19. 1956-1961: PREPARING THE WAY FOR MINERAL LEASING

It was no secret to anyone that the progressive faction which controlled the Hopi Tribal Council had views about land and religion which were very different from traditional Hopi principles. The Hopi Tribal Council was willing to barter over land rights as white Americans did. It was willing and eager to get into mineral leasing ventures, and would eventually approve massive strip mining of Hopi land. To accomplish these ends, the Council was prepared to take into United States Courts its case for the partitioning and division of the 1882 Hopi Reservation.

The traditional Hopis knew they were in for serious problems when the Commissioner granted official recognition to the Hopi Tribal Council in late 1955. Their protests and warnings went not only to Washington but also the Hopi Tribal Council itself. In a letter from the "Hopi Indian Nation" to the Council's chairman in early 1956 (Exhibit 89), 28 traditional Hopis of Hotevilla announced that they would not recognize or approve any acts taken by the Council:

> We have never approved nor ever will recognize the present so-called Hopi Tribal Council to be the representative of the Hopi people. We will never cooperate with you or the Council members even though it has been recognized by the present Commissioner of Indian Affairs, Glenn L. Emmons. We will hold all actions of the so-called Hopi Tribal Council illegal, null and void in view of the fact that the real traditional Hopi leaders have never given their consent or approval to the Council to be the representative of the Hopi Tribe.

Dan Katchongva's was the first signature on this letter. The letter was sent on the twentieth anniversary of the resistance Katchongva had helped lead against Oliver LaFarge and the original Hopi Tribal Council. (See, pp. 38-54, above.) He knew the twelve-year respite from official Council activity, which began when the Council collapsed and disbanded in 1943, was over. Thanks to BIA manipulation, the Council was again in command with the full blessing of the United States government.

The Hopi Tribal Council, under the tutelage of its attorney, John S. Boyden, made immediate plans to secure title for mineral leasing to as much of the 1882 Hopi Reservation as possible. A formal challenge to Navajo mineral rights in that area was made in a petition to the Secretary of the Interior for reconsideration of the 1946 Solicitor's opinion recognizing Navajo rights. In March 1957, the Navajo's attorney, Norman M. Littell, filed his opposition to the Hopi petition.

By late 1956, it became clear that the Hopi Tribal Council would have to go to Congress for help, so Boyden (working closely with the BIA) helped prepare legislation authorizing a test of Hopi and Navajo land rights in the United States Court. Boyden was being paid only $6,000 per year for his Hopi work at that time, but he admitted that he saw bigger money coming down the road once mineral leasing began.

The traditional Hopis petitioned and protested against the legislation but to no avail. (Exhibit 90.) By letter of November 20, 1957, Commissioner Emmons wrote the Tribal Council that he was "happy

to reaffirm" their recognition as the exclusive Hopi government. In the same letter he noted that Council membership was still only a bare quorum as required by the Hopi Constitution. [Exhibit 91.]

By July 1958, legislation had been enacted approving the filing of a lawsuit between the Hopi Tribal Council and the Navajo government to test their respective rights in the 1882 Hopi Reservation.* The lawsuit of Dewey Healing, Chairman of the Hopi Tribal Council, versus Paul Jones, Chairman of the Navajo Tribal Council (Healing v. Jones) was authorized by Congress only eighteen months after the Hopi Tribal Council was officially recognized. The Hopi Tribal Council was on its way to mineral leasing, following in the footsteps of the Navajos who had already undertaken significant mineral leases in the undisputed parts of the Navajo reservation.**

John Boyden and the Hopi Tribal Council were not content to sit back and wait for the Healing v. Jones case to be decided before getting into the mineral business. On June 30, 1959, the Hopi Tribal Council passed an ordinance establishing procedures and fees for the issuance of permits to prospect for oil and gas upon the Hopi reser-

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*Public Law 85-547, 85th Cong., 1st Session, 72 Stat. 402, July 22, 1958.

**Also in 1958, Congress pumped $20,000,000 more into the kitty for Hopi-Navajo rehabilitation, and designated the money for roads. The House of Representatives noted that there was "tremendous increase in road use in the reservation area" due to "oil and gas development, uranium mining, and other economic development," all of which was "breaking down" the roads. (House Report No. 2455.) Money seemed to be no object when mineral exploitation was at issue.

vation. This ordinance was supported by BIA Area Director F. M. Haverland, whose letter to the Commissioner of Indian Affairs sought to open a new line of power for the Hopi Tribal Council. Haverland's letter took note of the fact that the Hopi Constitution contained these words specifying its powers:

> The Tribal Council is given authority. . .To prevent the sale, disposition, lease or encumbrance of tribal lands, or other tribal property.

Despite the fact that the constitution's language authorized the Council only to prevent leasing, Haverland argued that the same language could be read to allow leasing (Exhibit 92):

> Conversely, we [at the BIA] presume to allow the leasing, disposition, sale or encumbrance of tribal lands, if it does not desire to prevent the same.

A clear limitation on the Hopi Tribal Council's authority was thus twisted in favor of unfettered authority for the Council.

A few weeks later, Dan Katchongva wrote a letter of protest on behalf of the traditional leaders of Mishongnovi, Shungopovy, Oraibi, Hotevilla, and "the majority of the Hopi people." (Exhibit 93.) He stated that the ordinance was designed to "open Hopiland for prospecting for oil and gas" and that it had been enacted "without the knowledge, consent nor approval of the Hopi Traditional Leaders and the majority of the people in these villages." *

Ironically, the Hopi Constitution itself supported the position of the traditional Hopi leaders. When the Hopi Constitution was

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* In November, 1958, traditional Hopi leaders met at Hotevilla and joined traditional Utes in demanding a federal grand jury investigation of John S. Boyden.

drafted by Oliver LaFarge in the mid-1930s, the question of whether the Hopi Tribal Council would have authority to enter into mineral leases was not especially significant. It was not until the early 1940s that the potential mineral wealth of Hopi land was discovered. In his effort to obtain approval of the Hopi Tribal Council, LaFarge had written into the Constitution clear limitations on the power of the Hopi Tribal Council. Had LaFarge attempted to authorize leasing of Hopi land by the Hopi Tribal Council, the boycott of the 1936 election would surely have grown, making it even more difficult to obtain a showing of support for the Hopi Constitution.

When the Solicitor's Office of the Department of the Interior was asked in 1959 to review the leasing powers of the Hopi Tribal Council, nothing was found in the Hopi Constitution to justify the Council's position. In a decision of November 16, 1959, the Solicitor's Office ruled that the Hopi Tribal Council did not have the legal authority to grant mineral leases under the Hopi Constitution (Exhibit 94):

> The Hopi Indians have expressly limited their Tribal Council to powers expressly mentioned in the constitution. None of the powers so listed can be construed to cover the granting of prospecting permits for oil and gas.
>
> Until the members of the Hopi Tribe have exercised the right to adopt an appropriate constitutional amendment, the Tribal Council is without power in the premises.

Temporarily set back by this ruling, the Hopi Tribal Council was not willing to follow the recommendation that it seek an appropriate amendment to the Hopi Constitution. The Council did not want to

conduct the campaign and referendum which was necessary before such an amendment could be made.

Rather than proceed to amend the Hopi Constitution, John S. Boyden, the Hopi Tribal Council, and the BIA field personnel conceived of a plan to undercut the constitutional restriction on mineral leases. They proposed that the Secretary of the Interior give leasing authority to the Hopi Tribal Council under a clause of the Hopi Constitution which reads as follows:

> The Hopi Tribal Council may exercise such further powers as may in the future be delegated to it by the members of the Tribe or by the Secretary of the Interior or any other duly authorized official or agency of the State or Federal Government.[Hopi Constitution, Article VI, Section 3].

On the strength of this clause, the Secretary of the Interior "delegated and granted the power" to make mineral leases to the Hopi Tribal Council on May 24, 1961. (Exhibit 95.) The government thus effected a unilateral amendment of the Hopi Constitution without suffering through another (and uncertain) referendum in Hopi country, as required under the Hopi Constitution. To the traditional Hopis, this grant of new and sweeping powers to the Council, in absolute violation of the Hopi Constitution itself, was further confirmation of their view that the Hopi Tribal Council was merely a tool and accomplice of the United States government. In the end, the United States would tolerate no legal objection to the power of the Council or the leasing of Hopi lands, and would perform flagrant legal manipulations to carry out its plans.

20. THE FIRST COAL MINING LEASE

In the late 1950s and early 1960s, there was little direct traditional Hopi protest focused on the Indian Claims Commission's handling of Docket 196. Attorney John S. Boyden was responsible for the litigation of Docket 196, and almost all of the proceedings were legal matters under his control which took place in Washington, D.C.

The focus of traditional Hopi discontent during this period of time was on the growing power of the Hopi Tribal Council, the beginning of mineral leasing, the Healing v. Jones case, and the continued presence of John S. Boyden in Hopi affairs. However, many of the issues presented by these matters have a direct bearing on the Docket 196 case.

One expression of traditional Hopi discontent is a letter written in September 1960 to the Chief Judge of the United States Court handling the Healing v. Jones case. (Exhibit 96 .) Dan Katchongva and Andrew Heremequaftewa wrote on behalf of the Hopi Sovereign Nation, the traditional villages of Mishongnovi, Shungopovy, Oraibi, Hotevilla, Lower Moencopi, and traditional people in the other Hopi villages. Again the Hopi Tribal Council's legitimacy was challenged. Again the authority of John S. Boyden to represent all Hopis was denied. The Court was informed that the traditional Hopi leaders did not authorize or approve of the Healing v. Jones case and that they would not consider any decision in that case to be binding on them:

> Any decision that has been made and will be made in the Federal Courts of the United States will be considered not binding on the Traditional Chiefs and Religious priests and their people. All actions in Prescott, Arizona Federal Court will be considered NULL and VOID by the Hopi Chiefs and the Majority of the people. They will not pay Attorney John S. Boyden for the services rendered for the Hopi Tribe as he was not hired by them.

Similar protests were made directly to the Hopi Tribal Council including a letter of February 14, 1961, from David Monongye and Thomas Banyacya, who challenged the very composition of the Council under its own constitution and by-laws:

> You and the Agency Officials know full well that the Council does not have representatives from Mushongovi, Shungopavy, Oraibi, Hotevilla and Lower Moencopi. Village of Bacabi has recently voted by majority against participation in the Council. This fact is being ignored by a few, mostly Government employees, Hopi men in that village. Village of Shipaulauvy has one representative in the Council but the majority of the people in that village have never voted on this matter. So you see, your whole organization has been operating illegally ever since it started. [Exhibit 97.]

The traditional leaders opposed both the composition of the Council and its actions. When the Hopi Tribal Council had passed an ordinance in late 1959 seeking to raise revenues for Council work and attorneys' fees by taxing Hopi merchants, Dan Katchongva and other traditional leaders registered a protest to the Council in the name of the Hopi Independent Nation. (Exhibit 98.) They refused to pay these taxes, and they stated that they would not recognize the legal authority of the Council to levy any taxes.

An especially strong protest was made by the traditional Hopi leaders when they learned of an impending coal lease with the Fisher

Contracting Company. On November 16, 1961, a letter signed by eight traditional Hopi leaders (Exhibit 99) was sent to the BIA Superintendent. It included this specific objection to coal leasing:

> This is to formally advise you and the members of so-called Hopi Tribal Council, Secretary of the Interior Udall, Attorney John S. Boyden, Area Director Frederick M. Haverland and Fisher Contracting Company of Phoenix, Arizona, that it is the unanimous verdict of the Hopi Traditional Chiefs and the Hopi people, during a meeting held Saturday, November 11, 1961, in Shungopavy Village, that you take immediate action to cancel and revoke any agreement or arrangement for the Fisher Contracting Company to carry on exploration or prospecting work for minerals, or other purposes on Hopiland.

The traditional leaders had received accurate information, for there had been serious leasing negotiations between the Council, Boyden, the BIA, and Fisher Contracting Company throughout much of 1961. These negotiations resulted in a small coal prospecting agreement between the Council and Fisher which involved lands located within District 6, undisputed Hopi area.

The Fisher Contracting Company lease was a prelude to the multi-million dollar coal strip-mining leases with Peabody Coal Company.* The big leases would not be completed until after Healing v. Jones resolved the dispute about leasing power of the Hopis and Navajos in 1963. However, the correspondence surrounding the negotiations with Fisher Contracting Company discloses that Peabody Coal Company had expressed interest in leasing Hopi land as early as August 1961.

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*The Fisher agreement was terminated in September 1962. The Hopi Tribal Council reportedly made about $10,000 under that agreement.

(Exhibit 100.) In March 1962, the Hopi Tribal Council was informed by attorney Boyden that Peabody Coal Company had offered to enter into an agreement to prospect or lease in the northern part of the 1882 Hopi Reservation. (Exhibit 101.)

It was clear to all involved that by 1961 the Hopi Tribal Council had embarked on a major mineral leasing venture. From that time to the present, the traditional Hopi leaders would continue to fight the leasing and massive strip-mining of Hopi land which they would call the desecration of Mother Earth.

21. THE HEALING V. JONES DECISION

In September 1962, a three-judge federal district court decided the Healing v. Jones case. The following year it was affirmed by the Supreme Court.* The court ruled that District 6, the range management area set aside for the exclusive use of the Hopis, was indeed the sole reservation to which the Hopis had an exclusive legal interest. In so ruling, the court's official imprimatur was added to the fencing in of the Hopis which had occurred in the face of vociferous traditional Hopi objection at the time and which had occurred in the face of numerous official pronouncements that no small exclusive Hopi reservation would result. (See Part 5, above.)

The Healing Court also ruled that all of the 1882 Hopi Reservation lying outside District 6 was an area in which the Hopis and Navajos had an undivided and equal interest. This area was to be known as

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

the "Joint Use Area." The sixty-three page opinion of the court will not be summarized in this report, but one quotation will be included to demonstrate the legal premise from which the court began in its discussion of Hopi land rights:

> The right of use and occupancy gained by the Hopi Indian Tribe on December 16, 1882, was not then a vested right. As stated in our earlier opinion, an unconfirmed executive order creating an Indian reservation conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such use and occupancy may be terminated by the unilateral action of the United States without legal liability for compensation. The Hopis were therefore no more than tenants at the will of the Government at that time. No vesting of rights occurred until enactment of the Act of July 22, 1958. [210 F. Supp. 138.]

Translated into non-legalese, the court based its decision on the notion that originally the Hopis had no more rights to their land than a tenant without a lease. In the court's view, the Hopis had no real right to their homelands until Congress passed the statute in 1958 which expressly gave them property rights to whatever land the Healing court would determine to be theirs. According to this view of Indian land rights, the Hopis, from the time of the Treaty of Guadalupe Hidalgo in 1848 until 1958, had only slightly more legal right to the land they occupied than squatters, trespassers and passers-by. Since the court concluded that the Hopis had no significant property rights during that century of United States rule, it necessarily followed that any action which the United States took which interfered with the Hopis' use and occupancy of the land was completely excusable under United States law. Without any protection under the United States Constitution, and without any

recognition of sovereign rights or treaty guarantee, the Hopis were found by the Healing court to be without any legal right to their ancient homeland. The only legal Hopi rights to land which the Healing court would recognize are the rights acknowledged by Congress in the legislation of 1958.

The traditional Hopis sought to dissociate themselves from all of these shocking developments. In a letter of November 21, 1962, Melvin Tewa, Chief of the traditional Hopi village of Lower Moencopi, wrote Senator Carl Hayden a letter on behalf of himself and other traditional Hopi people:

> I am writing on behalf of all the Hopi chiefs and people to earnestly inform you that we would not be able to regard as legal any ruling contained in the recent Healing v Jones judgment concerning the land dispute between the Hopi and Navaho on the primary ground that the Plaintiff of the case, Dewey Healing, is merely a representative of the Hopi Tribal Council, which, historically as well as legally, is not a justifiable organization of the Hopi and which does not include any of the traditionally recognized chiefs.
>
> .....
>
> Further we must point out that the tenure of John S. Boyden for the suit was a matter solely disposed of by the Council and not to any recognition of the Hopi chiefs. . . . [Exhibit 102.]

The Commissioner of Indian Affairs wrote to Senator Hayden in response to this protest. He argued that everything was proper because the Hopi Tribal Council was functioning with a quorum and because a majority of Hopi villages were represented on the Council. He further argued that the Healing v. Jones case was about a controversy between the Navajo and Hopi Tribes over rights and interests in the 1882 Hopi

Reservation. There is, of course, no hint in his letter of the United States government's interest in maintaining the Hopi Tribal Council and in facilitating the leasing of Hopi mineral resources. The BIA has always been quick to write off any problems in Hopi country as merely Hopi-Navajo disputes. This approach has, over the years, diverted much attention from the BIA's intermeddling and bungling.

Senator Barry Goldwater, a public official far more knowledgeable about Hopi affairs, was treated more gingerly when he made a pointed inquiry about the Hopi situation. He had corresponded with Caleb H. Johnson, a man who has served as interpreter and spokesman for the traditional Hopis. In an April 1963 letter to Senator Goldwater, an Associate Commissioner of Indian Affairs first explained how leasing authority had been delegated to the Hopi Tribal Council. He then admitted:

> The Bureau, as well as the Tribe, is cognizant of the shortcomings of the Tribal Constitution and the need for amendment. [Exhibit 103c]

He said that amendments designed to incorporate the traditional Hopi community into the Hopi government had been considered for about five years, but that the time was not yet ripe to act:

> The Hopis apparently felt discussion of constitutional questions might cause dissension among the Hopis which would be exploited by the Navajos to the detriment of the Hopis in the territorial dispute.

This was a confusing way of saying that the traditional Hopi leadership did not want the Healing v. Jones case to continue, that they did not want to fight the Navajos in such court action, and that they did

not want the land divided, partitioned, or strip-mined. The Hopi Tribal Council and the BIA did want all of these actions to continue. They knew that any amendment process might give the traditionals an upper hand which would again halt the BIA's program as it had done in 1943.

The letter concluded with the self-righteous pronouncement of respect for Hopi self-government, a principle which had never been honored in Hopi country and which had been violated countless times by the BIA:

> Any indication that the Bureau would impose a need for action on the Hopis would tend to defeat the purpose and would leave the Bureau vulnerable to the charge of interfering in tribal matters.

Time after time, the BIA had trammeled Hopi self-government and interfered in Hopi affairs to foster and maintain U.S. government programs. All of that interference, much of which is catalogued above, was to the detriment of the traditional Hopi leaders.

Congressman James A. Haley, Chairman of the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, wrote of concerns similar to those expressed by Senator Goldwater. In a letter to the Commissioner (Exhibit 104) he pointedly asked:

> Now that a judgment has been handed down in Healing v. Jones, what steps have been taken to create a committee to draft a constitution? I am aware of the factions within the Tribe, but unless steps are taken to establish a working relationship among them, I doubt if the differences will settle themselves.

Although the BIA had since 1957 been promising Congress that it would support amendments to the Hopi Constitution which would incorporate

the traditional Hopi leaders into the Hopi government, although the recognition given to the Hopi Tribal Council in 1955 spoke of the need for amendment, although the delegation of mineral leasing authority to the Hopi Tribal Council included a statement of need for amendment, and although attorney John S. Boyden had himself informed the Commissioner in 1961 that "after a rather careful study, we are confident that the entire constitution should be reviewed and redrafted," (Exhibit 105), the BIA, Boyden and the Council continued in 1963 to take the position that amendment would begin only after all of the legal problems between the Hopi Tribal Council and Navajo Tribal Council were resolved. (Exhibit 106.) That moment has yet to arrive.

In July 1963, the "authority" of the Hopi Tribal Council to lease lands was again confirmed and further clarified by the BIA. (Exhibit 107.) While the Hopi Tribal Council voted a raise to John S. Boyden which would make his salary $9,000 per year, traditional Hopi leaders wrote the BIA and the Council another protest on behalf of the Hopi Independent Nation calling for "a full investigation of all activities of the so-called Hopi Tribal Council, Bureau of Indian Affairs, and attorney John S. Boyden. (Exhibit 108.) There was newspaper coverage of some of the traditional protest. (Exhibit 109.) And efforts were made by some to help find an attorney to challenge Boyden and the Council. (Exhibit 110.)

With the BIA fending off all attacks, the Hopi Tribal Council and John S. Boyden moved ahead with their program and prepared legis-

lation to formally partition all of the 1882 Hopi Reservation. The introduction of such legislation brought a new wave of protest from traditional Hopi leaders. (Exhibit 111.)

22. THE FIRST COURT CHALLENGE TO MINERAL LEASES: STARLIE LOMAYOKEWA V. KERR-McGEE OIL INDUSTRY, INC.

In 1964 the Hopi Tribal Council entered into its first large mineral leases. The lessees included Kerr-McGee Oil Industry, Inc., Pennzoil Company, Tenneco Oil Company, Aztec Oil & Gas Company, El Paso Natural Gas Products Company, Kewanee Oil Company, Gulf Oil Corporation, Shamrock Oil & Gas Company, Texaco, Inc., Amerada Petroleum Corporation, and others.

Late that same year, a lawsuit was filed on behalf of named representatives of the Hopi villages of Mishongnovi, Shipaulavi, Oraibi, Shungopavi, and Hotevilla by a Phoenix attorney named Robert J. Wellie-ver.* All the lessee mineral companies were named as defendants, and the Hopi Tribal Council was also sued as a defendant. The complaint in that case alleged that the Hopi Tribal Council was without jurisdiction, power, right or authority to enter into those leases, that the lands in question belonged to the sovereign Hopi villages. The suit was captioned Starlie Lomayokewa et al. v. Kerr-McGee Oil Industry, Inc., et al.

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*Some traditional leaders had opposed bringing any action in United States Courts.

(U.S. District Court, Arizona, No. Civil 955 Pct.).*

By order of December 29, 1964, U.S. Judge Walter M. Bastain dismissed the case against the Hopi Tribal Council, ruling that the Hopi Tribal Council was a sovereign government, immune from suit and an indispensable party which could not be joined. The first court challenge to the Hopi Tribal Council was speedily rebuffed.

A curious and as yet unexplained development in this lawsuit is the fact that Attorney John S. Boyden represented both the Hopi Tribal Council and one of the lessees, Aztec Oil and Gas Company. (Exhibit 112.) This is the first but not the last indication that attorney Boyden had a very close working relationship with some of the mineral companies interested in exploiting Hopi mineral wealth.

23. $1 MILLION ATTORNEY FEE APPROVED FOR ATTORNEY BOYDEN

The 1964 mineral leases brought sudden wealth to the Hopi Tribal Council. The Council reportedly received some three million dollars for the leases, and more millions were foreseen in the immediate future. The Council was flush with money and power.

On December 3, 1964, John S. Boyden and two of his associates,

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*In the course of the proceedings, Secretary of the Interior Stewart Udall delegated even more leasing power to the Hopi Tribal Council. He authorized the Council to lease the Hopi mineral interests in the Joint Use Area. Even more leasing authority would be delegated in 1966. (Exhibit 113.)

Allen H. Tibbals and Bryant H. Croft, brought before a meeting of the Hopi Tribal Council their request for attorneys fees. The meeting convened at 1:15 in the afternoon. Soon Boyden and his associates began their presentation in support of attorneys fees for the work done in the Healing v. Jones case, for the defense of the Kerr-McGee case (which was at that very time coming to a close), and for other incidental legal work. A "day-long discussion" followed in which Boyden painstakingly detailed the work which he and his law firm had performed. The Council then excused Boyden and his associates from the meeting. According to the official minutes of that meeting, the following discussion then took place:

> The Hopi Indians present thought that 15 years was a long time to wait for payment, especially with the possibility of receiving no fee at all. It is very hard to put a price tag on all the insults and discouragements that resulted from the Traditionalist and NON-Indian opposition to all of Mr. Boyden's work. Numerous suggestions were made as to the fee. The start was around $100,000 which was suggested as a retainer fee that would be normally paid to a firm undertaking this kind of a job. This was rejected as the Hopi said this did not cover the interest, the hazards of the monetary benefit the Hopi had received. A suggestion was then made that they should give Mr. Boyden a million dollars. Quite a number of Hopi Indians agreed to this and someone said that Mr. Boyden would have to give his partners and others a percentage of this. Another Hopi said that they should give Mr. Boyden a fee of $535,000.00 and then award him a sum for himself. More discussion was held in Hopi and then the proposal was made that they give Mr. Boyden a fee of $780,000.00, with an additional $220,000.00 just for himself as an expression of their gratitude and thankfulness that he was able to get most of their land back and to repay him in part for all the bad things others had said about him. They all seemed to agree on this. One old man said that money means a lot to the bahanas, but land is what the Hopi people want and that we still have our land after they have spent all this money we are giving them.
>
> After a short recess the council was reconvened and a motion was made that the Tribal Council agree to pay Mr. Boyden a total fee of

> one million dollars for services in the litigation involved, $220,000.00 of which is to be considered compensation to Mr. Boyden for himself as an expression of the Hopi Tribe's gratitude and thankfulness for his diligence in following through and not quitting as others would have done. The motion was seconded. The vote on the motion was 9 in favor and none opposed. There being no tie vote, the Chairman refrained from voting.
>
> Mr. Boyden was then called back in and was told of the council's action. Then each Hopi present arose and came around and personally thanked Mr. Boyden, Mr. Tibbals, and Mr. Croft.
>
> The Council was then recessed while Mr. Boyden prepared to leave. [Exhibit 114.]

The million-dollar fee approved for Boyden at this meeting of the Council was only the first million that he would make from his work for the Hopi Tribal Council. The high fee was, according to the Council, justified in part by "the insults and discouragements that resulted from the Traditionalist and NON-Indian opposition to all of Mr. Boyden's work." Boyden himself had made the same argument in support of high fees. In his presentation to the Council he urged them to consider this factor:

> The opposition encountered; including that of the United States, the Navajo Tribe, the Hopi Traditionalists, and private interests.

Again the gross inconsistency of Boyden's position is exposed, for he often argued that <u>all</u> Hopis were his clients. Yet here he argued that the opposition of the traditional Hopis to his work justified higher attorney fees from the Hopi Tribal Council. It is nonsensical to argue that an attorney is entitled to greater attorney's fees because his "clients" did not want his assistance and therefore refused to cooperate with him. Boyden, the Council, the BIA, the mineral companies, and the Hopis themselves all understood that Boyden in fact represented <u>only</u>

the progressive Hopi faction which was represented by the Hopi Tribal Council.

24. THE TRADITIONAL LEADERS SEND A PROTEST PETITION TO PRESIDENT LYNDON B. JOHNSON

Having failed to stop the Hopi Tribal Council, the Healing v. Jones lawsuit and the first major mineral leases of Hopi land, the Hopi traditional leaders sent another protest petition to another United States President. The full text of that petition to President Lyndon B. Johnson reads as follows:

HOPI INDEPENDENT NATION
HOTEVILLA VILLAGE
HOTEVILLA, ARIZONA
JANUARY 12, 1965

Mr. Lyndon B. Johnson
President of the United States
The White House
Washington, D.C.

Mr. President Johnson:

On behalf of our Hopi traditional and religious leaders of the Hopi Nation, I, Dan Katchongva, Sun Clan and religious leader, spokesman for Hotevilla, urgently write you to bring to an end the forceful and illegal seizure of our ancient homeland, destruction of our religion, and Hopi way of life as an independent nation. Our homeland, way of life and religion are bound together as one and to uproot this oldest and most peaceful way of life, religion and self-government would mean destruction of all life of all people on this land.

Mr. President, our peaceful way of life and land are seriously threatened by your government, the government of the United States, under the arbitrary rule of the Bureau of Indian Affairs officials, the so-called Hopi Tribal Council which does not represent the traditionally established villages and attorney John S. Boyden, a Mor-

mon church member who was never hired by us and therefore does not represent us.

By reducing the Council members to merely puppets Keams Canyon Agency officials and John S. Boyden pressured them into rubber-stamping their pet plans and policies against the will of the traditional leaders and the majority of the people, they have finally leased our sacred homelands for oil, gas and other mineral development against the strong protests of the village leaders and people. They have denied the Hopi people to express their views or objections, often times they are intimidated, threatened and by calling those who oppose them trouble makers and by totally ignoring the people they claimed to represent they have brought about suit against the Navajos and the government of the United States against our will. After spending most of our tribal fund, attorney Boyden forced our young men to sell our property and leasing our homeland has made himself rich by grabbing most of our tribal money. He has stolen the money from us. He has made some of the members of the Council and Hopi government employees rich, but the majority of our people have never gotten benefit from the tribal fund. We demand you investigate this matter. We are not asking for our share of the illegally gotten money, the lease money, but we are asking you to stop this crime and illegal seizure of our ancient homeland.

Under their rule we have no rights to protest even though we occupy and built our villages on this land long before any white man or the Navajo came upon us. This is wrong and is as serious as if Russia or China or any other foreign country forced their way in and start to destroy your way of life, religion and land.

Now, we have heard you to say you desire peace, freedom and self-determination for all people. That is our desire and aim also and we have been peaceful with your government yet are not being protected by your officials at this date.

As first people to settle on this land we ask you: Are your government while speaking of freedom for all people in this world going to shut his eyes to this shameful destruction of our sacred land, religion and way of life? Or will you act immediately to stop all leasing of our land, illegal confiscation of our property and thereby fulfill your duty and obligation as guardian and protector of our property?

We have our sacred stone tablets in our possession which we firmly believed was given us by the Great Spirit, Massau'u. It contained the basic principles upon which our way of life, religion and land rest. It also contained the ancient teachings of the laws of the Great Spirit which governs our land and life. It foretold things that has happened in the past and will happen in the near future and what we must do at this period of life.

Therefore we must not allow our mineral resources to be disturbed in any manner at this time for it may fall into the hands of wrong or evil men and be used to make more powerful destructive weapons. This must be held for the future use of all good people when it shall be used in a peaceful way after the purification day where evil and wrong doing shall be destroyed or punished. This is the law of the Great Spirit.

Knowing these ancient knowledge and warnings for this day we are much concerned with your government's actions in trying to make life secure for your people by using armed forces in foreign lands. Our traditional and religious elders all have warned against going into other lands to create trouble. It would mean, they say, sowing the seeds of self-destruction. Therefore, the Hopi must remain to his religion and his instructions and not participate in a white man's wars. Our concern is to do the will of the Great Spirit and only by humble prayers we take care of our homeland and all people who are here with us. We are awaiting our true white brother to come to purify this land and life. When he comes with great power and might we must not show our bows or arrows to him but stand before him unafraid and speak with him in our own language and thereby showing our strong faith in the Great Spirit. For this reason we must bring this vital message direct to you as the highest leader of your people. We are willing to speak on these matters with you or with anyone who desire real peace, human understanding and true brotherhood.

We have for a long time tried to bring this message to your government officials, the so-called Hopi Tribal Council, and the two former presidents of the United States and even knocked on the doors of the United Nations but no one has heard our voice. We shall make attempt to tell the whole world for we seek real justice, real peace and freedom for all good people on this land and would not want to see our homeland be destroyed by gourd of ashes or H-bombs. We ask the whole world to do away with wars and sit down together to live peace as intended by the Great Spirit. We ask justice and correction of all wrong doings on Hopiland and in the lands of our Indian brothers. This is our sacred duty to our people. We asked you to stop leasing of our homeland now and investigate, correct and punish, if necessary, those found guilty of this dishonorable destruction of our way of life. Our life is at stake!

/s/
DAN KATCHONGVA, HOTEVILLA

DK/t.b.

[Exhibit 115.]

25. CONTINUING CHALLENGES TO DOCKET 196 AND THE HOPI TRIBAL COUNCIL

At the same time a new challenge to the Hopi Tribal Council was sent to the Secretary of the Interior. The traditional Hopi leaders took the position that the payment of attorneys fees to John S. Boyden was illegal, and they asserted that several Tribal Council members were not legally entitled to be on the Council under its own constitution and by-laws. (Exhibit 115A.)

Traditional Hopi protests were also again addressed to the Indian Claims Commission. In a letter of February 1, 1965 (Exhibit 116) the opposition to Docket 196 was again clearly stated:

> We, the undersigned, traditional and religious leaders of the Hopi People, do hereby, announce to you and to the world that all traditionally established Hopi villages of Lower Moencopi, Hotevilla, Old Oraibi, Shungopavy and Mushongnovi have never hired attorney, John S. Boyden, to represent them on a suit against the government of the United States and have never authorized the so-called Hopi Tribal Council to sell, lease or anyway dispose of our ancient homeland for we hold all this land in common and on the religious bases . . .

One of the most significant traditional protests to the Hopi Tribal Council was the continuing boycott of the Council. Minutes of a Hopi Tribal Council meeting of March 10, 1965, show that the Council was still--ten years after official Council recognition--comprised of only a bare quorum of certified members. Needless to say, it had been difficult over the years to conduct business with such a membership. But the Council had worked with Boyden to devise a procedure for overcoming the problems presented by absent members. That procedure was

discussed at the March 10, 1965 meeting after questions of its legality had been raised:

> Chairman Thomas was given the authority to ask Mr. Boyden's opinion of the legality of appointing alternates for representatives who are unable to attend a council meeting....Mr. Boyden indicated that there was nothing in the constitution that says that alternate representatives to the Council is not legal and nothing that prohibits it. This has been done for years and the only thing it says is that the manner in which he will be chosen is according to what the village says. [Exhibit 117.]

The only way in which the Council had been able to function was by having those members present at a Council meeting appoint someone to fill the seat of a missing, certified representative. That appointee was then deemed to be an elected and certified representative to the Council who could be counted as part of the quorum necessary to conduct the remainder of that meeting's business. It is hard to conceive of a more devious and perverse corruption of the concept of representative government. Yet Boyden and the BIA apparently gave this procedure their blessing.

In December of that same year, another written protest was made about the representation of Boyden and the continuation of Docket 196. This protest was made directly to Boyden and the Hopi Tribal Council. (Exhibit 117A.) At the same time, a new operating budget for the period of December 1965-November 30, 1966, was made by the Council. Flush with their mineral leasing revenues, the officers of the Council were designated full-time, paid tribal employees, and funds were budgeted to pay Boyden $54,000 for general counsel work performed from 1957 through August 1965. With an annual attorney's fee scheduled at $9,000, Boyden was the highest paid employee of the Council at that time.

26. THE UNEXPLAINED LINK BETWEEN JOHN S. BOYDEN AND PEABODY COAL COMPANY

The first coal mining agreement which the Hopi Tribal Council made was with Fisher Contracting Company in 1961. It was terminated in October 1962. But even before the termination of that agreement, Peabody Coal Company had, as early as 1961, expressed interest in mining Hopi and Navajo coal. (See p. 127, above.) By March 1962, Boyden had informed the Hopi Tribal Council about Peabody's interest in entering into coal mining leases with the Hopis.

In August 1963, after the Healing v. Jones decision had been made, the Hopi Tribal Council authorized Boyden to negotiate a lease with Peabody of 58,270 acres of land found in the northeastern part of the 1882 Hopi Reservation, an area known as Black Mesa.

In 1964, the Hopi Tribal Council entered into an exclusive drilling and exploration permit with Peabody. Finally, on May 16, 1966, the Hopi Tribal Council held a meeting to approve a major Peabody coal lease. The official minutes of that meeting report: "A representative from the Sentry Royalty Company (a subsidiary of Peabody Coal Company) was present at the meeting." A proposed coal lease was presented to the Council by that Peabody representative and attorney Boyden recommended Council approval. The Council gave its approval and on about June 6, 1966, the lease was formally signed.

The Secretary of the Interior added his approval and the lease went into effect.

Throughout the 1960s the Hopi Tribal Council continued to do business with Peabody Coal Company. For example, in November 1966, the Hopi Tribal Council discussed a possible railroad link between the Santa Fe Railroad and Peabody Coal Company. In March 1967 the Council granted permission to Peabody's subsidiary to construct a slurry pipeline for its coal.* In September 1967, the Council acted on the assignment of its Peabody lease interest to Kennecott Copper, a new parent company, which took control of Peabody after a merger in March of 1968. In February and March 1969, the Council discussed Peabody's mining efforts in the Joint Use Area and approved the transfer of certain leased land rights between Black Mesa Pipeline Co. and Peabody Coal Company. In November 1969, a new lease was made between Peabody and the Hopi Tribal Council for the mining of 10,240 acres of land. This lease was approved by the Secretary of the Interior on April 9, 1970.

Throughout the 1960s, during all of these and other dealings with Peabody, the Hopi Tribal Council was represented by attorney John S. Boyden, who had been authorized by the Secretary of the Interior to take legal action as general counsel on behalf of the Hopis.

Further research into Boyden's activities during the 1960s suggests that he may have been representing both the Hopi Tribal Council

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*The coal mined on Black Mesa by Peabody is pulverized and mixed with an equal amount of water for transport in a 275-mile pipeline to the Mohave electric generating plant. About 3,400 acre-feet of ground water has been pumped each year from aquifers below the arid Hopi surface. This "mining" of water has also been vociferously opposed by the traditional Hopis.

and Peabody Coal Company at the same time. If true, this may constitute a conflict of interest.

Documentary evidence of Boyden's work for Peabody is found in the 1966 and 1967 editions of Martindale-Hubbell's* attorney directory. This national directory is the leading reference work on attorneys and their clients. Each year attorneys supply lists of their representative clients to that directory and these are published the following year as part of a profile of the legal work the attorneys perform. In the 1966 edition of Martindale-Hubbell, John S. Boyden's law firm of Boyden, Tibbals, Staten & Croft listed among its representative clients both the Hopi Indian Tribe and Peabody Coal Company. The same listings were included in the 1967 edition for the same law firm. These listings strongly indicate that Boyden was representing Peabody Coal Company while he was negotiating the 1966 lease for the Hopi Tribal Council. (Exhibit 118.)

This information and the information about Boyden's representation of Aztec Oil and Gas in the first court challenge to mineral leases (see p. 135), raises questions about Boyden's representation of his Hopi clients. It would be extremely unusual for an attorney for a coal owner to simultaneously represent a buyer who has an ongoing lease to mine the same coal, without running afoul of the canons of ethics on conflicts of interest.**

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*Martindale-Hubbell Law Directory (Martindale-Hubbell, Inc., Summit, NJ.)

**The Code of Professional Responsibility provides: A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment. A lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

In an effort to have some light shed on this situation, letters were written by the authors of this report to Mr. Boyden, Aztec Oil and Gas, and Peabody Coal Company in early October, 1978. The correspondence which followed has confirmed that Boyden worked for corporate mineral interests, but it has failed to clarify the extent of Boyden's work for them.

Aztec Oil and Gas, through their parent company Southland Royalty, admits that Boyden did represent Aztec in the 1964 lawsuit in which the Hopi Tribal Council and Aztec were co-defendants, but says, "Mr. Boyden never billed Aztec for any legal fees and he was not paid any sum" for the legal work he did. (Exhibit 118d.) Boyden billed his Hopi clients for one million dollars at the very same time he gave free legal assistance to this wealthy mineral company.

Peabody Coal Company, through Marvin O. Young, its Vice-President and General Counsel, takes the position that it does not "believe" that Boyden was employed by Peabody during the years that Boyden listed himself as counsel for Peabody in the Martindale-Hubbell directory.(Exhibit 118e). However, Mr. Young states that Mr. Boyden was employed by Kennecott Copper Corporation and others to help with the merger of Kennecott and Peabody. Negotiations for that merger began in 1966, and it was concluded in March, 1968. Such work for Kennecott would raise new questions about ethics, for the 1966 Hopi-Peabody coal lease included a clause prohibiting Peabody from assigning its interest to Kennecott without approval of the Hopi Tribal Council. In September, 1967 Boyden recommended to the Hopi Tribal Council that it approve the transfer of Peabody's interest to Kennecott without any change in the lease's terms. This approval occurred during the same time that the merger arrangements were being concluded, a merger which may not have been

concluded if the Hopis had not approved the assignment of the 1966 lease or had insisted on additional compensation or other changes in the lease as a condition to their approval. The Hopi Tribal Council received only a token payment of $10.00 for agreeing to the assignment. (Exhibit 118A.) The Navajos had received $100,000.00 for agreeing to the assignment of the Navajo interest in the Peabody lease, and the B.I.A. appears to have recommended that the Hopis insist on a similar payment. [Exhibit 118A(5).] But Boyden advised against "attempting to extract money from the coal companies under these circumstances." [Exhibit 118A(6).] Meanwhile, without the knowledge of the Hopis, Boyden was being paid a total of at least $10,689.58 for the work he did for the same mineral companies and for the banks which needed Hopi approval of the assignment and were prepared to give the Hopis some $100,000.00 to get it. Again Boyden appears to have been on both sides, representing at the same time both the Hopi Tribal Council and a mineral company doing business with the Council.

An attorney from the counsel's office of Kennecott Copper Corporation has contradicted Peabody Coal Company.(Exhibit 118f) He denies that Kennecott ever employed Boyden, but admits that Boyden did legal work for the Peabody-Kennecott merger of 1968. This Kennecott attorney says that the only legal work which Boyden performed was the research and drafting of an opinion regarding the legality of conveying Peabody's Utah assets to Kennecott in the merger. He takes the position that this work was done only for the banks (principally Morgan Guarantee Trust) which lent money to finance part of the merger, and not for Peabody or Kennecott.

A copy of the seven page legal opinion which Boyden prepared for the merger fails to square with either of these positions and shows instead that Boyden worked for Peabody and for Kennecott and for the banks which helped finance the merger. This document, dated March 29, 1968 and

signed by John S. Boyden for his law firm, is addressed to all of the parties and financial interests involved in the 1968 merger, including Kennecott and Peabody. It begins:

"Dear Sirs: We have acted as your special counsel..."

Thus, in his own words Boyden again states that he was employed by the corporate mineral interests who were at the same time doing business with his Hopi Tribal Council clients. (Exhibit 118 B.)

When asked in correspondence about his employment for corporate mineral interests, Boyden has denied any conflict of interest but has chosen to speak only in generalities:

> "You may be sure that I have represented the Hopi Tribe for a good many years and have never represented any other client whose interests in the subject matter were adverse to the Hopi Tribe at the time of such representation. Nor have I ever represented the Hopi Tribe and a client with previous adverse interests without the knowledge and consent of both clients." [Exhibit 118 B (9)]

When asked for specifics, Boyden has refused to answer questions about his prior employment for Aztec, Peabody and other corporate mineral interests. He has also declined to specify how any of his representation of a "client with previous adverse interests" was made known to his Hopi clients and agreed upon by them.*

A complete clarification of Boyden's relationship to corporate mineral interests would require the analysis of information which is yet unavailable. However, the questions raised by the presently available information are substantial and serious.

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*Research indicates that Boyden did inform the Hopi Tribal Council in 1964 of his offer to represent any of the mineral companies who were sued in the first court challenge to the mineral leases. It is not known whether the Council was informed or aware of Boyden's other work on behalf of mineral companies.

The extent of BIA awareness of these matters is unknown. Since the Secretary of the Interior approved each extension of Boyden's attorney contract with the Hopis, and since the Department of the Interior and the BIA were intimately involved in all phases of the Hopi mineral leasing business, the United States government shares full responsibility for any attorney conflicts of interest and for all strip-mining which has occurred and which continues today in Hopi country. As discussed elsewhere in this report, traditional Hopis have been consistent and open in their opposition to Peabody's strip-mining of their sacred land.*

*It is noteworthy that many Hopi "progressives" and others have been extremely critical of the terms of the coal leases entered into by the Hopis and other Indian peoples. People who have not necessarily disapproved of the strip-mining of Hopi land have considered the terms of the mining leases to be overly favorable to Peabody Coal Company. It has been reported that over a 35-year period the Hopis will make $14 million in royalties while Peabody makes $750 million and while the state of Arizona receives more than $175 million in corporate taxes alone. In June, 1978, the Office of Audit and Investigation of the Department of the Interior concluded that the royalty rates should be renegotiated to "a more realistic and equitable level." [Exhibit 118B(10).]