July 21, 1983

Memorandum to Herbert A. Becker, Assistant U.S. Attorney, District of New Mexico

From William B. Taylor, Professor of History, University of Virginia

Re: "Land and Water Tenure in New Mexico, 1821-1846" by Daniel Tyler

Daniel Tyler's "Land and Water Tenure in New Mexico, 1821-1846" is a fine, extensively researched and generally cautious report which contributes new information and insight into the history of political jurisdictions, Indian status, and land rights in the Mexican Period, including the place of decrees from the Cortes of Cádiz in New Mexican law after 1821. Its conclusions are quite consistent with my findings for the Spanish colonial period. Even with changes in Indian status and a shift toward private property after 1821, the property rights of New Mexico Indian Pueblos generally were preserved during the period of Mexican sovereignty.

The purpose of this memorandum is to identify continuities and changes between the Spanish and Mexican periods suggested by our reports, to add some additional information on Indian lands and water use in the Mexican Period, and to comment on the issue of the sale of Indian lands after 1821.

Land

Professor Tyler is right to emphasize added pressures on Pueblo Indians in the Mexican Period to privatize and alienate

EXHIBIT
JP-331

some of their lands in the interests of increasing agricultural production, populating sparsely inhabited lands, and consolidating a settled frontier against the raids of nomadic tribes. Certainly petitions for grants in the Mexican Period more often laid claim to "sobrantes"--"excess" lands that were not used by their title holders--and there were more sales of Indian land.

But what Indian lands were sold, granted, or otherwise alienated? Were the four square leagues of an Indian pueblo--the area that was customarily recognized to be the basic community landholding--subject to private appropriation and sale? Professor Tyler recognizes that while the territorial government of New Mexico for part of the 1820s supported privatizing some community lands on the basis of decrees of the Cortes of Cádiz in 1812 and 1813, its long-term policy was to "protect the Indians in their lands and water" (p. 64): "Both the diputación and the governors of New Mexico maintained a noteworthy consistency in their attempts to determine if a grant of land would cause injury to a Pueblo" (p. 60); "For land petitioners who sought lands within the Pueblo league, or nearby in lands that had been assigned to the Pueblo for pasturing their animals, possibility of rejection was very real. Many requests were denied on the basis that use or occupation would constitute an injury to those with 'ejido' rights" (p. 44); and "Had there been no interest on the part of the Mexican officials in preserving the Pueblos intact, Pueblo lands might have been expropriated quite rapidly" (pp. 59-60).

Professor Tyler finds one case, that of Pecos in the mid-1820s, where substantial lands within a Pueblo's four square league community lands were granted and sold. He seems uncertain of its significance. On page 30 he speaks of Pecos as a "classic" case, and for the idea on p. 54 that vecinos could lay claim to uncultivated lands within the Pueblo league he cites only the example of Pecos. But on p. 59 he also speaks of the Diputación treating Pecos as unique. Here he adds that the case was considered unique because Pecos Indians had abandoned their lands, not because of the very small Indian population that remained in Pecos.

Additional evidence suggests that Pecos was treated as a singular rather than a classic case, and not only because the Indians had abandoned their lands. When the Diputación decided on November 17, 1825 to seek the national government's interpretation of Article 5 of the Spanish Cortes's decree of November 9, 1812 calling for up to half of a community's lands to be distributed to individuals if they were not in use, it stated that the division of lands had been undertaken only at Pecos and not in the other Indian Pueblos because of the "extremely small number of individuals who make up the old* pueblo of Pecos" (MANM roll 42, frs. 313-314, "las causas porque en esta Diputación no se ha hecho con los demás pueblos lo ejecutado

*"Former" is another possible definition of "antiguo" here: "Que existió o sucedió en tiempo antiguo," Diccionario de la Lengua Española, Real Academia Española, 19th ed., Madrid: 1970, p. 94.

con el cortíssimo número de los individuos que forman el antiguo de Pecos"). In this way the Diputación raised the question of whether the population of Pecos had become so small that it could no longer be considered a pueblo. When the Governor of New Mexico recommended the privatizing of some Pecos lands on October 14, 1826, he also noted the small number of Indians remaining: nine families and less than forty inhabitants (SANM I doc. 1371, fr. 2; as of March 1825 there had been ten families in Pecos, MANM roll 42, fr. 272). As Professor Tyler notes on p. 57 of his report, the Diputación later ordered the return to Pecos Indians of lands that had been granted to outsiders within the community lands while allowing the various land sales to stand.

The fate of the "Pueblo league" in the New Mexico Pueblos during the Mexican Period also sheds light on the case of Pecos as unique. The evidence available from the files of the Diputación minutes and the Governors' records in MANM and SANM I indicates strong government protection for the Pueblos' community lands from 1829 to the end of the Mexican Period. Professor Tyler believes that the Diputación made an ambiguous response in the case concerning protection of the "ejido" or community lands of Picurís Pueblo in 1829 (p. 57, citing MANM roll 42, frs. 606-607): "The diputación waffled in its response, authorizing the grantees to sow crops in their land for one year, but noting that if, as a result of the present dispute, the lands in question were determined to be 'indonable' they

would have to be returned." But the Governor's order in this dispute eliminated the ambiguity: on June 5, 1829, Governor Abreú declared that "Rafael Gonsales and his associates shall not be placed in possession of the land they requested near the Río de Picurís and as soon as they harvest the field they were allowed to plant this year they will vacate the land" (SANM I doc. 1374, "no se les consede propiedad al C. Rafael Gonsales y socios del terreno que solicitaron en el Río de Picurís y tan luego como cosechen la labor que se les consedió por este año se retirarán"). This verdict denying possession to Gonsales was repeated on March 4, 1830 and April 14, 1831 after Gonsales entered new petitions for community lands of Picurís (SANM I doc. 1374). In the last years of Mexican rule, Picurís Pueblo again received confirmation of its four square leagues of community land: "The judge of first resort of the Second District will arrange that the natives of the Pueblo of Picurís are not disturbed in the peaceful possession of the league of land that was granted to them and that the Justice of the Peace in Taos shall turn over to them, without any pretext whatsoever, the portion of the land of which they have been deprived" (SANM I doc. 1169 fr. 42, April 7, 1845, "El jues de 1ª instª del 2º Dtro dispondrá q los naturales del Pueblo de Piquríes no sean molestados en la pacífica poseción de la legua de terreno que se les concedió y q el Jues de Pas de Taos les entregue sin pretesto algº la parte de tierra de q los ha despojado").

Other examples of official validation of Pueblo community lands--the Pueblo league--in the Mexican Period are Jémez on April 18, 1833 (SANM I doc. 1245); Nambé, 1840 (Tyler report p. 57); Nambé and Tesuque, 1842 (Tyler report p. 57); Santo Domingo on August 26, 1844 (SANM I doc. 1380); and Isleta in June 1845 (SANM I doc. 1381). In the Isleta case even lands located beyond the league were denied to a private petitioner because the Pueblo had used them without opposition as ejidos comunes for a long time. In the 1820s Sandía Pueblo's league was formally protected although vacant lands beyond the league were considered sobrantes (Tyler report p. 53).

What constituted the Pueblo league in the Mexican Period? Without addressing this question directly, Professor Tyler speaks as if the Pueblo league was one square league (borders measuring one league from north to south and one league from east to west) as opposed to the customary four square leagues of the colonial period (one league measured in each of the four cardinal directions from the Pueblo's cemetery cross or church; that is, a square that is two leagues on a side). On page 52 Professor Tyler speaks of Pueblo community lands as "a square league" and on p. 53 Sandía's lands are spoken of as "one league."

New Mexico's custom of considering Pueblo community lands to be four square leagues in area is unusual. One square league was the accepted standard in the heartland of the Viceroyalty of New Spain. Some ambiguity about the size of the Pueblo league

occasionally does enter the New Mexico evidence after the Cortes of Cádiz decrees in 1812 and 1813. For example, the measurement of the community lands of Santo Domingo and Cochití in May 1817 raised the issue of two ways of measuring the Pueblo league. The commissioners first marked off 2,500 varas (one-half league) from the cemetery cross, which they called "the half league which by right belongs to this community"; then they measured "the other half league which the said Indians considered theirs" (AJANG caja 267 doc. 19-3658, fol. 42r). Ignacio María Sánchez Vergara, the Promotor Fiscal named by Governor Allande in these proceedings, recommended that the second half league in each direction which the Indians claimed as community land be declared surplus land available for reassignment (Ibid., fol. 50r). No action was taken on this recommendation but the idea of a one square league assignment was raised. Two years before, however, Governor Maynez had clearly defined the Pueblo league as a four square league area: "5,000 varas measured from the cemetery cross in the four directions" (SANM I doc. 1357, fr. 2, April 15, 1815).

While a new settlement of non-Indians during the Mexican Period might be assigned one square league surrounding their cultivated land as ejidos (e.g. El Chaparito, SANM I doc. 1130, 1846 decretos of the Asamblea Departamental, March 10, 1846), the Indian Pueblo league remained four square leagues: the Jémez community lands in 1833 were measured one league in the four directions "according to custom" (SANM I doc. 1245). Santo

Domingo's lands in 1844 also were measured 5,000 varas from the cemetery cross (SANM I doc. 1380). The governor's report on Pecos dated October 14, 1826 spoke of the Pueblos of New Mexico having "the ancient immemorial possession which was given to them and which, as I said above, occupies one league in each direction" (SANM I doc. 1371, fr. 3, "la antigua inmemorial posesión que se les dió, y que como dixe arriba ocupa una legua por cada viento").

Aside from Pecos in the 1820s, one other apparent case of division and sale of Pueblo community lands sanctioned by the government is described in "Land and Water Tenure in New Mexico, 1821-1846." It is a land partition between the Santo Domingo and San Felipe Pueblos in 1824 (p. 55). Professor Tyler says, "The diputación further pointed out that the lands held by these communities 'en comunidad' could be sold by each individual so that the 'sobrantes' would be disposed of in the best terms." This is an application of the policy to privatize some Indian land in the 1820s but the land in question was a separate grant outside the Pueblos' leagues that was made jointly to San Felipe and Santo Domingo by Governor Mendinueta in 1770 on the grounds that to grant the parcel to someone else would be prejudicial to the two communities (SG-142, MPNMLG roll 16). "En comunidad" here refers to the lands having been held jointly by San Felipe and Santo Domingo and should not be confused with the phrase "tierras de comunidad" which ordinarily would refer to a Pueblo's patrimonial lands, the four square leagues.

There is some ambiguity in Professor Tyler's report concerning the Indian lands that might be subject to sale. At several points he speaks in broad terms and without qualification of "the right of Indians to sell their lands" (p. 34); "the Spanish Cortes recognized the need to break up Indian lands" (p. 10); "State laws reflected this trend toward breaking up Indian holdings. Jalisco and Zacatecas passed legislation aimed at dividing up the lands of Indian villages" (p. 11); "The objectives of Mexican land policy seem to have been that of preserving the Indian's right to sufficient land for maintenance while allowing excess lands to be placed in the hands of those who would cultivate them" (p. 13); "The decrees of August 7, 1823, terminated the inalienability of Indian lands by specifically mentioning the end of entail on property that included lands controlled by caciques" (p. 11); and "the somewhat hazy implication /for the 1830s and 1840s/ that the Pueblos could sell their lands" (p. 57). What lands might be sold or granted? The Cortes's decrees on pueblo lands were not blanket edicts on the need to break up Indian lands or allow the sale of those lands without restriction. Article 1 of the often-cited Cortes decree of January 4, 1813 on the privatizing of common lands stated that the "ejidos necesarios de los pueblos" were to be exempt from distribution (Manuel Dublán and José María Lozano, Legislación mexicana o colección completa de las disposiciones legislativas expedidas desde la independencia de la república, Mexico, 1876, vol. 1, p. 397). That laws of Jalisco after 1821 were "aimed at dividing up the lands of

Indian villages" also needs qualification. Some community lands were distributed after 1821 (actually, many of these lands in Jalisco had been divided in a de facto fashion before 1810) but Article 1 of the Cortes decree of January 4, 1813 was invoked to exempt the ejidos needed by the communities (Colección de acuerdos, órdenes y decretos sobre tierras, casas, y solares de los indígenas, bienes de sus comunidades y fundos legales de los pueblos del estado de Jalisco, title varies, 5 volumes, Guadalajara: 1849-1880, vol. 1, pp. 14-17, instrucción of the Diputación Provincial, December 7, 1822) and on June 17, 1836 the Junta Departamental of Jalisco cancelled the laws on the division of terrenos de indígenas (Ibid., p. 86). The end of legal entailment of caciques' landholdings affected the mortmain property of individual Indians. It did not terminate "the inalienability of Indian lands" (all lands of Indians had not been inalienable in the colonial period for that matter)* any more than the disentailment of lands of the creole nobility in the Mexican Period meant the potential breakup of all municipal lands of non-Indian towns and cities in Mexico. As Professor Tyler shows later, the statement on p. 13 that Mexican land policy was to give Indian Pueblos subsistence lands and privatize excess lands had substance for the 1820s (although it was not widely implemented

*With the proper authorization, Indians could and did sell some lands outside the patrimonial holdings of the community. This would include lands purchased by communities outside the league as well as the private holdings of individual Indians.

then) but does not represent the history of land tenure in the later years of the Mexican Period in New Mexico.

That some lands owned by Indians in New Mexico were sold during the Mexican Period is apparent, but it is not clear that a significant part of the Pueblos' four square leagues was being transferred officially to non-Indians. Professor Tyler's references in note 165 to deeds of sale to non-Indians by Indians of Nambé and San Ildefonso during the Mexican Period from the Pueblo Lands Board records are not unequivocal evidence of Indian land sales or sales within the Pueblo league.* For San Ildefonso these records are very sketchy, amounting to a short outline of who sold, who bought, date of sale, and occasionally some further information in the deed on boundaries and witnesses. The Nambé records contain translations of the Mexican-Period deeds and some transcriptions of the original Spanish, but the original Spanish records are not available for study. The authenticity of the deeds for Nambé was ques-

---

*In discussing the Pueblo Lands Board records for private claims near Nambé and San Ildefonso the following changes in Professor Tyler's list in note 165 should be made: entries #3,4,7,8,10,11,12,13,14,17,18,19, and 20 for San Ildefonso are recorded in P.C. 45.1-13 rather than P.C. 131.1; entry #5 for Nambé (P.C. 14.2, Jan. 2, 1831) covers the same parcel of land as entry #1 (P.C. 14.2, Feb. 19, 1829); and two more deeds of sale by Indians are listed near San Ildefonso in P.C. 45.1-13--Oct. 29, 1823, seven small parcels by seven San Ildefonso Indians to Antonio Armijo, and Sept. 12, 1834, two fields by Juana and Dominga, Indians of San Ildefonso to Juan Ponciano Sánchez. This gives six apparent deeds of sale for different lands of Nambé Indians and twenty three for San Ildefonso; twenty nine in all. For San Ildefonso, entry #6 (P.C. 106.2), the seller is said to be Nicolás de _____, not Nicolás de Trujillo.

tioned by H. J. Hagerman, a member of the Pueblo Lands Board, in a "Memorandum in regard to the method of interpreting that part of Section 7 of the Pueblo Lands bill relating to Nambe," dated December 30, 1925. He stated that

> An examination of the deeds in a preliminary way (and a more detailed examination will be made) seems to indicate that in almost every instance /all underlining appears in the original/ the deeds from Indians as officers of the Pueblo or as indviduals, were signed by the same party (and in the same handwriting) who wrote the deeds or the descriptions in the deeds.
>
> The deeds seem to show that in some cases the so-called seal behind the signature was made by the same party who wrote the signature. In other cases the mark seems to have been inserted subsequently to the alleged signatures and in different ink and by different parties. In few instances does it seem that even the mark has been annexed to the alleged signature by the Indian himself.

It is not clear from the record whether the authenticity of the deeds for San Ildefonso was considered but there seems to be an internal contradiction between the summary of the deeds for San Ildefonso on December 14, 1834 (entry #5 in note 165) and December 15, 1834 (entry #6). In entry #5 the Governor of the Pueblo who witnessed the transaction on December 14 is said to be José María Trujillo. The next day, when entry #6 was executed, the Governor of the Pueblo is listed as Nicolás de _____.

If the deeds are authentic--and this is not likely in some cases and cannot be verified in others--there are patterns in the evidence that make it difficult to say how many of the lands were within the Pueblo league. In nine of the deeds it is not clear that the Indian seller was from Nambé or San Ildefonso

(the seller is identified only as an Indian and the witnesses are not officials of Nambé or San Ildefonso) and the record does not state that the land was within the Pueblo lands (Nambé entries #3,6; San Ildefonso entries #8,9,12,13,18, and 19). In two other deeds the Indian sellers are listed as natives of San Juan Pueblo (Nambé entry #4; San Ildefonso entry #21), one of whom was selling land "inside the league of the Pueblo of Nambé." Only in five of the deeds is it clear from the Pueblo Lands Board records that the lands were within the Pueblo league: Nambé, entries #1 and 4; San Ildefonso, entries #5 (house), 6 (house lot), and 17. I suspect, however, that if the deeds are genuine, at least some of the other sales by San Ildefonso Indians would be for lands within the league. Unfortunately, only for a few of the parcels is the description clear enough to permit a judgment: San Ildefonso, entries #8 (at the ciénega grande), 10 (at the ciénega in the Cañada de San Ildefonso), 19 (at El Bosque), and 21 (at El Bosque). Another pattern that emerges from these records is that all but two of the deeds describe small parcels of farm land (usually about 50 varas by 100 varas in size) or house lots. The two exceptions are "arid lands" in San Ildefonso entries #10 (P.C. 45.1-13, Feb. 3, 1837) and 18 (P.C. 45.1-13, Dec. 31, 1838). This suggests that the small farming plots available to Indian families may, at least in some Pueblos, have been considered private property in the Mexican Period. One

final ambiguity in these records and in the question of the sale of Indian lands is whether an individual Pueblo Indian could sell land without the approval of the Pueblo officials or higher authorities. In seven of these deeds Pueblo officials were the sellers or witnesses to the sale (San Ildefonso entries #1,5,6,14,15,16, and 20); in the other twenty two there is no mention of Pueblo approval or notice. In one case a non-Indian purchaser requested the Diputación to recognize the transaction, which it did (San Ildefonso entry #2, MANM roll 42, frs. 491 and 499).

On page 50 of his report, Professor Tyler says that 18,350 acres, or about 13.54% of lands within the Pueblo grants of Tesuque, Santa Clara, Taos, San Ildefonso, San Juan, Sandía, and Cochití were claimed by non-Indians at the time of the Pueblo Lands Board proceedings in the 1920s. Since these figures include post-1848 transfers and occupations, the 13.54% must be reduced, perhaps substantially reduced, to arrive at an estimate of Indian sales in the Mexican Period. Professor Tyler's secondary source for the point that non-Indians occupied lands within the Pueblos' leagues, Alvar W. Carlson (in "El Ranchito and Vadito: Spanish Settlements on Indian Lands," El Palacio 85: 1, spring 1979), indicates that most of the transfers took place after 1848, during the period of confusion and declining Indian population in the early years of American rule (Carlson, pp. 30, 34). For El Ranchito Carlson offers one Mexican

Period sale within San Ildefonso's community lands and for El Vadito, near Picurís Pueblo, he indicates that much of the settlement there occurred in the 1860s and 1870s (pp. 30, 34). Even including, as Professor Tyler does, all the sales and other transfers and occupations after the Mexican Period, between 1848 and 1923, the total is a small proportion of the Pueblos' holdings. That at least 86.5% of the patrimonial lands of the Pueblos were undisputed in 1923 suggests that the four square leagues were respected in the Mexican Period and that sales from within these community lands would have been the exception rather than the rule.

Water

Professor Tyler's brief consideration of water rights for the Mexican Period is consistent with what is known about water adjudications under Spanish rule: water rights were attached to rights in land, and water was distributed in *repartimiento* arrangements which were subject to some change as conditions changed; the water rights of formal communities were senior to those of individuals; and a principle of equity operated, in which efforts were made to accommodate the needs of the various potential users: "In regard to water transfers, all New Mexicans understood that rights to water transferred with the land. At the same time, these 'rights' were relative to the primary needs of communities and were subject to change when conditions changed" (p. 64); "everyone should be able to irrigate at least some portion of his land" and "water was a

community matter, and the priority of water rights was always with a community (Pueblo or municipality) and not with an individual" (p. 61).

Professor Tyler finds that the Diputación was careful to protect Indian Pueblos' access to water. He notes that Acoma was protected by the Diputación against loss of water in the case of an individual petition for a tract near the Pueblo's lands (pp. 60-61). He continues, "Similar concern was shown for the acequia rights of Santo Domingo and the possibility of water loss to the Pueblo of Santa Ana if a new settlement were allowed on the same stream above the Pueblo" (p. 61). The list of examples of attention to the water needs of Pueblos can be lengthened: for Laguna and Acoma, MANM roll 42 fr. 175, Diputación minutes of March 12, 1824; for Jémez, 1835, MANM roll 42 fr. 737; and Taos, 1837, described in Myra Ellen Jenkins, "Taos Pueblo and Its Neighbors," New Mexico Historical Review XLI: 2 (1966), 106-107.

Nearly all of the small group of records that treat irrigation systems in New Mexico between 1821 and 1848 have to do with maintenance of the ditches or division of the water within one community. For the distribution of water between an Indian Pueblo and neighboring non-Indians the one clear and detailed record of a repartimiento in the Mexican Period is the Taos-Arroyo Seco judgment of 1823 (discussed in my second report, "Colonial Land and Water Rights of New Mexico Indian Pueblos" on pages 27 and 34-35) which gave clear preference to the

water rights of the Pueblo but permitted other landowners to use some of the remaining water.

While he does not explore the point in detail, Professor Tyler says that a "concept of equal distribution seems to have been at least as important as primacía or antigüedad" (pp. 47 and 49). Given the clear preference for the rights of Pueblos and other formal communities, it is difficult to imagine how equal distribution would be applied. Perhaps a more appropriate word for the principle--and one that appears more often in the manuscripts than "igual" is "equitativo" or "equidad"--"equitable." Equity here recalls the efforts made to accommodate as many users as possible within a system that favored communities, not that the assignments should be equal.

Conclusion

In light of Professor Tyler's conclusions and my reading of evidence for the Mexican Period, the statement early in his report that "the official New Mexican records seem to indicate that decisions made in regard to land and water alienation in one Pueblo had little applicability when a similar problem arose in another Pueblo" (p. 4) needs qualification. Precedents were rarely cited in the decisions of colonial and Mexican judges for New Mexico but this was not a situation of judicial anarchy despite the frequent, often violent shifts in government in Mexico City and the sometimes bewildering changes in the laws sent north from the capital. There are several clear patterns

in the judicial records on land and water that permit us to identify principles in operation. One is the well-documented pattern of protecting the customary four square leagues of Pueblo community land; another is the attention paid to protecting the waters used by Pueblos; also preference for community rights over private rights; and equitable distribution that would promote agriculture and settlement and satisfy as many users as possible. While the Mexican Period is characterized by increased pressure on Indian lands, declining numbers of Indians and increasing numbers of non-Indians, the move toward privatizing community lands and authorizing their sale was centered in the mid-1820s. Even then it was not a frontal assault on Pueblo community lands and did not lead to a major redistribution of Indian landholdings to non-Indians in the Mexican Period.