

Intellectual Property Issues in Archaeology

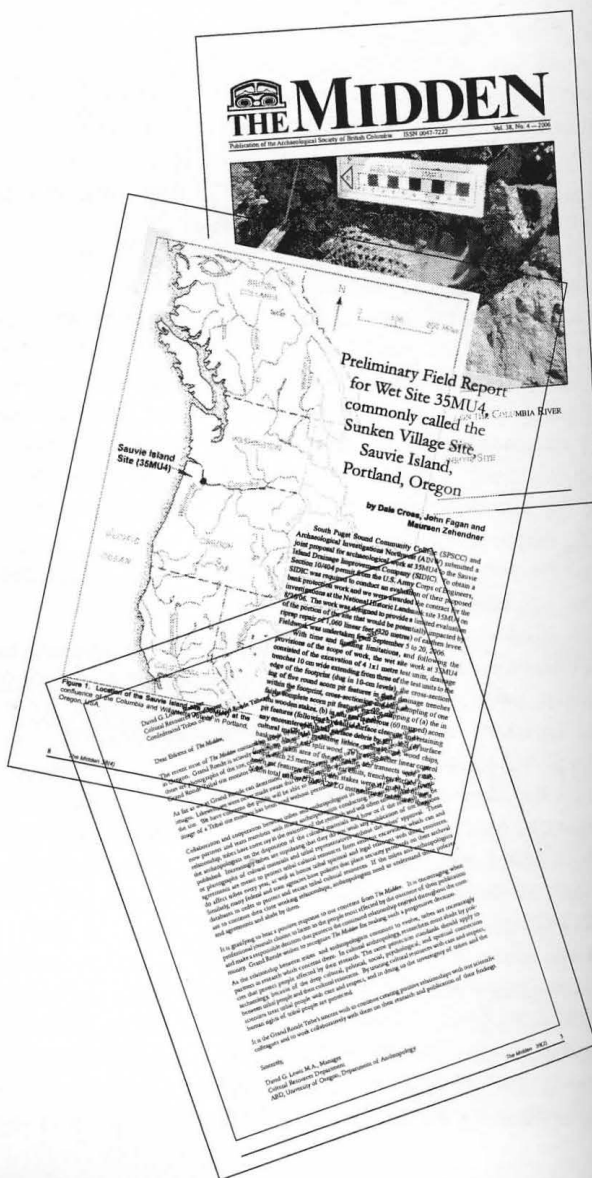
A Case from *The Midden*

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For the past four years, in concert with a growing number of colleagues, we have been examining intellectual property issues within archaeology and the larger realm of cultural heritage.¹ This topic is garnering increased attention as archaeologists, descendent communities, and other stakeholders grapple with difficult questions about the uses and abuses of cultural knowledge and research data. Our work seeks to identify the issues, examine the circumstances under which they arise, and disseminate policies and practices that lead to a better understanding of what is at stake and how to approach a resolution. For this reason, we were asked by ASBC president Eric McLay to comment on the particular situation described in David Lewis' letter, published in a recent issue of *The Midden* (39[2], 2007), written on behalf of the Confederated Tribes of the Grand Ronde Tribe of Oregon, in response to the article by Dale Croes, John Fagan, and Maureen Zehendner (*The Midden* 38[4], 2006). The public apologies by Croes represent a positive resolution and also promote increased awareness of and sensitivity to an important area on intellectual property issues related to archaeological practice.

Intellectual property figures into archaeology in a host of ways, and especially in the ethics of research and publication. New questions relating to the less tangible dimensions of the archaeological record extend beyond the emphasis on cultural property that emerged with reburial and repatriation issues of the 1990s. Who owns the data produced during research? Who has the right to use it in various forms or media? How should archaeologists (or other researchers) proceed when data collected during research are found to contain information or images and designs that may be culturally sensitive.

Often these questions are discussed in the somewhat esoteric atmosphere of academic discourse or legal analysis. What is most illuminating, however, for policymakers, practitioners, and even legal theorists are on-the-ground cases that show us where points of friction exist. These real situations challenge us to think through the decisions that need to be made, the unique context and constraints of each case, and the consequences of



various ways of acting — as well as what happens when concerns about intellectual and cultural property are not voiced or heard.

At Eric McLay's request, we take this opportunity to analyse and comment on the situation with the goal of identifying problem areas and promoting positive practices that will hopefully inform approaches to similar situations in the future. Our intention is to learn from this as an informative case study, not to criticize any of the parties involved.

We have organized our response around a series of questions that emerged from our reading of the letter from David Lewis, manager of the Grand Ronde Cultural Resources Department, to the editors of *The Midden*, namely: (1) Who owns the copyright to the images that were published?; (2) Did the Grand Ronde have a policy in place covering these issues that archaeologists should have been aware of and followed?; (3) What policies on permissions and attributions do publications typically adhere to?; (4) What is the ethical course of action?; and (5) What was the nature of the relationship between the author(s) and the Grand Ronde Tribe?

These queries are complicated by two outstanding questions, whose answers are not clear from information in the article, the letter, or the response to the letter, namely:

(1) Whose land is the site on? Croes notes that the site is on "ceded lands" but it is unclear what this actually means; and

(2) What was the relationship between Dale Croes's team and the development corporation, the U.S. Army Corps of Engineers, and the Confederated Tribes of the Grand Ronde? Who had jurisdiction, and who was employed by whom? Croes mentions that the Confederated Tribes "share co-management" of the site, but the nature of the collaboration and shared governance is still unclear.

Who owns the copyright to the images that were published?

Who actually holds the copyright to the photos that appeared in the article: the photographer?; an employer?; a tribal authority? The copyright of photographs taken of a site or of artifacts is generally owned or held by the photographer. This is because ownership is vested in the individual who physically exerted the labor to take the photograph. However, if the photos were taken by an employee while on the job, unless previously negotiated in the terms of employment, the copyright will usually belong to the employer. If this is the case, the use of the photographs in a publication would require the employer's permission.

As legal scholar Cindy Carson notes, "[t]he greatest concerns may be loss of control over how the images will be used and any profits the use may create. Governments or individuals may try to prevent the use of the archaeologist's own images by restricting access to the site, by making non-publication a condition of access, or by declaring that all images become the property of the landowner" (1997:291). This is especially true of archaeological sites, which many people consider to be put at risk if they are revealed to the public — a concern that the Grande Ronde Tribal representative mentions in his letter to *The Midden*.²

First Nations may have additional concerns about photographs

RESOURCES

Archaeologists, authors, and publishers might want to take note of the following two comprehensive resources that contain well thought-out guidelines for use of cultural knowledge.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Guidelines for Ethical Research in Indigenous Studies

http://www.aiatsis.gov.au/_data/assets/pdf_file/2290/ethics_guidelines.pdf

These guidelines, from the Institute charged with archiving all research related to Aboriginal peoples of Australia, ask that researchers negotiate an agreement about the allocation of intellectual property rights, gain informed consent for any publications that result, identify individuals contributing to the research and how they should be involved or acknowledged in any publications or other outcomes. It also asks researchers to consult with affected individuals and groups concerning the details of reports or publications, consider whether joint authorship is appropriate, and to report results to source communities before publication.

Guidelines for Respecting Cultural Knowledge, compiled by the Alaska Native Knowledge Network (<http://www.ankn.uaf.edu/publications/knowledge.html>). For this case, see in particular the sections on "Guidelines for Authors and Illustrators" and "Guidelines for Editors and Publishers." They suggest, among other things, "submitting all manuscripts with cultural content to locally-knowledgeable personnel for review, making effective use of local and regional entities set up for this purpose."

of sites or objects, or about other uses of knowledge that may have special significance or embody cultural meanings that people feel are endangered by making them public.³ In most cases, First Nations want to have a voice in how sites and information pertaining to their pasts are presented to the public, or, at the least, want to be apprised of how the information will be used.⁴ Part of the problem is that their concerns or rights to intellectual property are often not recognized by the legal system, which leaves them to be expressed in policies and agreements promulgated by a governing body or organization.

Table 1. Excerpts from various archaeological codes of ethics

**Extracted from the Society for American Archaeology's
Principles of Archaeological Ethics (1996)**

Principle 2. Accountability

Responsible archaeological research, including all levels of professional activity, requires an acknowledgment of public accountability and a commitment to make every reasonable effort, in good faith, to consult actively with affected group(s), with the goal of establishing a working relationship that can be beneficial to all parties involved.

(<http://www.saa.org/aboutSAA/committees/ethics/principles.html>)

**Extracted from the *Canadian Archaeological Association's
Statement of Principles for the Ethical Conduct Pertaining to
Aboriginal Peoples* (1997)**

I. Consultation:

1. To recognize the cultural and spiritual links between Aboriginal peoples and the archaeological record.
2. To acknowledge that Aboriginal people have a fundamental interest in the protection and management of the archaeological record, its interpretation and presentation.
3. To recognize and respect the role of Aboriginal communities in matters relating to their heritage.
4. To negotiate and respect protocols, developed in consultation with Aboriginal communities, relating to the conduct of archaeological activities dealing with Aboriginal culture.

(<http://www.canadianarchaeology.com/ethical.lasso>)

**Extracted from the World Archaeological Congress First Code of Ethics
(1990)**

Rules to Adhere to:

Members agree that they will adhere to the following rules prior to, during and after their investigations:

1. Prior to conducting any investigation and/or examination, Members shall with rigorous endeavour seek to define the indigenous peoples whose cultural heritage is the subject of investigation.
2. Members shall negotiate with and obtain the informed consent of representatives authorized by the indigenous peoples whose cultural heritage is the subject of investigation.
3. Members shall ensure that the authorised representatives of the indigenous peoples whose culture is being investigated are kept informed during all stages of the investigation.
4. Members shall ensure that the results of their work are presented with deference and respect to the identified indigenous peoples.

(http://www.worldarchaeologicalcongress.org/site/about_ethi.php)

Did the Grand Ronde have a policy in place covering these issues that archaeologists should have followed?

A second question is whether the Confederated Tribes of the Grand Ronde (or any of the co-management entities) have a policy in place that required some form of permission or permitting process for either taking photos of Grand Ronde cultural materials, of sites on tribally ceded lands, or regarding the use of such photos or information about a site in a publication? If so, was this policy clearly and plainly communicated to the researcher or photographer? If one were in place, were the tribal members photographed aware of such a policy?

Many First Nations and other Indigenous communities have policies or protocols that convey local values and tribal policies to archaeologists and others and serve as memoranda of agreement (see Watkins and Ferguson 2005). Research becomes a negotiated process, a sign of true collaboration, accountability, and ethical practice. In our experience and that of our colleagues, fears about censorship of reports or articles are almost always unfounded when parameters are worked out ahead of time in the spirit of collaboration.

What policies on permissions and attributions do publications typically adhere to?

Most publishers' guidelines require that the author gather and submit evidence that specific permission has been granted before a photo or image can appear in published form. Attributions of copyright are expected to accompany the captions of published photos (e.g., "used with permission of..."). Sometimes the institution or individual that lends permission for a photo will specify exactly how the attribution should be stated.

Even if a photographer holds unrestricted copyright to a photo that he or she took, if it contains an image of a person who can be identified, right to privacy laws come into play. These require that permission must be sought from person(s) portrayed before the photo can be used in a marketed work, with the exception of public figures (e.g., politicians or celebrities). For example, the manuscript preparation guidelines of University Press of Florida (2003:26 [§4.7]) state: "If a picture includes people who are not public figures, you will need to have signed release forms from the participants" (emphasis in original).

It is generally the responsibility of the author to obtain all the needed permissions and legal rights for publication, and the publisher typically disclaims any responsibility for inaccuracies or incorrect attributions. The publisher, however, is responsible for ascertaining that the author has indeed acquired the permissions needed for publishing. This is standard editorial policy, which we would recommend *The Midden* follow. [editorial note: As stated in *The Midden* 39(2), this will be our established policy].

Authors also need to be aware that giving a publisher permission for use of an image, unless explicitly negotiated in the license agreement, typically also gives them the right to use the image or an altered version of it on the cover of a book or journal or in other ways to promote the book.

What is the ethical course of action?

Above and beyond the legal implications regarding the publication of copyrighted material, there are ethical issues that underlie the situation. What were the authors' intentions? Did any of them recognize the legal or ethical implications? What did they do once they became aware of the sensitive nature of the situation? What did the affected parties suggest (or accept) as a remedy? In this case, the primary author (Croes) immediately took steps to publicly take responsibility and apologize for his actions and acknowledge that he has learned a great deal in the process.

One place to look for guidance is in the ethics codes and guidelines of professional archaeological organizations. The Society for American Archaeology's (SAA) *Principles of Archaeological Ethics*, however, do not speak directly to issues raised by this situation. Principle 2, Intellectual Property, only deals with sharing data within a reasonable time period. More applicable here is Principle 2, Accountability (see Table 1). Although the degree of actual consultation is unknown, if we were to judge this based on our reading of *The Midden* article, it would appear to be quite limited, even if this is not the case. To look to another code of ethics, again based on what we know from the article, the work as described is hardly in accord with the CAA Statement of Principles for the Ethical Conduct Pertaining to Aboriginal Peoples, in particular in reference to the section on Consultation (reproduced in Table 1 below). One must, however, keep in mind that both the SAA and CAA formed these statements as principles to aspire to, and not as rules to be adjudicated.

The World Archaeological Congress' First Code of Ethics consists of eight principles that focus on acknowledging the special relationship between Indigenous peoples and the sites, objects, and data related to their cultural heritage and on establishing equitable relationships with those whose heritage is being investigated (see Principle 7, in particular). The WAC Code also includes a set of "Rules to Abide By." The first four (see Table 1) are applicable here, and, of these, three (all but #3) are aspects that a journal such as *The Midden* might want to take into account in accepting manuscripts.

What was the nature of the relationship between the author(s) and Grand Ronde?

The published article (Croes et al. 2006) provides no information on the type and degree of consultation that the project director had with tribal authorities. Nowhere in the article were the Grand Ronde and Siletz, who may well see themselves as traditional owners of the site, acknowledged — in fact, they were barely mentioned. Nor do we have any sense of what forms of consultation occurred in the project. If the project had been truly collaborative in nature, wouldn't representatives from Grand Ronde have been asked to review the article(s) prior to publication, if not to co-author it?

General considerations

We can outline five general suggestions, based on this and similar cases, that may help to avoid the kind of problem that occurred here:

- Tribes need to provide clear guidelines for researchers and should make sure these are communicated early in the process, when research is designed, and revisited as a project proceed;
- Researchers need to seek appropriate permissions prior to publication of images or sensitive data (see Bendremer and Richman 2006);
- Researchers should recognize, acknowledge and be accountable to the special nature of the relationships that First Nations have to aspects of the North American past; and
- Journals need to make sure that authors have acquired the permissions needed, even though the responsibility to do so falls upon the researcher; and
- Some degree of transparency about the nature of the relationship between archaeologists and First Nations (or lack of one) seems called for in articles that include information or images about sites or projects located on traditional lands.

In the end, this situation could have been helped or perhaps avoided a) if there had been clear guidelines for researchers working on Grand Ronde ceded lands, including statements about who owns the copyright to images or data; b) if the archaeologists had exhibited a broader sense of accountability, thinking through the consequences of their publication of the articles and images from the perspective of the Grand Ronde; c) if a tribal representative had been more involved in the publication, and d) if *The Midden* had recognized the potentially sensitive nature of the article and required the author, as most journals do, to seek permissions and to include proper attributions for any images it publishes. We state this not as criticism but as lessons for us all, especially since there is likely to be many more complaints from all sectors about unfair or inappropriate use of photographs and images as knowledge of intellectual property continues to increase.

Concluding comments

Today intellectual property issues are increasingly on the agenda, whether in terms of restrictions on access to information or the exploitation of cultural knowledge for the benefit of public or commercial interests. Within archaeology, these concerns emerge not only in the obvious areas of cultural tourism or the appropriation and commodification of rock art images on t-shirts, but also in the areas of research permissions and protocols, dissemination of research data, and censorship

(Brown 2003, Nicholas and Hollowell 2004). Sometimes these issues are posed in the somewhat heady dialogue of culture-based rights and the A2K (access to knowledge) movement, but most often they transpire at the local level, such as when tribal representatives believe that their intellectual property, however defined, has been co-opted. It is here that we each must ask how do we conduct archaeology (or any form of research) in the spirit of true accountability and an understanding of the potential for both good and harm that our work has for others? It is not just a question of "who owns the past," but how specific material and intellectual aspects of the past are used or abused for various purposes. Who actually benefits from archaeology and how are these benefits distributed? The Grand Ronde case provides a timely opportunity to explore actual points of contact between the public domain and individual/tribal rights and to use this as an opportunity to think through some of the legal and ethical issues relating to archaeological publication.

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Notes

1. Much of this work is associated with the development of a major international research collaboration, "Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics." Information on the project can be found on its preliminary web site at <http://www.sfu.ca/IPinCulturalHeritage>.
2. Limits on the publication of site locations in newspapers and other publications are, of course, something that archaeologists themselves have long promoted.
3. The customary laws of Indigenous peoples may revolve around heritage values that outsiders may not recognize but which nonetheless carry a great deal of significance for them (see McLay et al. 2005, 2007; also Noble 2007).
4. Some individuals (Aboriginal or not) may not want to be photographed or to have photographs of themselves published or made public. In addition, some in this position may have objections but may not be willing to voice them.

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