PRIVATE AND COMMON RIGHTS IN THE "NATURAL PRIVILEGES" OF CAPE MAY, NEW JERSEY

Bonnie J. McCay
Rutgers University

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A. Introduction

Today "the commons" is a popular name for a shopping mall –for example, The Bridgewater Commons –or a collection of professional offices. Developers seem to have chosen the term for its connotation of tradition and communality, a touch of the colonial past and an ironic hint of community as opposed to individuality. Were there ever common lands in New Jersey? Did members of towns and villages cooperate in the use and management of common pastures and, more to the subject of my book, in the use and management of coastal beaches, clam and oyster beds, and fishing grounds? And if there were, how well did they manage the commons? If the common resources declined, why?

In historical research I found evidence for common rights to some lands marginal to agriculture in New Jersey: the barrier beaches of the Atlantic Coast, salt marshes of the swampy Delaware Bay area of the states, and forested lands not far from New York City Eighteenth century acts of the colonial assembly of New Jersey and a few early 19th century acts of the new state legislature after the revolution pertain to the management of common pastures and salt meadows along the oceanshore and rivers. I touch briefly on these They also reveal the failure of a large forest commons and its enclosure, a story I can only hint at here I focus on the very peculiar emergence of common ownership and management of marine and wetlands habitats in Cape May County in the early 19th century, a case in which common lands were privatized and then restored to the commons.

B. Fishing, Grazing, and Meadowland Management

When first settled in the latter 1600s, most of the new towns had areas that settlers defined as common lands much as existed in England. They were forests, meadows, and swamps that had not yet been surveyed and allotted to individuals. Evidence for Middletown, near Raritan Bay and what is now Sandy Hook, appears in the First Town Book, which records the assignment of lots to the first settlers, earmarks for their cattle, and early rules of the township. On January 6, 1667 the settlers agreed "That if any one shall ffell timber uppon the common and shall lett it laye three monts it shall bee lawfull ffor any one to make use of it: provided it bee niether Hewed nor cloven..." (Stillwell 1932: 150). More momentous events occupied the settlers than defining and managing the commons: they had to deal with "drunken Indians" and the threat of Indian aggression against them, and their claims to self-governance were being challenged by Carteret, one of the early "Proprietors," who demanded quitrents from them. But the early settlers insisted on the need for common lands against attempts by some to privatize everything within the town. Thus, on June 21, 1670, the town leaders declared that the salt meadows around Weikec Creek and also Shoal Harbour Creek should be "granted to lye common for cattle to graze on; notwithstanding any former order made to the contrary" (Ibid: 163). I was unable to find out what happened next but suspect that some of these lands are the marshy areas around the fishing port of Belford that are today used as communal sites for drying out fishing nets and tarring poles and pots for the coastal fishery.

There are many kinds of "commons," including situations where lands are owned in common and used privately, owned in common and used in common, and owned privately but used or improved in common. The last was most common in the legislative acts of New Jersey. On the coast, the beaches, meadows, and islands were actually owned by individuals (with grants from the Proprietors) but the cost of fencing was deemed too high and thus they were used in common. Evidence for this is a 1770 act of the colonial assembly of New Jersey "... to regulate the Pasturing the Lands, Meadows and Islands in Common, lying on and adjoining to a certain Beach, known by the Name of Barnegat or Long-Beach, and for other Purposes therein mentioned" (Colonial Laws 1986, v.4: 41).

The reason for common use was simple: it was very difficult and, in the circumstances, not very sensible to divide the land into separate pastures: "..the Situation and Circumstances attending said Beach, Meadows and Islands, are such that they cannot conveniently be divided in the ordinary Way, by fences or Ditches...." The result of communal land use on Long Beach Island was classic: overgrazing of the coastal pastures. However, the scenario, sketchy as it is, adds to the case against Garrett Hardin's (1968) notion that freedom and equality in themselves are to blame for "tragedies of the commons." Some English common pastures of the 16th century were overgrazed because a few entrepreneurs, responding to the woolen market, obtained rights to them and put large flocks of sheep on them (Tawney 1912). Just so, in New Jersey the coastal pasture lands were in trouble not because people had equal rights to them, but because those who used them had uneven amounts of wealth, power, and nerve. The legislation, short as it is, shows that some people were inclined to use the common lands at the expense of others: "...by Means whereof, it is in the Power of a few Proprietors to greatly prejudice the said Beach and Meadows, by overstocking the same, and receiving the whole Profits to themselves...."

The petitioners to the assembly asked for, and got, a law "to limit and regulate the Pasturing said Beach, Islands and Meadows in Common, which is but reasonable and just..." On their behalf the colonial assembly created a stinting rule, similar to those used in England: no one "shall put on, or suffer to run at Large on said beach, Islands and Meadows, a greater Number of Horses, Horned cattle, Sheep, or other Stock, than in Proportion to the quantity and Quality of the Lands, Islands and Meadows, he or they shall respectively

hold or be entitled to." Stinting is a way of managing access to common property by limiting use-rights according to some external criterion such as the amount of land owned or the number of animals that could be fed from one's private hayfields over the winter time In the Barnegat case, allocation of use-rights was simpler and internal to the case: it was according to how much of the grazing land each user owned.

The Barnegat pastures also show the potential for user-group management of the commons. The law passed by the colonial assembly created a corporate group for management of the commons. The users of these pasture lands had to meet yearly, at a predetermined time and place (the 4th Tuesday in October, at Benjamin Randolph's home or elsewhere as determined by majority), where they would choose three people to serve as managers to regulate pasturing, limiting the proportion of livestock allowed on the commons to the proportion of land owned. Also, every year the elected managers had to build impoundments and use them to brand the newborn animals for the owners, branding being critical to a management system such as this.

People who ran more animals on the commons than they were allowed had to pay penalties according to the kind of animals and the number of weeks they ran at large Managers were empowered to sell the animals after four weeks' notice of non-payment of this fine (which amounted to and was probably viewed by some as a rent). The money received from the sales went to the managers for their trouble and expenses, and the surplus, if any, would go to the several owners of the land according to how much they owned.

Geography made it easier to manage the Barnegat system The cost of defining the territory was relatively low for the Barnegat owners because the pasture was an island. In the legislation, the surrounding waters were deemed "a lawful fence," to support actions of trespass against those who tried to bring animals onto the barrier beach property from elsewhere.

I found no other case of a pastoral commons in New Jersey's colonial laws. There may have been others, accepted within the frameworks of local townships as the 17th century Middletown case described above, but it is also possible that few of these systems existed as settlement grew, given the emphasis on privatization in New Jersey colonial history. More common were associations of property owners who pooled resources to accomplish objectives that they could not do individually. One comparatively late example is found in an act of 1881 (New Jersey Laws 1881· 177-179) recognizing and defining the constitution of associations of owners of islands along the coast or tidal streams whose business it was to build and maintain sea walls or embankments to protect their property against coastal erosion from high tides and storms. More common were like associations of meadow-land owners, who cooperated in the construction and management of drainage ditches, dikes, and bridges.

C. The Forest Commons of Bergen

In the 17th century, Bergen Township, originally settled by the Dutch, encompassed the entire northeastern corner of New Jersey including the great tidal swamp and meadows now known as "the Hackensack meadowlands" and large forest tracts some being along the edges of the salt meadows in the region of Secaucus (across the Hudson River from Manhattan Island). This case in point of common rights to valuable timber (and wetlands) resources may also be the only case: In 1743 Bergen Township was described as having a "different circumstance" from the rest of East New Jersey having "a large Quantity of Land and Swamp that lyeth in Common" (Acts 1743: 577).

"In Common" meant that specific people had common rights to the land and swamp, not that it was public property or wilderness. Some of the land surely was wilderness: the Bergen County Freeholders were preoccupied throughout the 18th century with the matter of giving out bounties to those who killed "Wolves, panters and Redd foxes" (Minutes of the Justices and Freeholders 1717: 4). Some was thoroughly tamed, as for instance a thirty-acre plot in the common lands of the Secaucus Patent that was planted with European exotics by a French botanist from the Jardin des Plantes in Paris in the name of King Louis XVI (Westerveld 1923:90). Much was very valuable timber, the more so being close to New York City.

The text and context of the colonial acts pertaining to the Bergen commons suggest that this was an instance of a commons out of control because of commercial pressures to use its resources and because of conflicting claims. The solution taken was to privatize the commons, and that too turned out to be difficult, because of the numerous and often conflicting and competing claims, but it was finally accomplished. This case, if presented in greater detail, would show, like others, that New Jersey colonists were not very good at managing communal lands. The history of the forest commons of Bergen Township, as reconstructed it from legislative acts, is a classic instance of a "tragedy of the commons." It also can be used to argue that such tragedies are not inherent in communal property per se. Instead, they may be outcomes of a situation of a commons out of control because of competing and conflicting claims, increased market demand (in this case, for hardwood), and the underdevelopment of local political authority. The colonial legislature tried to empower the township to manage the commons but the solution finally taken was to privatize it. However, that too turned out to be extremely difficult because of conflicting claims through various kinds of title: through early grants from one or another agent of the king of England (dating roughly from about 1664, when the Stuart monarchy began giving away lands in North America, including New Jersey, to proprietors who in turn sold them to settlers and investors; from Indian purchases; and from the Proprietors of East New Jersey, the group, formed by William Penn and other English Quakers, that became New Jersey's real estate agency in the early 1680s, at the same time that another proprietorship group was formed for the southern, western half of New Jersey (Pomfret 1974).

D The Cape May "Natural Privileges:" From Private to Communal Management

Were there any "comedies of the commons" (Rose 1986; Smith 1984), or situations in which common resource users worked together to protect their mutual interests? The first hint I found were acts of the New Jersey legislature that established corporations of the citizens of townships of Cape May County for the purpose of managing fishing, hunting, fowling, and shellfishing activities I was ready to use the case to suggest that communal management was indeed common in the 19th and perhaps 18th centuries when I .stumbled upon more information. I now believe that the case, like that of the Bergen commons, was singular and exceptional. It is a complicated story of a failed attempt at communal management followed by monopolist privatization --by no other than Jacob Spicer, one of the commissioners in charge of privatizing Bergen's common lands. This was in turn followed by a return to communal management, which lapsed in the wake of the state's claims to ownership of tidewater soils and resources.

Two acts of the legislature in 1839 and 1844 pertained to corporations in Cape May County that had management functions and exclusive jurisdiction over coastal and tidewater resources. An act to incorporate the owners of certain fisheries in the Upper, Dennis, Middle and Lower townships, in the county of Cape May (N.J. Laws, 1839, supplement 1844) looks like evidence of the ability of people to *create local-level systems to manage their common property. In Cape May County, originally divided into Upper, Middle, and Lower* Precincts, "certain fisheries and rights of fishing and fowling, and privileges" had been granted as common property to inhabitants of each of the townships by one Jacob Spicer, Jr. in 1795. In 1839 the legislature approved the incorporation of "general associations" for Upper, Dennis, Middle, and Lower Townships which were to last for 20 years (and could be renewed), and to "have and enjoy all the rights, powers and privileges incident to a body politic and corporate, for use, enjoyment, management, and preservation of their said common property and for no other intent or purpose whatever" (N.J. Laws 1839: 76).

According to the legislation, the associations were to elect trustees at yearly meetings and through them enact laws and regulations as deemed "necessary or proper for improving their common property, and directing the use and management thereof, and the times and manner of using the same, and for the preservation thereof...." as long as they were not inconsistent with laws and constitutions of the state and the United States.

The reason given by the legislature for these unusual associations was that nothing else existed to help residents reduce conflict and protect the resources on which they depended, at least in part, for subsistence and income. The by-laws, regulations, and enforcement were needed in a situation in which population was growing and common property resources thus becoming scarcer: "...the said owners, by reason of their great numbers, have experienced great injury and inconvenience in the enjoyment of their common property." *In addition, a system was required that would allow them to keep strangers out or at least be able to punish them for breaking* local rules.

When I found the cases I read them as indicating that the state was unable to enforce laws promulgated by the legislature, so a group of citizens had taken the matter of common property management into their own hands. An alternative interpretation was that pressures on tidewater resources from rising demand led to an attempt to specify rights and responsibilities. But what about the grant from Jacob Spicer, Jr., in 1795?

There is little else written about these local management associations and nothing about how and whether people were able, through them, to manage access to and use of marine resources. But a local history (Stevens 1897) and old diaries (Stevens 1934, 1935), includes clues to how they came about. They did not arise simply out of concern about managing commonly held resources, as the legislative acts imply and I at first thought. Instead, they came about after a long, stormy period of dispute over communal management and privatization of rights to hunt, fish, and take shellfish. In this saga, another Jacob Spicer, the father of the man who gave the rights to the citizens in 1795, is the key figure. He was a public-minded citizen who turned coat, as it were, and became the single, exclusive proprietor of what were called "the natural privileges" of Cape May County.

This is not only an unusual case, at least in the United States, of "sole owner" privatization of fisheries and other erstwhile common-property resources. It is also a remarkable instance of a deliberate attempt by a large group of people to cooperatively manage a common resource. They failed when the resources were bought up by Spicer, but thereafter they persevered and led Spicer's son to change private property to communal property.

Jacob Spicer was a greatgrandson of New England Puritans. His father came from Long Island to Cape May in 1691, like other first settlers attracted by prosperous whaling and good prospects to obtain land (Stevens 1897: 44). His father was a very active man, colonel of the local regiment and a member of the colonial assembly from Cape May. He was among the handful of local men who had special commissions from representatives of the king to take whales, wreck and "other royal fish" along the New Jersey shore (Stevens 1897.68) and was a commissioner for Cape May to carry out the 1719 oyster bill of New Jersey, the first protective measure on record for oyster beds.

His son, Jacob Spicer, 2d, is the focus of our narrative. He was born in 1716 and entered the colonial assembly in 1745, remaining in it with his colleague and friend, Aaron Leaming, also of Cape May, until his death in 1765. Spicer was part of a commission to settle Indian claims and extinguish Indian title in the state but also appointed to buy land for the sake of the Indians who remained in New Jersey. He was responsible for provisioning and supplying troops for the French and Indian War of 1754-63 and was chairman of a

committee to settle claims for damages incurred by that war. As seen above, he was also one of the commissioners assigned to handle the enclosure of the Secaucus common lands. Spicer is best known for having worked with Aaron Learning to compile 126 volumes of *the original grants, concessions and other state papers concerning New Jersey (Learning and Spicer 1758).*

Jacob Spicer was by almost all counts a successful, public-spirited and accomplished colonist. He was probably also fairly well off, one of the two "really rich men in the county" (Aaron Learning being the other) (Stevens 1897: 137). He was a thrifty, clever merchant. Stevens says that he "had the faculty of acquiring wealth and of grasping every opportunity which presented itself" although during difficult times that meant household economies and encouraging knitting and wampum manufacture as local industry. Yet when he died, in 1765, he was very unhappy and felt himself to be much maligned. In his will he complained of unjust treatment by the populace, of being villously defamed and grossly abused. All of this "on account of the natural privileges" (Stevens 1897: 139). Here is what they are and how they become such a source of trouble.

The "natural privileges" were part of the landed property created in the European settlement of the area. Land ownership was apparently understood to include rights to hunt, fish, and fowl on adjacent waterways and marshes. The interesting and unusual problem was that those privileges were, as so much else, capable of being commoditized.

One of the speculators in West Jersey colonization, Daniel Coxe of London, amassed over 90,000 acres of what is now known as Cape May County. Although he never came to America, he tried, among other things, to create a manor complete with quitrents and feudal services at Town Bank, Cape May (Pomfret 1964· 72-73). Coxe's plans included a winery, glassmaking, and whaling industry. He claimed that he had invested £2000 in whaling and sturgeon fisheries in Delaware Bay and initiated salt panning in hopes of developing salt fish trade with the West Indies and the Mediterranean (Pomfret 1964: 72). This all came to naught, except that some New Englanders settled in Town Bank to prosecute whaling

The manorial impulse was strong and Coxe was not the only one to try. But settlers had no intentions of becoming tied to feudal systems of obligation, as disputes over quitrents demanded by the proprietors in East Jersey showed (Pomfret 1964). Conflicting land claims because of disputes between various proprietary and other groups claiming jurisdiction played a large role in the reluctance of settlers to come to New Jersey during the 17th century. Indeed, settlement on Cape May was extremely sparse until 1691, when most of *Daniel Coxe's interest in the area was sold to a a large trading and land company formed by a group of speculators in London. The* West Jersey Society, as it was called, was constantly battling with William Penn's group of speculators, the Council of Proprietors of West Jersey, but it also facilitated settlement.

Before, when land titles were available only through the proprietors (and Coxe took up most of them on the cape), hardly any titles were obtained. As the society was formed, land sales were brisk. For 64 years the Society sold off the lands (Stevens 1897:43). In 1696 the original Jacob Spicer bought 400 acres (Stevens 1943). Fifty years later the Jacob Spicer estate (probably that of the grandson of the original settler) was vast: in 1751 a Jacob Spicer owned 2342 acres of unimproved land in Lower Precinct of Cape May, far more than anyone else (the next largest estate was about 600 acres) (Stewart 1940). By that time most of the land had been sold by the Society. There was nothing much left but "vacant lands" and the so-called "natural privileges" (common rights) to use the sounds, marshes, and bays. And these had been thoroughly commoditized in the real-estate speculation that characterized the colonization of much of the Mid-Atlantic.

In 1749 a Dr. Johnson of Perth Amboy, agent of the West Jersey Society based in London, got instructions to sell off as much as possible of the society's remaining lands at Cape May (Stevens 1897: 105). In 1752, residents of the area prepared to claim and manage the "natural privileges" as common property. One hundred and forty one freeholders formed an association and proposed to buy from the West Jersey Society "the natural privileges of fishing and fowling and all the articles of luxury and use to be obtained from the bay and sounds, which were held in high estimation" (Stevens 1897: 112). The men argued that although the "broken and sunken marshes, sounds, creeks, barren Lands" involved in the proposed purchase were of very little monetary value, something had to be done to prevent an individual from buying them up because that person would thence be in a position "...to monopolize the Fishery, oystering & which nature seems to have intended for a General blessing to the Poor, and [for] others who have bought the Lands and settled contiguous thereto..." (quoted in Stevens 1897: 112). Their motives were not entirely altruistic. They also noted that "...many of us the Subscribers having already given advanced prices for our Lands by reason of the vicinity of the said privileges, are now unwilling to be deprived thereof...." (Ibid).

The association would maintain the common property nature of the coastal and tidal lands, at least for its members. It would buy "the natural privileges" –with or without the land–and hold them "...in equal Shares amongst all and every of us the Subscribers Our heirs and Assigns in common and undivided forever, as Tenants in Common" (quoted in Stevens 1897: 112). To pay for them, subscribers would tax themselves according to the size of the estates and also sell off parts of the lands that were "at the head or foot" of privately held lands, allowing owners to expand their holdings. However, "commonages of fishing & oystering" would remain attached to the lands that were sold: that is, people would still have common property rights to fish and hunt on them:

> ".. the above said Commonages of Fishery & oystering Shall be construed to remain and extend to all the Children of us the Subscribers & all their children & the children's children and so forever–And in any marshes that we Shall Sell the aforesaid commonages Shall be reserved thereout and not transferred but remain and above." (quoted in Stevens 1897: 112).

The association proceeded very slowly, having trouble getting a valuation "upon a right so endeared to the people as this" (Stevens 1897: 114) and perhaps having trouble keeping everyone in agreement on the matter. It proceeded too slowly and lost the main chance. In 1756 subscribers were dumfounded and angered to find that Jacob Spicer, who was one of the subscribers to the scheme, had bought not only the "natural privileges" but also all of the "vacant land" in the entire county including much that had been surveyed and that many people thought they owned or had rights to.[1] He bought this estate--all that remained of the West Jersey Society's proprietary holdings-- for a very small sum, only £300, from Dr. Johnson, the agent of the West Jersey Society.

It was rumored that the reason Dr. Johnson willed the West Jersey Society £1000 at his death was that he was ashamed for having sold out the land and use-rights "at a time when the influence of the wine bottle had usurped the place of reason" (Stevens 1897: 115, quoting an account by Dr. Maurice Beesley). But this did not help in relations between Jacob Spicer and the rest of the people of Cape May County (including his colleague Aaron Leaming, who had been competing with him to buy the privileges and land but lost).

Jacob Spicer did not, Stevens says, try to prevent people from using the "natural privileges," from fishing, shellfishing, or hunting on the sounds and tidal creeks of the county.[2] Nonetheless, he received ".. a large amount of obloquy and hostile feeling, which required all the energy and moral courage he possessed to encounter" (Stevens 1897. 114).

The historian may have made Spicer look overly generous. Spicer's memorandum book (Stevens 1933) suggests that he gained much value from the cedar swamps on these lands, which were harvested on sharecropping arrangements, and that he owned land ranging from Little Egg Harbor on the Atlantic Coast over to Maurice River on Delaware Bay. The salt marshes of the Maurice River area were being enclosed for salt hay meadows, and he had various sharecropping arrangements with people for that property too. He made money wherever he could, and was disinclined to give away anything Fishing privileges were not always free, and Spicer did not want to give up any oystering privileges; on May 17, 1760 he told someone that he might sell a Marsh but would not sell the "Oyster Privilege;" on February 2nd 1760 he recorded that the wife of a neighbor made people who used their land for fishing "pay one third of the Fish," and mused that he should be the one to get this share because the fishery takes place during low water (his "natural privileges" may have begun at low water mark, given the predilection in South Jersey for landowner's claims to extend that far) (Stevens 1935).

From 1756, when he bought the land and privileges, to his death in 1765, Spicer and various groups argued about the issue and negotiated possible sales. News that Spicer had purchased from the West Jersey Society all of its remaining property in Cape May County seems to have surfaced in 1759; that is the year that his memorandum book is dominated by requests from people that he sell them swamp, sedge, marsh, and other lands that they wanted, and in many cases that they had already had surveyed (Stevens 1934).[3]

In 1761, Spicer barely got enough votes to be elected again to the colonial assembly; although re-elected, his popularity was waning, and according to Stevens, he "..was being severely condemned by the people for what they believed were a usurpation of their rights in purchasing the natural rights of the West Jersey Society" (Stevens 1897: 128-129). There was a public meeting at the Presbyterian Meeting house in 1761 over whether Spicer would sell back to the association the land and privileges. It was described by Spicer in his diary and by Leaming in his, both accounts showing the mercantile capitalist's pride and selfishness that, in this case, kept Spicer from doing the public-spirited thing. First, from Spicer's diary:

> Went to hear myself arraigned by Mr. Leaming and others before the publick... for buying the Society's Estate at Cape May, and at the same time desired to know whether I would sell or not. I said not. He then threatened me with a suit in chancery to compel me to abide by the first association, though the people had declined it, and many of the original subscribers had dashed out their names. I proposed to abide the suit and told him he might commence it. If I should see a bargain to my advantage, then I told the people I should be inclined to sell them the natural privileges, if I should advance myself equally otherwise; but upon no other footing whatever, of which I would be the judge [in Stevens 1897: 129].

And here is Aaron Leaming's account of the same meeting, which took place on March 26, 1761:

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[1] He purchased of the West Jersey Society all that remained of their lands and privileges, consisting of "uplands, beaches, swamps, savannahs, cripples, marshes, meadows, oyster beds, oyster grounds, clam flats, shores, bays, sounds, thoroughfares, creeks, guts, rivulets, brooks, runs, streams, pools and ponds of water, and finallyall fast lands and waters, etc., woods, trees, mines, minerals, royalties, quarries, hawkings, huntings, fishing, fowling, etc." (Stevens 1897: 115).

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[3] An example: "Octr 5th 1759 Mr. John Mackey Informed me he had heard I have purchased the Society's Right to the County of Cape May I told him I had so he then Told me had a piece of Land under Survey & there was another piece of Land adjoining to his Land at Tuckahoe which he was Inclinable to purchase I told him in Case I sold he should have the preference of the above he then told me he knew of a piece of Cedar Swamp which he believed was Vacant & he inclined to purchase This I think I gave no assurance of because Edar Swamp is likely to become so valuable I much doubt whether it will be for my Interest in any shape to dispose of" (Stevens 1934: 169).

> About forty people met at the Presbyterian Meeting-house to ask Mr. Spicer if he purchased the Society's reversions at Cape May for himself or for the people. He answers he bought it for himself; and upon asking him whether he will release to the people, he refuses, and openly sets up his claim to the oysters, to Basses' titles, and other deficient titles, and to a resurvey, whereupon the people broke up in great confusion, as they have been for some considerable time past [in Stevens 1897: 129].

Spicer became ever more obstinate, fussing about whether it was legally possible that fishing and hunting rights could be "taken off" the land and sold, and raising the price he wanted for the whole estate, land and all, excepting his farm and rights for his family, to £ 7000. The offer was declined by members of the association, but he made it again.

In his diary (April 15, 1861), in response to a request to sell the Natural Privileges of the "upper precinct" of the county to its residents, Spicer explained that he could not do this and avoid being thought a fool:

> ...this was a delicate affair, that I did not know well how to conduct myself, for I was willing to please the people, and at the same time to do my posterity justice, and steer clear of reflection. Recollecting that old Mr. George Taylor, to the best of my memory, obtained a grant for the Five-Mile Beach and the Two-Mile Beach, and, if I mistake not, the cedar-swamps and pines for his own use and his son John Taylor reconveyed it for about £9, to buy his wife Margery a calico gown, for which he was derided for his simplicity [quoted in Stevens 1897: 130, Stevens 1935: 186]

Spicer was caught between his desire to do the right thing for the community at large, including his reputation as a citizen in that community, and the fear of being thought a fool. His greater inclination was, however, to care for his own posterity and his reputation as a calculating, sensible businessman. If the price was right, both could be accomplished, as he wrote in response to the Upper Precinct bid.

> ...could I see a prospect of making a good foreign purchase & thereby exchange a Storm for a Calm to equal advantage to my Posterity I should think it advisable & in that Case I should have no great objection against selling the natural Privileges & If I sold should by all Means give the publick a preference but at Present did not Incline to Sell.... [Stevens 1935: 185].

The next year, in 1762, 3 years before he died, Jacob Spicer gave the "natural privileges," by then described as rights to the "Shell, Scale and Fin Fisheries" (Anon. 1881: 8), to his son, Jacob. In this will he complained of having been unjustly treated by the public on account of the natural privileges. When he died in 1765, at the age of 49, his will was read at the Baptist meeting house per his instructions (Stevens 1897: 139).

Over thirty years later, in 1795, the state Supreme Court confirmed that the Spicers held the estate in <u>fee simple.</u> But this was done to clarify the much-disputed title so that it could be returned to the community. Two months later, on November 9, 1795, in what must be one of the most remarkable reversions of a privatized commons to a communal one in history, Jacob Spicer, Jr. deeded to "a company or association of persons of the lower precinct and Cape Island, his entire right to the natural privileges, which were viewed and used as a bona fide estate..." (Stevens 1897: 139). Apparently no money was exchanged in this transaction. One hundred and twenty-two named inhabitants of Lower Township became tenants in common of the "natural privileges;" the same thing was done for the other two townships of the county.

The new associations (of all freeholders in the precincts and their descendants) probably did little but enjoy the natural privileges at first. Acts of 1839 and 1844 were the first evidence of state recognition of these associations as corporations with the power to enact and enforce laws and regulations concerning the use and conservation of the property held in common. However, these acts and the impulses behind them may have come too late to result in much formal local community resource management. By that time, as we will see, both state and national courts had decided that the relevant commoners in areas brushed by the tides were <u>all</u> citizens, the "public trust doctrine." At least in the late 19th century, when Stevens wrote his history of Cape May County, the rulings were interpreted to have meant that no associations could hold title in tidewater resources. Stevens wrote that when the U S. Supreme Court reversed the lower court's ruling on <u>Martin v. Waddell</u>, supporting the ownership claims of the state against those derived from the proprietors, the Cape May County associations passed away. The state's claim to property in tidal lands was "in opposition to the claims of individuals or associations, however instituted or empowered" (Stevens 1897: 140).

However, even as Stevens wrote the associations may have existed, at least in name and corporate status. In 1844 the legislature redefined some boundaries. In 1859 and again in 1879 the legislature extended the term of the communal associations, and in 1881 a spokesman for the Proprietors of East New Jersey used the case of the "natural privileges" of Cape May as evidence of the ability of proprietors to own, and sell, tidewater resources (Anon. 1881: 9), an argument soundly defeated by the state. Nonetheless, the state's claim to ownership of tidewater soils and resources as well as the fact that the legislature was, by the end of the 19th century, readier to empower the state to take some responsibility for natural resource management, seems to have weakened if not destroyed the role of the management corporations of Cape May.

E Conclusion

In the 19th century the state took over some of the responsibilities and rights described, and privatization replaced the rest, but communal management did exist and function, for a while and in context. There were probably many more informal, customary (and hence undescribed) systems of common use-rights and management than formal ones. It is a serious mistake, however, to juxtapose "state" and "communal" as mutually exclusive As this chapter has shown, important communal systems were based on state laws. Moreover, the state systems of fisheries management that developed as the state later exercised its jurisdiction over marine lands and fisheries were generated from and directed toward local, communal problems and interests. Conflicts within the oyster fisheries of New Jersey led to articulation of what became the public trust doctrine of the U.S., that both declared the state as owner (or trustee) of tidewater lands and resources and guaranteed public rights of navigation and fishing.

The research for this paper was very difficult because information was scarce. Each case that I discovered was exciting, and at first I took the discoveries as samples or indicators of what must be a far larger set of instances of the type However, I gradually realized that almost every case I found of communal management was singular and exceptional. Very few if any towns granted privileged rights of fishing There was only one law on a barrier beach grazing commons, only one on an association of beach owners combined to fight erosion, and a small handful on associations of meadow owners The forest commons of Bergen was probably unique Besides the Cape May townships there were no other communities that had associations for the exclusive use and management of "natural privileges."

My general explanation for the singularity of the cases is the bias against common rights and for privatization in New Jersey history. In much of New England, local towns had–and in most cases retain to this day–jurisdiction over the tidewater resources within their boundaries As far south as Long Island, NY, towns often held title to tidelands within their boundaries and controlled access to and use of fish, shellfish, and other wildlife, as against the colonial government, proprietors, or the state. Some of the towns chartered by the king of England obtained special concessions including rights associated with manorial customs such as administration of common fields, stinting of pastures, use of rights (Kavenaugh 1980: 32). Over the years the form and substance of town proprietorship changed but the notion of public ownership and common rights at the town level remained. In many places, it endured even after the mid-19th century when, with help from the public trust doctrine to be discussed later, the states began asserting their title to tidewater lands (Kassner 1988).

Many of the early settlers of New Jersey came via New England and Long Island with the same cultural and religious background as the New England communalist Puritans. However, New Jersey was one of the "proprietary" colonies· colonial land allocation was done mainly by a group of entrepreneurs known as the Proprietors in East Jersey and similarly constructed groups of investors and speculators in West Jersey (Fleming 1977; Pomfret 1964; Whitehead 1875). Consequently, in New Jersey proprietorship as well as sovereignty was almost always at a level of government far above the town. Exceptions included the New Jersey towns of Bergen, Middletown, Shrewsbury, Piscataway, and Woodbridge, which had charters from the king of England and his agents Berkeley and Carteret in the 1600s (Whitehead 1875), and an ill-fated scheme to develop a full-fledged manor in the Cape May region (Pomfret 1964: 72-73).

In the proprietorship system of granting land, the proprietors were "tenants in common" of all of the land in New Jersey, but had the right to survey and sell off parts of the common tenancy. In "the waste of the proprietors," that is, lands not yet surveyed and deeded by the proprietors, the people of New Jersey exercised the right of fowling and hunting but once the lands were enclosed and improved, those common rights were gone (Arnold v. Mundy 1821: 61). And regulation of hunting activities on the "wastes" and elsewhere was not the business of local communities; instead it was up to the colonial assembly, and later the state legislature, to pass and enforce the laws. The proprietorship system may have reduced the power of local communities with respect to ownership of land and favored fee simple alienation rather than the retention of communal lands and common rights.

One methodological implication of the singularity of the cases described in this paper is the need to be careful about treating single cases as probable instances of larger phenomena. Another concerns the value of defining context and contingency before generalizing about human ecological situations. A theoretical implication is that the exceptional and singular nature of the events described is a reminder that human actions and their consequences are indeed grounded in specific social, historic, and ecological contexts.

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