

A People Betrayed

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Second of Two Parts

The traditional Hopi knew all along.

For nearly 50 years, their pleas to the federal government to prevent mining in the heart of their homeland on Black Mesa have been ignored.

Hopi religious leaders, the Kikmongwi, beseeched President Harry Truman in 1949 to forbid such atrocity.

Truman ignored them.

In the early 1960s, the traditional Hopi who followed ancient ways of self-governance by consensus protested efforts by a renegade Hopi tribal council to grant mining leases.

Washington, D.C., bureaucrats responded by usurping the Hopi Constitution that "prevent[ed]" the council from executing mineral leases without approval of the Hopi people by "delegating" leasing authority to the renegade council.

By the late 1960s, the traditional Hopi leaders had grown deeply suspicious of the council's attorney, who had negotiated a one-sided mineral lease with Peabody Western Coal Company. The lease allowed Peabody to create one of the largest coal strip-mining and water-consuming operations in the United States--on Black Mesa.

Hopi traditionalists wrote presidents Lyndon Johnson, Richard Nixon and Jimmy Carter seeking to halt the mining, but none listened.

They turned to the courts, filing numerous lawsuits. All were thrown out.

On Black Mesa--the land where their ancestors are buried, site of sacred shrines that bind their lives--Peabody's giant bulldozers remove 12 million tons of coal a year. Meanwhile, the London-based multinational corporation's deep wells suck 1.2 billion gallons of water each year from an ancient aquifer--a practice the Hopi claim is drying up sacred springs.

The coal fuels two massive electricity generating plants that power the Southwest's burgeoning cities and, perhaps more important, generate tens of billions of dollars of profits for utilities, banks and developers.

As the decades passed, many of the traditionalists faded into the dusty mesas where the Hopi first built villages more than 950 years ago and where their ancestors roamed 12,000 years ago.

Only a handful of the Hopi's traditional religious leaders remains. And only now are the half-century-old suspicions being confirmed. The Hopi, whose tenets are trust and loyalty, were deceived.

Nobody played a larger role than the Hopi's longtime, trusted and beloved attorney, the late John Sterling Boyden.

Documents recently uncovered by University of Colorado law professor Charles F. Wilkinson reveal Boyden's betrayal of the Hopi through a blatant conflict of interest.

Records show that Boyden was working for Peabody Western Coal Company at the same time he was representing the Hopi in negotiations with Peabody for the Black Mesa coal lease. Such actions are among the most heinous of attorney misconduct.

Wilkinson takes no delight in his revelation of Boyden's role. But he's pleased it provides proof to support the long-held contentions of Hopi traditionalists.

"This is one of the largest single events in the Hopi's thousand-year history," Wilkinson says of Boyden's role in the Peabody mining lease. "At least now, the record is clear."

John Sterling Boyden was a pillar of Utah Democratic politics for decades. A friend of Utah governors and an acquaintance of presidents, Boyden twice sought Utah's Democratic nomination for governor.

The prominent Salt Lake City attorney grew up a devout Mormon in Coalville, Utah. He served as a bishop in Salt Lake City from 1953 through 1958. His contribution to the Mormon Church was recognized at his funeral in 1980, when Marion Romney of the Church's First Presidency spoke.

Boyden was hired by an unofficial group calling itself the Hopi tribal council in 1950 to represent the tribe before the Indian Claims Commission. The commission was created to determine compensation to Indian tribes whose land was seized by the United States. The work was lucrative for Boyden, who eventually earned a \$500,000 fee, equal to 10 percent of a \$5 million settlement the U.S. offered to pay the Hopi for the loss of four million acres.

The elected Hopi Tribal Council was no longer recognized by the federal government when Boyden was hired. That council was dissolved by the federal government in 1943 because Hopi traditionalists refused to recognize it.

To legitimize his claim as Hopi attorney, Boyden executed agreements with leaders of seven of the 12 Hopi villages along with the unofficial Hopi council.

Boyden expanded his role beyond representing Hopi interests with the Claims Commission in 1951, when he convinced the seven Hopi villages to hire him as general counsel to negotiate with oil companies that desired leases on Hopi land. Boyden told the villages he would be paid only out of revenues he produced for the tribe, according to Hopi tribal records obtained by New Times.

The plan to make Boyden general counsel was problematic. The local Bureau of Indian Affairs director recommended the contract be rejected because it would legitimize the renegade tribal council without the consent of the Hopi people. But Boyden went over the local BIA director's head, and won approval from Department of the Interior officials who were eager to see the Hopi grant oil and mineral leases.

A BIA memorandum describes a Boyden meeting with Interior Department officials in which he says "that remuneration for his services will depend largely on working out solutions to many of the Hopi problems to such a point that oil leases will provide funds."

The BIA approved Boyden's general-counsel contract in May 1952, triggering controversy on the Hopi reservation. While the protests caused the Interior Department to review BIA approval of Boyden's contract, in the end, Boyden's appointment stood.

The lawyer turned his energy toward gaining federal recognition of the unofficial tribal council.

The original Hopi council had been created in the aftermath of the 1936 ratification of the

Hopi Constitution. The constitution, however, was strongly opposed by Hopi religious leaders, the Kikmongwi, and many Hopi did not vote in the 1936 ratification election. More than 1,800 eligible voters stayed home. The constitution was approved by a vote of 651 to 104.

Tribal records reveal that BIA officials knew there was profound opposition to the constitution at the time it was ratified.

Oliver LaFarge, the federal agent supervising the election, noted in his diary that the Hopi were opposed to settling matters by majority vote because that leaves a dissatisfied minority.

"Their natural way of doing things is to discuss among themselves at great length and group by group until public opinion as a whole has settled overwhelming in one direction," LaFarge wrote.

"Opposition is expressed by abstention," he concluded.

Nevertheless, the BIA approved the constitution and created the first Hopi Tribal Council.

But the constitution also required that Kikmongwi approve council members who were elected. Many Kikmongwi refused to do so. By 1942, several villages had failed to reappoint council members and the Hopi Tribal Council languished. By 1943, the BIA determined that the council had become dormant.

The unofficial tribal council soon evolved and operated through the 1940s and into the early 1950s.

Just as the area BIA director predicted, Boyden's approval as general counsel soon led to the BIA's recognition of the unofficial tribal council in 1955. The approval came even though only seven of 12 villages had elected members to the council.

For much of the next seven years, Boyden and the tribal council attempted to resolve a contentious land dispute between the Hopi and the much larger Navajo Tribe. In 1962, a federal court determined rights to 2.5 million acres of land; the ruling required several thousand Navajo and about a hundred Hopi to move from their homes to other areas.

The ruling also stated that the Hopi and Navajo would evenly split any proceeds from the rich coal deposits on Black Mesa.

Boyden had already banked \$500,000 for representing the Hopi before the Indian Claims Commission. For his work on the land-dispute case, the Hopi Tribal Council paid Boyden an additional \$1 million--\$780,000 for legal services and \$220,000 as an expression of the Hopi's "gratitude" for his work.

The fee was outlandish, and was initially rejected by Arizona BIA officials.

"The Phoenix area office noted that the 7,800 hours spent, valued at the 'top price paid for top attorneys' at that time would be worth \$273,000. It recommended approval of a \$400,000 fee" because Boyden had forgone any fee for a number of years, tribal records state.

Boyden appealed the BIA's assessment to Secretary of the Interior Stewart Udall in April 1965. Soon after, the Interior Department approved Boyden's \$1 million fee.

While Boyden was working on the land-dispute case, he also was eliminating a hurdle that kept private companies from leasing Hopi land.

The Hopi Constitution prevented the tribal council from entering mineral leases without tribal approval. Boyden knew the majority of the Hopi were against leasing or mining their land. To circumvent the constitutional provision, Boyden asked Interior Secretary Udall in early 1961 to delegate leasing authority to the tribal council so it could generate enough money to pay legal expenses in its land dispute with the Navajo.

Udall, who had just been appointed by Democratic President John F. Kennedy, directed the Department of the Interior to delegate mineral leasing authority to the tribe. This was a crucial decision for the Hopi and Boyden alike.

The tribe immediately began signing oil and gas leases with several corporations, generating \$3 million. Some of those funds were used to pay Boyden's \$1 million fee.

Hopi traditionalists filed suit in federal court in 1964 challenging the delegation of mineral leasing authority to the tribal council. But the suit was dismissed on the grounds that the council could not be sued because of its sovereign immunity.

The stage was set for Boyden to execute the Black Mesa coal lease with Peabody Western Coal Company.

The Hopi Tribal Council barely mustered a quorum--only 11 of 17 councilmen were present--when it voted to approve a lease with a subsidiary of Peabody on May 16, 1966. Of the 11 who

when it voted to approve a lease with a subsidiary of Peabody on May 10, 1900. Of the 11 who voted, only six had been certified by the Kikmongwi as the Hopi Constitution required.

The lease was negotiated on the Hopi's behalf by John Boyden.

"Nothing on record indicates that John Boyden ever provided the Hopi Tribal Council with any substantial analysis of the Peabody lease," Charles Wilkinson states in a paper published last year in the Brigham Young University Law Review titled: "Home Dance, The Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest."

Wilkinson states that the tribal minutes show little discussion of the lease, no information on whether the tribe would get a good return, and no revelation that Boyden had ties to Peabody.

The lease was a terrible deal for the Hopi.

The tribe only received 3.3 percent of gross sales, about half the rate that the federal government was getting in mining royalties at the time. Numerous taxes were waived. The lease had no provision for renegotiations--a standard clause usually providing for a new pact every 10 years.

The vast amount of land involved, 40,000 acres, was also far above the 2,560 acres that federal rules allowed for a single mining lease on Indian land. There are no indications that the tribe sought to have the acreage limits waived.

The lease was amended in October 1966 to allow Peabody to withdraw more than 4,000 acre-feet of potable water from beneath Black Mesa each year. (An acre-foot is the amount of water that would cover an acre of land to a depth of one foot; it is also estimated to be the amount of water used by a family of four in a year.) The water is used to transport coal through a 273-mile underground slurry line from the Black Mesa Mine to Southern California Edison's Mohave Generating Station near Laughlin, Nevada.

The lease called for the Hopi to receive a paltry \$1.67 per acre-foot for the water--a rate far below the \$30 to \$50 that other industries paid per acre-foot at the time. The \$1.67 figure was handwritten into the lease agreement. Hopi officials have been unsuccessful in trying to determine who wrote in the value.

The entire Peabody deal was negotiated in secret.

The Hopi people wouldn't learn details of the lease negotiated by Boyden until several years later, when Peabody began ripping Black Mesa apart.

A July 1971 Audubon Magazine article by historian Alvin M. Josephy stated: "So far this original contract has never been shown or read or explained fully to the Hopi Leaders and the people."

Former Interior secretary Udall now says he was oblivious to Boyden's maneuvers.

"How he manipulated them and how he got it done, I don't know," Udall says in a recent phone interview from Santa Fe, New Mexico. "The word that came to me was that they [Hopi] had approved the lease."

Udall contends today that he would never have approved the lease "if the word came back the Hopi don't want it."

Yet Udall, very early in his tenure as Interior secretary, approved the delegation of mineral leasing authority to the council, a decision that allowed Boyden and the council to bypass the Hopi constitutional provision calling for a plebiscite before any leases were approved.

The delegation of mineral leasing power removed a huge obstacle for Boyden, who by then was also working for Peabody.

Snowcapped mountains beckon through the window of Charles Wilkinson's small fourth-floor office at the University of Colorado's law school in Boulder.

Dressed in a blue denim shirt and casual slacks, Wilkinson delves quickly into a topic that has been his life's work--the West. Wilkinson is one of the nation's most prominent legal experts on public lands and Indian law. He has followed the developments on Black Mesa for more than 25 years.

A 1966 graduate of Stanford University law school, Wilkinson cut his teeth on Indian law in 1971 when he joined the Native American Rights Fund. He began his academic career in 1975 at the University of Oregon law school before moving to Colorado in 1987.

His numerous books and papers on environmental issues related to public lands and Indian reservations have won him widespread recognition. Outside magazine calls him the "West's foremost legal authority on natural resource management."

His discovery of Boyden's conflict of interest still leaves him unsettled, even though he's

known about it for several years. Boyden's relationship with the Hopi is an important element in Wilkinson's upcoming book, *Conquest and Endurance in the American Southwest*.

"There was a level at which this was very uncomfortable for me," Wilkinson recalls of his discovery of Boyden's role with Peabody.

"It just turns your stomach," he says. "Reading those letters is sickening."

The letters Wilkinson refers to are correspondence between Boyden and Peabody officials in the 1960s.

Rumors had persisted for years that Boyden was working for Peabody while also representing the Hopi Tribe. But the rumors couldn't be substantiated. Boyden always denied ever working for Peabody, as did the mining company. John Boyden's son and former law partner, Stephen Boyden, maintains that position today.

But files released by the University of Utah library contain letters between Boyden and Peabody officials discussing work Boyden did at Peabody's request. The records include Boyden's billings to Peabody for work done between 1964 and 1971.

While the university file is revealing, it is far from complete.

"We can't tell when the relationship began or when it ended," Wilkinson says.

But what is clear is that there was a close and intimate relationship between Boyden and Peabody.

"The file discloses that Boyden represented Peabody in October 1964 at a hearing in front of the Utah State Land Board; he urged the board to sell Peabody land for a proposed power plant that would use Black Mesa coal," Wilkinson's article in the *BYU law review* states.

Correspondence and records obtained by *New Times* show that Boyden wrote a Utah businessman in October 1964 and claimed he was "connected with the company [Peabody]."

In July 1965, Boyden sent a letter to Ed Phelps, Peabody's vice president of engineering, promising to update Phelps after he met with Utah's governor. "I will get together with him and then promptly inform you," Boyden wrote to Phelps.

At the time, Peabody was seeking to obtain water rights from Utah to use in the cooling

system of a proposed power plant that would burn Black Mesa coal. Boyden wanted the plant built in Utah.

In September 1965, Boyden wrote Phelps expressing concern that the plant was going to be located in Arizona, near Page, rather than in Utah. The letter clearly underscores Boyden's partnership with Peabody. "Does this mean we are abandoning the possibility of locating the plant in Utah?" Boyden asks.

Perhaps the most revealing letter in the file is a November 1967 letter marked "Personal & Confidential" from Boyden to Phelps in which Boyden states: "I am enclosing a proposed statement to Peabody Coal Company for my work done to date."

The letter requests payment for work dating back three years, to 1964--the year the Hopi, under Boyden's direction, granted Peabody an exploration permit on Black Mesa. The billing itemizes numerous phone calls between Boyden and Phelps as well as a dozen conferences with state and federal officials and private businessmen on Peabody's behalf.

The records do not reveal how much Peabody was paying Boyden for his services, which continued through at least 1971.

New Times faxed copies of several of Boyden's letters to Peabody officials at their Flagstaff headquarters, seeking comment. The company's response confirms that Boyden worked for Peabody during the period (1964-66) in which he negotiated the Black Mesa coal lease on behalf of the Hopi Tribe.

At the same time, Peabody denies Boyden represented the company during lease negotiations with the Hopi.

"The copies of correspondence you sent to us relate to an exploratory project near the Navajo reservation in Utah that had no connection to the Hopi Tribe," Peabody spokeswoman Beth Ulinger states.

Ulinger incongruently adds: "Mr. Boyden did not represent Peabody during the negotiation of the Arizona leases, and we have no knowledge or information to suggest that Mr. Boyden did anything inappropriate."

Boyden's son, Stephen Boyden, also says his father "wasn't representing Peabody at the same time he was representing the Hopi Tribe."

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After an initial interview, New Times faxed a copy of John Boyden's 1967 Peabody billing statement to Stephen Boyden for his review. Stephen Boyden, an assistant attorney in the Utah Attorney General's Office, declined to return repeated phone calls seeking comment on those documents.

Legal ethicists say an attorney should, at the very least, fully disclose any potential or actual conflict of interest to a client. There is no indication that Boyden ever disclosed to the Hopi Tribe that he was also representing Peabody in the crucial years leading up to the 1966 signing of the Black Mesa coal and groundwater leases.

Boyden's representation of Peabody and Hopi at the same time is harshly viewed by legal experts.

"Clearly, it is manipulative and duplicitous," says David Goldberg, director of Arizona State University's School of Justice Studies. "No doubt there was misrepresentation, at the least withholding information to one side that was in some way directly or indirectly made available to the other."

Wilkinson's documentation has convinced at least one key player in the coal rush that Boyden betrayed the Hopi. Former Interior secretary Stewart Udall says Boyden's actions raise serious questions about the lease--particularly the use of groundwater to transport coal to the Mohave Generating Station.

Federal reports show sharp declines in groundwater levels attributed to Peabody's pumping. The Hopi say numerous springs and washes have diminished flows because of Peabody's water pumping. The aquifer is the primary source of water for the Hopi, who have no flowing rivers on their reservation.

The Hopi want Peabody to stop pumping groundwater and obtain water for its slurry line from another source.

Udall says the water issue must be addressed by the current Secretary of the Interior Bruce Babbitt, particularly since Boyden had a conflict of interest at the time the lease was first negotiated.

"I'm not [saving] this to put Secretary Babbitt, my friend, on the spot," Udall explains. "I'm

doing this because I think the decision is secretarial. . . . If he looked at it and saw the evidence with regard to Mr. Boyden and what he did, then that would weigh pretty heavily on his mind."

Babbitt's office remains silent on the issue.

If Udall's suggestion isn't heeded, legal action by the Hopi appears likely.

"I imagine the tribe and their attorneys are reviewing the situation to see if they can bring a suit to void the lease because it was obtained by fraud," Wilkinson says.

"It is my strong sense that the Hopi would want to consider that suit," he adds.

Hopi tribal attorney Reid Chambers declined to comment on the tribe's legal options.

Boyden, Wilkinson explains, not only had a conflict of interest. He also failed to help the Hopi capitalize on the powerful economic lever the tribe had at its fingertips.

Black Mesa, Wilkinson says, was essential to one of the most important political and economic developments in Arizona history--the Central Arizona Project.

Ever since the idea was hatched in the 1940s, the Central Arizona Project was embraced by Arizona politicians from both sides of the aisle. Arizona wanted to tap its share of Colorado River water that was being used by California.

In 1963, the U.S. Supreme Court allocated 2.8 million acre-feet of Colorado River water to Arizona each year. To put that water to use, Arizona needed a canal to bring water to the farms, businesses and communities in and around Phoenix and Tucson.

Arizona was in a position to get the funding to build the CAP in the mid-1960s. Stewart Udall was secretary of the Interior and Senator Carl Hayden was the most senior member of the U.S. Senate. Together, they shepherded the project through a reluctant Congress.

"I played an important role in this. I can't deny that. We were frantic to get the CAP through Congress," Udall says.

Several major political and technical problems needed to be solved. Tremendous amounts of electricity would be needed to move as much as 2.2 million acre-feet of water more than 300 miles, over mountains, to central and southern Arizona.

The first plan was to build two hydroelectric power plants in the Grand Canyon. But the Sierra Club launched a massive publicity campaign and thwarted the proposal by the Bureau of Reclamation in 1966. A secondary plan soon emerged that called for a coal-fired power plant to be built near Page.

Udall again played a key role in nurturing the development of the Page power plant on Navajo land. The plant would be fueled by Black Mesa coal.

"Udall interceded saying if they [CAP backers] give up the fight for power plants in the Grand Canyon, he would help them get the Page plant," says historian Alvin Josephy.

"It was a big mistake of Udall's," says Josephy, a close friend of Udall's. "He was allowing people to deal for the Indians without even telling the Indians most of the time what was being dealt away."

Utilities were eager to construct power plants in remote locations so as not to exacerbate pollution problems in the burgeoning urban areas of Los Angeles, Las Vegas and Phoenix. Twenty-three Western utilities formed a consortium called WEST Associates to push for development of coal resources on Black Mesa and throughout the Four Corners region, where several highly polluting plants already existed.

Salt River Project soon presented plans to build the Navajo Generating Station near Page on Navajo land.

The coal for that plant would come from Black Mesa.

While the Page plant would solve the technical problem, the politics were more tangled. California, which was accustomed to receiving Arizona's share of Colorado River water, fought the CAP. To help convince California and Nevada to support the CAP, another power plant was proposed: the Mohave Generating Station near Laughlin, Nevada. That plant was dedicated to supplying cheap power primarily to Southern California and Nevada.

Once again, Black Mesa was to be the source of coal. The water beneath Black Mesa would be used in the slurry line to transport coal from the mine to the plant. And after the coal was removed, the water would be used in the power plant's cooling system.

A political resolution finally was hammered out in the 1968 Colorado Basin River Project Act,

which set the stage for the construction of the CAP and the two massive electric generating stations.

The whole deal depended on Black Mesa.

The Hopi and Navajo were in a unique position to strike lucrative deals with Peabody and the utilities. Without their coal, the CAP wouldn't get past square one.

"Boyden knew the leverage the Hopi had," Wilkinson says.

But Boyden was also working for Peabody coal.

Instead of cutting a lucrative deal, the Hopi (and for that matter the Navajo, who were represented by separate counsel) ended up with scraps.

It wouldn't be until 1987--21 years after signing the initial lease--that the tribes began to get anywhere near a market rate of return for their coal.

By then, Boyden was dead.

"He failed them miserably," Wilkinson says.

The \$5 billion CAP has yet to fulfill its promise.

The heavily subsidized water is used on heavily subsidized crops. High payments on the CAP debt have forced several agricultural irrigation districts into bankruptcy. Many municipalities have rejected using the expensive and low-quality water. Arizona still is failing to take its full allotment of CAP water.

At the canal's terminus west of Tucson, millions of gallons of Colorado River water that have been pumped across 300 miles of desert, propelled by power generated with Black Mesa coal, are unceremoniously dumped onto a dry lake bed.

The costly CAP water either evaporates or percolates back into the earth.

The Hopi experience with John Boyden has taught them a lesson. The tribe no longer relies on a single attorney for all its legal matters.

Nevertheless, when it comes to Indian lands and politics, there's a potential conflict of interest under every rock.

The tribe is currently in sensitive negotiations to settle a complicated water rights case on the Little Colorado River which flows near the Hopi reservation. A proposal to build a pipeline

...the settlement, which calls for the Hopi to pay for a pipeline that would deliver Lake Powell water to Peabody coal and to the Hopi and Navajo tribes is part of the settlement.

The plan requires the Hopi to pay \$75 million or more to get 2,000 acre-feet of Lake Powell water each year to its villages. The proposal would also allow Peabody to stop pumping groundwater--a high priority of the Hopi.

The settlement proposal, however, is opposed by some members of the Hopi Tribal Council and the former Hopi tribal chairman.

Besides the high cost to the Hopi, critics say the proposed settlement was developed by a man with strong ties to the Navajo.

Animosity and suspicion between the Hopi and Navajo run high.

The tribes continue to battle over land rights. Illegal Navajo occupation of some Hopi land has earned the Hopi a judgment against the Navajo worth about \$20 million. The Navajo, so far, have refused to pay the judgment.

Under the proposed Little Colorado settlement developed by Apache County Superior Court Judge Michael C. Nelson, the Hopi would forgive that judgment against the Navajo.

The Hopi believe Nelson's role in the case is dubious.

Before he became a judge, Nelson served as legal counsel to former Navajo tribal chairman Peterson Zah between 1982 and 1987. Prior to that, he was litigation attorney for DNA--Peoples Legal Services from 1977 through 1982. He's also written several books about Navajo government and has served on several Navajo committees.

Calls to Nelson seeking comment about his Navajo ties were not returned.

Former Hopi tribal chairman Vernon Masayesva is worried about Nelson's long relationship with the Navajo, and his proposed Little Colorado settlement.

"Why should we support the position where the Navajos would not have to pay a \$20 million settlement to the Hopi?" Masayesva asks.

Masayesva says he's sensitive to potential conflicts of interest, "particularly after having seen what John Boyden has done."

The long, sordid history of the exploitation of Black Mesa by Peabody, Boyden, the federal government and utilities has turned Masayesva and other tribal leaders into cynics.

And now, the Hopi Tribe faces another crucial moment in its long history.

"I just can't have trust in anyone, who in my opinion, is not neutral. I don't think Judge Nelson can be, regardless of what he says. In any other situation, it would not be acceptable," Masayesva says.

But this isn't "any other situation"--this is Black Mesa.

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