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# Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest

*Charles F. Wilkinson\**

This is a story, a true one, about the Hopi and Black Mesa. The fact that it is a story reflects my conviction, gained during my time spent in the law, that we too often study law in isolation. In fact, law is a derivative discipline. Law is organic—germinating from the loam of society and the land itself. We need to study and understand both society and the land to know the source and context of law.

First, some background for the story. Energy development in Indian country, especially on the Colorado Plateau, is a

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\* Moses Lasky Professor of Law, School of Law, University of Colorado. This article was originally presented on September 21, 1995 as the National Order of the Coif Lecture, which was awarded to the J. Reuben Clark Law School.

I extend my sincere appreciation to my colleagues at BYU, Associate Dean Cliff Fleming, Dean Reese Hansen, and Associate Dean Constance Lundberg for the many kindnesses they have shown me in connection with this lecture. I am deeply indebted to the hard and creative work of my research assistants, Nancy Nelson, Kristin Howse, Cherche Prezeau, Marlon Sherman, Brian Kuehl, and Cynthia Carter, all of whom have made essential contributions to this piece over the past three years. The Ford Foundation, the School of Law at the University of Colorado, and the Grand Canyon Trust have been generous in their support of this work, which is part of a book-in-progress on the Colorado Plateau.

I would like to pay special honor to two other people. Larry EchoHawk, now on the law faculty at the J. Reuben Clark Law School, was a superb practicing lawyer and a great Idaho Attorney General who made every last tough call based on law and principle. Monroe G. McKay, formerly a law professor at BYU and now a judge on the Tenth Circuit Court of Appeals, was a mentor for me when I first began law practice in Phoenix with Lewis & Roca in 1965. After understanding Monroe McKay, I knew with absolute clarity all that a lawyer should be, and that ideal has stayed with me for my entire legal career. I wish our laws were not so limited. I wish that we could borrow from Japanese law (see, e.g., H. HARADA ET AL., *LIVING NATIONAL TREASURES OF JAPAN* 14-15 (1983)) and declare Monroe a national monument, for he embodies the highest of our profession's and nation's aspirations.

I dedicate this article to Vernon Masayesva, former Tribal Chairman at Hopi, who takes such a long and clear view from the vantage point of his homeland on Black Mesa.

significant part of national energy policy. Black Mesa overlies one of the richest coal deposits in the world.<sup>1</sup> Some forty western tribes own an estimated seven to thirteen percent of all United States coal reserves and significant portions of the nation's onshore oil, gas, and uranium deposits.<sup>2</sup> Until recently, Indian tribes were passive and let others make their decisions for them. This began to change in the 1970s. In one of the most inspiring social movements of this century, the tribes began to take back their reservations. Bureau of Indian Affairs (BIA) dominance began to fade. These changes revitalized Indian societies, governments, and economies, and also recast energy development in Indian country.

The Navajo and the Apache took the lead. In 1978, chafing under the inequitable mineral leases of the 1960s, the Navajo Nation adopted tax ordinances assessing millions of dollars annually on energy companies doing business at Navajo.<sup>3</sup> In addition to four coal mines, the companies had drilled 700 oil and gas wells, producing 5 million barrels of oil, and 2 million cubic feet of gas each day.<sup>4</sup> Other tribes with mineral reserves adopted their own tax programs. When the tax notices arrived in the mail, the energy companies loosed cries of indignation. This was not the way tribes were supposed—or allowed—to act.

The energy industry's indignation quickly translated into lawsuits, a great many of them.<sup>5</sup> The first significant decision came in 1982. The United States Supreme Court ruled in *Merrion v. Jicarilla Apache Tribe*<sup>6</sup> that the tribe could indeed tax the energy companies. True, the Jicarilla were already receiving royalties on the very oil and gas leases the tribe was now trying to tax. But governments, including tribal governments, can properly collect payments as property owners

1. EMILY BENEDEK, *THE WIND WON'T KNOW ME: A HISTORY OF THE NAVAJO-HOPI LAND DISPUTE* 133 (Vintage Books 1993) (1992).

2. See, e.g., 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 339 (Comm. Print 1977); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 531 nn.23 & 26 (Rennard Strickland et al. eds., 1982 ed.).

3. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985).

4. DONALD R. WHARTON, RESOURCE DEVELOPMENT ON NAVAJO: THE DINEH POWER PROJECT 2 (June 9, 1988) (paper presented at the University of Colorado Natural Resources Law Center, Natural Resources Development in Indian Country Conference, Boulder, Colorado) (copy on file with the author).

5. See, e.g., *Kerr-McGee*, 471 U.S. 195; *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983); *Conoco, Inc. v. Shoshone & Arapahoe Tribes*, 569 F. Supp. 801 (D. Wyo. 1983).

6. 455 U.S. 130, 136-52 (1982).

and also tax activities on that same property. The *Jicarilla Apache* opinion was a beacon of "tribal sovereignty,"<sup>7</sup> the tribes' ultimate authority to govern their reservations, which Felix Cohen, the great Indian law scholar, has called "perhaps the most basic principle of all Indian law."<sup>8</sup> Then, in 1985, the Supreme Court also upheld the Navajo mineral taxes.<sup>9</sup>

The tribal program progressed far beyond litigation. The tribes forced the renegotiation of inequitable leases,<sup>10</sup> formed their own natural resources regulatory agencies,<sup>11</sup> and created the Council of Energy Resource Tribes (CERT), a coalition of more than fifty tribes.<sup>12</sup> In some cases they established tribal development companies,<sup>13</sup> having learned that the best way to advance in this economy is not by receiving royalties but by participating in the entire production and marketing process.

The revival in Indian country runs still deeper. Ultimately, it is based on the determination of Indian people to endure, to control their destinies in their homelands forever. The Hopi and their ancestors have endured on the Colorado Plateau for twelve thousand years.<sup>14</sup> Indeed, a recent archaeological find may prove the presence of Native people in the Southwest as far back as thirty-eight thousand years ago.<sup>15</sup>

7. *Id.* at 148.

8. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1942).

9. *Kerr-McGee*, 471 U.S. 195.

10. *Hearings Before the Subcomm. on Energy and Water Development of the House Comm. on Appropriations*, 104th Cong., 2d Sess. (1995) [hereinafter *Energy & Water Development Hearings*] (testimony of David Lester, Executive Director, Council of Energy Resource Tribes) available in WESTLAW, ALLNEWS Database; *Indian Mineral Development: Hearings on S. 1894 Before the Select Comm. on Indian Affairs*, 97th Cong., 2d Sess. 84 (1982) [hereinafter *Indian Mineral Development Hearings*] (prepared statement of Ed Gabriel, Executive Director, Council of Energy Resource Tribes); Daniel H. Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 645-47 (1976).

11. *Energy & Water Development Hearings*, *supra* note 10; *Indian Mineral Development Hearings*, *supra* note 10, at 11, 32, 34, 47, 81.

12. *Energy & Water Development Hearings*, *supra* note 10. CERT grew from an original membership of 26 tribes at its founding in 1975 to 53 tribes in 1995. *Id.*; see also COUNCIL OF ENERGY RESOURCE TRIBES, *FIRST DECADE* (1986).

13. *E.g.*, *Energy & Water Development Hearings*, *supra* note 10; *Indian Mineral Development Hearings*, *supra* note 10, at 34 (statement of Gilbert Harrison, Associate Director for Energy Development, Navajo Tribe).

14. F.A. BARNES & MICHAEL P. PENDLETON, *CANYON COUNTRY PREHISTORIC INDIANS: THEIR CULTURES, RUINS, ARTIFACTS AND ROCK ART* 14-16 (1979); LINDA S. CORDELL, *ANCIENT PUEBLO PEOPLES* 29-32 (1994); ROBERT H. LISTER & FLORENCE C. LISTER, *THOSE WHO CAME BEFORE: SOUTHWESTERN ARCHAEOLOGY IN THE NATIONAL PARK SYSTEM* 40-52 (1983).

15. David L. Chandler, *Palm Print May Undo "Clovis-First" Dogma Could*

The conquests of land and people on the Colorado Plateau have been myriad, ranging from military combat to land sales to forced termination of tribal status<sup>16</sup> to what I call the "Big Build-up," the massive energy and water development the southwestern cities undertook on the Colorado Plateau in the post-World War II era.<sup>17</sup> The Big Build-up was perhaps the most prodigious peacetime exercise of industrial might in the history of the world.<sup>18</sup> And conquest has many other faces, including faithless lawyers representing faithful peoples.

But the endurance of the tribes is even more remarkable than all the conquests. After all the exploitation, the Colorado Plateau is still Indian country—nearly one-third of the region's eighty million acres is owned by the tribes.<sup>19</sup> The story that follows is about conquest and endurance at Hopi.

*Prove Humans Have Been in Americas 38,000 Years*, BOSTON GLOBE, Dec. 2, 1991, at 25; Boyce Rensberger, *Placing Man in America 28,000 Years Ago: New Mexico Find Indicates Human Presence Far Earlier Than Believed*, WASHINGTON POST, Feb. 10, 1992, at A1.

16. See, e.g., DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY 1945-1960* (1986); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 142, 149 (1977); *id.* at 167 n.10 (citing GARY ORFIELD, *A STUDY OF THE TERMINATION POLICY* (1966)). See generally Arthur V. Watkins, *Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 47 (1957).

17. E.g., PETER WILEY & ROBERT GOTTLEB, *EMPIRES IN THE SUN: THE RISE OF THE NEW AMERICAN WEST* 42-53 (1982); Alvin M. Josephy, Jr., *The Murder of the Southwest*, AUDUBON, July 1971, at 54.

18. During a twenty-five year period (1955-1980), the Colorado Plateau increased net installed capacity in hydroelectric power plants and coal-fired power plants by 14,422 megawatts. By comparison, the dams built on the Columbia River system during the same period produced approximately 15,000 megawatts. The former Soviet Union's period of intense hydroelectric build-up (1937-1965) produced approximately 10,000 megawatts from the Volga River system. Since both these latter build-ups also included power from coal-fired plants, these three regions would be in competition for the "largest ever" title. NATIONAL SCIENCE FOUNDATION, *LARGE DAMS OF THE U.S.S.R.*, S. DOC. NO. 27, 88th Cong., 1st Sess. 14 (1963); 2 NORTHWEST POWER PLANNING COUNCIL, *THE EXISTING REGIONAL ELECTRICAL POWER SYSTEM*, 1991 NORTHWEST POWER PLAN 57 (1991); NORTHWEST POWER PLANNING COUNCIL, *POWER FOR PROGRESS: HYDROELECTRICITY IN THE COLUMBIA RIVER BASIN* (1992); WESTERN AREA POWER ADMINISTRATION, U.S. DEPT. OF ENERGY, 1993 RESOURCE DATA BASE (1993).

19. For a listing of the land holdings of the Indian reservations on the Colorado Plateau (22,279,708 acres total), see STEPHEN TRIMBLE, *THE BRIGHT EDGE: A GUIDE TO THE NATIONAL PARKS OF THE COLORADO PLATEAU* 3 (1979); GRAND CANYON TRUST, *THE FUTURE OF THE COLORADO PLATEAU: PRESERVING ITS NATURAL WONDERS WHILE SECURING ECONOMIC OPPORTUNITY FOR ITS RESIDENTS* at Table 5 (May 1990) (A Progress Report to the Ford Foundation by The Grand Canyon Trust) (copy on file with the author).

We drove west on Black Mesa as morning first began to bring light. A friend from Hopi told me that this large mesa, with its several branches, was shaped like a human hand, and it is true. If I place my left hand, palm down and directed to the southwest, on a large U.S. Geological Survey topographical map of Arizona, my hand almost exactly matches this high-desert land form: the back of my hand is the upper end of Black Mesa; my thumb is the high ridge running from Tsegi to Cow Springs; my forefinger is the Big Mountain-Rocky Ridge complex; and my other three fingers, in order, are Third Mesa, Second Mesa, and First Mesa, the most southeasterly extension. The hand would be severed at the wrist to indicate the eight-thousand-foot-high crest and sheer escarpment of the northeastern edge of Black Mesa, rising two thousand feet above the desert floor below. The thirteen Hopi villages (except for Moenkopi, which is fifteen miles beyond the western boundary of the reservation) are located at the lower end of Black Mesa, on the numbered mesas.

The journey would take us to Hotevilla for the celebration of Home Dance, held separately in each Hopi village. This kachina dance is a grand, electrifying ceremony, a high point for each village every year.<sup>20</sup> The kachinas come down from their home in the San Francisco Peaks to the Hopi mesas each February, when they perform the Bean Dance, bringing fertility both to the cultivated fields and to young families. Home Dance, the last kachina dance, is in late July. At the end of the dance, the kachinas return home, taking the prayers of the people back to the San Francisco Peaks. The kachinas leave behind their wisdom and strength, and their bounty, for this is a rain dance.<sup>21</sup>

We turned our two cars off the paved road into the village, which is on Third Mesa. Out by the highway, most of the houses—a mixed lot, ranging from wood shanties to cinderblock buildings—had electricity. We drove down a sandy street past

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20. Kachinas are not deities to the Hopi, but respected spirits (from the words *ka* meaning "respect," and *china* meaning "spirit"). FRANK WATERS, *BOOK OF THE HOPI* 204 (1963). Kachinas are the spirits of mineral, plant, animal, and human entities, which may take physical form. During Hopi dances, men of the tribe impersonate specific kachinas. *Id.* at 205.

21. For a perceptive view of Hopi government, culture, and religion, see Hugh Nibley, *Promised Lands*, CLARK MEMORANDUM, Spring 1993, at 2; see also DON C. TALAYESVA, *SUN CHIEF: THE AUTOBIOGRAPHY OF A HOPI INDIAN* 139-40 (Leo W. Simmons ed., 1942); WATERS, *supra* note 20, at 242-56.

the last wood power pole and parked. Looking around, I could see that the main part of the village lacked plumbing as well as electricity. We would be using the outhouses today. There were nine of us: three from Boulder; two women friends from Flagstaff and St. George; and a couple from Flagstaff, she an archaeologist and he a naturalist, with their two children. Hotevilla's Home Dance was open to outsiders, if invited, and we had all received invitations from people in the village.

The homes grew progressively older, more traditionally pueblo, as we approached the square that was at the center of the village. We started at a commotion to our right, on a rooftop. A large golden eagle was flapping on his platform, straining at his tether. We knew that tomorrow morning he would be smothered. His feathers would be removed, to be used for prayers in future ceremonies, and he would be reverently buried, his head facing to the west. Like the powerful kachinas, this great bird would carry the messages and prayers of the Hopi people aloft.

When we reached the square, several hundred people, mostly Hopi, were already there, up on the flat rooftops and terraces, in the four passageways that fed into the square, inside the stuccoed buildings (since homes made up the sides of the square). There were portable chairs all around, down on the sandy ground, up on the roofs and terraces. I moved off, to find a place to watch, to a low rise beyond the southwestern corner of the square, taking a spot in the back. The sun still lay below the eastern ridge far beyond the village buildings, and the kachinas had not yet arrived. Good: this ceremony would continue from daybreak until dusk, and I wanted to see all of it.

The square was drenched with anticipation. This feeling came not from sounds or motion, for there was very little of either. People picked their way to their places, and even whispers were rare. Hopi hide their feelings—people should not be conspicuous in a crowd. Only non-Indians, I surely include myself here, leaned forward or cocked their heads. Yet one knew how much emotion was in the air as the Hopi awaited the entrance of the majestic kachinas, bringing with them all the years, all the people, all the hopes, the remembered earth. For all I could feel and for all I had tried to learn from reading and listening, I had no real idea of what to expect. I waited, absorbing the people, the ancient buildings, the blue sky bare of clouds, the cool early morning air.

Is that something out past the pueblo structures? It seems like a jiggling, a waving, almost a cornfield in a breeze. Now I realize that they are coming, that I am seeing the very tips of the kachinas' masks, the tall feathers and long stems of grain, waving as they walk single file toward us from the east. Now they are coming down the alley, more than forty in all, now into the square with their turquoise masks and white skirts and red belts, and spruce bunched into fluffy collars and draped from their belts and their skirts. Their arms are filled with squash, melons, and most of all corn, the most sacred plant, corn to be distributed to the many Hopi who once again have experienced the elegant arrival of the kachinas about to begin the day's dances before their long journey home.

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The sprigs of spruce adorning the kachinas were gathered many days ago—for Home Dance is a ceremony that requires long and rigorous preparation before the entrance into the square—from a grove near a spring in a secret place in the high country of Black Mesa. The spruce boughs must be gathered exactly there, nowhere else. A great deal depends on these spruce trees. Contrary to our view, the Hopi believe the spruce do not exist because of the water; the spruce come first and *bring* water. At the end of the Home Dance, people from this village, from other Hopi villages, from Zuni, and from pueblos over on the Rio Grande, will come to the kachinas and take some of the sprigs of spruce, which can then be planted in their own fields, so that rain will come to them.

The whole of Black Mesa is a spiritual place. It is filled with villages, shrines, and burial grounds from the distant past. Two weeks before Home Dance, the men had constructed páhos, prayer sticks made of eagle feathers, and left them in the prescribed places on Black Mesa during their journey to the spruce groves. After the dance, they will leave more. Masauü<sup>22</sup> has told the Hopi that Black Mesa is the center.<sup>23</sup>

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22. Masauü is not the Creator, in the Hopi view, but the caretaker, guardian, and protector of the Earth, the Hopi "Fourth World." See HARRY C. JAMES, PAGES FROM HOPI HISTORY 6 (1974); WATERS, *supra* note 20, at 27.

23. Brief for Plaintiff, Exhibit A, at 26a-27a, *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) (No. 73-2132), *cert. denied*, 425 U.S. 903 (1976).



The Hopi have long used coal for firing their pottery, but non-Indians did not become aware of Black Mesa coal until 1909.<sup>24</sup> Initially, the find attracted little interest because of its remote location, but the deposits, their extent not yet fully known, gradually gained more attention during the ensuing decades. Then mineral companies explored the area to determine its potential for oil and gas as well as coal.<sup>25</sup> They liked what they found and applied pressure on the Department of the Interior to open Black Mesa for mining. By the end of World War II, the companies and the Interior Department, which also wanted to see Hopi minerals extracted, were both ready to proceed,<sup>26</sup> but they faced an array of obstacles.

In the Hopi's eyes, the Hopi did not own the land or minerals—no one did—and therefore they could not lease them to someone else. Beyond that, the Hopi's careful agricultural practices were a good use of the land, while the intensive extraction the energy companies had in mind was not. Masauù had given that message to the Hopi.<sup>27</sup> And even if the Hopi did want to lease their land, who could approve such an agreement? There was no formal, centralized Hopi tribal government—and there should not be. Decisions were made in the thirteen villages, each one an independent sovereignty unto itself.<sup>28</sup>

A complex series of events over the course of three decades eradicated all of these impediments to mineral leasing. First, the BIA took steps in 1936 that eventually erased two of the obstacles, village autonomy and the lack of any formal governmental structure. John Collier, Franklin Roosevelt's BIA Commissioner, brought to the office a long and distinguished career as an Indian scholar and activist.<sup>29</sup> He accurately

24. BENEDEK, *supra* note 1, at 133.

25. *Id.*

26. Letter from James D. Crawford, Superintendent, Hopi Agency, to Commissioner of Indian Affairs (Apr. 30, 1948) (copy on file with the author); Letter from Burton A. Ladd, Superintendent, Hopi Agency, to Commissioner of Indian Affairs (Feb. 15, 1944) (copy on file with the author).

27. Brief for Plaintiff, Exhibit A, *supra* note 23, at 28a.

28. John W. Ragsdale, Jr., *Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values*, 10 HARV. ENVTL. L. REV. 417, 448-49 (1986); Letter from Burton A. Ladd, Superintendent, Hopi Agency, to Commissioner of Indian Affairs (July 9, 1947) (copy on file with the author); Letter from D'Arcy McNickle, Assistant to the Commissioner of Indian Affairs, to James D. Crawford, Superintendent, Hopi Agency (Nov. 5, 1947) (copy on file with the author).

29. KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 26-112

viewed the 1930s as the nadir of Native existence on the continent.<sup>30</sup> Tribes had seen their landholdings plummet from approximately 140 million acres in 1887 to 50 million acres in 1934.<sup>31</sup> Tribal governments were inactive, leaving reservation Indians without any leadership to protect against further encroachments from the outside. Collier drafted the Indian Reorganization Act (IRA) and by 1934, in the early blush of the New Deal, convinced Congress to pass it.<sup>32</sup> The IRA ended sales of Indian lands and allowed tribes to organize and adopt federally chartered constitutions.<sup>33</sup>

Collier committed his biggest error at Hopi. His objectives, if presumptuous, were sincerely intended to benefit Indians: he fervently believed in his vision of tribal constitutions and wanted the Hopi, above all other tribes, to have one.<sup>34</sup> With a constitution, they could operate more effectively in a changing world. In addition, acceptance of the IRA at Hopi would give his program credibility with other tribes, who themselves could receive its benefits.<sup>35</sup> Collier, who had lived in the Southwest and had many friends at Hopi, barnstormed the reservations, promoting his plan, which would ultimately create a central Hopi Tribal Council.<sup>36</sup> He then dispatched Oliver LaFarge to carry on the lobbying effort. LaFarge was loyal to Collier, but in a letter back home to his family, he made it clear that this was an unwanted assignment: "The Indians didn't think this up. We did. . . . We came among these people, they didn't ask us, and as a result, they are our wards. It's not any inherent lack of capacity, it's the cold fact of cultural adjustment . . . ."<sup>37</sup>

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(1977).

30. *Id.* at 114.

31. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 138 n.104.

32. VINE DELORIA, JR. & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 80-100, 122-40 (1984).

33. Act of February 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331 (1994)); Indian Reorganization Act of 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479 (1994)); *Hearings on H.R. 792 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16-18 (1934); T.H. WATKINS, *RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD L. ICKES* 530-48 (1990).

34. PHILP, *supra* note 29, at 161, 166; BENEDEK, *supra* note 1, at 126.

35. BENEDEK, *supra* note 1, at 126.

36. DELORIA & LYTLE, *supra* note 32, at 103-07, 123.

37. JAMES, *supra* note 22, at 203.

A great confusion descended: Hopiland swirled with unanswerable questions about the meaning of voting, representatives, and a Tribal Council.<sup>38</sup> The Hopi, after all, were a people with a wholly different tradition of governance, a people living on an isolated mesa where decisions were not made, but rather emerged from an age-old rhythm of clan, village, Kikmongwi—the religious leaders of each village—and Masauù.<sup>39</sup> The real issue in the election was whether the villages, each an elaborate, decentralized theocracy, wanted to jettison their own ways of making decisions and superimpose the white man's system on their own.

In the end, the Hopi voted in Collier's IRA constitution. At least they passed it according to the way Anglos count votes. Most of the Kikmongwi opposed the constitution. The idea of deciding matters by a hard-and-fast vote on a particular day, rather than by the old tested way, was alien to the Hopi. Opponents of the BIA's proposed Tribal Council system, rather than vote in the BIA election, simply stayed away. The constitution "passed" in the 1936 election by a count of 651 to 104, but no less than 1800 eligible voters stayed home. Oliver LaFarge made it clear to Collier that this was a "heavy opposition vote," but Collier certified the election anyway.<sup>40</sup>

The 1936 election was a watershed event. The creation of a Tribal Council eliminated the impediments to mineral leasing that had previously flowed from village autonomy and a lack of any written governmental structure. Most basically, there was now one official body to sign a lease. The other obstacle to the wholesale development of Black Mesa, the Hopi's own reluctance to allow it, would in time be moved aside by the rise of a "progressive" faction in the tribe and the resultant capture of the Tribal Council by pro-development forces.

In all, though John Collier never so intended when he put the IRA through Congress and pressed the Hopi to adopt the constitution, by the 1960s the constitutional election of 1936 had moved the Hopi into the middle of the rapid

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38. JAMES, *supra* note 22, at 203-05; Richard O. Clemmer, *Black Mesa and the Hopi*, in *NATIVE AMERICANS AND ENERGY DEVELOPMENT* 17, 25-26 (Joseph Jorgensen et al. eds., 1978).

39. See Nibley, *supra* note 21; Ragsdale, *supra* note 28.

40. PHILP, *supra* note 29, at 166-67; *see also* INDIAN LAW RESOURCE CENTER, *REPORT TO THE HOPI KIKMONGWIS AND OTHER TRADITIONAL HOPI LEADERS ON DOCKET 196 AND THE CONTINUING THREAT TO HOPI LAND AND SOVEREIGNTY* 47-54 (1979).

industrialization of the American Southwest. The catalytic force was John Boyden, a leading Salt Lake City lawyer who would narrowly lose two Democratic primary races for governor<sup>41</sup> and would, over the course of thirty years, have a great deal to say about the future of Black Mesa and the Hopi Tribe.

Boyden's first choice was Navajo, not Hopi. In 1947, he applied to the nation's largest and most powerful tribe for the position of claims attorney and general counsel. Instead, the Navajo selected Norman Littell of Washington, D.C.<sup>42</sup>

Boyden then approached the Hopi in 1950,<sup>43</sup> but he encountered an immediate problem. From the beginning, controversy had simmered in the villages over the new Tribal Council, tarred as the "white man's government."<sup>44</sup> The constitution provided that the Kikmongwi must certify Tribal Council members, but the religious leaders regularly refused to do any such thing. Therefore, the Tribal Council disbanded in 1943.<sup>45</sup> This was of growing concern to the energy industry and the BIA, which by 1950 was keeping more than a dozen companies posted on its progress toward reorganizing the Tribal Council.<sup>46</sup>

Boyden wanted to be general counsel at Hopi and consummate the mineral leases, but an additional obstacle stood in the way: the matter of the Hopi's claims case would have to be dealt with first because there was a deadline. The Indian Claims Commission Act, passed in August 1946, which allowed all tribes to recover money damages for lands taken by the United States, required that all claims be filed within five years.<sup>47</sup>

He put in a great deal of work to be appointed tribal claims attorney. With no Tribal Council in place, Boyden and

41. ORPHA S. BOYDEN, *THREE SCORE AND TEN IN RETROSPECT* 47-54 (1986).

42. BENEDEK, *supra* note 1, at 134.

43. BOYDEN, *supra* note 41, at 174-75.

44. See BENEDEK, *supra* note 1, at 160-63, 172; JAMES, *supra* note 22, at 205.

45. JAMES, *supra* note 22, at 205; D'Arcy McNickle, Field Representative, Office of Indian Affairs, Notes of Meeting with Hopi Indians (Sept. 23, 1944) (copy on file with the author).

46. Letter from James D. Crawford, Superintendent, Hopi Agency, to 20 oil companies and individuals (Mar. 21, 1950) (copy on file with the author). This letter was sent to those "who . . . indicated an interest in the possibility of leasing Indian lands in the Executive Order Reservation." *Id.*

47. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, ch. 959, § 12, 60 Stat. 1049 (1947) (expired Sept. 30, 1978).

the BIA decided the best course was to seek separate approval from each village. He held lengthy meetings in the villages and generally spent a large amount of time on the reservation.<sup>48</sup>

Boyden's full-court press during 1950 and 1951 was and still is controversial.<sup>49</sup> In particular, there was the question of whether the Hopi thought that their claims suit might allow them to recover land, which is what they really wanted, as well as money. Under the Indian claims statute, however, the courts can award only money, not land. In fact, the award of money damages for confiscated tribal land is a final extinguishment of any claim to that land.<sup>50</sup> Oliver LaFarge, who as John Collier's emissary in 1936 had seen the difficulties inherent in presenting complicated legal matters to traditional Hopi, noted the Hopi's misunderstanding a year before Boyden ever came on the scene:

I find it clear that a great many Hopis are under the impression that the Indian Claims Commission might award them land. . . . I notice that there is a great deal of reference to this Commission as the "Lands Claim Commission." The prevalence of the term is, of course, a deception in itself.<sup>51</sup>

No one will ever know exactly what Boyden said, and in what context, at the many meetings and discussions. The minutes of some of the village meetings do show Boyden making precisely the point that the Hopi could obtain money, and money alone, in the claims case.<sup>52</sup> Nevertheless, angry charges persist that he raised his future clients' hopes that the money-damage claims case might somehow result in a return of former tribal land.<sup>53</sup>

Several villages and a rump group, not recognized by the BIA but calling itself "the Tribal Council," finally gave their approval to Boyden. Five villages refused to approve his claims

48. BOYDEN, *supra* note 41, at 175.

49. See BENEDEK, *supra* note 1, at 134-46; INDIAN LAW RESOURCE CENTER, *supra* note 40, at 149-55; Jim Richardson & John A. Farrell, *Divided Opposition, in The New Indian Wars*, DENVER POST, Nov. 21, 1983, at 19 (special reprint ed.).

50. See *United States v. Dann*, 470 U.S. 39 (1985).

51. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 88.

52. See, e.g., Transcript, Meeting of John S. Boyden; Dow Carnal, Superintendent; Sam Shing, Interpreter; and 10 members of the Hopi Tribe, Sipaulavi, Arizona (Sept. 3, 1951) (copy on file with the author).

53. BENEDEK, *supra* note 1, at 134-35; INDIAN LAW RESOURCE CENTER, *supra* note 40, at 91; Interview with Vernon Masayesva, former Hopi Tribal Chairman, in Boulder, Colorado (June 23, 1994).

contract.<sup>54</sup> The BIA, however, concluded that he should be installed as claims attorney. Boyden officially signed the contract on July 12, 1951, just a month before the statute of limitations ran out on the claim.<sup>55</sup>

Boyden immediately turned his attention to being named Hopi general counsel. Although the claims case figured to return a lucrative attorney's fee—they almost always did (and in 1977 Boyden in fact received five hundred thousand dollars for the Hopi claim)<sup>56</sup>—in his mind, the general counsel's contract was even more important.<sup>57</sup> The Hopi had no money to pay him in the role of general counsel, but he knew the potential that lay underground. Boyden was candid about his self-interest. He told one village, for example, "If I can do something with your resources, I will get paid. That is the chance that I am willing to take."<sup>58</sup> An internal BIA memorandum in 1952 stated that Boyden "pointed out 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."<sup>59</sup> But there was still no officially constituted Tribal Council either to retain him or to sign mineral leases.

Boyden had a strategy. In confidential conversations, he told the BIA that it should wait before formally recognizing the present Hopi Tribal Council; in the meantime, the agency should approve Boyden as general counsel to the tribe.<sup>60</sup> He

54. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 90-93.

55. BOYDEN, *supra* note 41, at 175; INDIAN LAW RESOURCE CENTER, *supra* note 40, at 90.

56. INDIAN LAW RESOURCE CENTER, SUPPLEMENTAL REPORT TO THE HOPI KIKMONGWIS AND OTHER TRADITIONAL HOPI LEADERS: ATTORNEYS' FEES FOR THE BOYDEN LAW FIRM 4 (1983); Richardson & Farrell, *supra* note 49, at 19, 25.

57. Letter from Allan G. Harper, Area Director, Window Rock Area Office, Office of Indian Affairs, to Commissioner of Indian Affairs (1952) (copy on file with the author); Memorandum from James S. Lindzey to G. Warren Spaulding (Mar. 27, 1952) (copy on file with the author); Transcript, Meeting of John S. Boyden; Dow Carnal, Superintendent; Sam Shing, Interpreter, and 10 members of the Hopi Tribe, *supra* note 52.

58. Transcript, Meeting of John S. Boyden; Dow Carnal, Superintendent; Bridget Whipple, Secretary; Sam Shing, Interpreter, and 45 members of the Hopi Tribe, Kykotsmovi Village, Arizona at 5 (Sept. 4, 1951) (copy on file with the author).

59. Memorandum from James S. Lindzey to G. Warren Spaulding, *supra* note 57.

60. Letter from Allan G. Harper to Commissioner of Indian Affairs, *supra* note 57; Memorandum from James S. Lindzey to G. Warren Spaulding, *supra* note 57.

had a contract signed by the rump-group council and seven villages. Approving his contract would be the first step.<sup>61</sup> Then, as general counsel, he could "develop a representative tribal council with whom BIA and outside interest[s might] deal."<sup>62</sup>

Eventually his plan worked, but only after BIA Area Director Allan Harper recommended that the contract be disapproved. Approval, Harper wrote, "would effect recognition of the Tribal Council by indirection, thus reversing the basic Hopi policy which has been worked out in the field."<sup>63</sup> Further, Harper predicted, "there will be a rebirth of bitterness and extreme controversy among the Hopi villages."<sup>64</sup> Nevertheless, Boyden prevailed with Harper's superiors in Washington, and, in 1952, the BIA approved his contract as general counsel.<sup>65</sup>

The next task was recognition of the Tribal Council. Boyden's constituency, the "progressives," became increasingly active. Many of them had converted to Mormonism, which was Boyden's religion. The "traditionals," knowing that the progressives wanted mineral leasing, refused to participate in the Tribal Council.<sup>66</sup> Many of the Kikmongwi, the village religious leaders, refused to certify Council members<sup>67</sup> as the Hopi Constitution required.<sup>68</sup> Although only nine Council members out of the allotted seventeen had been named and in spite of widespread criticism that such a council could not be representative, the BIA reasoned that a quorum existed.<sup>69</sup> Finally, in 1953, the Interior Department gave its formal

61. Letter from Allan G. Harper to Commissioner of Indian Affairs, *supra* note 57.

62. Memorandum from James S. Lindzey to G. Warren Spaulding, *supra* note 57, at 3.

63. Letter from Allan G. Harper to Commissioner of Indian Affairs, *supra* note 57.

64. *Id.*

65. Memorandum from Lewis A. Sigler, Acting Chief Counsel, to Commissioner of Indian Affairs (1952) (recommending approval of contract) (copy on file with the author).

66. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 48-49, 87, 100, 108, 117-19.

67. See BENEDEK, *supra* note 1, at 131-32, 137; Josephy, *supra* note 17, at 66; Letter from Glenn L. Emmons, Commissioner of Indian Affairs, to Frederick M. Haverland, Area Director (Mar. 21, 1954) (copy on file with the author).

68. CONST. AND BY-LAWS OF THE HOPI TRIBE, ARIZONA art. IV, § 4.

69. Letter from Glenn L. Emmons to Frederick M. Haverland, *supra* note 67.

approval to this group as the official Hopi Tribal Council, a decade after the previous Tribal Council had disbanded.<sup>70</sup>

The new Council and its lawyer promptly went to work on the task of mining Black Mesa. But another fundamental barrier remained, the legacy of the 1882 executive order creating the Hopi Reservation. The executive order encompassed Hopi heartland—nearly all of Black Mesa and additional lands as well, about 2.5 million acres in all.<sup>71</sup> The 1882 executive order arose from the need to protect Hopi occupation from encroachment both from the west, where Mormons had established a community at Moenkopi, and from the east, where Navajos returning from their exodus at Fort Sumner began to build hogans on land traditionally held by the Hopi.<sup>72</sup> The terse, two-page document set the land aside for the "Moqui [Hopi] and such other Indians as the Secretary of the Interior [might] see fit to settle thereon."<sup>73</sup> The order raised the question: who owned this land and its minerals—the Hopi or "other Indians" (namely the Navajo), or both?

The executive order never worked. Navajos moved onto Black Mesa, building their hogans and running their sheep. The Navajo population grew rapidly, the Hopi's much slower. Originally, the 1882 executive order reservation was west of, and separated from, the Navajo Reservation. The Navajo pressed the United States for more land to meet its burgeoning population and livestock needs. By 1884, additions to the Navajo Reservation bordered the executive order reservation land on the east and north, and by 1900 the expansion included land to the west as well. In 1934, Hopi lands were completely surrounded by the Navajo Reservation.<sup>74</sup>

John Boyden turned his formidable energies to the conflict with the Navajo over who owned Black Mesa and the untold

70. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 119; Letter from W. Barton Greenwood, Acting Commissioner of Indian Affairs, to Allan G. Harper, Area Director, Window Rock Area Office, Office of Indian Affairs (July 17, 1953) (copy on file with the author).

71. See, e.g., BENEDEK, *supra* note 1, at 37.

72. BOYDEN, *supra* note 41, at 174; JAMES, *supra* note 22, at 100-01.

73. President Chester A. Arthur, Executive Order of December 16, 1882, microformed on CIS No. 1882 38-39 (Congressional Info. Serv.).

74. See generally DAVID M. BRUGGE, *THE NAVAJO-HOPI LAND DISPUTE* (1994); James M. Goodman & Gary L. Thompson, *The Hopi-Navaho Land Dispute*, 3 AM. INDIAN L. REV. 397, 398 (1975); Kevin Tehan, Comment, *Of Indians, Land, and the Federal Government: The Navajo-Hopi Land Dispute*, 1976 ARIZ. ST. L.J. 173, 176 (1976).



mineral wealth under it. In 1962, a three-judge court handed down the epic decision in *Healing v. Jones*, deciding rights to 2.5 million acres of land, an area a third again as large as Delaware.<sup>75</sup> This was a pivotal ruling in the Hopi-Navajo relocation struggle, which continues today: several thousand Navajos and a hundred Hopi, almost all elderly people, must be moved from their homes, now on land legally belonging to the other tribe.<sup>76</sup> On the mineral issue, the judges ruled that the Hopi and Navajo would split, fifty-fifty, any proceeds from the upper, northern end of Black Mesa where the most valuable coal lay.<sup>77</sup> In 1964, the Hopi Tribal Council, then receiving payments from oil and gas companies, paid John Boyden one million dollars for his work on *Healing v. Jones*.<sup>78</sup>

John Sterling Boyden was a superb trial lawyer, a master tactician in Congress. He was utterly tenacious. An Interior Department spokesman articulated what most knowledgeable observers would say about Boyden's handling of the Navajo-Hopi land dispute from the 1950s until his death in 1980: "John Boyden set the groundwork so well, he had prepared the entire strategy so carefully and it was so clean that [opponents] didn't have a chance."<sup>79</sup>

The 1962 judicial clarification in *Healing v. Jones* of joint Hopi-Navajo ownership of the subsurface minerals, with the royalties to be divided equally, came at exactly the right moment. The water and energy build-up of the Colorado Plateau by the booming southwestern cities had moved into high gear. Uranium production was in full swing.<sup>80</sup> The big dams authorized by Congress in 1956—Glen Canyon, Flaming Gorge, Navajo, and others<sup>81</sup>—were under construction, and Four Corners, the first of the large Plateau coal-fired power

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75. *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).

76. Goodman & Thompson, *supra* note 74, at 397, 409-13; Tehan, *supra* note 74, at 210-11.

77. *Healing*, 210 F. Supp. at 132.

78. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 143; *Indians Vote \$1 Million Fee to Utah*, SALT LAKE TRIB., Dec. 5, 1964, at 35; Transcript, Special Meeting of the Hopi Tribal Council, Oraibi, Arizona at v (Dec. 3, 1964) (copy on file with the author).

79. BENEDEK, *supra* note 1, at 151.

80. See, e.g., PETER H. EICHSTAEDT, IF YOU POISON US: URANIUM AND NATIVE AMERICANS 51-62 (1994); RAYE C. RINGHOLZ, URANIUM FRENZY: BOOM AND BUST ON THE COLORADO PLATEAU (1989).

81. Colorado River Storage Project Act, Pub. L. No. 84-485, § 1, 70 Stat. 105, 106 (1956); WILEY & GOTTLIEB, *supra* note 17, at 41-44.

plants, was about to go on line.<sup>82</sup> Now the utility companies wanted to build a new round of power projects. Acquiring Black Mesa coal was a top priority.<sup>83</sup>

On the Hopi Reservation, a bitterness settled in, just as BIA Area Director Allan Harper had predicted when he recommended against Boyden's appointment as general counsel and *de facto* recognition of the centralized rump council.<sup>84</sup> The conversations continued late into the night in the rectangular, layered village buildings. The traditional leaders wrote many letters to the outside world.<sup>85</sup> As early as 1949, they beseeched President Truman to prevent any mineral leasing.<sup>86</sup> To them, as they said in a 1959 petition to BIA Commissioner Glenn Emmons, the work of Boyden and the Tribal Council was a double wrong: the Hopi's sacred homeland, Black Mesa, should not be mined at all, but, in any event, the matter should be "settled in accordance with our ancient knowledge and with the consent of our Hopi Traditional Leaders."<sup>87</sup> Thomas Banyacya was one of the spokesmen: "You pass all kinds of laws without asking us. You will make us landless, homeless people. This land is the only land we have. This is the land of the Great Spirit. European people can go back to their lands. Native people have no place to go."<sup>88</sup>

In 1966, John Boyden presented a coal lease for the Black Mesa mine to the Hopi Tribal Council.<sup>89</sup> Peabody Coal Company would do the mining. (The actual lease was with Sentry Royalty Company, a subsidiary of Peabody, but the parties knew that Peabody would later take over the lease and

82. Josephy, *supra* note 17, at 55; Hollis Whitson & Martha Roberge, *Moving Those Indians into the Twentieth Century*, 89 TECH. REV. 46, 48 (1986).

83. JERRY KAMMER, *THE SECOND LONG WALK: THE NAVAJO-HOPI LAND DISPUTE* 78 (1981); WILEY & GOTTLIEB, *supra* note 17, at 41-48; Richardson & Farrell, *supra* note 49, at 23.

84. Letter from Allan G. Harper to Commissioner of Indian Affairs, *supra* note 57, at 3.

85. See generally BENEDEK, *supra* note 1, at 157-58; INDIAN LAW RESOURCE CENTER, *supra* note 40, at 107, 115, 118-19, 126.

86. Letter from the "hereditary Hopi Chieftains of the Hopi pueblos of Hotevilla, Shungopov and Mushongnevi" to President Harry Truman (Mar. 28, 1949) (copy on file with the author).

87. Letter from Dan Katchongva to Glenn L. Emmons, Commissioner of Indian Affairs (July 21, 1959) (speaking on behalf of "Hopi Traditional Leaders . . . and the majority of the Hopi people") (copy on file with the author).

88. BENEDEK, *supra* note 1, at 161.

89. Transcript, Special Meeting of the Hopi Tribal Council, Oraibi, Arizona (May 16, 1966) (copy on file with the author).

do the mining. The transaction was commonly referred to as "the Peabody lease."<sup>90</sup> The proceeds from this lease would be divided equally between the Navajo and Hopi. The transaction took place before environmental impact statements. There were no public hearings.<sup>91</sup> Few people, Indian or non-Indian, in or out of government or business, knew about the transactions.<sup>92</sup>

Nothing on record indicates that John Boyden ever provided the Hopi Tribal Council with any substantial analysis of the Peabody lease. The Tribal Council minutes, which usually were complete, show little discussion of the lease.<sup>93</sup> There is no indication that Boyden explained the magnitude of the operation and its probable impacts—that, for example, the two mines on Black Mesa (the Kayenta Mine, on Navajo land, was adjacent to the Black Mesa Mine) would constitute the largest coal strip mining complex in the country.<sup>94</sup> The minutes reflect no information on whether the tribe would be receiving the highest possible financial return,<sup>95</sup> even in light of the pivotal role of Black Mesa coal in the development of the American Southwest.

Nor do the minutes show much mention of water, so scarce on Black Mesa, so central to the people on Black Mesa. Peabody would be slurrying coal 273 miles to an electric power plant in Nevada, using 3867 acre-feet of groundwater annually from under Black Mesa.<sup>96</sup> Boyden briefly mentioned that the Hopi would "benefit" from the lease of water, but the minutes show no indication that he gave any information on whether the Hopi would receive fair market value for their water. Neither do they disclose whether he had any ties to Peabody Coal Company.<sup>97</sup>

90. *Id.*; see also Letter from Richard P. Conerly, Vice President, Peabody Coal Co. to John S. Boyden (Feb. 8, 1966) (copy on file with the author).

91. Clemmer, *supra* note 38, at 27.

92. Josephy, *supra* note 17, at 59, 66.

93. Transcript, Special Meeting of the Hopi Tribal Council, *supra* note 89.

94. BHP International's Navajo Mine is the largest strip mine in the country. BUREAU OF COMPETITION, U.S. FEDERAL TRADE COMMISSION, STAFF REPORT ON MINERAL LEASING ON INDIAN LANDS 5 (1975). Together the Black Mesa and Kayenta mines occupy more acreage and produce more coal than the Navajo Mine. Mary J. Martin, *Navajo Find Their Rainbow's Pot of Gold . . . in Coal*, COAL, Nov. 1992, at 32, 34, 40.

95. Transcript, Special Meeting of the Hopi Tribal Council, *supra* note 89, at 3.

96. PEABODY WESTERN COAL COMPANY, A QUARTER CENTURY ON BLACK MESA 11 (1980) (information brochure on file with the author).

97. Transcript, Special Meeting of the Hopi Tribal Council, *supra* note 89.

Approval of the Peabody lease, one of the very largest decisions in the millennia-long history of the tribe, was up to the Hopi Tribal Council, created in 1936 after a questionable election under the Indian Reorganization Act, dormant from 1943 to 1955, and then revived by John Boyden, the tribal attorney.

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The kachinas at Home Dance do successive rounds, continuing all day, of their rain dances and songs. When the kachinas left the square after the conclusion of the first round, which lasted about forty-five minutes, I moved down into one of the passageways to get a closer view. I was now at ground level and, when the kachinas returned, was startled at their size, nearly eight feet to the tips of the parrot and eagle feathers on their tabletas—their tall, dramatic masks. Hopis had explained to me that their children do not worship kachinas but that the kachinas do excite the greatest wonder and awe in the children, in somewhat the same way that Santa Claus does in other children.

The children are awestruck, and so is everyone else. Up close I can see the exquisite detail of the kachinas' costumes. Their tabletas seem to have slightly different designs, but all use a background of turquoise with cloud and half-moon symbols painted in red, white, black, and yellow. The kachinas carry turquoise rattles and wear white and black rope sashes, red moccasins with white soles, full red fox pelts hanging from the belts, and elaborate red sashes, also hung from the belt. I finally realize that they create the sharp, dry, rattling sounds of the dance by working in unison the desert tortoise shells each kachina has strapped to his right calf.

These are the Hemis kachinas. The dance includes ten other kachinas, called kachina manas. They are less dramatic than the Hemis kachinas (almost anything I have ever seen is), but the kachina manas drive the dance by scraping painted sticks with cut notches across deer scapulas and ceremonial dried gourds. They begin slowly. At first, it seems that they are tuning their instruments, but they are making frog sounds. Then their rain noises steadily build up. When they get into full swing, they are metaphorically creating thunderstorms.

The kachina manas, with red and white shawls and black wigs with circular whorls on the sides, kneel in front of the Hemis kachinas. The songs, sung by the Hemis kachinas, are a low, driving rumble accompanied by the rasping of the kachina manas' instruments. The kachina father, and a younger man who is in training, lead the kachinas and sprinkle cornmeal on them as they sing. The father instructs the kachinas to come closer, to touch shoulders, like clouds clustering together. He is also encouraging all of us to come together, to be participants, not just observers, in the prayers for rain.

In between some of the songs, the Hemis kachinas pass out the long stalks of corn they carried down to the square. The Hopi receiving the bounty do so silently, with no overt thanks. You know they are reverent about the corn, though, if you have seen the cornfields the stalks come from. Almost all the farming at Hopi is done by dry farming. The seeds are planted deep, at least a foot, to reach moist soil. The rows are five or six feet apart, and each plant is isolated so that the root systems will not compete for the scarce water. Black Mesa has a great many of these carefully tended fields, some just a few rows, some an acre or more. The Hopi have been called the world's finest dry farmers, and they grow more corn than anything else.

The kachinas made two more rounds as the air filled with the smells of roasting chiles and cornmeal, piki bread, and mutton stew from the kitchens near the square. It was time for the long—two hours or so—midday break. Our friends from the village had invited us to lunch and we went by their building. The darkened, cooler, inside rooms, low-ceilinged, were packed with family and visitors. After lunch we went back out to our cars to reapply sunblock and fill our water bottles with ice water from the spigot of our large aluminum container.

That done, we began walking back to the square so that we would not miss any of the dancing. We knew the Home Dance was accelerating. During the morning, the kachinas' gifts became increasingly elaborate; some of the corn stalks had tiny, painted bows and arrows attached to them.

It began to seem that we might get some relief from the intense sun of the late morning. A light cloud cover had formed. We passed the eagle. He was gathered from his nest as a chick and spent his life in captivity but seemed nonetheless fierce for it. A gust of wind came up, and he rose with it to the height of his four-foot tether, flapping his wings furiously. He

lives for the wind rising up from the desert floor to the mesa. I cannot help my ambivalence. But he is surely the right being to take prayers upward—the eagle, powerful and true.

I walked into the square with a Hopi gentleman I met at lunch. I asked him whether he thought the village would continue to keep Home Dance open to outsiders. "The Hopi way," he answered, "is that you trust everybody. If a stranger asks you for something, you give it to him. If he breaks that trust, that's his problem, not the Hopi's problem. The Hopi aren't the victims, other people are the victims."

"But many people have violated our trust. Outsiders act disrespectfully at the dances, or they take pictures, or make drawings, which they are not allowed to do. So, many of the villages have closed their dances. We haven't yet, but we might. It's a matter of whether the people of the village will still be willing to trust."

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John Boyden always denied that he ever represented Peabody Coal Company.<sup>98</sup> There were persistent, contrary rumors.<sup>99</sup> When the charges continued after Boyden's death, Boyden's law partner explained that the firm's small amount of work for Peabody was on an antitrust matter unrelated to the Hopi and that it had been done by an office mate. The law partner angrily denounced the accusations of Boyden's conflict of interest as "baseless, unfair and inaccurate."<sup>100</sup>

Loyal and tenacious though Boyden's representation of the Hopi may have been against the Navajo in the land dispute, his role in mineral development presents a very different picture. John Boyden's legal files, donated to the University of Utah after his death in 1980 but only recently available for public review, show that Boyden had violated his high duty to the Hopi by working concurrently for Peabody Coal during the decisive years of the mid-1960s. One of the files contains

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98. See INDIAN LAW RESOURCE CENTER, *supra* note 40, at 154.

99. See, e.g., *id.* at 149-55; Richardson & Farrell, *supra* note 49; Letter from Tim Vollmann, Acting Associate Solicitor, Division of Indian Affairs, U.S. Dep't of the Interior, to Steve M. Tullberg, Indian Law Resource Center (July 18, 1983) (copy on file with the author).

100. Richardson & Farrell, *supra* note 49, at 24.

correspondence between Boyden and Peabody Coal executives and representatives, as well as Boyden's attorney billings for work done for Peabody between 1964 and 1971.<sup>101</sup>

The correspondence, which reveals a close, ongoing relationship between Boyden and Peabody Coal Company officials, is very substantive. Several letters to and from Peabody executives discuss water and mineral rights on Black Mesa.<sup>102</sup> Boyden reported on his meetings with the Governor of Utah and the State Engineer on behalf of Peabody.<sup>103</sup>

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.<sup>104</sup> The file also includes the transcript of an appearance by Boyden on behalf of Peabody before the Utah Water and Power Board in 1964.<sup>105</sup> At this hearing, when the Hopi were deep in continuing negotiations with Peabody over the leasing of Black Mesa coal and water, Boyden forcefully and ably argued Peabody's side on water rights, a presentation that included Peabody's statement that a "possibility is to obtain Indian water rights."<sup>106</sup>

Indeed, Peabody did lease water as well as minerals from the Hopi in a very bad business deal the Hopi Tribal Council saddled itself with when it approved the lease for the Black Mesa Mine on May 16, 1966.<sup>107</sup> The tribe received 3.335% of gross sales (the royalty for the Navajo Tribe was the same),

101. John S. Boyden Papers, 1920s-1980s, Accession No. 823, Box No. 56, Folders 1-4, Special Collections, University of Utah Marriott Library, Salt Lake City, Utah.

102. See, e.g., Letter from John S. Boyden to E.R. Phelps, Vice President, Engineering, Peabody Coal Company (Nov. 27, 1967) (enclosing a statement to Peabody Coal Company for "my work to date") (copy on file with the author); Letter from John S. Boyden to E.R. Phelps, Vice President, Engineering, Peabody Coal Company (Sept. 3, 1965) (discussing acquisition of water from Indian tribes and the location of a steam generation plant) (copy on file with the author).

103. Letter from John S. Boyden to E.R. Phelps, Vice President, Engineering, Peabody Coal Company (May 28, 1965) (copy on file with the author).

104. Clarence S. Barker, *Coal Firm Maps Giant S. Utah Power Facility*, DESERET NEWS (Salt Lake City), Dec. 18, 1964, at B1.

105. Transcript, Presentation on Proposed Thermal Power Plant Before the Utah Water and Power Board at 17 (Dec. 1964) (statement of John Boyden, counsel for Peabody Coal Company) (copy on file with the author).

106. *Id.* at 27.

107. Telephone Interview with Reid Peyton Chambers, former Associate Solicitor for Indian Affairs and attorney for the Hopi Tribe during Black Mesa Mine lease renegotiation (July 15, 1994) (copy on file with the author); Transcript, Special Meeting of the Hopi Tribal Council, *supra* note 89, at 4.

which was below royalty rates at the time.<sup>108</sup> Even more fundamentally, the lease did not have a reopener, a standard provision allowing renegotiation after an agreed period, usually ten years. By 1978, just eight years after Peabody began mining the coal, a confidential Interior Department audit concluded that the royalty rate did not "accurately reflect or compare with current rates."<sup>109</sup> The return was "only a little more than half of what the government [was then] receiving."<sup>110</sup>

The Black Mesa lease had other undesirable features from the Hopi standpoint. It allowed Peabody to control much more land than was customary or, apparently, legal—40,000 acres as compared to the limit of 2560 acres in the federal regulations for Indian leasing.<sup>111</sup> For the right to take almost 4000 acre-feet of Hopi water each year, in a lease signed at the height of the rush on the Plateau's limited water supply, Peabody paid the Hopi the laughable rate of \$1.67 per acre-foot.<sup>112</sup>

Further issues, all resolved favorably to Peabody, continued to arise after the 1966 lease. In 1967, Peabody wrote Boyden, wanting to complete the formality of assigning the lease from Sentry to Peabody.<sup>113</sup> The Navajo had insisted on, and obtained, a payment of one hundred thousand dollars before approving the assignment.<sup>114</sup> Boyden wrote Peabody, saying that he would try to "expedite" the matter.<sup>115</sup> Then, arguing that the tribe had no legal basis for objecting to the assignment, Boyden wrote the tribe and opposed, on the basis

108. Richardson & Farrell, *supra* note 49, at 24; Mining Lease Between the Hopi Tribe, State of Arizona, and Sentry Royalty Company (June 6, 1966) (Sentry Royalty Company was a subsidiary of Peabody Coal Company) (copy on file with the author).

109. Richardson & Farrell, *supra* note 49, at 24.

110. *Id.*

111. 25 C.F.R. § 211.9 (1995).

112. See Richardson & Farrell, *supra* note 49, at 20, 24; Letter from D.E. LeCroue, Acting Assistant Area Director, Phoenix, Arizona, Bureau of Indian Affairs, to Clarence Hamilton, Chairman, Hopi Tribal Council (Dec. 16, 1968) (copy on file with the author).

113. Letter from Richard P. Conerly, Vice President and General Counsel, Peabody Coal Company, to John S. Boyden (Aug. 2, 1967) (copy on file with the author).

114. Letter from W. Wade Head, Area Director, Phoenix, Arizona, Bureau of Indian Affairs, to Commissioner of Indian Affairs; Superintendent, Hopi Agency; and John S. Boyden (Feb. 14, 1968) (copy on file with the author).

115. Letter from John S. Boyden to Richard P. Conerly, Vice President and General Counsel, Peabody Coal Company (Aug. 10, 1967) (copy on file with the author).



of principle, any attempt by the Hopi "to extract money from the coal company under these circumstances."<sup>116</sup> He then gave a vague assurance that the Hopi would nonetheless receive the same payment as the Navajo,<sup>117</sup> but apparently payment was never made. In 1967, E.R. Phelps of Peabody (Boyden's letters to Phelps in his capacity as Hopi attorney were addressed: "Dear Mr. Phelps"; in his Peabody role they were addressed: "Dear Ed")<sup>118</sup> requested that the lease area on Black Mesa be increased by ten thousand acres, or fifteen square miles; on Boyden's recommendation, the Council agreed to the request without asking for anything in return.<sup>119</sup> In 1969, the BIA expressed concern about the low payment rate for the use of Hopi groundwater: "the transportation of coal slurry [the Council had approved a right-of-way for a coal-slurry pipeline] will require a tremendous amount of water. . . . [We] feel that a much greater amount should be charged for the water if possible."<sup>120</sup> The Council decided to "defer action on the matter" and refer it to Boyden "for further review,"<sup>121</sup> but the issue was apparently never raised with Peabody.

Hopi traditionalists opposed the leasing at every turn and in every way they knew. In addition to sending many letters and petitions to U.S. Presidents,<sup>122</sup> the Interior Department,<sup>123</sup> and congressmen,<sup>124</sup> they travelled to the

116. Letter from John S. Boyden to Jean Fredericks, Chairman, Hopi Tribal Council (Mar. 4, 1968) (copy on file with the author).

117. *Id.*

118. *See, e.g.*, Letter from John S. Boyden to E.R. Phelps, Vice President of Engineering, Peabody Coal Company (Aug. 13, 1963) ("Dear Mr. Phelps"); Letter from John S. Boyden to E.R. Phelps, Vice President of Engineering, Peabody Coal Company (Aug. 12, 1964) ("Dear Mr. Phelps"); Letter from John S. Boyden to E.R. Phelps, Vice President of Engineering, Peabody Coal Company (May 28, 1965) ("Dear Ed"); Letter from John S. Boyden to E.R. Phelps, Vice President of Engineering, Peabody Coal Company (Sept. 3, 1965) ("Dear Ed") (copies on file with the author).

119. Transcript, Meeting of the Peabody Coal Company and Representatives of the Hopi Tribe (Aug. 19, 1969) (copy on file with the author); Letter from E.R. Phelps, Vice President, Engineering, Sentry Royalty Company, to Raymond Nakai, Chairman, Navajo Tribe, and Dewey Healing, Chairman, Hopi Tribe (July 26, 1967) (copy on file with the author).

120. Letter from D.E. LeCroue to Clarence Hamilton, *supra* note 112.

121. Transcript, Special Meeting of the Hopi Tribal Council, Oraibi, Arizona at 3 (Jan. 7, 1969) (copy on file with the author).

122. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 144-45 (letter to President Lyndon B. Johnson), 159-60 (letter to President Richard Nixon), 185-86 (letter to President James Carter).

123. *Id.* at 147; Letter from Dan Katchongva to Glenn L. Emmons, *supra* note 87.

124. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 172 (letter to Arizona

cities, the universities, even other countries to explain how their sacred land was about to be torn apart. "Hopi clans," traditional leaders wrote,

have traveled all over the Black Mesa area leaving our sacred shrines, ruins, burial grounds and prayer feathers behind. Today, our sacred ceremonies, during which we pray for such things as rain, good crops, and a long and good life, depend on spiritual contact with these forces left behind on Black Mesa. . . . If these places are disturbed or destroyed, our prayers and ceremonies will lose their force and a great calamity will befall not only the Hopi, but all of mankind.<sup>125</sup>

The traditionalists also sued in federal court, on the ground that the Tribal Council lacked authority to act on behalf of the Hopi people.<sup>126</sup> The Council was barely limping along in 1966 when the Peabody lease was signed. Only eleven of seventeen seats had been filled. Of those, just six council members were certified by the Kikmongwi as the Hopi Constitution required.<sup>127</sup> At best, the legal validity of the Council's actions was ambiguous. For the traditionalists, who surely represented a majority of the Hopi,<sup>128</sup> this was not merely a council chosen in an election in which most voters had refused to participate; this was a council never properly constituted in the first place. The courts never reached the merits of the traditionalists' case, dismissing the suit on the ground that the Tribal Council's decisions were protected by tribal sovereign immunity.<sup>129</sup>

By the mid-1960s, the Big Build-up on the Colorado Plateau was nearing its zenith. Literally dozens of large energy, water, oil and gas, and uranium projects were roaring ahead in various stages of study, design, and construction.<sup>130</sup> The high-level political bargaining and trading were progressing toward another congressional Christmas-tree bill for southwestern states and their developers.

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Congressman Sam Steiger).

125. Brief for Plaintiff, Exhibit A, *supra* note 23, at 27a.

126. *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

127. INDIAN LAW RESOURCE CENTER, *supra* note 40, at 165.

128. See JAMES, *supra* note 22, at 205; Richardson & Farrell, *supra* note 49, at 23.

129. *Lomayaktewa*, 520 F.2d at 1326.

130. WILEY & GOTTLIEB, *supra* note 17, at 41-54.

A pivotal event took place in 1963 when Arizona won *Arizona v. California* in the United States Supreme Court, finally determining the state's water rights in the Colorado River.<sup>131</sup> To put the hard-won water to use, Arizona wanted to build the Central Arizona Project (CAP).<sup>132</sup> Because of Arizona's insistence on the CAP and because Arizona was well-situated with Stewart Udall as Interior Secretary and Carl Hayden as Chairman of the Senate Appropriations Committee, the comprehensive legislative package—it would become the Colorado River Basin Project Act of 1968—could not be finalized without the CAP and, as it turned out, Black Mesa.

The two-billion-dollar CAP would transport, by canals and pipelines, 2.2 million acre-feet of water every year more than three hundred miles to Phoenix and then south to Tucson.<sup>133</sup> The goliath, however, had a hearty appetite for electricity because of the pumping made necessary by the inconvenient fact that part of the CAP route ran uphill.<sup>134</sup>

At first, the answer in those frenetic years seemed simple: What better way to create a high head of water for spinning turbines to power the CAP than to dam the Grand Canyon? Together, the proposed Marble Canyon Dam and Bridge Canyon Dam would turn 146 miles of the Grand Canyon into reservoirs.<sup>135</sup>

But by then the new environmental movement was getting its sea legs. David Brower of the Sierra Club was raising all possible hell. Among many other things, in 1966, the Sierra Club began running so-called "Battle Ads" in the *New York Times* opposing the Bridge and Marble Canyon Dams.<sup>136</sup> One

131. *Arizona v. California*, 373 U.S. 546 (1963).

132. Norris Hundley, Jr., *The West Against Itself: The Colorado River—An Institutional History*, in *NEW COURSES FOR THE COLORADO RIVER* 9, 35-37 (Gary D. Weatherford & F. Lee Brown eds., 1986). See generally RICH JOHNSON, *THE CENTRAL ARIZONA PROJECT 1918-1968* (1977); Charles Coate, "The Biggest Water Fight in American History": *Stewart Udall and the Central Arizona Project*, 37 J.S.W. 79 (1995); Robert J. Glennon, *Coattails of the Past: Using and Financing the Central Arizona Project*, 27 ARIZ. ST. L.J. 677 (1995).

133. *Central Arizona Project: Oversight Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Natural Resources*, 103d Cong., 1st Sess. 17 (1993); Glennon, *supra* note 132, at 682.

134. RUSSELL MARTIN, *A STORY THAT STANDS LIKE A DAM: GLEN CANYON AND THE STRUGGLE FOR THE SOUL OF THE WEST* 251 (1989); Glennon, *supra* note 132, at 682.

135. RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 228 (3d ed. 1982).

136. See, e.g., DAVID R. BROWER, *FOR EARTH'S SAKE: THE LIFE AND TIMES OF DAVID BROWER* 365-68 (1990); MICHAEL P. COHEN, *THE HISTORY OF THE SIERRA*

in particular caught the nation's imagination: "SHOULD WE ALSO FLOOD THE SISTINE CHAPEL SO TOURISTS CAN GET NEARER THE CEILING?" Another exhorted readers to write Udall: "Who Can Save Grand Canyon? You Can . . . and Secretary Udall can too, if he will."<sup>137</sup>

But the matter could not end with the defeat of the Marble Canyon and Bridge Canyon Dams. Perhaps it had become nearly unthinkable to dam Grand Canyon, but it remained completely unthinkable not to build the Central Arizona Project. The energy had to come from somewhere. So, instead of the two dams, the compromise came down in favor of the Navajo Generating Station at Page, Arizona, not far from Glen Canyon Dam.<sup>138</sup> Peabody Coal would supply coal from the rich deposits under Hopi and Navajo lands on Black Mesa.

All the trade-offs were embodied in the 1968 Colorado River Basin Project Act, the last comprehensive legislation of the Big Build-up.<sup>139</sup> The CAP would be funded, the coal-fired plant at Page would provide the electricity to pump the water to Phoenix and Tucson, and the other Colorado Basin states would get their pet projects.<sup>140</sup> It all depended on Black Mesa coal and if you owned it—hundreds of millions of tons of high-BTU, low-sulphur coal, maybe the best deposit in the country, maybe in the world—you held the trump card. But the Hopi and the Navajo, whose mineral leases were as one-sided as those of the Hopi, were never able to use the leverage their lawyers surely knew they had.

And so the mining complex on Black Mesa went full steam ahead. The costs have been high, both in terms of the impacts on the Hopi's spiritual homeland and in terms of lost revenues. Yet the two tribes have also gained many benefits from the mines. The Navajo have particularly benefitted. The Navajo Nation receives higher revenues than the Hopi Tribe because it splits the proceeds from the Black Mesa mine with the Hopi

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CLUB, 1892-1970, at 359-65 (1988); NASH, *supra* note 135, at 228-35; Coate, *supra* note 132, at 86.

137. BROWER, *supra* note 136, at 366-68.

138. H.R. REP. NO. 1312, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S.C.A.N. 3666; WILEY & GOTTLIEB, *supra* note 17, at 44-45; Coate, *supra* note 132, at 93.

139. See generally Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (1968).

140. See, e.g., *id.* § 301 (authorizing the CAP), § 303(b) (allowing the Secretary of the Interior to participate in power projects), § 501 (authorizing the Central Utah Project and the Animas-La Plata Project); Coate, *supra* note 132, at 87-92.

and also obtains all royalties from the Kayenta Mine.<sup>141</sup> In total revenues, the Navajo Nation receives about twenty-six million dollars annually, the Hopi Tribe about nine million dollars.<sup>142</sup> In addition, Indians hold ninety-three percent of the nine hundred jobs Peabody offers at the two mines.<sup>143</sup> These are steady, high-paying jobs, and a few Navajos have moved into management positions. Almost all the jobs go to Navajos, since the entrance to the mine is from the north, not far from the Navajo town of Kayenta. From the Hopi villages at the other end of Black Mesa, by contrast, the only all-weather route is through Tuba City, a drive of approximately 130 miles each way.<sup>144</sup>

All the while, as the revenues pour in, the blasting, digging, scouring, pumping, slurring, and railroading continue at a frenetic pace. The ambiguities and uncertainties continue too. "It's very simple," one Navajo leader told me. "We're hooked. When you're hooked, you lose your options."<sup>145</sup>

Recently, the water supply on Black Mesa has taken a sharp turn for the worse. The groundwater level under Black Mesa is dropping and springs have dried up.<sup>146</sup> The many skilled Hopi farmers notice it every day, and so do the people who haul their household water. The Interior Department and even Peabody agree that the aquifer is going down. It is unclear, though, why. It may be Peabody's pumping, but Peabody's claim that it takes water only from a deep aquifer, unconnected to the shallow surface aquifer feeding the springs, may be correct. The crisis—and it is that, for the Hopi have no perennial streams on their reservation—may be caused by overpumping from the shallow aquifer in the towns of Tuba City and Moenkopi, far to the west.<sup>147</sup>

Vernon Masayesva, who became Hopi Tribal Chairman in the late 1980s, believes to his depths that the water crisis at

141. Martin, *supra* note 94, at 40; Richardson & Farrell, *supra* note 49, at 24.

142. PEABODY WESTERN COAL COMPANY, *supra* note 96, at 19; Martin, *supra* note 94, at 37.

143. PEABODY WESTERN COAL COMPANY, *supra* note 96, at 19; Interview with Sil Perla, General Superintendent, Black Mesa and Kayenta Mines (Mar. 25, 1993).

144. Interview with Sil Perla, *supra* note 143.

145. Personal communication received by the author (Mar. 22, 1993).

146. See Elliot Diring, *Drying Springs Threaten Hopis*, SAN FRANCISCO CHRON., Dec. 17, 1993, at A1; Joanne Dittmer, *Running on Empty*, DENVER POST, Mar. 20, 1994, at A1.

147. Dittmer, *supra* note 146.

Hopi is caused by the Peabody pumping.<sup>148</sup> He has seen the long series of events of the Big Build-up. His life changed in the early 1970s when, as a young engineering student at Arizona State University, he listened late into the night in the pueblo homes in Hotevilla as the traditionalists, including Thomas Banyacya, talked about the immorality of leasing sacred land on Black Mesa. For him, Black Mesa, water, and the soul of the Hopi are all one. He laments, "All of our songs are about rain. Our poetry, our kachinas, are about rain. The mining of our water violates our beliefs. When you sell something that sacred, it doesn't sit right, it bothers you, it sits on your conscience."<sup>149</sup> Sil Perla, Peabody General Superintendent for the two mines, speaking not directly about water but generally about the whole matrix of jobs and money and culture and Black Mesa, says sympathetically but also matter-of-factly, "The Hopi want to go back to the way they were twenty years ago. That's impossible. Time goes on."<sup>150</sup>

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Wanting to get a view from a different angle, I watched the first round of afternoon dances from a flat roof above the northeast corner of the square. I counted six kivas around the village, the distinctive uneven tops of their ladders sticking up through the entrances. The kachinas entered the square, using the passageway just below me. Still logy from lunch, I was taken aback by their vigor. They had been fasting for four days.

As the kachina manas ritually made storm rumbles with their ratcheted sticks and gourds and the Hemis kachinas broke into their chant, I found myself wondering about John Boyden. He was a good man, an accomplished lawyer. He must have come to many Home Dances. Like myself, he tried to bring his sons and his daughters whenever he could. By every account, he cared deeply for the Hopi.<sup>151</sup> Many of them were his passionate loyalists. At Boyden's funeral, Abbott Sekaquaptewa, then Hopi Tribal Chairman, spoke with genuine warmth, affectionately referring to him as "Big John."

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148. Interview with Vernon Masayesva, *supra* note 53.

149. *Id.*

150. Interview with Sil Perla, *supra* note 143.

151. See, e.g., Richardson & Farrell, *supra* note 49, at 23.

Boyden had two kachinas in his office, the owl, a warning to watch for danger to Indian people, and the bear, the warrior.<sup>152</sup> His collection of Indian art, which included many kachinas, was magnificent, and he donated it to Utah State University, where it is on impressive display.<sup>153</sup>

Good lawyers, almost all of them, avoid even a brush with a conflict of interest. It is a matter of honor, not just a rule in the Canons of Professional Responsibility.<sup>154</sup> Lawyers can use the word "sacred" too, and they will likely use it first to describe their duty to their clients. Why, then, Boyden's seeming duplicity?

I do not think it was just the money. The fact that the Hopi made him rich would, if anything, have made him toe the line even more. The money may have been a factor, but my impression is that it was only that, a factor. Beyond that, Boyden was driven by the ambition that prompted him twice to seek the governorship of Utah. He may have wanted to be one of the main players in the Big Build-up, which meant so much to Utah and the Southwest.

Just as important, I have come to believe, was his certitude, his absolute conviction, that he knew what was best for society. The coal and water under Black Mesa could better be used by the cities for energy than by the Hopis. Besides, the Hopi could be brought into the twentieth century only through the revenue from coal mining. Toward these ends, it might be justifiable to ramrod the Tribal Council, and even to engage in some conflicts of interest. That certitude, if not the conflicts of interest, put Boyden in a large company of people who knew to an absolute certainty what was right for the Colorado Plateau in the halcyon postwar years. Conquest by certitude.

There was, too, his Mormonism. John Boyden grew up devout in Coalville and remained so all of his life. He was a bishop in Salt Lake City from 1953 through 1958. Only the most faithful are called to be bishops, a heavy, time-consuming responsibility. One of the speakers at Boyden's funeral in 1980 was Marion G. Romney of the Church's First Presidency.<sup>155</sup>

152. BOYDEN, *supra* note 41, at 266-68.

153. *Id.* at 216.

154. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 8, cmt. 10; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-16.

155. BOYDEN, *supra* note 41, at 115-21, 271-74.

In the era when the critical events at Hopi were unfolding, it may have been difficult for a devout Mormon to disentangle completely from the religion's complex and distinctive relationship with Native Americans. Indian people are Lamanites, a special group that can and should be saved by conversion to Mormonism.<sup>156</sup> When that conversion occurred, the curse of black skin would end and Indians would become—this was taken literally—"white and delightsome."<sup>157</sup> Thus it was practice for the LDS Church to reach out to and convert Indians. In the last analysis, did his religion contribute to his treating Indian people as less than full equals?

But the truest observation about John Boyden came from Vine Deloria, Jr., the Sioux historian and lawyer, whom I asked about this. Vine has a strong perspective on Indian policy in the 1940s and later, because he both studied and lived those times. He knew most of the people personally. Vine grew serious, because this was serious to him and he had thought about it a lot. He spoke slowly:

Look. To understand guys like Boyden and Norman Littel [the Washington, D.C. lawyer who represented the Navajo during the same era], you've got to understand the historical context. Nobody really believed that Indians had any rights. Nobody thought they would be around very long. "We'll just try to help that little band of survivors as best we can."<sup>158</sup>

Indians, in other words, were not equals, not in John Boyden's mind, not in Mormon society, not in American society. Weak and confused, the Hopi and other tribes had few ways to combat the many faces of termination—of conquest—during the 1950s and 1960s.

In the years since, there has been a renewal of traditional ways and a reassertion of tribal sovereignty across Indian

156. BRUCE R. MCCONKIE, *MORMON DOCTRINE* 32-33 (1966).

157. At 2 *Nephi* 30:6 the *Book of Mormon* edition used from 1870 until 1981 contained the phrase "a white and delightsome people." In the current *Book of Mormon* (1986), this phrase has been changed to "a pure and a delightsome people." The reason given for the change in language in the *Book of Mormon*, one of the few textual changes ever made, is that "pure and delightsome" reflects language used in pre-1870 editions. A *Brief Explanation About the Book of Mormon*, BOOK OF MORMON (1986). Elsewhere in the current edition of the *Book of Mormon*, the term remains "white." See BOOK OF MORMON, 2 *Nephi* 5:21, *Jacob* 3:8, 3 *Nephi* 2:15; see also Eugene England, "Lamanites" and the Spirit of the Lord, 18 *DIALOGUE: A JOURNAL OF MORMON THOUGHT* 25 (1985).

158. Interview with Vine Deloria, Jr., in Boulder, Colorado (July 11, 1994).



country. The Hopi have empowered themselves in many ways, including the reclaiming of their government from law offices in Salt Lake City. Vernon Masayesva, who as a young man went to the lengthy meetings of the traditionalists when the coal lease was at issue and who later became Tribal Chairman, speaks from his perspective gained over many decades. Gone are the days, he explains, "when lawyers were father figures. You don't question or criticize, you accept their word."<sup>159</sup> Now, at the Council's insistence, the old centralization of legal representation has been eliminated; the tribe has water specialists for water matters, trial lawyers for the land litigation, and on-reservation attorneys for handling ongoing business and coordination with the firms in Denver and Washington, D.C. Now the Hopi's lawyers give the Tribal Council options and explain the risks and advantages of each.

In 1987, the Hopi and their eminent Washington lawyer, Reid Peyton Chambers, succeeded in renegotiating the Peabody lease. Until then, the Hopi had never received more than three million dollars in any year in royalties. In all, the tribe lost tens of millions of dollars that it could have earned between 1970 and 1987. Under the renegotiated lease, the Hopi began receiving a standard royalty (divided with the Navajo) of 12.5% of the value of the coal. Hopi royalties doubled to more than seven million dollars annually. The old figure of \$1.67 for an acre-foot of water was scrapped, replaced by a payment of \$300 per acre-foot. Under a provision that the Hopi insisted upon to give Peabody an incentive to conserve water, the price for water doubles after the first twenty-eight hundred acre-feet. The new lease contains a reopener clause; after ten years, the royalties can be renegotiated, but they can only stay the same or go up.<sup>160</sup> The renegotiated lease did not completely heal all the old wounds, but it did eliminate the bitter taste of financial injustice.

The Tribal Constitution, adopted in 1936, and its Council, revived by John Boyden in the 1950s as the big mineral leases became possibilities, remain in place. So do many of the tensions engrafted onto the Constitution. Yet the Hopi make sure that the old values, as explained by the Kikmongwi, are embedded in their decisions. Problems, many of them, remain, but they will be addressed by the Hopi themselves. The Hopi

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159. Interview with Vernon Masayesva, *supra* note 53.

160. Interview with Reid Peyton Chambers, *supra* note 107.

have found a way, and although some of the trappings may be different, underneath it is the same way it has always been.

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The gift-giving grows more elaborate as the day moves on. During the last few rounds, the square becomes the analogy to Christmas that is often made about Home Dance. For weeks, the men at the village have been busy making gifts, mostly flat dolls—kachina-like figures carved and painted on thin boards—and kachina dolls, some small and simple, some large and exquisitely carved. Each of the presents is tied to a corn stalk. There are so many gifts that the kachinas bring in several armloads for each round.

The restraint of the children is incomprehensible to me. They stand there and a Hemis kachina—huge, beautiful, powerful, mystical—approaches. These little people remain perfectly still, betrayed only by their eyes, which widen, widen, widen as it becomes ever clearer that they may be a chosen one. Don't move, don't extend the arms yet. The kachina may be going to the nearby cousin. Then! The kachina is right in front of me—so towering, so strong, so giving. Somehow, miraculously, the corn plant and the tied-on kachina doll are in my arms. I can't run out from the square, but I am allowed to walk. Calmly. Slowly. No show of excitement on my face. Now, I'm past the last row! A few more steps and I can run! I'm off, back to my own living room with this magical kachina that can teach me so much, inspire me, be with me always . . . .

It was 6:30 p.m. when the kachinas filed out. The last round would be a ceremony in which all the young women who had been married in traditional Hopi ceremonies during the past year would be presented to the gathering. This was an important time for the brides. Hopi weddings involve two weeks of ceremony and this was the last time they would wear their wedding dresses. A woman, whose daughter had just married, told me that the next round would be the last. "Isn't this something?" she said, looking up. I had been enjoying the clouds for the comfort they brought from the July heat. I hadn't noticed how they had thickened and darkened or appreciated their significance on this day.

The rain was coming down lightly but steadily as the kachinas entered the square. The crowd had swollen during the

last rounds. Now a thousand or more. All the rooftops were packed. The kachina father and the kachina manas started up the songs of the Hemis kachinas. Soon a surrounding lightning storm broke out. There is no place like a high mesa in the American Southwest to see lightning ignite. The streaks cracked the sky in all directions. Thunder. The rain began coming down in sheets. It was the tail end of dusk now. No one wanted to leave, although some did. Drenched, we found a vacant eave and moved under it. A man next to me said quietly, "This Home Dance will last this village a long, long time."

The kachinas moved into single file for the last time, ready to begin their journey to the San Francisco Peaks. This was when Pueblo people could pluck sprigs of spruce from the kachinas. They did their work so deliberately and took so much longer than I had imagined, that at first I worried for the kachinas, bare-chested, wet, exhausted. Yet they stood in line so erect, absolutely still. Then I realized how exactly wrong my reaction was. This was no ordeal. This was their moment, a chance to extend a final gift of spruce after all the many gifts of the long day.

The rain softened into a drizzle. The people had finished gathering their spruce. The kachina father moved to the head of the line. A flash bright-whitened the square, the village, the whole mesa. The violent thunderclap shattered the air almost immediately. The noise and vibrations came from no specific place; they came from everywhere—from on high, from all sides, up from the ground. Right then, the kachina father called out and the kachinas broke into stride, their work done, heading toward home.