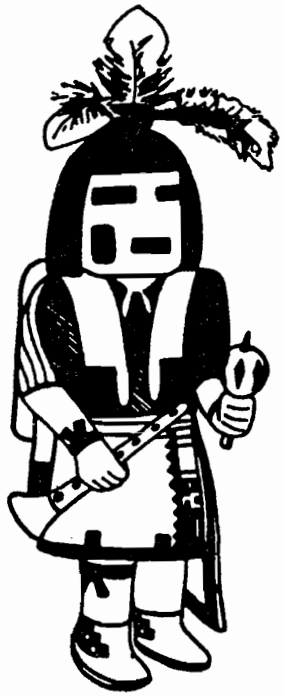

LAND AND WATER RIGHTS IN THE VICEROYALTY OF NEW SPAIN

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LAWYERS and historians in search of the broad outlines of Indian land and water rights in Spanish America find that there is no single, authoritative source of law on the subject. The *Recopilación de Leyes de las Indias* is most often cited, but as its title suggests, the *Recopilación* is a compilation of laws; it is not a comprehensive code.[1] Published in 1681, near the midpoint of the colonial period, as a step toward standardizing principles of justice in Spanish America, the *Recopilación* contains excerpts from a wide variety of royal decrees responding to the special circumstances of colonial rule in America. Unfortunately, the *Recopilación* is not always explicit and consistent on every important topic, and it did not preclude other royal and viceregal laws on matters such as water rights or the application of traditional and pragmatic principles not directly provided for in this compilation of law.

The purpose of this report is to discuss sedentary Indian (*pueblo*) rights in principle and practice as they applied to the use of water and land in the viceroyalty of New Spain (1535-1810). To fill out the body of principles and procedures concerning land and water rights and their application to Indians in New Spain, Mexico's Archivo General de la Nación in Mexico City is the indispensable source. Two of its large *ramos*, or sections, contain materials directly related to Indian land and water rights: Tierras (litigation over land and water) and Mercedes (viceregal grants of all kinds, including land and water). Tierras and Mercedes provide examples of both the principles and the operation of water rights for most parts of the Audiencia de México jurisdic-

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tion—all of southern, central and north-central Mexico, with a few cases from the far northern borderlands reaching the high court in Mexico City on appeal.

Indian property rights throughout the Audiencia de México territory shed light on the main lines of Spanish justice in the viceroyalty and therefore apply in a general way to the Pueblo Indians of New Mexico at the northern limits of the viceroyalty. The application of Spanish justice in central Mexico, where Spaniards acknowledged the property rights of the fully sedentary Indian communities they found there, to the Pueblos of New Mexico is especially appropriate in view of the settled way of life of both groups. As Edward Spicer, noted anthropologist and ethnohistorian of the Southwest, explains, the Spaniards recognized the Pueblos as separate, "civilized" people in contrast to their nomadic, "barbarous" neighbors. Held up to the Spanish settlers as "models of organization and morale," the Pueblos acquired the property rights of sedentary, allied, Christian settlers:[2]

> In addition to fostering the mission and town organization, they [the Spanish government] proclaimed the village lands of the Pueblos and the tribal lands of the rancherias as part of the territory of the King of Spain. This specifically meant in New Mexico the designation of boundaries for each of the villages, and the proclaiming of the land within such boundaries as a grant to the village from the king. . . . Within most of the land granted to the Pueblos, the Spanish administrators did not interfere, and hence the territorial concept underlying Spanish government did not become a practical reality.[3]

In short, the Pueblo Indians and the Indian communities in central and southern Mexico were similar in the eyes of the colonial authorities—"civilized" people with special property rights as opposed to the "barbarous" Chichimecas of north-central Mexico or, to the Spaniards, the equally "barbarous" Apaches and Comanches on the northernmost rim of the Spanish empire.

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THE LEGAL STATUS OF SEDENTARY INDIANS AND THEIR PROPERTY IN SPANISH AMERICA

THE discovery of America for Spain in the late fifteenth century was in fact as well as in name the discovery of a "New World" inhabited by millions of unknown people who could not be placed neatly into a Europe-centered world of laws and social relationships. The sedentary indigenous people of Spanish America were not considered analogous, as non-Christians or potential Spanish subjects, to the Muslims who were absorbed in the Christian Reconquest of the Iberian Peninsula between the eighth and the fifteenth centuries. Unlike the Muslims, American natives had not previously rejected Christianity, nor, for the most part, were they committed to resisting Spanish hegemony. The lengthy sections of the *Recopilación* dealing with Indian affairs document the Spaniards' concern for defining who these new people were and how they should be treated. The numerous and elaborate provisions for Indians in the *Recopilación* contrast sharply to the short, terse treatment of Black people—another group whom the Spaniards had dealt with before in the Old World and who needed to be defined legally only in terms of special New World situations, primarily for purposes of punishment and control.

The Indian sections of the *Recopilación* reveal two underlying concerns that bear upon property rights: 1) a paternalistic preoccupation with the well-being of the indigenous population as new and different royal subjects; and 2) the economic motive inherent in colonial rule. Both contributed to a special, sometimes preferential, status for Indians under Spanish rule.

The paternalistic concern carried with it a view of sedentary, converted Indians as innocents, *niños con barbas* (children with beards), as an eighteenth-century Spanish priest put it, who needed special protection and consideration in learning the ways of Christian civilization. Royal laws frequently refer to "looking out always for the welfare of the Indians" or "to giving greater protection to the Indians."[4] The special status of Indians carried over into the judicial system for, unlike other royal subjects in

America, Indians were not subject to the rigorous authority of the Inquisition, and in most civil and criminal proceedings involving Indians the special Juzgado de Indios had jurisdiction. To protect Indian communities in their daily lives, the Crown issued a series of laws designed to keep non-Indians out of the *pueblos de indios*. Several of these protective segregation laws are included in the *Recopilación* in Book 6, title 3, laws 21-25. These laws provide that non-Indians not be allowed to live in the pueblos, or visit them for more than two days, or lodge with Indian families. They were issued and repeated many times in the colonial period and were applied to Mexico City among other places in the late seventeenth century.[5] Other laws provided that wine should not be sold to Indians and also placed the indigenous people in a separate, protected category.[6]

Protective segregation and a degree of political autonomy for Indian communities did not mean that the Spanish rulers intended Indian cultures to carry on unchanged. Segregation was intended to save Indians from the worst features of non-Indian ways and to allow for the best features of Christian Spain to establish themselves. The Indians were to be taught the Castilian language so that they could better understand Christian doctrine.[7] The establishment of the *cabildo* form of government in Indian communities was also a formal attempt to introduce Spanish institutions into the Indian way of life.

Paternalism and religious interest in the indigenous population were not inconsistent with economic exploitation. The colonial economy depended very heavily on Indian labor and productivity for its wealth. In particular, the colonial system in the sixteenth century relied almost completely on Indian agriculture to supply the predominantly non-agricultural Spanish population which clustered together in newly formed urban centers. This dependence on Indian agriculture explains laws in the *Recopilación* which emphasized that Indians should engage in farming and have sufficient time to cultivate their fields.[8] The Spanish town of Antequera (present-day Oaxaca) in the Valley of Oaxaca is a

specific example of the Spanish expectation that Indians would supply the urban demands for food and basic supplies. As early as 1532 the cabildo of Antequera petitioned the King to order Indians in the district to sell food to Spaniards in the city. Bishop López de Zárate complained on behalf of the city in 1538 that Valley natives were not cultivating all the lands available to them, and that as a result there was a shortage of wheat and maize. In 1551 the cabildo again urged the Crown to order Indians to produce wheat, silk, and other commodities for the Spaniards, arguing that otherwise the natives would produce only what they needed for the royal tribute and would become lazy and quarrelsome. Antequera's dependence on the Indians for food is further reflected in recurrent pleas that more Indian towns be brought into its political jurisdiction, and in a 1551 order by the cabildo that more Indian lands be cultivated to meet the cereal needs of the city.[9]

The Spanish Crown also expected Indians to pay tribute and to provide a certain amount of labor service. Again, the *Recopilación* provides several examples of the attention paid to Indian taxation, and gives specific procedures for collection of tribute.[10] In both taxation and agricultural production for Spanish consumption, the economic system depended upon the Indians' ability to produce a surplus above subsistence needs.

The special position of Indians based on paternalism and economic colonialism carried over into Indian property rights included in the excerpted laws in the *Recopilación*. Indians were to be confirmed in their landholdings and further, they were to be assured of the lands they needed for planting and livestock.[11] One law suggests that the Indians were in fact to receive preferential treatment in access to the land:[12]

> Whosoever has not had possession of the land for ten years, although he may claim that he is in possession (for this pretext alone is not sufficient), shall not be allowed to settle said land, and the Indian communities, in relation to other interested parties, shall be granted all consideration.

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A law of 1713 gave the most complete description of the lands to which an Indian town in the Viceroyalty of New Spain was entitled in principle:[13]

> Indian towns shall be given a site with sufficient water, arable lands, woodlands, and access routes so that they can cultivate their lands, plus an ejido of one league for the grazing of their cattle.

Unlike other royal subjects, Indians could sell their lands only by express royal or viceregal license and the sale itself required a public auction.[14] This special consideration was, according to this law, for "the welfare of the Indians," but the productivity of these royal vassals was also an important factor.[15] Another kind of preferential treatment for Indians in economic matters was set down in 1601.[16] Indians were to be charged less than other groups for the purchase of food and supplies.

LAND AND WATER GRANTS

A LARGE NUMBER of grants to portions of the royal patrimony (*mercedes*) were made by the Viceroys of New Spain in the name of the King. Most of the mercedes assigned unused farming and ranching lands to individuals and communities. Less frequently, the Viceroys also assigned mercedes for mills, salt deposits, lime deposits, streams, and rivers. The Ramo de Mercedes in the Archivo General de la Nación contains eighty-three volumes of property grants, summaries of disputed property rights, and grant petitions for the Audiencia de México district for the period 1542-1796. The great majority of actual mercedes dates from 1542-1620 (volumes 1-36). The last thirty-six volumes of the Ramo de Mercedes (volumes 48-83) for the years 1644-1796 contain boundary measurements, composición,[17] and clarifications of land and water distribution rather than many new grants. I have made a careful search through volumes 1-31 of the Ramo de Mercedes for the dates 1542-1616, the period of greatest activity in the

assignment of mercedes. This sample yields approximately four thousand grants of farmland and ranching land. For the remainder of the Ramo de Mercedes, I have made spot checks in every four to eight volumes.

Land mercedes in the Viceroyalty of New Spain fall into three categories: *caballerías* (farmland), *estancias de ganado mayor* (ranching grants for cattle and horses), and *estancias de ganado menor* (ranching grants for sheep and goats). In all three categories ownership was contingent upon a series of conditions that normally were stated in the formal merced. The standard farming grant stipulated that: 1) all or most of the land must be cultivated within one year; 2) after the harvest the land could be used for common pasturage; 3) no livestock would be permitted on the land during the cultivating season except those needed to till the soil; 4) the land could not be sold for four years after the merced was issued; 5) the land was not to lie fallow for four consecutive years; and 6) if this land were to be chosen as the site for a Spanish town, it (the land and improvements) must be sold at the current market value. If any of these conditions were not met, the grant would be revoked. The same kinds of use and sale provisions were applied to ranching mercedes with the additional stipulation that the grazing land could only be used for the kind of livestock mentioned in the grant.

In addition to these conditions, the procedure for granting lands as described in the mercedes always included a stipulation that the grant was not to prejudice the interests of the Crown or of people who already occupied land in the vicinity, with special reference to Indians. The exact wording of this *sin perjuicio* provision varied somewhat over time. The usual wording in the late sixteenth century was *sin perjuicio de Su Derecho ni de él de otro tercero* (without prejudice to Your [Royal] Rights or those of any other third party).[18] Later grants provided for "no prejudice to any person," or "[the said grant] will not result in injury to any of the neighboring communities."[19] Where they were needed, specific provisions for protection of Indian lands and water were inserted in individual land grants. For example, in a caballería

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grant to Pedro Núñez de la Cerda near Zinacantepec (Puebla) the Viceroy stipulated that "We make this grant to you on the condition that you do not take away from the Indians of Zinacantepec an irrigation ditch below the said two caballerías of land."[20] In the early seventeenth century, the meaning of sin perjuicio as applied to Indian rights and future use was put in more precise terms:[21]

> and if the said farmland is needed for some purpose by the Indian congregación in that area, it can be taken back from [the grantee] without payment, appeal, or compensation of any kind.

The procedure for determining whether a proposed grant would prejudice the interests of neighboring Indians is described in a ranching merced of 1635. The Spanish judge in the district where the grant would be located was ordered to inspect the Indian lands and submit a report on the advisability of making the grant:[22]

> The said Viceroy sent the agreed-upon order to the judge of that district to inspect the land of the Indians that borders on [the proposed grant] and that of other people who might have lands or ranches [there] and who might in some way receive harm or prejudice, and to report, as he has been empowered to do, on whether the said grant may be assigned.

The provision for denial or annulment in cases of prejudice to the interests of others in the vicinity was not merely a *pro forma* condition. The Ramo de Mercedes contains many examples of grants denied to individuals or later annulled because they infringed upon the property rights and well-being of local Indian communities.[23]

A distinction between land and water rights in the history of mercedes was not firmly or irrevocably drawn. Early farming and ranching mercedes generally did not mention use of water within the boundaries of the grant. However, by the first decade of the seventeenth century land mercedes containing water rights provisions were quite common. For the period 1604-1616 I have located twenty-one examples of mercedes combining land and water. The earliest example of a land and water grant in the Ramo

de Mercedes dates from 1584.[24] A spot check of Mercedes, volumes 32-47, suggests that combined land and water grants continued through the 1640's (the last period of numerous mercedes). The combined grants shed some light on how colonial justice viewed the relationship between a piece of arable land and irrigation waters. In a 1608 grant to a Spaniard, Juan de la Cueva y Guevara, in the jurisdiction of the Villa de León (Guanajuato), the Viceroy made a general assignment of enough water to irrigate the available land (i.e., irrigable acres) rather than only that portion of the land which might be under irrigation at that time:[25]

> I grant to Don Juan de la Cueva y Guevara four caballerías of land and the water needed to irrigate them in the Valley of Cuerámaro in the Province of Chichimecas, jurisdiction of the Villa de León.

The Ramo de Mercedes records also contain a number of cases where the use of water was considered specifically and separately from land. Excluding mercedes to operate mills, which often mention water diversion, and the few instances of small grants of water for domestic use, volumes 1-31 (1542-1616) yield a total of one hundred and one cases where water is treated apart from land.[26] Compared to the large number of grants for farming and ranching land during this period (over four thousand), this is a surprisingly small number, approximately two and one-half per cent.

In addition to the rarity of their appearance in the Mercedes records, the water cases have several characteristics: 1) Roughly half of the water cases are mercedes or grants of stream or river water to one party. The remainder are petitions for grants without verdicts, complaints over use of waters by two or more parties, division of water use from streams and rivers among several parties (*repartimiento*), and water rights associated with the operation of sugar mills.[27] 2) Many of the sixteenth-century cases were not new grants but verifications of Indian rights to water based on long prior use, usually dating from before the Spanish Conquest and designed to protect against encroachment by individual

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Spaniards and to encourage and support Indian agriculture.[28] 3) The actual mercedes for use of water in farming and mill operation broaden the provisions for protecting Indian interests characteristic of the land grants discussed on pp. 194-196 *supra*. The sin perjuicio rule was invoked in each case before a water grant could be made. Further, to ensure that the grant would not prejudice the interests of neighboring Indians, the Viceroy ordered the Abogado del Juzgado de Indios (a special attorney assigned from the Court of Indian Affairs) to investigate and report on how the grant would affect the Indians. The long form of sin perjuicio for land grants in volumes 26-28 of the Ramo de Mercedes, which stipulated that if the property granted "is needed for some purpose by the Indian settlement in that area, it can be taken from him [the grantee] without payment, appeal, or compensation of any kind," was applied in exactly this wording to water mercedes.

Mercedes for the operation of mills—usually flour mills—represent a final type of grant directly affecting Indian use of water. Mill grants were made to Indian communities and individuals as well as to non-Indians. Unlike the use of water for irrigation and watering livestock, mills seem to have required formal mercedes for legal operation. The following list of mill grants to Indians is far from exhaustive. It is included here to suggest that mercedes for mills were assigned in various parts of the territory under the jurisdiction of the Audiencia de México: San Agustín Etla (Oaxaca), 1556 (AGN, Mercedes, vol. 4, fol. 403r); Totimehuacán (Puebla), 1560 (*ibid.*, vol. 5, fol. 170v); Maravatío (Michoacán), 1563 (*ibid.*, vol. 7, fol. 35v); Zinapécuaro (Michoacán), 1563 (*ibid.*, vol. 7, fol. 228v); Huanhtinchán (Puebla), 1564 (*ibid.*, vol. 7, fol. 358r); Tulancingo (Hidalgo), 1565 (*ibid.*, vol. 8, fol. 80v); Teitipac (Oaxaca), 1565 (*ibid.*, vol. 8, fol. 90v); Calpan (Puebla), 1567 (*ibid.*, vol. 9, fol. 22r); Jilotepec (Edo. de México), 1567 (AGN, Tierras, vol. 307, exp. 2).

The surprisingly small number of water mercedes suggests that rights to water, unlike rights to vacant lands, were not generally established through formal grants. Although both land and water belonged in principle to the royal patrimony, they were not separate mirror images of a single type of royal property. Rights to water and land were not treated in exactly the same way. The adjudication of water rights and the system of water use in practice suggests a more spontaneous process which was not formalized until after several landowners along a stream bed found that they could not all use as much water as they wanted.

The district of Tulancingo, an important agricultural zone in the present-day state of Hidalgo, northeast of Mexico City, inhabited by sedentary Indians and Spanish landowners, offers a special opportunity to examine the significance of the relatively small number of water mercedes. Tierras, volume 338, expediente 2, contains a detailed inspection of landholdings and water use in the district for 1716, nearly two hundred years after the first Spanish occupation of the area. I have made a careful search for land and water grants in the district of Tulancingo to supplement the information in Tierras 338. The mercedes records yield a total of forty-seven land grants for this district between 1542 and 1616. Of these, thirty-three were farming grants, eleven, ranching grants, and three, mill grants.[29] On the subject of water, the Tulancingo mercedes exemplify the characteristics of colonial grants discussed on pp. 195-197 *supra*: 1) None of the forty-four farming and ranching mercedes specifically mention water rights or the use of water for irrigation or livestock; and 2) I did not locate any water mercedes for Tulancingo.

The 1716 inspection and composición of lands and waters in Tierras 338 fills out the picture of land and water use in the district of Tulancingo. The document lists ninety-five non-Indian estates: ranchos, farms (ranchos de labor), and haciendas; forty-seven Indian communities, one Indian rancho, and one *paraje* (an inhabited site but not a formal town). Of the ninety-five non-Indian estates, fifty were irrigated in 1716. Forty-six of the fifty clearly irrigated without obtaining water mercedes. A number, perhaps most, of the caballería grants for Tulancingo were irrigated even though the land grants themselves did not expressly provide for the use of water.

The absence of water mercedes in this district cannot be ex-

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plained on the basis that it was an arid zone where irrigation could not be practical. As Tierras 338 shows, most of the farming properties in the district were irrigated even though during the one hundred and eighty years of Spanish rule only one of them, according to this document and as verified in my search through the Ramo de Mercedes, ever received a specific grant for water. A passage, referring to the lands and waters of the Indian town of San Francisco Xaltepec, provides a glimpse of how water rights were established without formal grants.[30] It states that most of the Indians' lands were irrigable and were in fact irrigated. A portion of the same source of water used to irrigate the Xaltepec lands also had been set aside for two nearby haciendas. The agreement had been arranged without mercedes to any of the users:[31]

> The town of San Francisco Xaltepec: Most of the lands of these natives are irrigable, and are irrigated from the aforesaid water of the source located at the place called San Dionicio [probably a spring-fed stream] from which the already mentioned haciendas of Pedro Marques and the heirs of Joseph Ramires are authorized to irrigate their lands on the days which they have divided among themselves without any of the parties possessing, as has been said, a special water merced.

ADJUDICATION OF WATER RIGHTS

THE FOLLOWING description of procedures and principles which were applied to water rights in the Viceroyalty of New Spain is drawn from a reading of twenty-two lengthy cases of water litigation in AGN Tierras. These span the period 1538-1800 and include examples from a variety of locations within the district of the Audiencia de México.[32] One general characteristic of the judgments in all the water litigation consulted should be noted at the outset. These are not erudite or scholarly proceedings based on formal and extensive legal doctrine. Not one of the thirteen eighteenth-century cases even refers specifically to the *Recopilación*. Although broad guidelines and principles are applied where appropriate, these are basically pragmatic judgments concerned with

"peace among the Indians and farmers" and designed to "prevent divisions and difficulties" and to "avoid lawsuits and unrest."[33]

By the last century of colonial rule in New Spain (1710-1810) the standard procedure in water adjudication was: 1) to determine whether there were formal mercedes that might establish preemptive rights; 2) if there were no mercedes, to determine whether an official distribution of waters to local users had been recorded; 3) if there was no official distribution, to initiate an investigation based on testimony of witnesses and visual inspection to determine the amount of water available, who had traditionally used the disputed water, and for how long; and 4) based on the investigation, to draw up a *repartimiento de aguas* (distribution of waters agreement) for the users, generally based on prior use, need, availability of water, and protection of Indian communities.[34]

A formal merced for water, when it existed, was the firmest kind of title. The litigation records add additional weight to the conclusion based on the grants in the Ramo de Mercedes and the case of Tulancingo. Formal water grants very rarely enter the picture at all. Only one of the twenty-two cases in Tierras includes a merced. From the very early years of Spanish rule in the sixteenth century, the standard solution to water disputes was the repartimiento de aguas or distribution of available waters among landowners in the vicinity who needed them. Repartimientos antedating the earliest records in the Ramo de Mercedes are included in several of the Tierras cases consulted: 1538 Atlatlauca (Morelos) and 1542 Apaseo (Guanajuato). Seven other sixteenth-century repartimientos were located.[35]

A 1611 case describes the ideal repartimiento solution from the viewpoint of Spanish justice: "The judge of the said villa [Villa de Carrión, Atlixco Valley, Puebla] went out to visit it [the disputed water] and the result of [the] inspection was a repartimiento which was accepted by all the said farmers."[36] All but four of the sixteen complete adjudication cases consulted in the Ramo de Tierras conclude with a specific repartimiento de aguas.[37] Examples of repartimientos are also abundant in the Ramo de Mercedes.[38] Repartimiento decisions usually distributed water

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por tandas (by turns), a specified number of days' use being allotted to each of the landowners named in the repartimiento. Occasionally, however, repartimientos provided for continuous use of a portion of the available water by one party.[39]

What criteria were used by the water judges and the Audiencia to determine the distribution of water among users in repartimiento? One of the two crucial considerations was prior use, referred to in the adjudications as *uso antiguo, aprehendida posesión, anticuada posesión,* or most often, use *de inmemorial tiempo*. Although the application of a prior use principle was most beneficial to Indian interests, it did not refer only to the waters used by Indian communities before the Spanish Conquest. It meant undisputed beneficial use of a source of water in the past, and this principle was used to good effect by Spaniards as well as Indians who could prove use of a water source (sometimes for less than fifteen years) to establish formal water rights. For example, in the Valley of Mexico in the 1760's, Father Pedro Espinosa y Navarro claimed that in addition to the six days of irrigation he received in repartimiento, "I find myself in undisputed peaceful possession of the use of this water every Sunday, which possession is so old that I, having been here twelve years, have been told that my predecessors enjoyed it in the same way without contradiction or objection by anyone."[40] His rights to the Sunday water were confirmed by the Audiencia. The claim of use from time immemorial also carried considerable weight in the following cases decided in favor of Indian communities: the Indian communities of San Martín Guaquechula and San Francisco Huilango against the Hacienda de Santa Catarina (Tochimilco, Puebla, 1771); the Indians of Ocopetayuca against those of Huilango (Puebla, 1538); and the Indians of San Martín, San Juan Bautista, and Teotitlán del Camino against a neighboring sugar plantation.[41]

In one case where river water was particularly scarce, prior use formed the basis for exclusive rights to three Indian communities in northern Oaxaca and refusal to confirm the water rights of one of the recent users.[42] These communities claimed three spring-fed

streams near the abandoned town of San Bernardino by traditional use. A neighboring sugar mill petitioned for water from these streams on the ground that only former residents of the now abandoned town had used them. The judge ruled against the sugar estate because it was "the last to participate in irrigation [from the streams]."

Normally, however, prior use was combined with repartimiento, giving the oldest users, especially Indian communities, rights to the water they needed for their livelihood, *para su sustento*. The remainder would be divided among other users largely on the basis of need. For example, a 1594 repartimiento in the jurisdiction of Tochimilco first provided that "the Indians of the said town of Tochimilco are to have the use of all the waters from sources originating within said town [lands] without any person for any reason impeding the use of them by those who have their houses in said pueblo for the irrigation of their milpas, nopal cactus, and orchards."[43] The remaining waters were divided among local estates in four unequal parts.

In other words, prior use was a type of superior right but it did not usually serve to establish exclusive rights for the oldest user, especially if there were surplus waters. This point is taken up directly in the case of the Indians of Agueguetzingo (jurisdiction of Chietla, Puebla) against Nicolás de Torres Castillo Merlín in 1705 where the Indians claimed exclusive water rights based on prior use. After a visual inspection revealed that the Indians' irrigation canal contained a flow of twenty surcos and that the river was still so full that it could not accurately be measured, the judge determined that the river supplied much more water than the Indians could actually use, and he assigned a portion of the water to an adjacent sugar mill.[44] A similar case of excess waters being apportioned to non-Indian landowners who did not establish long prior use is recorded:[45] The Hacienda de San Isidro received the use of stream water against the objections of the town of Acámbaro (Guanajuato) in 1733. The division of waters was justified on the grounds that the Indians had more water than they needed: "They

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[the Indians of Acámbaro] have the waters of the large river named Toluca which passes by this town, in addition to the numerous wells located in the same town."

The second important consideration in distributing the waters, then, was need. Especially where there was an abundant flow, the colonial authorities sought to accomodate landowners who would make productive use of streams and rivers. The very notion of repartimiento de aguas and its appearance at the earliest stages of settled colonial life suggests that accomodation and practical solutions to local needs operated in the settlement of water disputes. The division was sometimes based on a half-and-half formula as in the 1542 repartimiento between the Indians of Apaseo on the one hand and Hernán Pérez de Bocanegra and the Indians of Acámbaro on the other, and also in the 1745 case of the Indian community of San Miguel el Grande (Oaxaca) and the adjacent Spanish villa.[46]

In each case of repartimiento involving Indian communities, the judge was careful to provide them with a blanket provision of enough water to irrigate their lands as well as to meet domestic needs. At least enough *para el sustento del pueblo* is a common phrase in the repartimientos, or, as the judge in the San Miguel el Grande case put it, "not only enough for their personal needs, but also for the irrigation of their fields and orchards."[47]

None of the repartimientos consulted determined that the Indians had water rights only for the lands that they had actually irrigated before the Conquest. They consistently mention that the Indians should have enough water "to irrigate their lands," or "for the irrigation and benefit of their lands;" somewhat open-ended phrases that allowed for a sliding scale of irrigation of lands that could be irrigated (i.e., irrigable acres) and that were owned at the time of the repartimiento. Water cases that refer to prior use dating from pre-Conquest times generally mention only the source of the water, not how much of the Indians' land had actually been irrigated.[48] This provision to irrigate their lands was not, however, so open-ended as to allow a landowner to irrigate fields acquired after the repartimiento. The Apaseo repartimiento case makes this limitation explicit:[49]

> We find that the definitive judgment by the Judges of this Royal Audiencia in this case brought by the said resident farmers of Salaya [Celaya] is a good settlement and carefully determined and pronounced; and as such we should and do confirm it by our authority, to the effect that the said Hernán Pérez and his descendants use the said water for the irrigation of only the lands which they have and possess right now and not those [lands] that they may acquire in the future, and the rest of the water is to be allowed to return to the mainstream so that the interested parties [the Indians of Apaseo] may have the use of it.

A final and less important factor in the distribution of waters was proximity to the source. There are two cases from the Valley of Oaxaca of landowners with spring-fed streams originating on their properties who rented water to users downstream or who diverted water for their own use without a repartimiento.[50] However, unlike prior use and need, upstream priority was rarely applied. For example, the distribution of waters from the Tlalnepantla in the Valley of Mexico in 1718 provided nine surcos for upstream users and fourteen surcos for those downstream based on prior use and need.[51]

Provision for the use of ground water is notably absent from the mercedes records, the adjudication cases and the composición record of land ownership and water use in the district of Tulancingo in 1716. Lack of evidence usually is not a firm basis for conclusion, but in this case the absence of grants and formal adjudication certainly suggests that landowners had undisputed use of wells within their recognized boundaries. The landowner's right to well water on his property is consistent with the Tochimilco repartimiento of 1594 which stated that the town of Tochimilco had rights to "all the waters with sources in the said town."[52] It is also implicit in Juan García de Madriz' justification for assignment of excess water to his hacienda in his complaint against the town of Acámbaro: "They [the Indians] have the waters of the large river named Toluca which passes by this same town, in addition to the many wells which are located in this same town.[53]

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CONCLUSIONS

In principle, land and water rights in the Viceroyalty of New Spain both belonged to the royal patrimony. They were not, however, treated in the same way by the colonial administration. First, although lands were generally assigned by mercedes such formal grants were rarely applied to water rights. Second, there was no firm line of separation between land and water rights. From the late sixteenth century on, a significant number of mercedes specifically assigned land and water together. These land-water grants demonstrate that the legal structure was not in a frozen state, with land and water placed in separate, coequal categories. The majority of land grants do not mention water but we know from the Tulancingo records that grants and Indian community lands were, in fact, irrigated without formal water mercedes.

The standard arrangement for assigning water rights was the repartimiento de aguas, or distribution of water among local landowners. Repartimiento proceedings responded to specific cases of competition over scarce supplies of stream and river water. Distribution of water in repartimiento was based largely upon prior use, need, protection of Indian communities, and to a lesser degree, upstream advantage. Prior use was a special advantage for sedentary Indian communities, since pre-Conquest use could almost always be established to the satisfaction of the water judges. Determinations of pre-Conquest use were concerned with the use of sources of water. They did not inquire into the exact area that had been irrigated before the beginning of Spanish rule. Undisputed use after the Conquest also was a valid form of prior use as both Spanish and Indian cases noted in this report suggest.

Indian needs were expressly protected in land and water mercedes and the repartimiento judgments. This was consistent with the large body of special protective legislation for Indians which derived from the paternalistic and economic considerations of the Spanish rulers. Grants could not be made to the detriment of local Indian interests, and in the early seventeenth century the standard merced form stated that if it were determined that the

Indians needed this land or water, a conflicting grant would be revoked without compensation. In repartimientos involving Indian communities, the Indians received the first assignment of enough water "for their needs" or "to irrigate their lands;" that is, irrigable lands. This standard provision provided some leeway for increased use in the future as did formal mercedes to Indians for the operation of mills. Landowners, whether Indians or Spaniards, apparently had undisputed use of wells within their recognized boundaries.

In sum, the colonial land and water records indicate that mercedes were not essential to the establishment of water rights and that land ownership carried with it an implied right to available water. Where demand for water outran supply, distribution of available water was based primarily on prior use, need, and protection of Indian communities. Indian communities in these distribution arrangements, normally were entitled to the water needed to irrigate the lands that were susceptible to irrigation.

NOTES

1. *Recopilación de Leyes de los Reynos de las Indias*, 4 vols. (Madrid, 1681). Hereafter cited as RI.
2. Edward H. Spicer, "Political Incorporation and Culture Change in New Spain: A Study in Spanish-Indian Relations" in Howard Peckham and Charles Gibson, eds., *Attitudes of Colonial Powers Toward the American Indian* (Salt Lake City, 1969), pp. 127-30.
3. Edward H. Spicer, *Cycles of Conquest: The Impact of Spain, Mexico, and the United States on the Indians of the Southwest, 1533-1960* (Tucson, 1962), p. 389.
4. RI, Book 4, tit. 12, laws 16, 17; provisions of the same type appear regularly in the viceregal laws of the seventeenth and eighteenth centuries as well. Archivo General de la Nación, México (AGN), *Reales Cédulas Originales* (RCO), vol. 1, exp. 1; vol. 2, exps. 43, 189; vol. 8, exp. 29; vol. 10, exp. 74; vol. 16, exp. 49; vol. 24, exp. 9.
5. RI, Book 6, tit. 3, law 21; AGN, RCO, vol. 12, exp. 23.
6. RI, Book 6, tit. 1, law 36.

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7. *Ibid.*, Book 6, tit. 1, law 18.

8. *Ibid.*, Book 6, tit. 1, laws 21, 23.

9. Archivo General de las Indias, Sevilla (AGI), *Audiencia de México*, leg. 1088; Real Academia de Historia, Madrid, Muñoz Collection, vol. 113, fols. 135-36.

10. RI, Book 6, tit. 5, laws 24, 25; Book 6, tit. 4, law 37.

11. *Ibid.*, Book 4, tit. 12, laws 14, 18, 19.

12. *Ibid.*, Book 4, tit. 12, law 19.

13. *Recopilación sumaria de todos los autos acordados de la real audiencia y sala del crimen de esta Nueva España, y providencias de su superior gobierno* (México, 1787), vol. 1, p. 208.

14. RI, Book 4, tit. 12, law 16. Grants of land to Indians included the same provision. AGN, Tierras, vol. 11, segunda parte, exp. 2, fol. 2r.

15. RI, Book 6, tit. 1, law 23.

16. *Ibid.*, Book 6, tit. 1, law 26.

17. Composición, which means compromise, adjustment, or agreement, is used in the phrase *composición de tierras* to refer to legal review and verification of dubious titles to and possession of lands; this was also a source of revenue to the Crown.

18. AGN, Mercedes, vol. 21, fol. 189r-v, 1598; AGN, Tierras, vol. 11, segunda parte, exp. 2, fol. 2r, 1538.

19. "Sin perjuicio a persona alguna," AGN, Mercedes, vol. 66, fol. 158r, May 22, 1706, Edo. de México; "no serle de inconveniencia alguna a los pueblos vecinos," *ibid.*, vol. 66, fol. 182r, Oct. 19, 1707, farm grant in the Indian district of Cuicatlan, Oaxaca.

20. "La cual le hacemos con calidad que no se les quite a los naturales del dicho pueblo de Cinacantepec una canxa de agua que pasa por bajo de las dichas dos caballerías de tierra." *Ibid.*, vol. 12, fols. 4v-5r, Oct. 3, 1583.

21. "Y siendo necesarias las dichas caballerías de tierra para algún efecto de la congregación de los naturales de aquella comarca, se le pueda tomar sin paga, mejora, ni recompensa alguna." Many of the land grants in vols. 26-28 of the Ramo de Mercedes (1608-1614) contain this exact wording. Grants in these volumes that do not include this wording are framed in what I would call the notary's short form, and therefore carry this provision by implication. For example, in Mercedes, vol. 28, where the provision appears in full in most grants, there are also mercedes less than half the length of the full wording for a standard merced which mention only "sin perjuicio de Su Derecho ni de otro tercero" (e.g., fol. 222r, merced to Andrés Juárez, Dec. 9, 1613) and do not detail the standard provisions on use and sale. I find nothing intrinsically different between mercedes using the short and long forms. The short form throughout the Ramo de Mercedes was a convenience for the notary.

22. AGN, Mercedes, vol. 40, fols. 88v-89r.

23. Some examples of grants revoked: AGN, Mercedes, vol. 12, fol. 85v; vol. 21, fols. 40r, 141v, 263v, 295v; vol. 27, fols. 149v-165r; vol. 29, fol. 94v.

24. Land and water combined grants in AGN, Mercedes, vols. 1-31: vol. 13, fol. 69v (1584); vol. 24, fols. 143r, 176v (1604); vol. 26, fols. 67v, 123r, 160v, 161r, 179r (1607-1609); vol. 27, fol. 106r (estancia and water, 1611); vol. 28, fols. 64r, 221r (1613-1614); vol. 29, fols. 18r, 33v, 106r (1614); vol. 30, fols. 100r, 273v (1614); vol. 31, fols. 100v, 107v, 109r, 138r, 160v, 192v (1615-1616).

25. AGN, Mercedes, vol. 26, fol. 123r-v.

26. Water cases in AGN, Mercedes, vols. 1-31: vol. 2, fol. 237v (1544); vol. 4, fols. 18v, 129r, 270v, 362v (1554, 1556); vol. 5, fols. 126v, 132r, 183r, 192r (1560-1561); vol. 6, fols. 117r, 243r (1563); vol. 7, fol. 134v (1563); vol. 8, fol. 3r (1565); vol. 10, fols. 6r-7v (four asientos), 23v, 35v (1573); vol. 12, fol. 98v (1584); vol. 13, fol. 114r (1584); vol. 18, fols. 134v, 268r, 288r, 295r (1592); vol. 19, fols. 100r, 270r (1594); vol. 20, fols. 5r, 64v (1595); vol. 21, fols. 335r, 336r, 344r (1594-1595); vol. 22, fols. 136r, 161v, 192v (1595-1598); vol. 23, fols. 29v, 63v (1600-1601); vol. 24, fols. 14v, 71r (1602-1605); vol. 25, fols. 26r, 454v (1606); vol. 26, fols. 41r, 96v, 119v, 135v, 221r, 224r (1607-1609); vol. 27, fols. 23v, 43v, 100v, 131v, 207r, 243v (1611); vol. 28, fols. 133v, 145v, 164v, 179r, 184v, 188r, 204r, 217v, 240r, 252v, 284r, 287r, 288r, 297r, 298r, 322r, 328r, 347r, 383v, 384r, 386r (1613-1614); vol. 29, fols. 100v, 131v, 148v (1614); vol. 30, fols. 33v, 74r, 118v, 144r, 145r, 155r, 260v, 262v, 286v, 292v, 298v (1614-1616); vol. 31, fols. 6r, 7r, 68r, 81r, 82r, 106r, 131v, 137r, 139v, 177r, 193v (1615-1617).

27. This characteristic of water cases in the Ramo de Mercedes, vols. 1-31, applies to later volumes as well, although there were few new mercedes in the eighteenth century. For example, the six water documents in Mercedes, vol. 66 (1699-1720), include two cases of estates receiving additional water allotments because of abundant supply, and no prejudice to other users, two small grants to individuals for household use, and two *vistas de ojos* (inspections to clarify previous distribution). AGN, Mercedes, vol. 66, fols. 53r, 122v, 142v, 146r, 150r, 158r. The six cases in vol. 83 for 1783-1796 include two cases of measuring and clarifying previous distributions (officials in both cases lamented the imprecise measurements at the time of the original distribution which had led to further litigation), one case of an estate receiving an additional water allotment, two cases of estate owners usurping Indian river water, and one small grant for household use. AGN, Mercedes, vol. 83, fols. 24v, 67r, 72r, 94v, 106r, 118r.

28. AGN, Mercedes, vol. 3, fol. 320v (1551); vol. 4, fols. 18v, 129r, 362v (1554, 1556); vol. 6, fol. 243r (1563); vol. 7, fol. 134v (1563).

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29. Tulancingo land grants in AGN, Mercedes, vols. 1-31: vol. 4, fols. 103r, 132r (caballería grants, 1554); vol. 5, fols. 47v, 243r (caballería grants, 1560, 1561); vol. 6, fols. 1r, 245v (estancia grants, 1563); vol. 8, fols. 79r, 79v, 80r, 80v (estancia grants, 1565), 150r (caballería grant, 1565), 80v (mill grant to Indians, 1565); vol. 9, fol. 128v (caballería grant, 1567); vol. 11, fols. 44r (estancia grant, 1581), 202r, 266r (caballería grants, 1583); vol. 12, fols. 53v (estancia grant, 1584), 85v (caballería grant, 1584); vol. 13, fols. 22r, 187v (caballería grants 1584, 1585); vol. 15, fols. 146v, 163v, 199r, 200r, 224v (caballería grants, 1590); vol. 16, fols. 21r, 196r, 239v (caballería grants, 1590, 1591), 198v (estancia grant, 1591); vol. 17, fols. 12r, 168r (estancia grants, 1591, 1592); vol. 18, fols. 210r, 210v, 265r (caballería grants, 1592); vol. 19, fols. 135v, 143v (caballería grants, 1594); vol. 20, fol. 131v (caballería grant, 1595); vol. 21, fols. 260r, 293v (caballería grants, 1595); vol. 23, fols. 151r (caballería grant, 1601), 277r (mill grant, 1602); vol. 25, fols. 449v (caballería grant, 1606), 136v (mill grant, 1606); vol. 26, fols. 87v, 177v, 196r (caballería grants, 1607-1609); vol. 30, fol. 104r (caballería grant, 1614).

30. AGN, Tierras, vol. 338, exp. 2, fol. 8r.

31. *Ibid.*

32. AGN, Tierras, water cases consulted: vol. 3, exp. 8, Villa de Carrión (Puebla), 1611; vol. 11, segunda parte, exp. 1, Huilango (Puebla), 1538-1550; vol. 11, segunda parte, exp. 2, Atlatlauca (Morelos), 1538-1598; vol. 13, exp. 2, Tochimilco (Puebla), 1771; vol. 57, exp. 3, Epatlán (Puebla), 1795; vol. 79, exp. 6, Xilotepec (Edo. de México), 1613-1614; vol. 79, exp. 8, Atlixco (Puebla), 1594-1615; vol. 151, exp. 3, Teotitlán del Camino (Oaxaca), 1672-1692; vol. 151, exp. 6, Chilac (Puebla), 1691; vol. 186, exp. 3, Amozoc (Puebla), 1728; vol. 187, exp. 2, Apaseo (Guanajuato), 1542-1696; vol. 225, segunda parte, exp. 2, Agueguetzingo (Puebla), 1705; vol. 307, exp. 2, San Juan del Río (Querétaro), 1714; vol. 338, exp. 2, Tulancingo (Hidalgo), 1716; vol. 339, exp. 3, San Luis Potosí, 1800; vol. 356, exp. 3, Tlalnepantla (Edo. de México), 1718; vol. 414, exp. 4, Tlaxcala, 1684-1726; vol. 534, segunda parte, exp. 1, Acámbaro (Guanajuato), 1733; vol. 671, exp. 5, San Miguel el Grande (Oaxaca), 1745; vol. 933, exp. 1, Coyoacán (México, D. F.), 1768; vol. 933, exp. 3, Coyoacán (México, D. F), 1768; vol. 973, exp. 5, Nombre de Dios (Durango), 1573-1774.

33. "Quietud de los indios y labradores," AGN, Tierras, vol. 79, exp. 8, fol. 4r; "quitar divisiones e inconvenientes," AGN, Tierras, vol. 187, exp. 2, fol. 62v; "obviarlos de pleitos e inquietudes," AGN, Tierras, vol. 151, exp. 6, fol. 28v.

34. Parts of the procedures are described at some length in the following charge from the Audiencia to an inspector about to examine a water dispute in the Valley of Mexico in 1768: "those who enjoy the use of such

waters exhibit their mercedes and gracias before your Excellency, so [that] many controversies between so many interested parties could cease. So from now on this business is to be conducted as instructed. The proceedings to settle it should be undertaken inspecting all the grants [and] safeguarding every party's right to what his respective gracia may have allotted him, but only insofar as it is suited to the property. [Further,] you are to undertake very lengthy-in-details and prolix proceedings, in the manner of experts, examination of titles, eyewitness inspection, [and] also inspection of the waters and their present condition, manner of distribution, targeas, or aqueducts, and many other things of this kind; in addition [you will] hold a hearing for the interested parties to which proceeding it will always be necessary to have recourse if they do not come to an agreement among themselves and succeed in finding a peaceful solution." AGN, Tierras, vol. 933, exp. 1, fol. 10r-v.

35. See note 32 *supra.*

36. "La justicia de la dicha villa fue a visitarla y de la visita resultó hacer repartimiento que fue acepto a todos los dichos labradores," AGN, Tierras, vol. 3, exp. 8, fol. 1r-v.

37. AGN, Tierras, vol. 3, exp. 8; vol. 11, segunda parte, exp. 2; vol. 13, exp. 2; vol. 79, exp. 8; vol. 151, exp. 6; vol. 187, exp. 2; vol. 307, exp. 2; vol. 356, exp. 3; vol. 671, exp. 3; vol. 933, exp. 1; vol. 933, exp. 3; vol. 973, exp. 5. Two of the four non-repartimiento cases were clear usurpations of waters entitled by earlier repartimientos, a third was preliminary to a merced, and the fourth assigned to an Indian community exclusive rights to a stream, based on prior possession.

38. AGN, Mercedes, vol. 2, fols. 227v, 237v; vol. 4, fol. 270v; vol. 6, fol. 243r; vol. 8, fol. 3r; vol. 22, fol. 38r; vol. 24, fol. 71r; vol. 26, fols. 135v, 221r, 224r; vol. 27, fol. 243v; vol. 28, fols. 133v, 179r; vol. 30, fol. 118v.

39. The Indians of Tlalnepantla received continuous use of two surcos of water from the Río de Tlalnepantla while the remaining water was divided by turns among other landowners along the river. AGN, Tierras, vol. 356, exp. 3.

40. "Me hallo con la quieta y pacífica posesión del gozar la misma casa, el uso de esta agua todos los domingos cuya posesión es tan antigua que habiendo yo estado en ella doce años, hallé ser en ella antigua y haberla disfrutado mis causantes en la misma conformidad sin contradicción ni reclamo de otra persona," AGN, Tierras, vol. 933, exp. 3, fol. 1r. Other examples include AGN, Mercedes, vol. 26, fol. 221r and vol. 83, fols. 95v-97r.

41. AGN, Tierras, vol. 13, exp. 2; vol. 11, segunda parte, exp. 1; vol. 151, exp. 3.

42. *Ibid.*, vol. 151, exp. 3.

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43. "Que los naturales de dicho pueblo de Tuchimilco gosen de todas las aguas de los nacimientos de dicho pueblo sin que para ningún efecto ninguna persona les impida el uso de ellas para el riego de sus milpas nopales y frutales [a los] que tienen sus casas dentro de dicho pueblo," AGN, Tierras, vol. 79, exp. 8, fol. 4r-v.

44. *Ibid.*, vol. 225, segunda parte, exp. 2, fol. 48r.

45. *Ibid.*, vol. 534, segunda parte, exp. 1.

46. *Ibid.*, vol. 187, exp. 2, Apaseo; vol. 671, exp. 3, San Miguel el Grande.

47. "No solo en la Provisión necesaria para sus personas sino también para el riego de sus siembras y huertas," *ibid.*, vol. 671, exp. 3, fol. 1r.

48. *Ibid.*, vol. 151, exp. 3, fol. 1r.

49. *Ibid.*, vol. 187, exp. 2.

50. *Ibid.*, vol. 211, exp. 2, Soledad Etla; vol. 113, exp. 2, San Juan Guelache.

51. *Ibid.*, vol. 356, exp. 3.

52. *Ibid.*, vol. 79, exp. 8, fol. 4r-v.

53. *Ibid.*, vol. 534, segunda parte, exp. 1, fol. 1v.

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LINCOLN COUNTY POSTSCRIPT: NOTES ON ROBERT A. WIDENMANN BY HIS DAUGHTER, ELSIE WIDENMAN

with comments by

BRUCE T. ELLIS

RUNNING through most of the published accounts of New Mexico's bloody "Lincoln County War" are implications of extra-territorial intrigue—pointers to the beginnings of vague trails leading beyond the borders of Lincoln County to possible command posts in Santa Fe and even Washington. The trails are difficult to follow; material for their mapping is for the most part little more than partisan assertion, secondary inference, and unverified rumor. Unacceptable as hard evidence, its chary treatment by historians has brought the often repeated charge that the full story of the war has never been told.

Another, although minor, obstacle to an agreed-upon final assessment of the war has been uncertainty about the roles of some of its known participants. One such debatable figure is Robert Adolph Widenmann, whose record as the supporter of the murdered John Henry Tunstall has assured him his small measure of fame. But it is a fame not unclouded by doubt.

Historians have not known precisely what to say about Widenmann, although they quote his many letters, reports, and court depositions at length. The strange mixture of fact and histrionic fancy in these writings, as well as shadowy areas in some of his actions both before and after Tunstall's death, make him less easy to classify than most of his contemporaries. Robert N. Mullin calls him "one of the most illusive and controversial figures in the Lin-