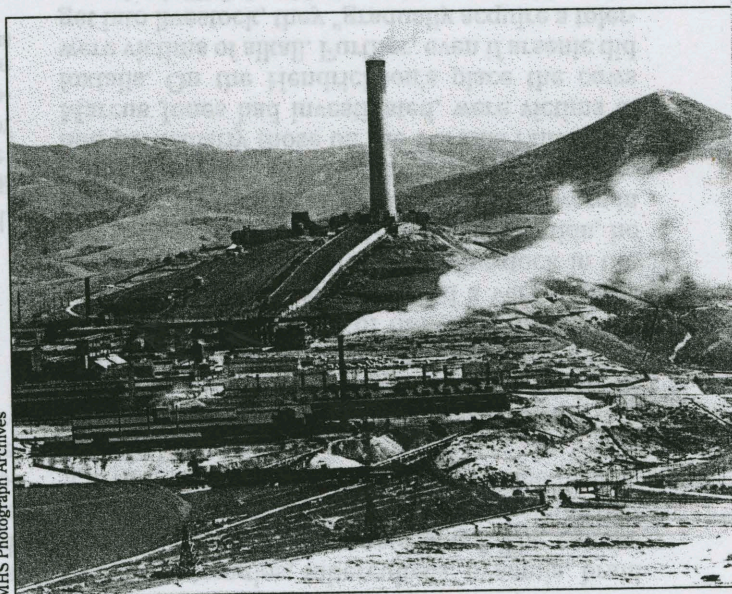
Judge Hunt agreed. The farmers lost but appealed. They lost again and again before the United States Supreme Court. This history is not about the box score, however, but about how law could make a difference, how changing styles of litigation could sweep the challenge to air pollution aside for half a century.

Con Kelley grasped the twentieth century and used new litigation techniques and new science to gain a precedent based on centuries-old common

law nuisance concepts. The *Bliss* decision kept the smelter in business and Anaconda mining copper. A half century later, America would discover the environment, Congress would pass clean air legislation, and Anaconda would go the way of corporate buy-outs. Fortunately for this story no one shredded the smelter manager's correspondence file in the transfer of company records to the Montana Historical Society.

Con Kelley, like Louis Brandeis, had demonstrated that science and social science could become the focus for litigation. Kelley's use of expert witnesses gathered from around the world was innovative, but his awareness of scientific method, used as a tool for giving veracity to evidence, was equally important. For Montana, Kelley had left an uphill fight for those who would clean the air. It would be for another Montanan, Lee Metcalf, to fight that fight, but in Congress rather than in the courts. Finally, Kelley and Brandeis had obtained very different results using similar techniques. That, in turn, reminds us that law is truly marvelous when it results in things that we support, but it can be monstrous when it results in something we abhor. *m*

GORDON MORRIS BAKKEN is professor of history in California State University, Fullerton, and holds his law degree and a doctorate in history from the University of Wisconsin, Madison. He is author of numerous books and articles on law in the West, including *The Development of Law on the Rocky Mountain Frontier* (1983) and his most recent book, *Practicing Law in Frontier California* (1991). He was the 1990 James H. Bradley fellow at the Montana Historical Society.



Washoe Smelter, Anaconda

## Deer L Trip

- Garrison cement plant - blew up in '50s (contrast to arenic / run stack)

Valley: winding willow crk, N end

- broader than + in MT; Pintlers like grade-schl mts (white capped above timberline)
- irrigation ditches (diff from Maria's Coulee)
- m-in benchlands in valley
- prison-built barns & log houses
- Ancala stack, betn buffer, 15-20 mi to S
  - prominent all way
- hombarly poplars (?) - Eurpm touches
- green high grass
- slope of valley, to ft hills
- Chig E from W Springs rd: stairstep ridges ledg to mtns
- 8-10 big c woods (hanging)

Deer L. Valley / 2 A macenda

- rr under stack
- rr "depot" - crenellated
- slag heaps; stack over all

Valley from S: broad, mtns all around  
- prominent canyon C shot

Deer Lodge valley, June 10, going home

- dapples of sunshine on entire buttes
- broad, broad valley as you come onto it from Butte
- smokestack like vent of Hell

contains 7 rain gauges. buffers

Sandison & Morrie encounter this?

*Probably, I will have seen him.*

→ It is one of the stories of this country, that Ben once rode up to

check on his cattle and <sup>from far off</sup> could hear his black bulls bellowing and

*to hear  
say by.*

bellowing. He traced the uproar to the homestead shanty in OO Coulee

where there were bulls snorting and romping with their tails high.

In the shanty Ben found a moonshine still, and the mash his bulls

had been sampling. At the next election <sup>day,</sup> my father <sup>made sure to ask</sup> asked Ben if his

bulls were going to come into town and vote for repeal.