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Archaeology as common property

As indicated in Chapter 2, the category of 'common' or 'communal' property is generally regarded with suspicion by those who spend time thinking about property relations. For them, such material is subject to a lack of proper control and therefore care, and will fall victim to the so-called 'tragedy of the commons'. This is the fate foreseen also for the archaeological heritage if removed from the realm of formal controls in the form of the exercise of what are, in effect, exclusive property rights.

This chapter, however, takes a different view. Starting from the premise that the heritage is a 'public' good in which a range of divergent interests have a legitimate stake, the discussion will consider in what ways archaeological material can be genuinely considered to be a 'common resource' and how these inevitably different interests can be reconciled within an appropriate structure that will avoid both a tragedy of the commons and the appropriation of the material by one particular interest group. It is also new ground, as indicated at the end of the last chapter: while economists in particular have considered the effectiveness of common property regimes for the conservation of commercially productive resources, they have not yet done so in respect of non-productive environmental resources such as archaeological remains (Cole 2002: 128). This is the direction in which we now turn.

Common property in practice

While the consensus of the disciplines of law and economics has been in favour of private property regimes, some scholars have broken ranks to advocate – or at least study – the potential value of common property systems (e.g. Wade 1987; Ostrom 1990; Thompson 2000). In general, the success stories they relate concern agricultural land use – especially as common pasture – and shared fisheries (e.g. Dahlman 1980; Campbell and Godoy 1992; McKean 1992; Berkes 1992) rather than countryside or heritage protection, and success in these studies is usually measured in terms of sustainable (i.e. ongoing and continued) economic production of cattle or fish. A more strict evaluation criteria that has been proposed, however, consists of the combination of three elements: failure to squander the resource (i.e. no loss of the resource), investment in the resource (i.e. its enhancement) and a lack of anarchy among the co-owners (i.e. ongoing commitment to resource maintenance) (Bromley 1991: 3). None of these in fact require economic productivity in the narrow sense and could be easily applied to assess the conservation of an environmental resource, such as the archaeological heritage.

From a series of studies the economist Elinor Ostrom (1990) has constructed a model of what is required for a successful common property regime, comprising eight key components:

- clearly defined boundaries to the resource
- clearly defined rights in it
- rules that meet the needs of local conditions
- common agreement as to rule-making and amendment
- monitoring of resource use to ensure compliance with rules
- a graduated system of sanctions for rule-breaking, applied by co-owners to each other and to non-owners
- low-cost mechanisms for dispute resolution

- external recognition of and respect for the common property regime in place.

Ostrom (1990: 90-102) also recommends for complex arrangements an additional element: a nested structure in multiple layers. As a list of those factors that will make a common property regime operate effectively, these are all well and good. What they do not do – as Cole (2002: 123) makes clear – is explain why a group of individuals would come together to form a co-ownership scheme in the first instance, especially since there is no historical or other evidence for the inevitability of such structures (e.g. Field 1989). In response, Ostrom (1990: 211) offers the following hierarchy of conditions which encourage the development of a common property system, listing the most desirable first and the least necessary last:

- a shared perception among owners of the advantages of cooperation over non-cooperation
- an expectation of equitability of outcomes from applying rules
- low transaction costs (i.e. the time, trouble and costs associated with maintaining agreement and cooperation)
- a general acceptance among the co-owners that each can be trusted to behave according to the rules
- a relatively small number of co-owners.

In response, Cole (2002: 124-5) argues that these factors can be reduced to a single element: that in fact, each of them contributes to low transaction costs, and accordingly he offers this alone as reason enough for entering into a common ownership arrangement.

The key point that appears to lie at the heart of any successful common property regime, however, is a community of interests among co-owners. It is generally assumed in discus-

sion of these regimes that all the owners will make equal and identical use of the resource and will accordingly require equal and identical access to it, and that therefore benefits and costs will be the same for all. Indeed, in economic discourse at least, the co-owners and users of the resource are assumed to be co-terminus. This works well for economically productive resources, but is perhaps less relevant in the case of environmental resources. Cole, for instance, cites as an example of the extension of the common property idea to the field of environmental protection, that of the Thanet Coast of southern England (www.english-nature.org), by the involvement of 42 stakeholders in the construction of a management-plan (Cole 2002: 127). In doing so, he makes explicit that the concept of 'stakeholder' employed is necessarily wider than that of 'user' and that they represented very different kinds of interest group, including:

commercial fishing fleets, recreational fishing associations, bikers, bait diggers, horseback riders, hoteliers, jet skiers, water skiers, swimmers, local schools, archaeologists, and environmentalists (Cole 2002: 127).

Interests here diverge widely: from the economic to the purely amenity, from use to non-use, and from use by those directly represented to use by others for whom they may speak or provide facilities.

In terms of the kinds of values recognised by economists (as discussed in Chapters 3 and 4), most are represented:

- direct consumptive uses are represented by fishers, bait diggers, and possibly research archaeologists seeking sites for excavation;
- direct non-consumptive uses are represented by unsuccessful fishers, bikers, horseback riders, jet skiers, water skiers,

swimmers, local schools, conservation archaeologists and environmentalists, although some of these may also result in consumptive use if damage from wheels, hooves, feet, and the wash from watercraft is not effectively controlled;

- indirect uses are represented by hoteliers on behalf of tourists and visitors, by archaeologists and environmentalists.

In terms of the kinds of use value listed by e.g. Darvill (1995; see Chapter 3 above), the following are evident:

- research (by archaeologists and environmentalists)
- creative arts (tourists and visitors)
- education (schools)
- recreation/tourism
- social solidarity (local amenity groups and activity societies – environmental, fishing, sporting)
- monetary gain (commercial use, both direct and indirect, consumptive and non-consumptive).

It is clear that many of these different interests collide. Commercial fishing may affect the availability of stocks for recreational fishing and *vice versa*, while any fishing may impede water sports and swimming, which may also affect the availability of fish. Horseriders and bikers may impede each other, and the presence of both may affect the quality of recreation available. Tourists and visitors – on foot, on horseback or on wheels – may interfere with local use of the resource generally, and educational use by schools in particular. Any kind of use may interfere with environmental or archaeological considerations. In such a case, the idea that each co-owner represents an identity of interest with all other co-owners breaks down. Any scheme of common ownership of an environmental resource must therefore accommodate these different uses, different requirements for access and differences in outcome.

Co-ownership of archaeology

Although economists and lawyers have been slow to examine the role of common property regimes in relation to environmental resources, and especially archaeological remains, archaeologists themselves have been experimenting in just this area. The language of such efforts is not that of property regimes, however: the general reference is to 'community' archaeology (*World Archaeology* 2002), 'collaborative' archaeology (Field et al. 2000; Moser et al. 2002; McDavid 2002) or 'democratic' archaeology (Faulkner 2000; McDavid 2004). Nevertheless, close examination of such efforts reveals a remarkable similarity between these initiatives and the kind of common property regime advocated by transaction cost economists such as Ostrom (1990) and Bromley (1991).

Yvonne Marshall (2002: 216) suggests that in general archaeologists encounter two kinds of overlapping community: one defined by geography is the 'local'; and the other defined by affiliation is the 'descendant', of which the indigenous community is a particular example (Layton 1989a; 1989b; Smith 2004). Either of these – or both – may be involved in an emerging community archaeology project. The issue is primarily, however, not one of who is involved, but the nature of the involvement, and in this connection Stephanie Moser and her colleagues in Egypt (Moser et al. 2002: 221-3) note that there is a standard hierarchy of types of collaboration: 'outreach' represents a one-way process of communication and education; beyond this is a willingness to recognise the contribution to knowledge and information others can make; and beyond this is an active process of consultation, most evident with indigenous and descendant communities. In going further, the project at Quesir in Egypt involved a series of additional steps:

- fostering social relationships with the local community
- maintaining a presence in the community between fieldwork seasons
- employing locals as part of the project
- using locals as the means of outreach programmes
- ensuring the retention of remains retrieved locally in the local area (Moser et al. 2002: 223).

Similar ideas emerge from the work of Judith Field and her colleagues with the Aboriginal community at Cuddie Springs in Australia (Field et al. 2000: 43-4). Here, it was important to the community that the archaeologists establish their integrity, that they engendered trust, that they encouraged active participation in the project, especially by employing members of the community in the work, that they maintained a constant presence in the area, that they conveyed information to the community members in ways to which they could respond, and – as in Egypt – that locally-found archaeological material remained in the area. In both cases, these factors contributed to a sense among the local community of the project as something of direct relevance to them and in which they had a direct stake, both emotional and economic. It also engendered trust among them of the archaeological team, who arrived as strangers. In both cases, however, the community was involved by the researchers. A similar kind of project in Fiji (Crosby 2002) aimed to go a little beyond this by listing the requirements for a 'true' community archaeology project, which are said to be:

- initiation of the project by the local community
- a basis in local ideology and attitudes, linked to concerns for sustainable resource-use
- the provision of expert advice from outside the community
- external (in this case, government) funding.

Here, the community calls upon others to undertake the work, which is then organised and financed from outside. Although dependent upon the willingness of professional experts to place themselves at the service of untrained locals and of government agencies to provide full financial support, which may be exceptional and peculiar to the Fijian context, there is nevertheless an indication here of a way forward in terms of creating a viable common property regime for archaeology and which relates to transaction costs, to be discussed further below.

'Democratic' archaeology projects take a similar approach. At Sedgeford in England, for example, a local committee of trustees has control over the project as well as employing – indeed relying heavily upon – local labour, while hierarchical structures are minimal (Faulkner 2000: 31-2). In other cases, more formal structures serve to support community control. At the Levi Jordan Plantation site in Brazoria, Texas, USA (McDavid 1997; 1999; 2000; 2002; 2004) control over archaeological research and its public interpretation is in the hands of a board of trustees drawn from descendants of former owners of the plantation and those they enslaved and their representatives, the aim of archaeologists being to collaborate with members of local descendant communities in reciprocal, non-hierarchical, mutually empowering ways (McDavid 2000: 222). It is also clear, however, that any particular initiative requires the permission of the trustees, that committee members are involved in every stage of the project and are seen as the 'bosses' who direct the archaeologists; these are then concerned both to involve committee members, and to be 'involved in [committee members'] own agendas, according to ... mutual needs' (McDavid 2000: 222). Nevertheless, McDavid admits that the committee members perceive her as the project leader, a role she both claims and does not attempt to disguise (McDavid 2000: 222).

McDavid takes an explicit approach to her work at the Levi

Jordan site, grounded in American pragmatist philosophy, which entails the establishment of a continuing 'conversation' about issues at the site (McDavid 2000: 229; 2002: 305). She emphasises the diversity of backgrounds of committee members and of attitudes towards the site, both white and African-American, and draws upon the pragmatist approach as a way to accommodate this without closing the conversation. First, she notes how involving herself as one actor in a conversation among many served to enhance her standing in the community, rather than diminish it: effectively by denying her own 'expert' status as an archaeologist she was able to emerge as the community's expert (McDavid 2000: 230). Second, she sees how the abandonment of scholarly authority allowed her to engage more closely with the more contingent and contextual interpretations of others' lives by those others (McDavid 2000: 230-1). Thirdly, a pragmatic approach is about keeping the conversation going, not about winning arguments: accordingly, disagreements between actors become not problems to be overcome but opportunities to engage more deeply with colleagues (McDavid 2000: 231). The outcome is an approach grounded in four principles: reflexivity; multivocality; interactivity; and contextuality (McDavid 2002: 307-10) designed to maintain the conversation and by doing so to build trust with the community whose project it is.

None of the projects outlined here have described themselves in terms of property relations, although they may recognise that community 'ownership' in a broader sense (to be examined in the next chapter) is what they aim at. Nevertheless, as community projects they represent the rejection by professional archaeologists of any claim to exclusive control over the object of their research – archaeological material itself – or its products. As discussed in previous chapters, it is this right of use which constitutes a property right. To abandon it to others is therefore to abandon the claim to property. It is appropriate

therefore to consider these experiments in community archaeology also as experiments in the common ownership of archaeological material.

Assessing co-ownership in archaeology

Against Bromley's (1991: 3) criteria for evaluating the success of common property regimes, community archaeology projects such as those covered above appear to do well. In all cases, the resource – the site and its products from research – are not squandered: local involvement and leadership in the project ensures that the resource is given value; and where the project offers opportunities for local employment, this ensures further a direct economic incentive in preventing damage and looting. The resource is in various ways enhanced: by the process of research, it yields new information for archaeologists and others; outreach and educational programmes – for locals and others – ensure that this information is made widely available, while formal academic publications give the resource intellectual value; where recovered items are retained in a local museum, the nearby site from which they come is given greater prominence and the objects themselves are more closely contextualised. The lack of 'anarchy' among co-owners is attested by the continuing nature of these projects and their success in maintaining and enhancing the resource, as well as establishing and retaining good will among the local community.

It is perhaps less clear whether these projects comply with Ostrom's (1990: 211) suggestions for factors encouraging the inception of co-ownership schemes. There appears to be a shared appreciation among those involved as to the mutual benefits of working together: traditionally, archaeologists have been unwilling to engage with others in conducting research (see e.g. Skeates 2000; Smith 2004), and these projects overcome such disciplinary pride. Whether there is an expected

equality of outcomes is more difficult to assess: clearly the benefits for archaeologists are different from those of the local or descendant community; on the other hand, all receive benefits from a deeper understanding of that particular past, and both locals and archaeologists from outside will benefit from employment opportunities where these are part of the arrangement. Certainly, there seems to be a recognition that all will benefit, even where this is clearly in very different ways and possibly benefiting one group more than another, and this may be enough. It is also difficult to evaluate transaction costs: these may be low in certain cases, higher in others; overall, since the projects continue, they may be simply low enough (especially as compared with benefits received) for those involved; or, as will be suggested below, are covered by other means. Commentators on these projects all emphasise the importance of trust between archaeologists and the community, whether as an outcome of other aspects or as a key element to begin with: a preparedness to invest in the community, a clear and demonstrable willingness to defer to the community in decision-making, and ensuring a presence in the community outside of fieldwork periods are all important elements here. Numbers of co-owners vary: where an entire community is directly involved, numbers may be high; on the other hand the appointment of representatives to a managing committee will serve to limit interactions. It is evident, however, that this was the least important factor to emerge from Ostrom's analyses; the others are reasonably well met.

Ostrom's (1990) eight components for a successful common property arrangement are also generally well met. In all cases, the resource – a local site or the archaeology of a given area – is clearly defined. In most cases the purpose of the project – whether pure research into the past or to encourage tourism – is made clear. It is frequently the community who make the rules regarding how the project will be conducted, and accord-

ingly they will meet local needs and conditions, while there is also in all cases common agreement as to the rules and how they may be changed. Monitoring of the project is conducted jointly by archaeologists and community alike in both formal and informal ways: the peer-review process evident in formal academic archaeology serves to support such monitoring, as will auditing of financial and other arrangements. Sanctions for rule-breaking or failure to perform will be appropriate for the project and agreed by parties, and will involve external recognition of the arrangements in place. Whether dispute resolution is low-cost or otherwise will depend upon specific arrangements: like transaction costs generally, this is difficult to assess. In terms of archaeologist's time and effort, however, and the way in which this will inevitably impact upon their specifically archaeological performance, it will seem that these costs are quite high.

Such a point may appear to invalidate any argument made in favour of treating such projects as common property regimes. If such regimes rely for their success upon low transaction costs, then if these costs are high they do not meet suitable tests. A common factor in all the cases discussed above, however, has been a willingness on the part of those with a specifically non-economic interest to invest in the community project. McDavid (2000: 222) is recognised as a project leader and takes time and trouble to ensure community wishes are respected and disputes addressed. Moser and her colleagues (Moser et al. 2002) and Field and hers (Field et al. 2000) were at pains to build significant trust and willingness to collaborate among members of the communities they work with. In Fiji (Crosby 2002), government funding and the provision of expert guidance was a pre-requisite for the project.

In all these cases, the costs of establishing and maintaining community involvement may in fact have been very high: the same applies in the case of the Thanet example quoted by Cole

(2002: 127), where the burden was carried by English Nature. This may be the key to addressing this issue. It is not necessarily that overall transaction costs need to be kept low for environmental resources to be held as common property: but if one or more owners, or an agency acting on their behalf, is prepared to carry them on behalf of all, then they will be considered low so far as owners are concerned, allowing them to act as if transaction costs are in fact low. In the case of community archaeology projects, it is generally the archaeologists involved who are prepared to carry these costs – in terms of effort and time – on behalf of the owning community, of which they may also be members. Where it is a State agency that shoulders the cost – as in the case of English Nature or in Fiji – they do so without also appropriating the resource to themselves: this is different therefore from exclusive State ownership.

Creating a common property right in archaeology

Assessing community archaeology projects as if they are common property systems may be a useful academic exercise: but in practice – except in so far as such projects involve actual trusteeships and their formal incorporation as types of legal person, as at the Levi Jordan site (McDavid 1997; 1999; 2000; 2002; 2004) – they do not generally represent property ownership in the full legal sense. To achieve this, some form of specific property must be created and rights in it duly allocated.

Heritage as intellectual property

A problem with heritage that is frequently stated is that it does not, in fact, represent any kind of property (see e.g. O'Keefe and Prott 1992; Brown 2004; Rowlands 2004). A way of overcoming

this problem that has been proposed is to treat cultural resources as a form of intellectual property – akin to a copyright or a patent. The idea derives in particular from problems attendant upon the appropriation for commercial use of traditional knowledges concerning especially the medicinal use of biological material. As justified by Ditchfield (2000: 15), recognising such knowledge as a form of intellectual property serves to privatise (and thus give a market value to) a common or open-access resource otherwise lacking such a value, and also acts as a market intervention to prevent abuse of those in a weak negotiating position. This view is supported by standard economic arguments that ownership of rights in a valuable property (knowledge) encourages trade in that property and provides an incentive to production, while increases in production contribute to an increase in general welfare. At the same time, the moral rightness of giving ownership rights is asserted, and of course such rights have the merit of general recognition.

The system of intellectual property ultimately recommended consists of:

- the grant of intellectual property rights to communities
- the explicit recognition of community and collective rights
- the recognition of sectional community rights – to protect the infringement of rights to hold sacred or special knowledge that may be part of the local culture
- comprehensive conservation legislation to protect the resource from exploitation
- a public defender or ombudsman to advocate and protect the rights of the community (Ditchfield 2000: 79-81).

Here, legal ownership of a resource is vested in a recognisable community with clearly defined rights and with sufficient outside investment – in the form of supporting legislation and a mediator – to keep transaction costs (at least for community

members) low. This way forward therefore meets Ostrom's (1990: 211) list of preconditions for a common property regime to become established.

It follows from this section and the last that if a given community was granted the right of ownership of an archaeological property under arrangements like these, and the archaeological project was then organised as a community archaeology project such as those discussed earlier, it would meet the conditions set by economists for a successful common property regime. The question remains, however, as to identify a given community as 'rightful' owners of the property.

Identifying co-owners: stakeholders in archaeology

It could be argued that major differences between divergent stakeholders in relation to archaeological remains represents just the state of 'anarchy' that Bromley (1991: 3) warns against in assessing the success or failure of common property regimes. On the other hand, so long as agreement as to the need to maintain the resource remains in place, and his other requirements (non-depletion of the resource and possible investment in it) are met, no such anarchy really exists. All that matters is that mechanisms are in place to regulate, negotiate and mitigate differences in use and access requirements among different categories of co-owner. In advocating what he calls 'the stakeholder society', political writer Will Hutton (1999: 85-96) offers seven principles for effective stakeholding, which can be conveniently adapted (and paraphrased) for application here:

- openness and democracy
- inclusion
- recognition that ownership confers duties as well as rights
- doing the right thing without policing

- recognition that economic entities are primarily social in nature
- that economic returns must also be shared
- recognition of the role of external institutions.

These principles amount to an effective programme for mutual co-operation among what may be very different interests, which is precisely what is required by a co-ownership arrangement for an environmental resource. They also map quite well onto McDavid's model of a 'democratic' archaeology (McDavid 2004) in that all serve to keep going the pragmatic 'conversation' that lies at the heart of such an idea (McDavid 2000).

The question that necessarily arises at this point, however, is to consider those who should be involved in such a conversation and to develop a list of those who can legitimately claim co-ownership of the archaeological resource. This list cannot consist of actual users only, as recognised by Cole (2002: 127), although his list of those involved in decision-making at Thanet appears to exclude some likely candidates. While hoteliers may profit from incoming tourism, for example, tourists themselves do not appear. Nor do other members of the local community who do not neatly fall into other categories already represented, such as dog-walkers or coastal navigators, or indeed those who merely live in or near the land affected by preservation efforts. Also excluded are potential interested parties, such as those who may wish to develop property or prevent such property development, utility companies and environmental protesters. Indeed, anyone can be proposed as a legitimate stakeholder who represents any potential for use of the resource in any manner: this would bring into the equation those who represent the non-use values recognised by Darvill (1995) and others as 'option' values and 'existence' values, which exist in potential but may never be realised.

Merriman's (2004) edited volume provides an attempt to

identify relevant stakeholders for the purposes of 'public archaeology'. These include the State (Thomas 2004), a rather ill-defined 'public' albeit in Brazil (Funari 2004), local communities (Mapenda and Lane 2004), indigenous peoples (Parker Pearson and Ramilisonina 2004; Byrne 2004), amateur and 'alternative' archaeologists (Schadla-Hall 2004), metal detectors and treasure-hunters (Bland 2004), and antiquities dealers (Qin 2004). Others have generated similar lists, such as McManamon's (1991) comprising an unspecified 'general public', students and teachers, legislators, government officials and Native Americans. The problem with such generic lists is that they fail to specify who actual owners should be: it is clear that one of the elements for a common ownership regime is that ownership rights are limited to certain parties only; unlimited participation would take us into the realm of 'open resource' which (as will be discussed in the next chapter) is something different. Common ownership is not the exclusive ownership represented by private or State property regimes, but it is not entirely open either. Accordingly, to qualify, some limit must be placed upon candidacy; and also to meet Ostrom's (1990) criteria for successful common ownership arrangements.

One way is simply to recognise the manner in which this has already been addressed in community archaeology projects and in considering the grant of intellectual property rights to holders of traditional knowledge. In general, a community – whether defined geographically as 'local' or by affiliation as 'descendant' – can be considered to be self-defining in large measure. Once recognised, rights can be granted to the community as an entity in itself, leaving the community to decide rules of admission and exclusion, systems of representation, and the allocation of responsibilities and powers. This will necessarily exclude some actual and potential stakeholders, but this has not prevented success in other cases. Instead, the role of advocate for these other voices is vested in whatever other agency

takes on the responsibility for managing the system and carrying the transaction costs associated with the project. This – as in examples cited above – may be an individual such as Carol McDavid in the case of the Levi Jordan Plantation (McDavid 2000: 222), the State as in Fiji (Crosby 2002) or an organisation such as English Nature as at Thanet (Cole 2002: 127).

**Conclusion: a common property regime
for archaeology**

This chapter breaks new ground for this book (and indeed the work of its author) in two ways: first by addressing ideas not previously approached from archaeology; and secondly by proposing actual recommendations. It would seem that the idea of archaeology as a form of common property may not be quite so outlandish as may be first thought, and indeed that there is a practical way in which it could be accomplished. This then is the proposal in outline:

- that archaeology – both as material in the ground and as practice – be treated as a form of intellectual property right (IPR)
- that a specific IPR in archaeology be granted to a given community
- that the community establish rules governing the management and conduct of archaeological research and related activities
- that the role of monitoring the project and acting as a locus for dispute settlement be placed either with the archaeologists involved, or outside the community altogether, thus reducing transaction costs for co-owners.

This extension of community archaeology into the realm of common property would overcome many of the problems iden-

tified with exclusive rights discussed in previous chapters. However, the idea of archaeology as any kind of property may yet be challenged: this takes us again further from exclusive claims and into the realm of the next chapter.