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MEMORANDUM NUMBER 4

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***Montana
Constitutional
Convention
Memorandums***

Sources of the
Montana
Constitution



***Prepared By:
Montana
Constitutional
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MONTANA CONSTITUTIONAL CONVENTION

1971-1972

SOURCES OF THE MONTANA STATE CONSTITUTION

PREPARED BY

ELBERT F. ALLEN

CONSTITUTIONAL CONVENTION RESEARCH MEMORANDUM NO. 4

PREPARED BY

MONTANA CONSTITUTIONAL CONVENTION COMMISSION

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PREFACE

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention.

To fulfill this responsibility, the Constitutional Convention Commission is preparing a series of research reports under the general title of Constitutional Convention Studies. In addition to the series of research reports the Commission has authorized the reprinting of certain documents for the use of Convention delegates.

This memorandum republishes an analysis of the sources of the Montana Constitution prepared by Elbert F. Allen in 1910 for the Montana Historical Society. The essay is reprinted as originally written without any additions, changes or corrections. As Allen indicates in his introductory comments, he did not attempt to write a comprehensive analysis of the sources of the Montana Constitution. The Commission's research will undoubtedly add to the knowledge regarding the sources of the individual sections of the Constitution of 1889. The sources of each section, where factually determined, will be indicated in other studies of the Commission.

The discovery of the proceedings of the 1884 Constitutional Convention in 1969 by the Secretary of State's Office will facilitate the delineation of sources of the Montana Constitution, since, as Allen notes, the Convention of 1889 basically reworked the Constitution of 1884 during the Convention of 1889.

The reprinting of this analysis by Elbert F. Allen is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Montana Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

By far the larger part of our constitution was taken directly from that of Colorado, some from California and a less amount from other states.

Elbert F. Allen

SOURCES OF THE MONTANA STATE CONSTITUTION

Prepared by Elbert F. Allen, Livingston,
Montana, June 10, 1910

In investigating the sources of our State Constitution many difficulties have been met, which have made it impossible to find the source of every section. Each article was prepared by a separate committee, and as no record of the discussions of the committees was kept, it has been very hard to find any direct statement of authorities consulted and sources drawn from. This thesis is intended more as a beginning for a more comprehensive study of our constitutional history, than as a complete study in itself. If there are any errors the author will be very grateful for corrections.

Our principal method has been comparing our constitution, section by section, with other constitutions, particularly those of Colorado, California, Kansas, and Minnesota, which members of the Convention informed us were especially consulted. We assumed that if several sections of an article were worded the same in the Montana Constitution as in some other constitution, that that constitution was the source. If the article was quite similar and the sections arranged in much the same order the probability seemed strong that the one was the source of the other. Even in the case of single sections which were worded the same or were of the same import as a section in some other constitution, when no other source could be found, we assumed that our constitutional section was taken from the one to which it was similar.

The proceedings of the Constitutional Convention, which have been consulted, throw much light on sections which were discussed by the entire convention. By far the larger number of sections, however, were passed by the convention as reported by the committee without any comment. Some correspondence has been carried on with members of the convention and some valuable information has been received in that way. We feel very grateful to those who have helped us in that way, and also to Mrs. Laura E. Howey and Mr. T. O. Crane, State Librarians, for kindness shown and help rendered us.

By far the larger part of our constitution was taken directly from that of Colorado, some from California and a less amount from other states. Undoubtedly some things have been introduced by persons who were accustomed to them in the codes of their former states; a few sections are intended as remedies for mistakes in other constitutions.

SOURCES OF THE MONTANA STATE CONSTITUTION

The present constitution is a remodeling of the one previously drawn up in 1884, so being removed, as it is, one step from the source, the task has been doubly hard. A thorough investigation of the sources of the present constitution would have necessitated a perfect knowledge of the sources of the constitution of 1884 and a comparison with the present one, noting the changes made and the reasons for the change.

Article one, Boundaries, is simply an embodiment into the constitution of the federal enactment organizing the Territory of Montana.

Article two, Military Reservations, was drawn up by the Secretary of War, Redfield Proctor, and was adopted at his request.

Article three, The Declaration of Rights, is, for the greater part, taken directly from Colorado, sections one to seven being word for word the same as sections one to seven in Colorado. Section 8 as reported from the committee was the same as Section 8 of Colorado. The convention, however, was forced to accept a substitute offered by Hon. W. W. Dixon, as a compromise between those who wished to retain the Grand Jury system intact, and those who wished to entirely abolish it. Mr. Dixon modeled this section after a provision in the California Constitution, Art. 1, Sec. 8, except that Cali. provides for the meeting of the Grand Jury at least once a year. He also quoted Wis. as a precedent. Sec. 9 to 23 were as originally reported the same as Colo. Sec. 9 to 23. Sec. 11 "Retroactive in its operation", which was in Colo. was struck out on motion of ex-governor Carpenter. Mr. Carpenter thought it might occasionally be necessary for the legislature to pass retroactive laws. (Conv. files p. 719.) Sec. 14 and 15 are substitutes for the sections as in Colo. and as reported by the committee. 14 and 15 to Private roads were offered by Hon. Jos. K. Toole? the remainder of 15 by ex-governor Carpenter. (Conv. files p--) Jos. K. Toole proposed the amendment to Sec. 16 "Subject to the right of the state etc." Ex-governor Carpenter proposed the amendment to Sec. 17 "Or without their presence - - -". Hon. G. S. Hartman offered the resolution to strike out the provision of Colo. defining jeopardy in Sec. 18. Sec. 23 was offered by Hon. W. W. Dixon and was probably based on Cali. Art. 1, Sec. 8. Sec. 24 is simply an embodiment into the constitution of principle of common law. We have found no similar provision in any other constitution. "But this shall not affect the power of the legislature to provide for the punishment of offenses by death." was proposed by Hon. W. W. Dixon. Sec. 25 as originally proposed was the same as Colo. Sec. 27, which allows

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aliens to hold all kinds of property. The Sec. as adopted is a substitute offered by Hon. W. W. Dixon (Conv. files p. 340.) Sec. 26 to 28 are the same as Colo. Sec. 24 to 26. Sec. 29 is a rule drawn from court decisions. Cali. Art. 1, Sec. 20 is the same. Sec. 30 is the same as Colo. Sec. 28. Sec. 31, the so-called Pinkerton clause, is a substitute offered by Judge L. H. Luce for a similar section proposed by Wm. T. Field. (Conv. files p. 380.) The section Mr. Field proposed was drawn up by Hon. J. M. Clements, representing the K. of L. (Letter received from Hon. Peter Bresn.)

Article four, Distribution of Powers, is the same as Colo.

Article five, Legislative Department, seems to have been taken bodily from Colo. there being very few changes. Several sections in Montana are slightly different and Sec. 45 is from Cali. Art. 5, Sec. 13, and was not in the report of the committee. Sec. 1 is from Colo. Sec. 1, Sec. 2 to 15 are from Colo. Sec. 3 to 16 Sec. 16 to 18 are from Colo. Art. 13, Sec. 1 to 3. Sec. 19 to 38 are from Colo. 17 to 36. Sec. 24 Colo. provides for a reading of all bills on three separate days and that a majority of all the members elected shall be required to pass a bill. Sec. 26 is much more comprehensive than Colo. Sec. 29 "except as may be otherwise provided therein" is not in Colo. Sec. -- Sec. 31 "where such salaries or emoluments are not fixed by this constitution" is not in Colo. 30. Sec. 34 "except interest on the public debt" is not in Colo. Sec. 33. Sec. 2, 23, and 37 of the Colo. constitution were omitted.

Article six, Apportionment and Representation, the first three sections are from Colo. except as regards the apportionment of senators and senatorial districts. Sec. 4 is based on the U.S. constitution, which provides for two senators from each state. This was adopted because the so called "cow" counties were afraid of the power of the mining counties. (Statement of Hon. Peter Cooper.)

Article seven, Executive Department, is also based on Colo. Sec. 1, Colo. Sec. 1 provides that the term of the executive officers shall be two years, and Sec. 21 provides that the state auditor as well as the state treasurer shall not be eligible for two consecutive terms. Sec. 2, 3, and 4 are similar to Colo. Sec. 3, 4, and 19. Sec. 5 is the same as Colo. Sec. 2. Sec. 6 and 7 are the same as Colo. Sec. 5 and 6. Sec. 8 was offered by Hon. Chas. E. Conrad; his source we have been unable to discover. Sec. 9 was proposed by the Judiciary Committee of the Convention. Penn. has a Board of pardons but with less power. Sec. 10 is similar to Colo. Sec. 8 except Colo. does not provide for the inspection of

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state institutions and offices by a committee at any time the governor may deem it necessary. Sec. 11 is similar to Colo. Sec. 9 except "or which - - - thereto" is not in Colo. Sec. 12 is somewhat similar to Colo. Sec. 11 but Colo. provides for bills becoming laws after the legislature adjourns if the Governor does not file his objections with the secretary of state. Sec. 13 to 16 are the same as Colo. Sec. 12 to 15. Sec. 17 is similar to Colo. Sec. 18. Sec. 18 seems to be from Cali. Art. 5, Sec. 15. Sec. 19 embraces the substance of Colo. Sec. 4, 16, and 17. Sec. 20. For this section we have found no source except New York has a provision for suspending the state treasurer but not in exactly the same manner as our constitution provides.

Article eight, Judicial Departments, seems to be a combination of the corresponding articles of Colo. and Cali. The general system of courts and their respective duties is like that of Cali., except Cali. has a court in each county, while in Mont. owing to the sparse population some of the counties were combined into districts. (Letter received from Hon. W. W. Dixon and from a speech of his given at the second Annual Reunion of the Members of the Constitutional Convention.) The details for the workings of the courts are much more explicit than Cali., and seem to be taken from Colo. so far as the systems of the two states are the same. Colo. provides for county probate and criminal courts. Sec. 1 is from Cali. Art. 6, Sec. 1. Sec. 2 is from Colo. Art. 6, Sec. 2. Sec. 3 is mostly from Colo. Sec. 3 but the power to issue writs is from Cali. Sec. 4. Sec. 4 to 7 are from Colo. Sec. 4 to 7, except Colo. has nine years for a term of office for justices of the supreme court. Cali. has six. Sec. 8 is similar to Colo. Sec. 8 and Cali. Sec. 3. Sec. 9 provides for the election of the clerk of the supreme court while Colo. Sec. 9 leaves it to the judges and Cali. Sec. 14 to the legislature. Sec. 10 is similar to Colo. Sec. 10 and Cali. 23 except to age qualifications. Sec. 11 is very similar to Cali. Sec. 4 except the amount in controversy in Cali. must be as much as three hundred dollars. Colo. Sec. 11 is also similar. Sec. 12 is similar to Colo. Sec. 12. Cali. has no such provision as the courts corresponding to our district courts are county courts. Sec. 14 was a temporary convenience Colo. Sec. 13. Sec. 14 is very similar to Colo. Sec. 14, except Colo. provides for a vote of two thirds of of each house to increase the number of judges. Cali. Sec. 9 is similar to Colo. We find no source for Sec. 15 although it is implied in other states. Sec. 16 and 17 are similar to Sec. 16 and 17 in Colo. Sec. 18 is similar to Sec. 19 in Colo. except the clerk is appointed by the judge in Colo. Judge Luce proposed the amendment to the section as originally reported providing each county with a clerk of the district court. Sec. 19 is similar to Colo. Sec. 19 except Colo.

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has district instead of county attorneys. We find no source for Sec. 20 to 23. Sec. 24 to 27 are similar to Sec. 26, 12, 28, and 20 respectively of Cali. For Sec. 28 we find no source. Sec. 29 to 32 are similar to Sec. 17, 15, 22, and 16 respectively of Cali. Sec. 33 and 34 are similar to Sec. 29 of Colo. except in Colo. the judge fills vacancies in the office of district court and justices of the peace. Sec. 35 is similar to Sec. 16 of Cali. For Sec. 36 we find no source. Sec. 37 is taken from Cali. Sec. 9.

Article nine is likewise from both Cali. and Colo. Sec. 1 to 4 are similar to corresponding sections in both states; Cali. Art. 2, Sec. 6, 1, 4, and 2, Colo. Art. 7, Sec. 8, 1, 4, and 5. In Sec. 2 the first and second provide Were offered by Hon. Chas. S. Hartman, and the third by Mr. W. A. Clark. Sec. 5 and 8 are similar to Cali. Sec. 3 and 5. Sec. 7, 9, 10 and 11 are similar to Colo. Sec. 6, 5, 1, and 8. For Sec. 6 we find no source and Sec. 12 was offered by ex-governor Carpenter.

Article ten, State institutions and public buildings is almost copied from Colo. Art. 8. Sec. 1 of Colo. does not provide for a soldiers home. Sec. 2 was offered by Hon. C. S. Hartman and is much more explicit than Colo. Sec. 5 is probably from Kansas Art. 8, Sec. 3, or possibly from Nevada Art. 13, Sec. 3.

Article eleven, Education, is not based on any other single constitution, although undoubtedly most of the sections were based on already existing school laws; probably the constitutions of Cal., Colo., Kan. and Minn., but we have been unable to get any information which would justify us in making any definite statement. Sec. 11 was probably original with the committee and was prompted by the unsatisfactory provisions of other states, Mr. A. J. Craven mentions Iowa in particular.

Article twelve, Revenue and Taxation, except Sec. 3, 5, 16, 17, and 18 is similar to Colo. Art. 10, although some few changes were made. Sec. 1 and 2 are from Sec. 2, 3, 4, 5, of Colo. A resolution similar to Sec. 3 was offered by Hon. Jos. K. Toole early in the session and referred to the proper committee; it is almost the opposite to Sec. 6 of Colo. Sec. 4 is from Colo. 7. For Sec. 5 we find no source. Sec. 6 is similar to Colo. Sec. 14 but ex-governor Carpenter offered: "but the legislative assembly etc". Sec. 9 is very similar to Colo. Sec. 11 except Colo. has 6, 4, and 2 mills instead of 3, 2 1-2 and 1 1-2. Sec. 10, 11, and 12 are similar to Colo. Sec. 37, 3, and 16. Sec. 12 "no appropriation shall be made for a longer period than two years" was offered by ex-governor Rickards. Sec. 13, 14, and 15 are similar to Colo. Sec. 12, 13, and 15. Sec. 15, 16, and 17 are similar to Sec. 10, 1 and 13 Art. 13 of Cali.

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Article thirteen, Public Indebtedness. Is largely from Colo. Article 11. Sec. 1 is similar to Sec. 1 and 2. Sec. 2 and 3 are similar to Colo. Sec. 3 and 4. Sec. 4 was probably put in the constitution because someone offered a resolution providing that the state assume all county indebtedness at that time. Sec. 5 is similar to Colo. Sec. 6. N. W. Harris and company, bankers of Chicago, sent a communication asking for a similar provision. The letter was laid on the table by the convention but probably influenced the Committee on Finance. Sec. 6 is based on Colo. Sec. 7 and 8.

Article fourteen, Military Affairs, Sec. 1 and 4 correspond to Colo. Art. 17, Sec. 1 and 4. Sec. 2 is like Colo. Sec. 2 and Cali. Art. 8, Sec. 1. For Sec. 3 we find no constitutional provision, but such power is, of course, implied. Sec. 5 is from Cali. Art. 5, Sec. 16.

Article fifteen, Corporations other than Municipal, Sec. 1, 8, 9, 10, 13, and 16 are the same as Colo. Art. 15, Sec. 1, 7, 8, 9, 12, and 15. Sec. 2, 3, 5, 6, 7, 11, 12, 14 and 15 are similar to Colo. Sec. 2, 3, 4, 5, 6, 7, 12, 14 and 15. Sec. 5 and 17 are the same as Cali. Art. 12, Sec. 12 and 10. Sec. 18 and 19 are similar to Cali. Sec. 33 and 32. Sec. 20 Wm. H. Watson offered a resolution instructing the proper committee to frame a section prohibiting trusts.

Article sixteen, Municipal Corporations and Officer is evidently based on Colo. Art. 14, although much that is in Colo. is left out in Mont. The corresponding sections in Colo. are: 1, 2, 4 and 5, 6, 8 and 9, and 12.

Article seventeen. Public Lands is entirely original. The most of the article was proposed by Mr. Chas. S. Marshall. Judge Luce proposed the first few lines of Sec. 1. The fourth division was changed from the way Mr. Marshall suggested. Sec. 2 was amended by Chas. E. Conrad to read 1910 instead of 1895 as Mr. Marshall proposed.

Article eighteen, Labor. The committee reported an article of five sections which were drawn up by a committee of the K. of L. and submitted through the Labor Committee to the Convention. (Letter received from Hon. Peter Breen.) Of these sections two were combined into Sec. 1 and the word agriculture added. The remainder were rejected. (Conv. files p. 160.) Sec. 2 was proposed by Hon. John R. Toole and was copied from an amendment to the New York constitution. (Conv. files p. 559).

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Article nineteen, Miscellaneous Subjects and Future Amendments, is taken from both Cali. and Colo. Sec. 1 is from Cali. Art. 20, Sec. 3, except Cali. provides only for that part of the oath to support the constitution. The part relating to the means used to secure election was proposed by Hon. Jos. K. Toole. "So help me God" was proposed by Mr. C. H. Loud. Sec. 2, 4, and 9, are the same as Colo. Art. 18, Sec. 2 and 1, and Art. 19, Sec. 2. Sec. 3 and 8 are similar to Colo. Art. 18, Sec. 6 and Art. 19, Sec. 1. Sec. 5 is the same as Cal. Art. 20, Sec. 9. For Sec. 6 and 7 we find no source.

