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**RECONCEPTUALIZING ENTRENCHED NOTIONS OF
COMMON LAW PROPERTY REGIMES: MĀORI SELF-
DETERMINATION AND ENVIRONMENTAL PROTECTION
THROUGH LEGAL PERSONALITY FOR NATURAL OBJECTS**

Bridget Williams

INTRODUCTION

The concept of legal personality for land and natural objects addresses many points of difference between English common law concepts of property and Māori notions of kinship with and stewardship of ancestral lands. The two major implementations of this concept in Aotearoa¹ New Zealand have involved the Whanganui River/Te Awa Tupua Act and the Te Urewera National Park/Te Urewera Act. This paper will consider where these recent attempts to formalize legal personalities and the resulting legislative actions have been successful in bridging gaps in the two conflicting property regimes – English and Māori – and where they have further to go. It argues that while the Acts were undertaken as a concession to Māori, there will be long-term benefits for all Aotearoa New Zealanders in that these reconceptualizations of property rights provide much stronger protections for the natural environment, an area where the common law tradition of property ownership has major weaknesses.

Part I of the paper begins with a brief introduction to the history of property law in Aotearoa New Zealand, including how the infliction of settler-colonial common law concepts shaped the landscape and title-driven property system. Part II provides an overview of the source of seeming incompatibility of English common law property law and Māori land relations, focusing on the concepts of rangatiratanga and kaitiakitanga. Part III briefly covers the origins and goals of the personhood movement, which was started

¹ *Aotearoa*, MAORI.COM, <https://www.maori.com/aotearoa> (last visited Apr. 20, 2018) (“*Aotearoa* is the Māori name for the country of New Zealand. The literal translation of Aotearoa is ‘land of the long white cloud.’”).

in the 1970s by American law professor Christopher Stone. This part also includes overviews of the two implementations of the model in Aotearoa New Zealand thus far – Te Urewera and Te Awa Tupua – including their respective explicit fundamental objectives and practical methods of implementation.

Part IV of the paper focuses on the specific areas where the personhood implementations have validated Māori cosmologies, and where similar types of legislation may solve problems which exist precisely because of long-standing common law property systems. Part V focuses on potential long-term benefits from these Acts in terms of environmental protection and how they address areas where English common law is particularly weak.

I. INTRODUCTION OF SETTLER-COLONIAL COMMON LAW PROPERTY REGIMES INTO AOTEAROA NEW ZEALAND

Aotearoa New Zealand settler-colonists brought with them a British-influenced, common law property system and an anthropocentric approach to property. The overarching theme under this common law system is that land is owned, and it is owned by individuals. In many countries that were colonized by the British, the relationship between the indigenous population and the land was never recognized, and the land was simply “taken” by the settler-colonists and colonial governments. The indigenous peoples of Aotearoa New Zealand, whose relationship to the land will be one focus of this paper, are commonly known as Māori.²

Compared to the British approach in other colonies, the settler-colonial government in Aotearoa New Zealand actually recognized Māori ownership, and required that native title be extinguished before land could be transferred to individual owners. In the early days of settlement, this was accomplished by large-scale pre-emptive land sales (some say confiscations) by the Crown, followed

² See Jessica C. Lai, *Māori Culture in the Modern World: Its Creation, Appropriation and Trade* (Int'l Comm. & Art L. Lucerne, Working Paper No. 2, 2010).

by allocation to local governments for parceling out.³ This process extinguished the customary title, also known as native title or “right of occupancy,”⁴ of huge swaths of land. It is important to understand that Māori, at this time, had no concept of absolute ownership of land, and the idea of exclusion and boundaries was very rare.⁵ This initial interaction between settler-colonial and native indigenous perspectives on land provides the perfect illustration for friction to come. Māori “sellers” believed that the settler-colonial “buyers” were simply making a gift to them in order to live and share the land with them.⁶ In fact, they could not have intended to completely alienate the land, because this concept would have been foreign to them.

This large-scale process of stripping (what would later be known as) customary title was then replaced by the Native Lands Act of 1862. This Act allowed Māori to convert land held by customary title into “Crown-sanctioned” ownership. The resulting parcels are known as Māori freehold land and remain under the jurisdiction of the Māori Land Court, which was created by the Native Land Act in 1865.⁷ The Māori Land Court is responsible for oversight of Māori freehold land, including its “status, ownership, management, and use.”⁸ Once converted into Māori freehold, the land could be alienated in ways that Māori chose,⁹ albeit under the watchful eye of the Māori Land Court. This process allowed for Māori to bring land

³ See Richard P. Boast, *Recognizing Multi-Textualism: Rethinking New Zealand’s Legal History*, 37 VICTORIA U. WELLINGTON L. REV. 547, 577 (2006).

⁴ PARLIAMENTARY LIBRARY, BACKGROUND NOTE: THE FORESHORE AND SEABED: MAORI CUSTOMARY RIGHTS AND SOME LEGAL ISSUES (2003).

⁵ See *Māori and Land Ownership*, TE ARA: THE ENCYCLOPEDIA OF NEW ZEALAND, <https://teara.govt.nz/en/land-ownership/page-1> (last visited Mar. 3, 2019).

⁶ Anna Shackell, *Ownership, Rangatiratanga and Kaitiakitanga: Different Ways of Viewing Land Entitlements in Aotearoa/New Zealand*, 2 TE TAI HARURU: J. MAORI LEGAL WRITING 86, 93 (2006).

⁷ W. Galvin, *Māori Land Development with Particular Reference to Land Development at Poutu, Northland*, 3 AUCKLAND U.L. REV. 291, 292 (1978).

⁸ *Māori Land: Ownership and Management by Tangata Whenua*, CMTY. LAW MANUAL ONLINE, <http://communitylaw.org.nz/community-law-manual/chapter-2-maori-land/what-this-chapter-covers-2/> (last visited Mar. 3, 2019).

⁹ See Boast, *supra* note 3, at 555.

into the official “system” of ownership, without first relinquishing it to the government for it to be given back via Crown grant.

A. *Current Aotearoa New Zealand Land Ownership Structure*

Today, Aotearoa New Zealand land is divided into five general categories. The first is “general” land. The nature of this type of land is such that an individual holds title in fee simple, by grant of the Crown.¹⁰ The second is Crown land itself, which is simply land that has not been granted by the Crown to an individual owner.¹¹ This category of land accounts for about half of Aotearoa New Zealand’s landmass.¹² The third is the previously mentioned Māori freehold land, which is land that has been identified and brought under the Crown title system, but remains within the jurisdiction of the Māori Land Court.¹³ Māori freehold land is subject to a number of restrictions that make it more difficult to alienate or sell when compared to general land. Members of Māori communities that have relationships with the land (often called the “preferred class of alienees”) at issue are given the right of first refusal for purchases.¹⁴ In the event that no one from the preferred class of alienees is interested and financially qualified, land may be sold to non-Māori, although the strong preference of the Māori Land Court is to protect and promote Māori ownership.¹⁵ These first three categories of land are based in the English common law system that was imposed in

¹⁰ *Id.* at 554.

¹¹ *Id.* at 555.

¹² Richard P. Boast, *Property Rights and Public Law Traditions in New Zealand*, 11 N.Z. J. PUB. INT. L. 161, 180 (2013).

¹³ *Id.*

¹⁴ *Alienation: Selling, Gifting, and other Transactions*, CMTY. LAW MANUAL ONLINE, <http://communitylaw.org.nz/community-law-manual/chapter-2-maori-land/alienation-selling-gifting-and-other-land-transactions/restrictions-on-selling-or-otherwise-alienating-maori-land/> (last visited Mar. 3, 2019).

¹⁵ *Māori Land and the Māori Land Court*, CITIZENS ADVICE BUREAU, <http://www.cab.org.nz/vat/hle/ml/Pages/MaoriLandCourt.aspx> (last visited Mar. 3, 2019).

Aotearoa New Zealand, by which the Crown had ultimate title to the land and individual title could only be derived through the Crown.¹⁶

The fourth category of land is largely symbolic at this point, and that is land that remains under Māori customary title. This is land that has never been moved into the feudal system, and therefore has always remained under Māori “customary title,” without any intervention by the Crown.¹⁷ This land is no longer alienable according to the Te Ture Whenua Māori Act/Māori Land Act 1993.¹⁸ The fifth category is the “foreshore and seabed” land, which comprises the common marine and coastland. This category of land was created by the Foreshore and Seabed Act of 2004. This land essentially belongs to no one.¹⁹ Although it is not owned by the Crown, this category of land can also be seen as having extinguished customary title.²⁰

The division of land into the above categories, particularly the large swaths of “general,” Crown-devised land and Crown land represents a lasting legacy of colonization in Aotearoa New Zealand.²¹ The settler-colonial anthropocentric view of land and property has become the prevailing regime in Aotearoa New Zealand.²² The supremacy of this system in Aotearoa New Zealand delivers a setting in which there is great conflict between Māori beliefs and attitudes towards land and the Aotearoa New Zealand government’s overarching approach.

B. *Common Law Property Regimes*

English “possessory title” is the central organizing principle of Aotearoa New Zealand’s property law system.²³ The “bundle of

¹⁶ See Shackell, *supra* note 6, at 94.

¹⁷ *Id.*

¹⁸ Te Ture Whenua Māori Act/Māori Land Act 1993, pt 7, c1 145 (N.Z.) (“No person has the capacity to alienate any interest in Māori customary land or to dispose by will of any such interest.”).

¹⁹ Boast, *supra* note 12, at 167.

²⁰ *Id.* at 180.

²¹ Elaine C. Hsiao, *Whanganui River Agreement*, 42 ENVTL. POL’Y & L. 371 (2012).

²² Blair Keown, *Ownership, Kaitiakitanga and Rangatiratanga in Aotearoa New Zealand*, 2 TE TAI HARURU: J. MAORI LEGAL WRITING 66, 68 (2006).

²³ *Id.* at 74.

rights” afforded to property ownership in Aotearoa New Zealand’s common law system allows an owner to use, manage, enjoy, convey, and enjoy exclusive possession of property. The incidents of ownership that arise from current Aotearoa New Zealand property law include some things that come into direct conflict with the Māori worldview. Rights of land possession in Māori culture are based on ownership and use; under common law, rights of possession are based on deeds of sale.²⁴ Therefore, if a system is to recognize that land can be owned, it must also generate a framework around which ownership can be managed, acquired, and controlled.²⁵ These incidents of ownership are supported by Aotearoa New Zealand laws and further reflect that the settler-colonial attitudes towards land ownership are the entrenched principles upon which Aotearoa New Zealand property law is founded.²⁶

The key to property ownership in a common law system is the right to exclusive possession.²⁷ This notion is strongly centered around the “individual” notions of property ownership, and protections for individual owners are supported by common law property actions such as trespass.²⁸ The rights to income from property demonstrate the individual’s exploitative relationship with the land, whereby the owner confers an entitlement to resource use necessarily demonstrating the submission of the land to the individual.²⁹ The use of resources is evidence of possession, as is the land’s characteristic of transmissibility,³⁰ allowing the land to be passed in ownership from generation to generation. In Aotearoa New Zealand, the strength of individual property ownership is strengthened by the fact that land titles are guaranteed by the

²⁴ Robert Joseph, *Legal Challenges at the Interface of Māori Custom and State Regulatory Systems: Wāhi Tapu*, 13-14 Y.B.N.Z. JURIS. (2010-2011). For more illustration of Māori and colonial attitudes to land, see Table 1.

²⁵ Shackell, *supra* note 6, at 89.

²⁶ Keown, *supra* note 22, at 68.

²⁷ *Id.* at 72.

²⁸ Boast, *supra* note 12, at 169.

²⁹ Keown, *supra* note 22, at 73.

³⁰ *Id.*

government.³¹ One responsibility that arises as an incident of ownership is the prohibition of harmful use.³² Ironically, this doesn't have to do with harming the land itself (as one is entitled to vis-à-vis the incident of profit derivation), but with using one's land to injure another. This involves avoiding breaking laws of nuisance and negligence, and mostly revolves around avoiding interference with the dominion of another individual over his or her own land.

The colonial view of nature is generally anthropocentric, meaning that humans are generally considered to be supreme over nature,³³ and revolves around "individual identity" and humans as the dominators of the natural world. Laws and property regimes reflect this supremacy, whereby individuals can hold complete dominion over land or natural resources. In this strain of thought, the land is only "good" insofar as it is useful to humans.³⁴ In indigenous ways of knowing, however, there is a much more symbiotic or interdependent relationship with the land and natural world.

The Māori worldview, more expansively known as Māori cosmology, centers on the "collective identity" where humans are but one element within a balanced and complex natural world, where all elements are connected through whakapapa, or genealogy.³⁵ The concepts briefly detailed above, especially the ideas of exclusive possession and exploitation of natural resources, are absent from Māori worldviews.³⁶ In most indigenous cultures, including the Māori, "property" regimes, insofar as they exist, treat ecological resources (including land, rivers, forests, etc.) as "intrinsically communal, intergenerational, and spiritually imbued with obligation."³⁷ The U.N. Declaration on the Rights of Indigenous

³¹ Boast, *supra* note 12, at 172.

³² Keown, *supra* note 22, at 73.

³³ Catherine J. Iorns Magallanes, Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment, 21 WIDENER L. REV. 273, 275 (2015).

³⁴ *Id.* at 277.

³⁵ Jacinta Ruru, Indigenous Peoples' Ownership and Management of Mountains: The Aotearoa/New Zealand Experience, 3 INDIGENOUS L. J. 111, 114 (2004).

³⁶ Keown, *supra* note 22, at 77.

³⁷ MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 271 (Cambridge University Press 2014).

Peoples³⁸ recognizes the important spiritual connection that indigenous people worldwide have with the land.³⁹ This is specifically referenced in the document as an indigenous peoples' right to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources."⁴⁰

When different ideologies co-exist in the same physical space, they can either be held in equal regard, or one can yield to the other. In Aotearoa New Zealand, the settler-colonial common law notions of property and ownership have taken the dominant role, with the Māori worldview being forced into the submissive position.⁴¹ The concepts in Māori that come closest to describing the Western notion of ownership are themselves so multi-dimensional that the immediate removal of context by translation erases much of their meaning.⁴²

II. KAITIAKITANGA AND RANGATIRATANGA: CULTURAL CONCEPTS THAT "JUST DON'T TRANSLATE"

Kaitiakitanga and rangatiratanga, which trace directly to spirituality elements, or wairua, are Māori concepts that have difficulty existing authentically in a legal and property framework that was developed without them in mind. Kaitiakitanga is broadly defined as stewardship or guardianship,⁴³ and rangatiratanga is

³⁸ The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) was not originally supported by New Zealand, the United States, Canada, or Australia. The original adoption was supported by 144 countries, opposed by the four mentioned, with eleven countries abstaining. Since the original adoption in 2007, the four opposing countries have reversed their positions and now support UNDRIP. See *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited Mar. 3, 2019).

³⁹ Michelle Bryan, *Valuing Sacred Tribal Waters within Prior Appropriation*, 57 NAT. RES. J. 139, 143 (2017).

⁴⁰ G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

⁴¹ Keown, *supra* note 22, at 67.

⁴² *Id.* at 70.

⁴³ Iorns Magallanes, *supra* note 33, at 281.

broadly defined as self-determination or sovereignty.⁴⁴ The terms are multi-dimensional and their richness only develops in their appropriate context; however, the government of Aotearoa New Zealand recognizes the importance of incorporating these concepts into formal legal systems. Blair Keown describes settler-colonial common law property ownership as a blanket, with kaitiakitanga and rangatiratanga only able to exist in places where the blanket has holes or provides no cover.⁴⁵ The largest difference between rangatiratanga and ownership is that ownership simply involves an individual's rights, where rangatiratanga is a part of the collective group's authority, interests, and rights.⁴⁶ The key element of kaitiakitanga that differentiates it from ownership is that it has a spiritual quality at its core.⁴⁷ In the Māori worldview, the land gives and sustains life, and kaitiakitanga represents the obligation that humans hold in return.

The concept of rangatiratanga refers to the right of self-determination and sovereignty. This interpretation is based in the idea that indigenous peoples were autonomous before colonialism and are entitled to rights and recognition as self-governing.⁴⁸ This interpretation is also supported by the Waitangi Tribunal, who considers the term in the context of indigenous self-management, as opposed to entirely separate sovereignty.⁴⁹ Even though it is expressed in the Treaty of Waitangi, the concept of rangatiratanga has always been a point of contention for Māori-Crown relations. The English and Māori versions of the Treaty of Waitangi are internally inconsistent with regard to sovereignty. Article I of the English version provides for the termination of sovereignty to the Crown, while Article II of the Māori version provides for rangatiratanga over their land, resources, and people.⁵⁰ The Māori version seems to

⁴⁴ Keown, *supra* note 22, at 75.

⁴⁵ *Id.* at 66.

⁴⁶ Shackell, *supra* note 6, at 93.

⁴⁷ *Id.* at 91.

⁴⁸ Andrew Erueti, *Māori Rights to Freshwater: The Three Conceptual Models of Indigenous Rights*, 24 WAIKATO L. REV. 58, 60 (2016).

⁴⁹ WAITANGI TRIBUNAL, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM 187 (1988).

⁵⁰ Erueti, *supra* note 48, at 63.

anticipate power-sharing, where the English version presumes the Crown has absolute sovereignty. The English version extinguishes broad Māori rights to self-determination and bases that presumption in the original “giving up” of Māori independence to the Crown. Because of the difference in the two versions of the Treaty, the concept of rangatiratanga has been relegated to only applying where land is under Māori legal control – an idea that is incompatible with a Māori worldview.⁵¹

The concept of kaitiakitanga, on the other hand, does not directly conflict with the settler-colonial notion of ownership.⁵² Kaitiakitanga is broadly defined as guardianship or stewardship, but these simple explanations again remove the notion from its complex context by trying to plug in feudal English notions. The notion of kaitiakitanga involves the interaction between the whakapapa (genealogical connection to the land) and the whanaungatanga (multi-dimensional relationships with the land).⁵³ The relationship described by kaitiakitanga can involve individuals but also spirits of the dead. All humans are spiritually connected as kaitiaki, or guardians of the land.⁵⁴ Guardianship and stewardship do not necessarily capture the “broader intangible notions of spiritual integrity, restoration of mana and maintenance of sacred relationships,” but they are together the closest analogous English terms and together represent how kaitiakitanga has been understood in the Aotearoa New Zealand legal context.⁵⁵ The seeming incompatibility of these Māori concepts and the English common law property regime which dominates much of Aotearoa New Zealand provides an opportunity for the country to adopt a novel approach to land management, one that would show respect for Māori cosmologies while practically addressing environmental concerns.

⁵¹ Keown, *supra* note 22, at 76.

⁵² *Id.* at 79.

⁵³ *Id.* at 80.

⁵⁴ Christopher Rodgers, *A New Approach to Protecting Ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, 19 ENVTL. L. REV. 266, 270 (2017).

⁵⁵ Keown, *supra* note 22, at 81.

III. The Movement for Personhood for Natural Objects in Aotearoa New Zealand

The idea of granting legal personhood to natural objects, resources, and formations arises from the work of American law professor Christopher D. Stone. In his seminal article *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, Stone lays out what he calls the “legal-operational aspects” and the “socio-psychic aspects” of granting personhood to natural objects.⁵⁶ The central concern addressed by Stone’s proposed framework was the inability of an anthropocentric legal system to fully protect our planet’s natural resources.⁵⁷ According to Stone, in order to truly have legal rights, an object’s autonomy must meet the following three criteria: the thing must be able to create legal actions, any injury to it must be considered in the determination of relief, and the relief must be to the benefit of the thing.⁵⁸ Without these three criteria, a natural object does not have what could be considered legal rights in and of themselves. There is a fourth, albeit more indirect criterion: that there is a public authority empowered to review actions that interfere with these rights.

With particular attention to the first three criteria, it seems obvious that the common law property regime in Aotearoa New Zealand is incompatible with a personhood model for natural objects. However, Aotearoa New Zealand has illustrated and codified a national commitment to incorporating Māori cosmologies into its legal system where practical, and this idea of granting personhood has been undertaken with respect to two natural objects: Te Urewera (a former national park) and Te Awa Tupua (the face of the Whanganui River).

In Aotearoa New Zealand, the act of “granting” personhood to natural objects demonstrates opposing views of natural objects. From the point of view of Parliament, granting personhood is a concession. From the point of view of Māori, achieving personhood

⁵⁶ Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 458 (1972).

⁵⁷ Philippe Sands, *On Being 40: A Celebration of Should Trees Have Standing*, 3 J. HUMAN RIGHTS. & ENV’T. 2 (2012).

⁵⁸ Stone, *supra* note 56, at 458.

is much closer to a recognition of the inherent characteristics of the natural objects. For Māori, the Parliamentary action is simply a legal declaration of what they have always known to be true, that the natural objects are ancestors regardless of their legal status.⁵⁹ While it is true that this vesting of title does not necessarily perfectly reflect traditional Māori concepts, it is the tool that is available today, within the current property and legal regime.⁶⁰

The question that remains is this: how does granting personhood to natural objects address the incongruities between Aotearoa New Zealand's common law "bundle of rights" approach to property law, and the Māori cosmological view of property, incorporating concepts such as rangatiratanga and kaitiakitanga? Specifically, does the enacted legislation in Aotearoa New Zealand, relating to the personhood of Te Urewera and Te Awa Tupua, address these incongruities?

A. *Te Urewera Act 2014*

Te Urewera was the largest national park on the North Island of Aotearoa New Zealand. Despite its longstanding classification as a national park, Te Urewera is the ancestral land of the Tūhoe iwi,⁶¹ who have a deep spiritual connection to it as their homeland.⁶² Unlike the Whanganui, party to the Te Awa Tupua Act discussed below, the Tūhoe never signed the Treaty of Waitangi. The Tūhoe actually entered into a separate agreement with the Crown, known as the Urewera Agreement, however, this agreement (along with many others signed by other iwi) have been largely forgotten in the "myopic" focus on the Treaty of Waitangi as the fulcrum of Crown-Māori relations.⁶³ The Tūhoe's partial motivation for abstaining from

⁵⁹ Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 86 (2018).

⁶⁰ Iorns Magallanes, *supra* note 33, at 317.

⁶¹ The modern meaning of "iwi" is tribe. Traditionally, it refers more generally to a "set of people bound together by descent from a common ancestor or ancestors; literally: bone". See *Glossary*, TE ARA: THE ENCYCLOPEDIA OF NEW ZEALAND, <https://teara.govt.nz/en/glossary#iwi> (last visited Mar. 3, 2019).

⁶² Iorns Magallanes, *supra* note 33, at 318.

⁶³ Hannah Blumhardt, *Multi-Textualism, Treaty Hegemony and the Waitangi*

the Treaty of Waitangi was their wish to retain absolute sovereignty with no Crown intervention in their lands.⁶⁴ Tūhoe lands were transferred to Crown ownership through a combination of confiscation and purchase, whereby the Crown consolidated thousands of small plots into the swath that became Te Urewera National Park.⁶⁵ This ultimately became the underpinning of the legal battle for personhood of Te Urewera, which began with an inquiry by the Waitangi Tribunal and ended with a negotiated settlements process; a settlement agreement signed by the Tūhoe and the Crown; and legislation brought to Parliament.⁶⁶ The Tūhoe argued that only the restoration of their traditional relationship with the land would allow them to adequately exercise their guardianship responsibilities, or *kaitiakitanga*.⁶⁷ Initially, this meant that the Tūhoe sought to transfer title directly to the *iwi*, as this was the only remedy available “within the system.” The Crown, however, was not amenable to this option and instead offered to grant the park legal personality. In this respect, the park would vest title to itself, and would be governed differently than Crown-owned land.⁶⁸ Some have seen this remedy as a bit of a work-around for the Crown in order to avoid any remedy that would truly restore full rights to the Tūhoe *iwi*.

The explicit objectives of the Te Urewera Act include provisions for the management of the spiritual aspects of the land. This is known as the “*mana me mauri*,” the “sense of the sensitive perception of a living and spiritual force in a place.”⁶⁹ Operationally, the management of Te Urewera involves a Board, with a much larger body than the analogous body in Te Awa Tupua.⁷⁰ The Board is established to “act on behalf of, and in the name of, Te Urewera” and

Tribunal: Making Sense of the 19th Century Crown-Māori Negotiations in Te Urewera, 43 VICTORIA U. WELLINGTON L. REV. 263, 264 (2012).

⁶⁴ Iorns Magallanes, *supra* note 33, at 319.

⁶⁵ WAITANGI TRIBUNAL, WAITANGI TRIBUNAL REPORT 50 (2015).

⁶⁶ Catherine J. Iorns Magallanes, *Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand*, VertigO - la revue électronique en sciences de l'environnement, Hors-série 22, at ¶ 5 (September, 2015).

⁶⁷ Iorns Magallanes, *supra* note 33, at 319.

⁶⁸ *Id.*

⁶⁹ Rodgers, *supra* note 54, at 272.

⁷⁰ Iorns Magallanes, *supra* note 66, at ¶ 37.

“to provide governance for Te Urewera.”⁷¹ The Board is likewise required to consider Tūhoe tradition and provide for the relationship of the iwi and Te Urewera. While there are some similarities between the Te Urewera Act and legislation that dictates the operations of Aotearoa New Zealand’s national parks, the Te Urewera Act marks the first time that land has been removed from the umbrella of national park legislation.⁷² The Act demonstrates a “bi-cultural” approach to the land – recognizing both its environmental importance (through specific provisions relating to preservation, similar to the protections provided in the previous national parks legislation) and its cultural importance (through language specifically referring to the Tūhoe relationship).⁷³ The Act itself incorporates many Māori language terms, some without translation whatsoever. Including Māori terms in this manner has the goal of upholding the actual concept itself, as opposed to an English translation of a foreign cultural concept.

B. *Te Awa Tupua Act 2017*

The Whanganui iwi has been fighting with the government of Aotearoa New Zealand for the recognition of their relationship with the Whanganui River since 1873,⁷⁴ making it the longest running litigation over Māori land claims in Aotearoa New Zealand history.⁷⁵ The battle has centered around the Crown’s mistreatment of the river and its surrounds, including stripping minerals and diverting its source waters for hydroelectric power.⁷⁶ The end of the battle, culminating in the Te Awa Tupua Act recognizing the personhood for the river, represents a movement towards decolonization of land and

⁷¹ Iorns Magallanes, *supra* note 33, at 322.

⁷² Jacinta Ruru, *Tuhoē-Crown settlement – Te Urewera Act 2014*, 1 MĀORI L. REV., 1, 2 (2014).

⁷³ *Id.* at 3.

⁷⁴ Marcello B. Rodriguez Ferrere, *New Zealand – Wanganui river becomes a ‘person’*, P.L., 524, 524 (Jul. 2017).

⁷⁵ Rodgers, *supra* note 54, at 266.

⁷⁶ Rodriguez Ferrere, *supra* note 74, at 524.

marks an assertion of rights and decision-making over their ancestral lands.⁷⁷

Te Awa Tupua as a living being encompasses the entire Whanganui River, from the mountains and tributaries to the sea.⁷⁸ To the Whanganui, the river is their ancestor,⁷⁹ and the agreement incorporates this geneological approach (whakapapa) to describing the river.⁸⁰ The Māori saying “ko au te awa, ko te awa ko au,” meaning “I am the river, the river is me,” became one of the fundamental principles of the final negotiation.⁸¹

The predecessor agreement to the Te Awa Tupua Act was the Record of Understanding in Relation to Whanganui River Settlement and was signed by the Whanganui iwi and the Crown as an interim agreement in 2011. This Record of Understanding expressed principles that would carry through into the final agreement. Among other things, it seemed to honor the relationship between the river and the Whanganui iwi by recognizing the interconnected nature of the iwi’s sovereignty with that of the river, as well and the reciprocal nature of the “health and well-being” of the iwi and the river.⁸² The explicit objectives of the final legislation include the goals of recognizing, promoting, and protecting the health and well-being of the river and its status as Te Awa Tupua.⁸³ The agreement also agrees to recognize and provide for mana (roughly meaning honor, prestige, and respect) and support the relationship of the Whanganui with the river (te mana o te iwi).⁸⁴

The Act returned the riverbed to the river itself, not to the iwi. While vesting title in the iwi would have been a step in the right direction of acknowledging the sovereignty of the river, the creation of the autonomous entity of Te Awa Tupua recognizes the complete

⁷⁷ Hsiao, *supra* note 21, at 371.

⁷⁸ *Id.*

⁷⁹ Iorns Magallanes, *supra* note 66, at ¶ 13; see also Tūtohu Whakatupa, Whanganui Iwi and the Crown, ¶ 1.3, Aug. 30, 2012.

⁸⁰ Iorns Magallanes, *supra* note 33, at 315.

⁸¹ Iorns Magallanes, *supra* note 66, at ¶ 19.

⁸² Hsiao, *supra* note 21, at 373.

⁸³ Rodgers, *supra* note 54, at 267.

⁸⁴ *Id.*

and indivisible qualities of the river in its entirety. The river itself no longer can be owned – representing a complete break from common law principles.⁸⁵ “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.”⁸⁶

Te Pou Tupua is the name of the office which operates as the “human face” of the river’s personality and can interact on behalf of the river and is responsible for protecting the river and promoting its interests. The office consists of two (human) persons “of high standing,”⁸⁷ one nominated by the iwi having interests in the river and one nominated by the Crown.⁸⁸ Te Pou Tupua has an obligation to uphold the tupua te kawa, which is the concept encompassing the physical and spiritual aspects of the river. The Crown provided NZD \$30 million in a grant to help fund the Te Pou Tupua and support it in its mission. This operates as a sort of public trust,⁸⁹ with the trustees in Te Pou Tupua acting as the “human face” of Te Awa Tupua.

IV. IMPLICATIONS OF THE PERSONHOOD IDENTITY FOR MĀORI

The clear implication of the new framework under which Te Urewera and Te Awa Tupua exist is that there is now the recognition of a very different overall idea of property when compared to the common law tradition.⁹⁰ Te Urewera and Te Awa Tupua no longer exist in the British, settler-colonial, common law context in that individuals may no longer own or claim property rights to them. On the surface, it seems as though these “concessions” by the Crown are only for the benefit of the Māori whose kinship with their natural objects has been validated and absolutely benefit from the formal recognition of their ancestral relationships. As Blair Keown states, “A truly integrated system of property rights appears problematic and perhaps unachievable. However, the Tiriti obligation of good faith

⁸⁵ Hsiao, *supra* note 21, at 373.

⁸⁶ Te Awa Tupua Act 2017, § 14(1).

⁸⁷ Iorns Magallanes, *supra* note 66, at ¶ 23.

⁸⁸ Rodriguez Ferrere, *supra* note 74, at 525.

⁸⁹ Rodgers, *supra* note 54, at 274.

⁹⁰ *Id.* at 276.

and the notion of partnership inherent in our nation's founding document have provided an opportunity for rigorous and potentially fruitful political dialogue between the Māori and the Crown.”⁹¹ As this paper addresses below, there are likely some additional benefits derived from these Acts and others that may follow them. Two centuries of title-driven property ownership and common law practices have resulted in some challenges – particularly for environmental protection – that these new approaches could potentially address, to the benefit of the whole of Aotearoa New Zealand.

A. *Recognition of Ancestral Nature of Land and Natural Objects*

The Māori understanding of land as an ancestor differs from the interdependent relationship described below. The recognition of humans as descended from the rest of the natural world is pervasive in indigenous creation stories, and Māori culture does not tend to separate the spiritual from the physical when considering the natural world.⁹² The Whanganui iwi, for example, recognize the Whanganui river itself as their ancestor, and see Te Awa Tupua as a being, inseparable from the iwi.⁹³ Likewise, the Tūhoe describe Te Urewera as “their place of origin and return,” and have always held a deep spiritual attachment to the land, even throughout the six decades it classified as a national park.⁹⁴

The Te Awa Tupua Whanganui River Claims Settlement Act 2017 contains the following language in recognition of the ancestral nature of Te Awa Tupua:

Ko au te Awa, ko te Awa ko au: I am the River and the River is me:
The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its

⁹¹ Keown, *supra* note 22, at 82.

⁹² Iorns Magallanes, *supra* note 33, at 280.

⁹³ Hsiao, *supra* note 21, at 371.

⁹⁴ Iorns Magallanes, *supra* note 33, at 318.

health and wellbeing.⁹⁵

This language, among other language in the Act, formalizes into law not only the relationship between the iwi and Te Awa Tupua, but the importance of the relationship – signaling its symbiotic nature and the presence of kaitiakitanga.

The Te Urewera Act 2014 uses even more esoteric language to explain the relationship between the Tūhoe and the land now legally known as Te Urewera:

For Tūhoe, Te Urewera is Te Manawa o te Ika a Māui;
it is the
heart of the great fish of Maui, its name being derived
from
Murakareke, the son of the ancestor Tūhoe.⁹⁶

Beyond the description of the land as the “heart of the great fish of Maui,” a description earned through the mythological tale of the demigod Maui “fishing up” the North Island with his hook,⁹⁷ the Act also refers to Te Urewera as “prized by all New Zealanders as a place of outstanding national value and intrinsic worth.”⁹⁸ This inclusion of Te Urewera’s importance to all of New Zealand seems to give even more credence to the relationship with the iwi, not only because it comes chronologically after the description of the Tūhoe relationship, but because it signals a level of trust in the iwi’s caretaking.

Although the language from the Acts formally recognizes the inalienable nature of the connection between the iwi and Te Urewera and Te Awa Tupua, the vesting of legal title in the name of the entities themselves is still somewhat problematic vis-à-vis Māori traditions.⁹⁹ Put simply, “indigenous cultural property transcends the classic legal

⁹⁵ Te Awa Tupua Act 2017, § 13(c).

⁹⁶ Te Urewera Act 2014, § 3(4).

⁹⁷ Amy Cooper, *Maui’s Fish: How the North Island Got its Name*, 100% PURE NEW ZEALAND, <https://www.newzealand.com/us/article/mauis-fish-how-the-north-island-got-its-name/> (last visited Mar. 3, 2019).

⁹⁸ Te Urewera Act 2014, § 3(8).

⁹⁹ Iorns Magallanes, *supra* note 66, at ¶ 26.

concepts of markets, title, and alienability that we often associate with ownership.”¹⁰⁰

B. *Symbiosis, not Supremacy*

The differences between the ways that settler states and indigenous populations view their relationship with natural elements are the basis for disputes between the two regarding use of land and natural resources. The indigenous “cosmologies,” which include protective views of the environment, are in constant conflict with the settlor governments by which they are bound.¹⁰¹ Settler-colonialists arrived in Aotearoa New Zealand with a particularly individualistic interpretation of property rights – humans had authority over nature and were entitled to do as they pleased in the interest of personal or corporate gain.¹⁰²

Kaitiakitanga is the obligation to nurture and provide care. While it is roughly translated as stewardship, this does not fully incorporate the spiritual element that instills in Māori a responsibility to and of their community.¹⁰³ The kaitiaki relationship is not transactional and does not involve any elements of ownership. Additionally, the Māori term whanaungatanga roughly translates to kinship and refers to a wide network of people, land, water, animals, plants, and spirits.¹⁰⁴ In this sense, humans might be the guardians of nature, but they are not above or below any other element in the whanaungatanga.

The systems devised to facilitate these relationships with the land, codified by the Te Awa Tupua and Te Urewera Acts, function differently. The “human face” of Te Awa Tupua, known as Te Pou Tupua, consists of two individual trustees, one nominated by the iwi having interests in the Whanganui River and one nominated on behalf of the Crown (the first of these Crown appointments is to be

¹⁰⁰ Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, In *Defense of Property*, 118 YALE L. J. 1022, 1027 (2009).

¹⁰¹ Iorns Magallanes, *supra* note 33, at 273.

¹⁰² Shackell, *supra* note 6, at 89.

¹⁰³ Iorns Magallanes, *supra* note 33, at 281.

¹⁰⁴ Iorns Magallanes, *supra* note 66, at ¶ 8.

nominated by the Minister for Treaty of Waitangi Negotiations and all subsequent nominations are to be made by the Minister for the Environment).¹⁰⁵ The functions of Te Pou Tupua are to “act and speak for and on behalf of Te Awa Tupua,” and Te Pou Tupua “must act in the interests of Te Awa Tupua.”¹⁰⁶

The governance of Te Urewera, on the other hand, consists of the Te Urewera Board, which consists of members appointed by both the governing body of the Tūhoe, the Tūhoe Te Uru Taumatua, and members appointed by the Minister of the Environment and the Minister for Treaty of Waitangi Negotiations.¹⁰⁷ Interestingly, the balance of the appointees shifts as time passes. In the first three years after the settlement date, the Board is to consist of an even split of appointees from both the iwi and the Crown, totaling eight members. However, after the third anniversary of the settlement, the Board shifts to a total of nine members, made up of six iwi appointees and three Crown appointees.¹⁰⁸ Much like the charges of the Te Pou Tupua, the Te Urewera Board’s purpose as stated in the Act are “to act on behalf of, and in the name of, Te Urewera; and to provide governance for Te Urewera in accordance with this Act.”¹⁰⁹ When making decisions, the Board must “consider and provide appropriately for the relationship of iwi and hapū and their culture and traditions with Te Urewera.”¹¹⁰

While the respective Acts vary in drafting style, the rights and responsibilities given to the governing bodies are relatively the same. However, the Te Urewera Board’s structure seems to be a sharper reflection of the concept of kaitiakitanga. While the Act charges the Board with pursuit of unanimous decision-making, and requires it in some cases,¹¹¹ there is some flexibility for consensus decision-making.¹¹² Because of the numerical breakdown of the Board, which

¹⁰⁵ Te Awa Tupua Act 2017, § 20(2)-(4).

¹⁰⁶ Te Awa Tupua Act 2017, §§ 19(1)(a), 19(2)(a).

¹⁰⁷ Te Urewera Act 2014, § 21(1).

¹⁰⁸ Te Urewera Act 2014, § 21(1)-(2).

¹⁰⁹ Te Urewera Act 2014, § 17.

¹¹⁰ Te Urewera Act 2014, § 20(1).

¹¹¹ Te Urewera Act 2014, § 33.

¹¹² Te Urewera Act 2014, § 34.

is to consist of two-thirds majority Tūhoe appointees, decisions that may be made by vote (if consensus cannot be achieved) would seemingly go in favor of the Tūhoe members.

The question becomes, in the context of complex legislation and management schemes involving human guardians, whether laws that afford rights to humans over nature really resolve the issue of affording rights to nature itself. Does dissolving ownership by humans in favor of a board of appointed humans really disaggregate the natural object from humankind? While this is likely the closest available legal option at this point in time,¹¹³ there is also some Māori-focused justification for the involvement of humans in the management. According to Catherine J. Iorns Magallanes:

The appointment of a body to be an official guardian recognises “the inseparability” of the people and the river or forest, respectively, as well as the responsibilities inherent in that relationship for taking care of them as kin. In this sense, these examples emphasise the responsibilities to nature more than nature’s rights. But it is certainly possible to place this within a framework that emphasises nature’s rights, viewing the responsibilities as the flip side of the human duties within a legal system that recognises these rights.¹¹⁴

V. UPSCALING ENVIRONMENTAL PROTECTIONS, OVERCOMING SHORTFALLS IN COMMON LAW PROPERTY SYSTEMS

The Te Awa Tupua and Te Urewera Acts were created in order to recognize and show respect to the Māori cosmologies, not for environmental protection reasons.¹¹⁵ However, the idea of personhood for natural formations and objects has its birthplace in environmental protection. As stated earlier, the originator of the idea

¹¹³ Iorns Magallanes, *supra* note 66, at ¶ 27.

¹¹⁴ *Id.* at ¶ 49.

¹¹⁵ *Id.* at ¶ 51.

of environmental personhood was Christopher D. Stone, who introduced the idea in the *Southern California Law Review* in 1972. Therefore, the concept theoretically can go beyond the importance of recognizing Māori relationships with the land. As Stone laid out in his article, there are clearly links between the legal personality concept and the goal of environmental protection.

Addressing issues of environmental protection is one of the problems that arise from two centuries of title-driven property ownership and common law practices. These Acts, in unifying “title” to natural formations, may address this issue to the benefit of the whole of Aotearoa New Zealand, not just Māori. The fallout from title-driven property regimes, which focus on individual ownership, is that they are often too narrow of a scope for true environmental protections.¹¹⁶ English common law is focused on exclusive rights and protecting private property, which often means that it doesn’t allow for strategic planning or large-scale protections. In order to provide the environmental protections that will benefit the entire population of Aotearoa New Zealand, there needs to be a broader approach. This means that some mechanism must facilitate planning and execution at the landscape or ecosystem scale in order to effectively plan conservation and protective programs.¹¹⁷

Both the Te Awa Tupua and Te Urewera Acts place emphasis on the protection of nature itself, as opposed to the personal rights of individual property owners. This is important in that they essentially recognize the intrinsic value of nature standing alone, not just in its context of usefulness to people.¹¹⁸ Most environmental legislation today balances interests between protection of nature and use or access by humans. By focusing on the protection of nature itself, the Te Awa Tupua and Te Urewera Acts provide examples of frameworks “in which the ‘environment’ is seen not as a disparate collection of property entitlements with special attributes, but instead as a collective whole, a living entity which incorporates all of the physical and metaphysical elements of each ecosystem.”¹¹⁹

¹¹⁶ Rodgers, *supra* note 54, at 274.

¹¹⁷ *Id.*

¹¹⁸ Iorns Magallanes, *supra* note 33, at 324.

¹¹⁹ Rodgers, *supra* note 54, at 272.

Stone identified four criteria which should be met in order for the concept of legal rights to truly be achieved. First, the thing must be able to create legal actions; second, any injury to it must be considered in the determination of relief; third, the relief must be to the benefit of the thing; fourth and more indirectly, there should be a public authority empowered to review anything that interferes with these rights.¹²⁰ Focusing on the first three, the Te Awa Tupua and Te Urewera Acts as written provide examples for frameworks that address each of the issues in the context of the title-driven, common law legal regimes that create them.

A. *Legal Standing*

One of the main criteria for the validation of legal rights is the ability to institute legal action. At common law, a natural object has no such right. In order for there to be a suit against the polluter of a stream in a common law system, the individual owners of individual parcels of land must demonstrate injury. While the overall damage to the stream may be substantial, the individual damage may or may not be adequate to sustain a suit against the polluter. Regardless, the rights that are honored by the courts are the rights of the owners of the individual parcels of the stream not to be injured by another private entity – the stream itself has no standing to protect itself.¹²¹

The issue of legal standing is a problem for environmental justice everywhere.¹²² In common law property regimes, the problem of establishing sufficient interest in an environmental dispute often blocks claims from court.¹²³ Typically, a plaintiff must demonstrate harm to property or a commercial interest and satisfy close proximity tests.¹²⁴ While Aotearoa New Zealand has historically set a liberal standard for legal standing in environmental cases,¹²⁵ especially where there has been a community impact or damage to natural

¹²⁰ Stone, *supra* note 56, at 458.

¹²¹ *Id.* at 459.

¹²² Rodgers, *supra* note 54, at 268-9.

¹²³ *Id.* at 273.

¹²⁴ *Id.*

¹²⁵ Rodgers, *supra* note 54, at 271.

resources, there still remains the issue that one natural object – a forest, for example—could consist of several different types of property, all which are managed differently and are under the jurisdiction of different courts (“general” land vs. Crown land vs. Māori freehold vs. customary title).

When it comes to legal standing, both Acts address the matter. The Te Awa Tupua Act begins the description of Te Awa Tupua’s legal status by declaring that Te Awa Tupua has all the rights, powers, duties, and liabilities of a legal person.¹²⁶ The Te Awa Tupua Act imbues the Whanganui River with ‘legal standing in its own right.’¹²⁷ The Te Urewera Act’s statement of purpose begins in the following way: “The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera”¹²⁸ By establishing a legal identity for Te Urewera, Parliament has imbued the land with the ability to enforce its own legal rights (and to be subject to enforcement of its duties).¹²⁹

B. *Injury and Benefits to the Natural Object*

From an environmental protection perspective, the main goal of bestowing legal personality on a natural object is to protect that object, whether it be a forest, a river, or an ecosystem, from injury. The main issue with title-driven and common law property regimes, on this matter, is defining what injury means. Stone argues that one approach to measuring damages to the environment, which is currently implausible under individual ownership regimes, is by determining the “cost of making the environment whole.”¹³⁰ While he expresses reservations about quantifying what could otherwise be considered priceless,¹³¹ he does consider including considerations such as pain and suffering and future costs into the calculations.¹³² There are also concerns about dealing with environmental interests

¹²⁶ Te Awa Tupua Act 2017, § 14.

¹²⁷ Iorns Magallanes, *supra* note 33, at 316.

¹²⁸ Te Urewera Act 2014, § 4.

¹²⁹ Bryan, *supra* note 39, at 146.

¹³⁰ Stone, *supra* note 56, at 476.

¹³¹ *Id.* at 477.

¹³² *Id.* at 479.

that some would consider useless, such as certain species of commercially-valueless inedible fish.¹³³ Calculating damages from the river's perspective could involve examining the costs associated with restocking, which would be difficult for any individual other than the river itself to justify. Another form of protection available to the natural resources is injunctive relief, whereby the resource or object can itself be a party.¹³⁴ By granting legal personality to Te Awa Tupua and Te Urewera, Parliament has given the governing bodies the ability to sue on behalf of the natural formations themselves, with the natural formations as parties and therefore beneficiaries of any potential awards.

VI. CONCLUSION

The concept of legal personality for land and natural objects addresses many points of difference between English common law concepts of property and Māori notions of kinship with and stewardship of ancestral lands. While the idea of legal personality was conceived by an American law professor as a path to environmental protections, it found its way to Aotearoa New Zealand as a way to recognize Māori rights and relationships to the natural world.¹³⁵ Although the two major implementations of this concept, the Whanganui River/Te Awa Tupua Act and the Te Urewera National Park/Te Urewera Act, were conceived in order to bolster Māori cosmologies, they provide frameworks for and examples of how this concept could be used to provide environmental protections in parts of the world still restricted by common law notions of property ownership.

¹³³ James D.K. Morris & Jacinta Ruru, *Giving Voice to Rivers: Legal Personality as a Vehicle for Recognizing Indigenous Peoples' Relationships to Water?*, 14 AUSTRALIAN INDIGENOUS L. REV. 49, 55 (2010).

¹³⁴ *Id.*

¹³⁵ Jacinta Ruru, *In New Zealand, this river and park are legal persons*, TEDx (Nov. 16, 2017), <http://www.tedxchristchurch.com/jacinta-ruru/>.