

GIVING VOICE TO RIVERS: LEGAL PERSONALITY AS A VEHICLE FOR RECOGNISING INDIGENOUS PEOPLES' RELATIONSHIPS TO WATER?

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Indigenous peoples throughout the world have strong connections to the flowing freshwater of rivers. For instance, Maori - the Indigenous peoples of Aotearoa New Zealand - view many rivers as tupuna (ancestors) and invoke the name of a river to assert their identity. There is a deep belief that humans and water are intertwined as is encapsulated in common tribal sayings such as 'I am the river and the river is me' and 'the river belongs to us just as we belong to the river.' Indigenous peoples, including Maori, wish to achieve particular cultural aspirations in regard to the management of water as a consequence of these relationships. While many state and federal governments throughout the world are increasingly willing to engage with their respective Indigenous Peoples in developing aspirations for co-management, we argue that the English common law derived legal system continues to restrict Indigenous peoples from achieving their full aspirations. The central question we explore is whether affording rivers legal personality would be a useful tool for governments to employ in order to seek reciprocal relationships with Indigenous peoples. The United States Law Professor Christopher Stone first explored the idea of giving legal personality to natural resources. We argue that it is timely to consider the application of this concept in the specific context of New Zealand's rivers.

I Introduction

Thousands of lakes and rivers pool and flow through the lands that constitute Aotearoa New Zealand. As the first persons, Maori, made their homes there, they became intricately linked to the lands and waters - literally, tangata whenua (the people of the land). The Maori language provides a daily reminder of this connection. For instance, hapu means sub-tribe and to be pregnant; whanau means family and to give birth; and whenua means land and

afterbirth.¹ The Maori worldview, including its legal system, is predominantly values, not rules, based.² It encapsulates a certain way of life that depends on the relationships between all things, including between people and gods; different groups of people; and people and everything in the surrounding world, including rivers. Many rivers, and other natural landmarks such as specific mountains, are regarded as tupuna (ancestors). A person's identity is intricately linked to their ancestral river - for us, the authors of this article, we whakapapa (genealogically link) to the Waitoa and the Waikato rivers.

In 1840, Maori chiefs signed the British Crown's constructed *Te Tiriti o Waitangi/the Treaty of Waitangi*.³ While in the English version, Maori ceded to the Crown absolutely and without reservation all the rights and powers of sovereignty, in the Maori version, Maori did no such thing. In the Maori version Maori retained tino rangatiratanga (sovereignty) over their taonga (treasures). The English version added that despite a change in sovereignty, Maori retained full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties. Despite this, the Crown took total control, including assumed ownership and management of the natural resources in Aotearoa New Zealand. There has since been a fraught history whereby Maori have sought for the Crown to honour its Treaty promises. Beginning in the 1970s with the creation of the Waitangi Tribunal as a commission of inquiry empowered to receive, report and recommend on alleged Crown breaches of the principles of the Treaty of Waitangi,⁴ the more recent Treaty of Waitangi claim settlement era⁵ and the incorporation of the Treaty principles into several statutes, a new era is emerging.

In recent decades, Parliament has begun to legally recognise the important relationship between Maori and water.

The statute that regulates all use of water, the Resource Management Act 1991, demands that decision-makers take into account the principles of the Treaty of Waitangi and recognise the Maori relationship with water.⁶ Numerous Treaty of Waitangi claim settlement statutes describe iwi, hapu and whanau cultural, spiritual, historical, and traditional associations with rivers.⁷ Many of these statutes use statutory acknowledgement tools to recognise the importance of specific rivers and oblige decision-makers to have a certain level of regard to that relationship.⁸ For example, s 8(3) of the most recent settlement statute, the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010*, records the Crown's recognition of a Waikato-Tainui statement that reads:

The Waikato River is our tupuna (ancestor) which has mana (spiritual authority and power) and in turn represents the mana and mauri (life force) of Waikato-Tainui. The Waikato River is a single indivisible being that flows from Te Taheke Hukahuka to Te Puuaha o Waikato (the mouth) and includes its waters, banks and beds (and all minerals under them) and its streams, waterways, tributaries, lakes, aquatic fisheries, vegetation, flood plains, wetlands, islands, springs, water column, airspace, and substratum as well as its metaphysical being. Our relationship with the Waikato River, and our respect for it, gives rise to our responsibilities to protect te mana o te Awa and to exercise our mana whakahaere in accordance with long established tikanga to ensure the wellbeing of the river. Our relationship with the river and our respect for it lies at the heart of our spiritual and physical wellbeing, and our tribal identity and culture.

But are these legislative acknowledgements enough? Do they translate into providing Maori with a means to protect their ancestral rivers from pollution and high volume water take? While we certainly do not wish to undermine these legislated Treaty settlement agreements, we believe that there is scope to explore a different model that has not yet received much attention in our country: the possibility of affording rivers legal personality.

In 1972, a United States of America law professor, Christopher Stone, advocated that legal personality should be afforded to all natural resources for better protection of those resources.⁹ Stone offered three specific reasons for why he believed that affording natural resources legal personality could lead to better environmental protection. First, when taking a case to court the issue of standing for third parties

would be less problematic since parties would only need to establish harm to a particular natural resource and claim they are representing its interests. In other words, the natural resource would have its own standing, and the third party concerned would speak on its behalf, as a guardian speaks on behalf of a child, for example. Second, if natural resources had legal personality, then emphasis would be on the actual impact on that resource as opposed to assessing an affected party's economic loss. Third, remedies would apply to the natural resource directly rather than compensating the third party for its losses. Attributing the compensation to the natural resource itself would ensure the money is used for its well-being; or alternatively that the resource be returned to its previous state.

We argue that applying Stone's idea to afford legal personality to New Zealand's rivers would create an exciting link between the Maori legal system and the state legal system. The legal personality concept aligns with the Maori legal concept of a personified natural world. By regarding the river as having its own standing, the mana (authority) and mauri (life force) of the river would be recognised, and importantly, that river would be more likely to be regarded as a holistic being rather than a fragmented entity of flowing water, river bed and river bank.¹⁰ Moreover, a shift in the state legal system towards this concept would not only put the health and wellbeing of the river at the forefront of decision-making, but would also signify an uptake of the challenge posed by the New Zealand Law Commission in 2001 to Parliament:

If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Maori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Maori is, how it is practiced and applied, and how integral it is to the social, economic, cultural and political development of Maori, still encapsulated within a dominant culture in New Zealand society.¹¹

This article begins by exploring the current legal mechanisms that are available for Maori to seek reconciliation aspirations concerning rivers and concludes that these are (mostly) inadequate. The next part proposes another option, legal personality, and thus takes the opportunity to explain Stone's idea. The final part seeks to apply the concept of legal personality to Aotearoa New Zealand's rivers. The central question of this article – should Maori and the government give serious attention to affording New Zealand's rivers

legal personality – is then answered affirmatively in the conclusion.

II Current Legal Recognition Mechanisms

There exist several options available for Maori to pursue legal recognition of their ancestral relationships with rivers. This part explains the options available under 1) the *Resource Management Act 1991* and rights pursuant to this Act to appeal local authority decision making to the Environment Court; 2) the ability to pursue negotiated Treaty of Waitangi settlements with the Crown; and 3) the potential to claim ownership of rivers via the common law doctrine of native title. This discussion provides an important backdrop to better understand the existing options and why, we believe, that there is scope for an alternative option: legal personality.

A Pursuing Rights Under the *Resource Management Act 1991* (NZ)

The *Resource Management Act 1991* provides a comprehensive statutory regime for all natural resources including freshwater. The Act's purpose, as its preamble states, is to 'restate and reform the law relating to the use of land, air, and water.' In relation to river beds, it explicitly states that no person may, for example, use, erect, or excavate in, on, under, or over a bed unless expressly allowed by a rule in a regional plan or a resource consent.¹² In relation to freshwater, no person may, for example, take, use, dam, or divert any water unless expressly allowed by a rule in a regional plan or a resource consent.¹³ Local authorities have the mandate to make regional plans and issue resource consents. Regional councils have the express duty to: control the use of land for the purpose of the maintenance of the quality and quantity of water; control the taking, use, damming, and diversion of water.¹⁴ In deciding whether to make a regional plan in relation to water or to issue a resource consent to allow a person or company to take water, the local authority must have some level of regard to the Maori relationship with water as stipulated in the *Resource Management Act*. Section 6(e) requires decision makers exercising their functions and powers in relation to managing the use, development, and protection of natural and physical resources, to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral water. Section 7 states that these decision makers must have particular regard to *kaitiakitanga* – defined in s 2 to mean 'the exercise of guardianship by the *tangata whenua* of an area in accordance with *tikanga*

Maori in relation to natural and physical resources; and includes the ethic of stewardship.' Moreover, s 8 states 'In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)'.

In terms of joint Maori and local authority cooperation, the *Resource Management Act* affords two possibilities. First, s 33 allows local authorities to transfer any of its functions, powers or duties to 'public authorities,' which includes 'iwi authorities.'¹⁵ The Ministry for the Environment has set out possible instances where a s 33 transfer could apply in a booklet on Maori participation, essentially via a transfer of power to become a consent authority or through joint management. To effect this transfer, the local authority must hold special consultations with the iwi authority.¹⁶ The transfer is not absolute as local authorities must retain responsibilities for some matters including approval of any plan developed by the iwi authority under its s 33 power. Moreover, s 35 requires local authorities to monitor the exercise of those transferred functions, power or duties. To date there are few instances where a local authority has transferred its powers to Maori.¹⁷

Another option is that an iwi could opt to jointly develop plans or strategies under s 36B to arrive at mutually agreed and supportive outcomes, or introduce an iwi environmental management plan that the local authority must consider when developing regional policy statements or district plans.¹⁸ However, there are problems with both options, most significantly that the discretion is with the local authorities to enter into such agreements and without their will, or the will of the public majority, few councils have entertained the idea to do so.

Other options under the *Resource Management Act* are those that are open to third parties generally: appeal a council's decision to issue a resource consent to the Environment Court, or apply to a council for a water conservation order.¹⁹ However, there are few instances where Maori have been successful in challenging the issue of a resource consent.²⁰ In terms of a water conservation order, any person²¹ can apply for such an order that will serve to recognise and sustain either:

outstanding amenity or intrinsic values which are afforded by water in their natural state: [or]

where waters are no longer in their natural state, the amenity or intrinsic values of those waters which in themselves warrant protection because they are considered outstanding.²²

A water conservation order may provide for preservation, protection (for example, of habitats and fisheries), or for the 'protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Maori'.²³ The order means that consent authorities may not grant resource consent contrary to the water conservation order and moreover that regional policy statements and regional and district plans must also not be contradicted.

Thus, while there is protection in the *Resource Management Act*, Maori need to be proactive to seek this protection, which involves financial cost and time. And, even if they do devote money and energy, because decision-makers simply have to have a level of regard to Maori concerns, other concerns can, and often do, trump Maori issues.²⁴

B Pursuing Direct Negotiations with the Crown

Maori may negotiate a river co-management agreement directly with the Crown. Since 1995, the Office of Treaty Settlements has been responsible for all Treaty negotiations for 'historical' Treaty breaches (before 21 September 1992). The Office is a separate unit in the Ministry of Justice and reports to the responsible members of the Executive. For 'contemporary' breaches (after 21 September 1992), the government department or agency concerned handles the negotiation.²⁵ Several tribes have been successful in seeking statutory recognition of their interests in rivers.²⁶ However, the most prominent settlement regarding a river is the one concerning the Waikato River – Aotearoa New Zealand's longest river (425 kilometres). The *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (NZ)* demonstrates that pursuing direct negotiations with the Crown can yield results. Yet, they can be protracted – for example, it took the Waikato-Tainui tribe more than 20 years to bring to resolution their river claim.²⁷

The *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (NZ)* has at its heart the Crown recognition that Waikato-Tainui regard the Waikato River as a tupuna.²⁸ The Act endorses that a new vision and strategy 'is intended by Parliament to be the primary direction-setting document

for the Waikato River and activities within its catchment affecting the Waikato River'.²⁹ Key components of the Vision and strategy include: '(a) the restoration and protection of the health and wellbeing of the Waikato River; (b) the restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships'.³⁰ The Waikato River Authority is the new statutory body responsible for setting the primary direction through the vision and strategy for the Waikato River.³¹ The Authority consists of ten members, including one member appointed from each of the iwi that link with the river (Te Arawa, Tuwharetoa, Raukawa, Maniapoto, a member appointed by the Waikato River Clean-up Trust, and 5 members appointed by the Minister for the Environment in consultation with other Ministers such as Finance, Local Government, Maori Affairs.³² The Act gives power to the new Waikato River Clean-up Trust. The Trust's primary object is 'the restoration and protection of the health and wellbeing of the Waikato River for future generations'.³³ The Trust must also be involved in preparing a new integrated river management plan, along with relevant central departments, local authorities and other appropriate agencies.³⁴ The integrated river management plan must have conservation, fisheries, and regional council components.³⁵ Moreover, a joint management agreement must be in force between each local authority and the Trust in the near future.³⁶

While the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* sets a significant standard of co-management between Maori and local authorities, there is much uncertainty as to whether a similar commitment to co-management will be negotiated over another river. Even if it is, the legal personality concept may be of benefit if employed as an immediate temporary measure. Treaty of Waitangi claim settlements are notoriously lengthy experiences. The legal personality concept may even negate the need for an iwi to pursue co-management (although we doubt this); it might very well have value for those iwi that have already signed 'full and final' settlements at the time when the Government refused to explore co-management options. Legal personality of rivers may give those iwi some hope for legal recognition of their relationship with rivers.

C Claiming Ownership Via the Common Law Doctrine of Native Title

The common law doctrine of native title, also called Aboriginal title, is a further way in which Maori could possibly achieve

their aspirations in river management. Stated simply, the doctrine recognises a beneficial legal interest in land that predates the transfer of British sovereignty, and therefore survives the Crown's acquisition of legal title to land. The doctrine of native title is part of the English common law, existing at 1840 when the Treaty of Waitangi was signed, and explicitly accepted as part of New Zealand's common law in 1847 in *R v Symonds*.³⁷ However, in 1877, in *Wi Parata v The Bishop of Wellington*³⁸ the court dismissed the application of native title in New Zealand. Subsequent domestic courts applied this case.³⁹

In 1986, a New Zealand court partially accepted the doctrine of native title in *Te Weehi v Regional Fisheries Officer*,⁴⁰ by recognising a native title right to collect shellfish against the fisheries regulations. In 2003, the Court of Appeal finally overruled *Wi Parata* and reintroduced the doctrine of native title into New Zealand's common law. This case, *Attorney-General v Ngati Apa*,⁴¹ involved a South Island *iwi* that claimed native title of the foreshore and seabed in their tribal area. While the Court accepted the possibility (albeit as remote) and paved the way for the lower courts to decide the issue, the Government reacted by passing the *Foreshore and Seabed Act 2004*. This Act vested full legal and beneficial ownership of the public foreshore and seabed in the Crown.⁴² However, apart from the furor that this created, the extent to which native title might exist in New Zealand, as noted in *Ngati Apa*, remains 'little developed'.⁴³

In terms of rivers specifically, the Crown's assumption of sovereignty and attitudes about the absence or inferiority of Maori law have resulted in a general presumption of Crown ownership of waterways. As Bargh explained, 'Crown assumptions have been expressed in a number of somewhat contradictory assumptions in regards to water. The first is that by signing the Treaty Maori ceded sovereignty and customary title over waterways to the Crown. The second is that once land passed through the Native Land Court the common law rule of ... [*ad medium filum aquae*] took precedence over Maori law rules about water, river/lake beds and banks constituting an undivided entity'.⁴⁴

A number of Waitangi Tribunal reports have indicated that Maori customary rights in rivers and freshwater are far more extensive than the Crown recognises.⁴⁵ First, in the 1984 *Kaituna Report* the Tribunal found that the Kaituna River had been 'owned for many generations by the Ngati Pikiao sub-tribe and Te Arawa'.⁴⁶ Second, in the

1992 *Mohaka River Report* the Tribunal concluded that 'the Mohaka River was a taonga of Ngati Pahauwera, who has never relinquished te tino rangatiratanga over it'.⁴⁷ Third, in the 1998 *Te Ika Whenua Rivers Report* the Tribunal found no evidence that Maori had willingly given up customary title rights to waterways or to tino rangatiratanga (sovereignty) over water itself.⁴⁸ The Treaty of Waitangi stated that Maori could retain their whenua (land), kainga (homes) and taonga (treasures) for as long as they wished to keep them.⁴⁹ Fourth, in the 1999 *Whanganui River Report* the Tribunal found that for the Whanganui people the river including its water are a taonga.⁵⁰

The courts have yet to decide whether a native title claim is possible in regard to the flowing water of a river.⁵¹

On the whole, most of the currently available legal mechanisms do not provide a simple route for achieving Maori aspirations in river management. We argue that a new legal framework that recognises the legal personality of rivers is a plausible device requiring close attention.

III Another Option: Legal Personality

Professor Christopher Stone introduced a novel approach in the 1970s to give natural resources legal personality in his article *Should Trees Have Standing? Towards Legal Rights For Natural Objects*.⁵² In this part, we introduce and describe Stone's idea and the elements he thought essential for implementing such a change in the law.⁵³

A legal person is an entity – a natural person, company or similar – that has legal rights and may be subject to obligations. For example, legal personality for companies enables the company to sue and be sued just like a natural person. For both legal and natural persons, ownership is excluded: one cannot own a natural person, and nor can one own a legal person. As Stone explained in *Should Trees Have Standing*, rights in the law developed in a similar way to morality. For example, in the later Roman period, a father had *jus vitae necisque*: the power of life and death over their children. He alone could sell or give away his children as if an object or thing.⁵⁴ Although the law has not always treated children as legal persons, it has made them so, and now various legal provisions protect their rights and interests. This is true of other groups of people such as prisoners, aliens, women, African Americans and Indigenous peoples.

As Stone explained, rights development, however, is not limited to just people. It has expanded to include trusts, corporations, joint ventures, and nation-states.⁵⁵ These were once jarring ideas to earlier jurists, but have become normalised and universally accepted concepts.⁵⁶ Sea ships have long had a kind of legal personality, referred to in the female gender, and hold legally recognised rights with interesting consequences. For example, in *United States v Cargo of the Brig Malck Adhel*⁵⁷ a ship was held to have committed an offence.

Standing, or *locus standii*, is directly related to legal personality. When a complainant comes to court, the court requires him or her to have standing. The court's focus is the complainant's connexion with what he or she seeks the court's assistance with. Therefore, provided the complainant and complaint to be remedied are sufficiently connected, the court will most likely accept the complainant's standing. There are historical reasons for the requirement of standing and the courts in New Zealand routinely apply it.⁵⁸

With legal personality also comes legal rights and duties. As with the rights companies are afforded through legal personality, Stone did not suggest that natural objects have all rights imaginable, or even equivalent rights to humans.⁵⁹ What Stone emphasised is the four essential components that he saw as necessary for being a holder of rights: 1) if you are going to be a rights-holder, then there must be some public authoritative body that can enforce your rights;⁶⁰ 2) The rights-holder can bring legal actions at its behest. 3) In awarding legal relief or damages, 'the court must take *injury to it* into account.'⁶¹ 4) 'That relief must run to the *benefit of it*,' meaning the judgment, including awards of money, should be used for the benefit of the natural object.⁶² The latter three components make the right count *jurally*: to be legally effective.⁶³ Further to the four rights-holder components, Stone also emphasised that it is essential that one actually legally holds one's own rights. He stated that there is a fundamental difference in having one's own rights compared to having someone who holds your rights for you.⁶⁴

Natural resources are said to be without rights at common law because they lack 'standing'. Stone used the example of a stream to illustrate this in that while there is some legal intervention in streams regarding pollution, the stream itself is right-less and does not have standing.⁶⁵ Moreover, even where a court recognised a riparian landowners' standing, the emphasis would be on balancing the 'identifiable human'

economic aspects of the riparian owners.⁶⁶ The economic interests of upstream polluters are contrasted with those of downstream right-holders. At common law, there is no consideration of the damage to the stream or the creatures within.⁶⁷

Further, the common law is concerned with 'who' is regarded as the beneficiary of a favourable judgment regarding resources.⁶⁸ As at common law, damages are paid 'to' riparian landowners, in order to make the riparian landowner's rights whole, not 'to' or 'for' the stream in order to repair or remedy the actual damage.⁶⁹ Stone stated that a real remedy would be the amount of money required to make the stream whole again: re-stocking fish, plants and so on. Stone emphasised a further issue in this scenario, that the damages payable to make the riparian landowner's rights whole is probably far less than the actual cost of remedying the problem for the stream.⁷⁰ Thus, the disincentive to the polluter to desist is lesser, and there is a risk that he or she may prefer to continue polluting, but also meet the costs of the riparian landowner's entitlement to damages. Moreover, the riparian landowner might simply sell out to the polluter.

A To Have Standing in its Own Right

Based on the fact that giving natural objects rights through legal personality could help achieve better environmental protection, Stone suggested how this might work by elaborating on the 'guardianship' idea and how this would work together with recognition of legal personality of natural objects as its fundamental basis. Like most citizens and all corporations, estates and so on, natural resources like rivers should have legal representation: appointed trustees or guardians as in 'trustees in bankruptcy' or 'executors of estates.'⁷¹ Such people would apply to the court for such authority or guardianship to be afforded to them, and in Stone's view, special environmental legislation could be enacted along traditional guardianship lines to support this. Non-governmental organisations would play a major role in guiding the administration of this, including in the setting of water standards at a national administrative level, and in some instances may be appointed guardians under the system proposed above.⁷² There would naturally be associated procedures with guardians, such as procedures for removal of guardians, conflicts of interest, termination of guardianship and other reasons.⁷³ The guardian approach would also, as legislation, secure a more effective voice for rivers, the way a corporation's trustee provides continuous

supervision in bankruptcy, and is less likely to open a floodgate of litigation.⁷⁴

B To Have Recognition of its Own Injuries

Stone argued that the environmental harm, that is the actual harm to the natural resource in dollar value should be considered in terms of the 'full social costs.'⁷⁵ Stone tested this hypothesis against a thought experiment regarding a lakeside mill that pollutes. Riparian interests may bring legal action, forcing the court to weigh their aggregate losses against the costs of installing some sort of anti-pollution device.⁷⁶ However, many other, including other 'recognised homocentric interests' are so fragmented that they are lost in the mix or considered causally too remote to be considered. Stone advocated in this regard that:

There is no reason not to allow the lake to prove damages to them as the prima facie measure of damages to it. By doing so, we in effect make the natural object, through its guardian, a jural entity competent to gather up these fragmented and otherwise unrepresented damage claims, and press them before the court even where, for legal or practical reasons, they are not going to be pressed by traditional class action plaintiffs.⁷⁷

The problem is that many other interests related to the environment, such as extinction of inedible fish and other 'useless' resources are not recognised as 'economically valid damages'.⁷⁸ Stone asked 'how can they have a monetary value for the guardian to prove in court?' The answer for Stone is simple: that the law creates a value for the damage to a river in dollar terms. This for Stone is the same as rights being recognised and paid for in copyright, or in the value of gold, which he stated goes far beyond just supply and demand.⁷⁹

It is difficult to determine how these costs are calculated. There is one option, being the cost of making the resource 'whole' again, for example by re-stocking and re-planting, just as claims to damages are intended generally. Stone predicted that in creating damages to make the river whole again is that there is a 'freeze' on environmental quality.⁸⁰ As a general rule, he said this 'freeze' may be inevitable, but there are clear instances where the status quo is already unacceptable.⁸¹

The standard approach, Stone said, is to reach an acceptable compromise or assess the damages of bringing a damaged

car back to fair market value, or to compensate a person for lost earnings because of damage to their property.

C To Be a Beneficiary in its Own Right

Once a natural resource has standing, and recognition of its own injuries, the next step for Stone is for the natural resource to be a beneficiary in its own right. This is because being a beneficiary prevents the resource from being 'sold out.' Further protection is possible by making the resource a party to an 'injunctive settlement,' and moreover a beneficiary of the money from damages. On this, Stone noted that assessing damages, to the best extent humanly possible, is more realistic than 'freezing' the environmental status quo. Both humans and the environment will have to make compromises to achieve the best possible outcome. The goals must be achievable, for example there will inevitably be some pollution, but subject to continual improvement and re-improvement.⁸²

D To Have Rights in Substance

As Stone noted, there are no naturally occurring, absolute rights in the context of his article. Only legal rights, from sources of law, are at issue. To infringe on these rights, the law has established various hurdles and rules called 'procedure.' Thus, a right is a question of degree in terms of how much the right is protected by associated procedures.

Stone's example of making rights is based on the *United States' National Environmental Policy Act 1970*.⁸³ The Act created rights of the environment through elaboration of procedural safeguards.⁸⁴ In the United States, even when Stone wrote the article, he said that the Act worked in support of the environment in certain cases. For example, a federal power commission's failure to make inquiry into 'alternatives' was sufficient for a court to delay the implementation of an environment-threatening scheme.⁸⁵ Stone explained the importance of the procedural safeguards, which may seem ineffectual, but can make a difference in decision-making, encouraging the institution to consider environmental threats carefully and seriously.

According to Stone, these rights in substance should similarly be extended as broadly as possible. The examples he gave considered absolute rights and even voting rights.⁸⁶ Ultimately, however, it is essential that the rights of natural objects be enforced, which he said would be achieved by them having rights in substance.⁸⁷

IV Applying Legal Personality to Rivers

Should Stone's idea travel to Aotearoa New Zealand? Is it an appropriate vehicle to recognise the Maori relationship with rivers? Will it do anything more than the current legislative recognition provisions? This part turns to address these questions.

A Frame's Work

Professor of Law Alex Frame has long been aware of Stone's work and its potential application in New Zealand.⁸⁸ In particular, Frame applied a variation of the idea in response to the Foreshore and Seabed controversy in 2004.⁸⁹ Frame saw potential in the legal personality concept as a solution. He proposed his ideas to the Fisheries and other Sea-Related Legislation Select Committee when it was considering the Foreshore and Seabed Bill.⁹⁰

Frame viewed the Bill as a 'confiscatory construction' of Maori rights,⁹¹ and proposed a different solution similar to the legal personality idea (although Frame did not specifically refer to Stone's work in his submission). As part of this, Frame constructed the Treaty Title Bill which deemed the actual *Treaty of Waitangi* a legal person (clause 1) and vested the foreshore and seabed in 'the Treaty' (clause 2).⁹² Frame's Bill vested the control and management of the foreshore and seabed in a 'Treaty Council' which would have to act in accordance with the Treaty principles and in the interests of all New Zealand citizens.⁹³ The Treaty Council was to comprise of seven members,⁹⁴ and where particular management decisions involve 'issues of significant concern to a particular tribal region, or local body or community' the Treaty Council must 'co-opt' two special members to represent the issues of that group.⁹⁵ However, the Select Committee did not endorse Frame's solution. The Select Committee was bound by tight political timeframes whereby the Government sought to urgently enact Crown ownership of the foreshore and seabed legislation. We accept that legal personality is a radical idea and thus for it to be properly considered the concept needs time to germinate. This article is an attempt to canvass the possibility of legal personality attaching to rivers in Aotearoa New Zealand. To engender this debate, we present a brief *Rivers Bill*.

B The Rivers Bill 2010

Some of the clauses of this Bill could be pitched as follows:

An Act to give rivers legal personality for the purposes of environmental protection and natural resource management.

1 Short Title and commencement

- (1) This Act is the Rivers Act 2010.
- (2) This Act shall come into force on 1 December 2010.

2 Interpretation of Act generally

- (1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that respects the Maori worldview that regards many rivers as tupuna (ancestors) and the importance of the health and wellbeing of rivers to all New Zealanders, including Maori.
- (2) This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.⁹⁶

3 Object and Purpose

- (1) The object of this Act is to establish legal personality for rivers for the purposes of environmental protection and natural resource management, creating a system whereby damages can be assessed in terms of the health of that river, and whereby any damages that apply can be used directly for its benefit;
- (2) The Act gives effect to this object by creating legal standing for all rivers in New Zealand.

4 Interpretation

In this Act, unless the context otherwise requires, -
river means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal).⁹⁷

5 Act to bind the Crown

This Act binds the Crown.

Legal personality

6 Legal personality of rivers established

- (1) For the purposes of environmental protection or natural resource management, all rivers shall be legal persons.
- (2) Rivers have legal personality for all situations, including:
 - (a) in court proceedings;
 - (b) resource consent hearings;
 - (b) policy and plan development by central and local government agencies; and
 - (c) Treaty of Waitangi claim settlement negotiations.

Legal standing

7 River Guardian

- (1) The Parliamentary Commissioner for the Environment shall be appointed in the first instance as responsible for advocating the legal personality of a river in any proceedings under section 6.

Existing law unaffected

8 Existing processes preserved

- (1) Nothing in this Act affects the legal and policy procedures that exist for rivers, including the role of local authorities to issue resource consents.
- (2) For clarity, other statutes are not affected by this Act, including the *Resource Management Act 1991*, the *Local Government Act 2002*, the *Biosecurity Act 1993*, the *Fisheries Act 1996*, and the *Foreshore and Seabed Act 2004*.⁹⁸

9 Existing rights preserved

- (1) Nothing in this Act affects any rights of fishing recognised immediately before the commencement of this section, by or under an enactment or a rule of law.
- (2) Nothing in this Act affects any public rights of access and recreation in, on, over and across rivers recognised immediately before the commencement of this section, by or under an enactment or a rule of law.
- (3) Nothing in this Act affects any Maori customary rights of access to and use of rivers recognised immediately before the commencement of this section, by or under an enactment or a rule of law, or recognised subsequently in Treaty of Waitangi claim settlement statutes.

C Commenting on the Rivers Bill 2010

The essential purpose of proposing a statute that recognises the legal personality of a river is to give that river standing in legal and policy developments so that decision makers are forced to give weight to the importance of preserving the river's health and wellbeing. This initiative is not to undermine the importance of needing to take volumes of water for economic activities such as agriculture, and for public purposes such as domestic water supplies, or damming rivers for hydroelectric power generation. All of these activities are critical to modern day survival. But the point of recognising the legal standing of a river is to give that river a voice. The health and wellbeing of the river must factor into all decision making concerning the use of a river. While central and local government policy and management plans may well already recognise the importance of river ecology, legal action cannot be mounted from the sole perspective of the river. Moreover, this is still true even though the *Resource Management Act 1991* (NZ) posits very clearly sustainable development as the end goal. The recognition of the legal personality of a river goes further than any existing mechanisms designed to balance decision-making. But is it an idea that should take hold in Aotearoa New Zealand?

The draft Rivers Bill is a very preliminary attempt to signify some key aspects of how the concept could apply here. The Bill certainly raises more questions than it settles. For example, should legal personality attach to all rivers, or a select few (perhaps only the longest or most heavily used)? If the Parliamentary Commissioner for the Environment is the appropriate body to act on behalf of a river, in what situations should the Commissioner act? Who ought to activate the legal standing of a river?

Turning specifically to the Parliamentary Commissioner for the Environment, we signalled this body simply because it is one already in existence that is focused on maintaining and improving the quality of the environment. But we doubt that it is in fact the appropriate body for acting on behalf of rivers because a conflict of interest is bound to arise between the Commissioner and local government. This is because a key job of the Commissioner is to review 'agencies and processes established by the Government to manage the allocation, use, and preservation of natural and physical resources'⁹⁹ and 'to investigate the effectiveness of environmental planning and environmental management

carried out by public authorities, and advise them on any remedial action'.¹⁰⁰ However, it does provide a logical starting point to commence debate. The solution may well be to appoint a second environmental commissioner tasked specifically with the mandate to advocate legal standing for rivers. Alternatively, there could be scope for the recently formed Environmental Protection Authority (EPA) to take on this role.¹⁰¹ The EPA was established in late 2009 and has a potentially wide jurisdiction in that the Minister can delegate any functions or duties to it.¹⁰²

Nonetheless, is legal personality a vehicle for recognising Maori relationships with water? The beauty of the concept is that it takes a western legal precedent and gives life to a river that better aligns with a Maori worldview that has always regarded rivers as containing their own distinct life forces. Furthermore, the legal personality concept recognises the holistic nature of a river and may signal a move away from the western legal notion of fragmenting a river on the basis of its bed, flowing water, and banks. But, in terms of the proposed draft River Bill, Maori would have some specific questions. For example, some iwi, namely those who genealogically link to the Waikato River, have already negotiated a co-management type solution that may not benefit from the legal personality concept. Thus, it may well be important to not give legal personality to all rivers, but only to a named few. Or, to give a blanket voice to all rivers, but allow iwi to opt out of the legal personality idea through their own Treaty of Waitangi claim settlements. The notion of basing the advocacy role with the Parliamentary Commissioner (or similar) may also prove contentious although it is important to note that the statute that empowers the Commissioner already requires the Commissioner to take a 'full and balanced account' of the principles of the Treaty of Waitangi.¹⁰³ However, this point would require further consultation with Maori and other options, including perhaps the appointment of a pan-tribal Maori representative alongside the Commissioner might be more palatable.

It should also be noted that just because Maori have a personified worldview, it is incorrect to assume that they will always favour non-development. Maori do not tend to ascribe to a preservation standpoint, but rather a sustainable one: 'Maori responsibility to the environment did not mean they were preservationists; rather, they actively utilised and developed nature for subsistence and cultural purposes'.¹⁰⁴ Thus, from a Maori perspective, humans and nature are part of a unified whole. There is no dichotomy that seeks

to separate humans from the natural world. For example, the Maori ethic is: 'one of conservation for human use, and rahui (temporary prohibitions) [are] intended to ensure the sustainability of the resource for this purpose, and not because of the 'sanctity' or 'intrinsic value' of the resource concerned'.¹⁰⁵ Appreciating the western legal concept of legal personality within the realm of the Maori worldview would be instructive in understanding how the device could be applied in reality. The concept need not stymie development, just unwise development that threatens the future use of the river.

V Conclusion

Through Maori eyes, many of New Zealand's rivers are tupuna and thus Maori have deep responsibilities to care for and nourish these waterways. Affording legal personality to rivers is one way in which the law could develop to provide a lasting commitment to reconciling with Maori. We believe it is an exciting concept that deserves close attention in New Zealand, and could even be of use in other once British colonies, such as Canada and Australia.

For sure, Stone's idea is radical. What he suggested was a novel approach for better environmental protection of the resources that sustain humans. In a way, his idea is to close the gap between natural resources and humans and highlight the closeness that there should be between us. From a Maori perspective (and perhaps also other Indigenous perspectives), the idea is less radical as it aligns with a worldview perspective that believes there is a genealogical link between all living things, including rivers and people. We hope that this article provides a springboard for more Indigenous peoples, lawyers, and government officials to examine the possibility of affording legal personality to rivers.¹⁰⁶ It is a concept that we surely look forward to thinking about and debating more closely.

Glossary of Maori words

hapu	sub-tribe, to be pregnant
iwi	tribe
kaitiakitanga	guardianship
kainga	home
mana	authority
mauri	life force
rahui	temporary conservation prohibition
tangata whenua	people of the land

<p>taonga tikanga Maori tino rangatiratanga tupuna whakapapa whanau whenua</p>	<p>treasure Maori customs and values sovereignty ancestor genealogy family, to give birth land, afterbirth</p>
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1 For an introduction to the Maori world view and language see Hirini Moko Mead *Tikanga Māori. Living by Māori Values* (Huia Publishers, 1993).

2 For an introduction to the Maori legal system, see E T Durie 'Will the Settlers Settle? Cultural Conciliation and Law' (1996) 8 *Otago Law Review* 449.

3 See First Schedule of the *Treaty of Waitangi Act 1975 (NZ)*

4 See *Treaty of Waitangi Act 1975 (NZ)*

5 See Office of Treaty of Settlements, *Office of Treaty Settlements New Zealand*, <<http://www.ots.govt.nz/>>.

6 See *Resource Management Act 1991 (NZ)* ss 8 and 6(e).

7 See, eg, *Ngati Awa Claims Settlement Act 2005 (NZ)* sch 10.

8 See, eg, *Ngai Tahu Claims Settlement Act 1998 (NZ)* ss 205–220, sch 26.

9 Christopher D Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (1972) 45 *Southern California Law Review* 450.

10 See, eg, *Te Arawa Lakes Settlement Act 2006 (NZ)* ss 23(1), 23(2). The Act vests ownership of the lake beds in Te Arawa and then 'retains' Crown ownership of the space the water occupies and the air above it:

11 New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (Wellington: New Zealand Law Commission, 2001), 1.

12 *Resource Management Act 1991 (NZ)* s 13.

13 *Ibid* s 14.

14 *Ibid* s 30(1).

15 *Ibid* s 2. Defined as 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so.' See Ministry for the Environment, *Tools for greater Maori participation* (9 June 2009) <<http://www.mfe.govt.nz/publications/rma/ki-teuo-te-hiahia/html/page5.html>>; and Elizabeth Clark, 'Section 33 of the Resource Management Act 1991' in Janine Hayward (ed), *Local Government and the Treaty of Waitangi* (Oxford University Press, 2003).

16 *Resource Management Act 1991 (NZ)* s 33(4).

17 See Linda Te Aho 'Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa New Zealand – the Waikato River settlement' (2010) 20 *The Journal of Water Law* 285.

18 *Ibid* ss 61(2), 74(2)(b)(i).

19 For a discussion of this Court, see Kenneth Palmer, 'Reflections on the history and role of the Environment Court in New Zealand' (2010) 27 *Environmental Planning Law Journal* 69–79.

20 For a recent example of a partial success, see *Te Maru o Ngati Rangiwewehi v Rotorua District Council*, 25 August 2008, Environment Court, Rotorua A95/2008, per Whiting J, and Commissioners K Prime and M P Oliver.

21 See *Resource Management Act 1991 (NZ)* ss 200, 201(1).

22 *Ibid* s 199(1).

23 *Ibid* ss 199(2)(a)–(c).

24 For example, in a survey of RMA cases concerning Maori and water, only two of the identified 19 cases resulted in clear wins for Maori and both did not concern the typical water take facts of most of the other cases. See Jacinta Ruru, 'Undefined and Unresolved: exploring Indigenous rights in Aotearoa New Zealand's freshwater legal regime' (2010) 20 *The Journal of Water Law* 236.

25 Office of Treaty Settlements, *Ka Tika A Muri, Ka Tika A Mua, Healing The Past, Building A Future* (Wellington: Office of Treaty Settlements, 2002) at 27, and available at <<http://www.nz01.2day.terabyte.co.nz/ots/DocumentLibrary%5CRedBookPart1.pdf>>.

26 See, eg, *Ngati Mutunga Claims Settlement Act 2006 (NZ)* ss 12, 48, 57, sch 3; *Ngaa Rauru Kiitahi Claims Settlement Act 2005 (NZ)* ss 12, 51–52, schs 2–6, 8–12; *Ngati Awa Claims Settlement Act 2005 (NZ)* ss 12, 52–53, schs 2–4, 8, 10–14; *Te Uri o Hau Claims Settlement Act 2002 (NZ)* ss 5, 75, schs 1, 19, 12.

27 The Waikato River Claim (part of Wai 30) was filed with the Waitangi Tribunal in 1987.

28 See Preamble (1) and 17(f), ss 8(2), (3).

29 *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (NZ)* s 5(1).

30 Sch 2, cl 3. Note that cl 3 is extensive and lists 13 objectives – only the first two are reproduced here.

31 *Ibid* s 22(2).

32 Ibid sch 6, cl 2(1).

33 Ibid s 32(3).

34 See above n 29, s 36(1).

35 Ibid s 35(3).

36 Ibid s 41(1). To understand the scope of the joint management agreement, see s 43. To better understand this settlement, see, eg, Linda Te Aho 'Contemporary Issues in Māori Law and Society: The Tangled Web of Treaty Settlements, Emissions Trading, Central North Island Forests, and the Waikato River' (2008) *Waikato Law Review* 229.

37 (1847) NZPCC 387.

38 (1877) 3 NZLR 72.

39 See, eg, *Nireaha Tamaki v Baker* (1901) NZPCC 371; (1902) AC 561; *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA); *Baldick v Jackson* (1911) 13 GLR 398; *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321; *Waipapakura v Hempton* (1914) 33 NZLR 1065; *Hoani Te Heuheu Tukino v Aotea District Maori Land Court* (1941) AC 308; *Re the Bed of the Wanganui River* [1963] NZLR 673; *In re Ninety Mile Beach* [1955] NZLR 419.

40 [1986] 1 NZLR 680.

41 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643. For commentary see Richard Boast, *Foreshore and Seabed* (LexisNexis, 2005); P McHugh, "Aboriginal Title in New Zealand: A Retrospect and Prospect," (2004) 2 *New Zealand Journal of Public and International Law* 1; Claire Charters and Andrew Erueti, *Maori Property Rights and the foreshore and seabed: the last frontier* (Victoria University Press, 2007); and Jacinta Ruru, 'What Could Have Been: The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand' (2006) 32(1) *Monash University Law Review* 116–144,122.

42 *Foreshore and Seabed Act 2004* (NZ) s 13.

43 *Attorney-General v Ngati Apa*, above n 41, para 46.

44 Maria Bargh, Submission on Water Issues in Aotearoa New Zealand to the Office of the High Commissioner for Human Rights May 2007, 5–6.

45 The Waitangi Tribunal is a commission of inquiry empowered to receive, report and recommend on alleged Crown breaches of the principles of the Treaty of Waitangi. See *Treaty of Waitangi Act 1975* and Waitangi Tribunal (2011), <<http://www.waitangi-tribunal.govt.nz>>.

46 Waitangi Tribunal, *Kaituna Report* Wai 4 (Waitangi Tribunal, 1984) 31.

47 For commentary, see, Mason Durie, *Te Mana, Te Kawanatanga. The Politics of Maori Self-Determination* (Oxford University Press, 1998) 39.

48 Waitangi Tribunal, *Te Ika Whenua Rivers Report* Wai 212 (Waitangi Tribunal, 1998).

49 Guaranteed by art 2 of the *Treaty of Waitangi 1840*.

50 Waitangi Tribunal, *Whanganui River Report*. Wai 167 (Waitangi Tribunal, 1999) 74.

51 This point was explicitly acknowledged in *Paki v Attorney-General* [2009] NZCA 584. For a more detailed discussion of the law, Maori and water, including the possible application of native title, see Jacinta Ruru, *The Legal Voice of Maori in Freshwater Governance: A Literature Review* (Landcare Research, 2009).

52 Stone used the term 'natural objects,' which holds the same meaning as 'natural resources.' This article adopts Stone's use of 'objects'; see Stone, above n 9.

53 Stone's essential idea that non-humans can have legal rights has also been applied similarly in a Duke Law School article suggesting the possibility of 'products being liable,' as well as experimenting with the idea of affording legal rights to everything from chimpanzees to artificially intelligent cyborgs. See: A Bernstein, 'How Can a Product Be Liable?' (1995) 45(1) *Duke Law Journal* 1, 44; Jane Goodall and Steven M Wise, 'Are Chimpanzees Entitled To Fundamental Legal Rights? A presentation to the Senior Lawyers division of the American Bar Association in Orlando, Florida on August 2, 1996' (1997) 3 *Animal Law Review*; Lawrence B Solum, 'Legal Personhood for Artificial Intelligences' (1992) 70 *National Civic League Review* 1231.

54 Stone, above n 9, 451.

55 Ibid.

56 Ibid 452.

57 43 US (2 How.) 21 (1844). Discussed further in Stone, above n 9, 452.

58 Maori groups could choose to form trusts or corporations that would establish their legal standing; however these do not mesh well with Maori culture and traditions. The *Waka Umanga (Maori Corporations) Bill 2008* (NZ), which was intended to recognise Maori collectives as legal entities, could have helped in establishing standing, but this Bill has now been discharged. See New Zealand Law Commission, *Waka Umanga: A Proposed Law for Maori Governance Entities* (2006) para 1.8.

59 Stone uses the Fifth Amendment (which concerns the right to silence) of the United States Constitution as an example.

60 Stone explained by using the example of a student's right to education. If a student has this right then he/she must be able to go to a court or administrative agent to require the university to justify its actions, or to compel the university to accord the student some procedural safeguards. Otherwise, the right basically does not exist. See Stone, above n 9, 458.

61 Ibid 458.

62 Ibid. (emphasis added)

63 Stone phrased this: 'to have a legally recognised worth and dignity in its own right.'; Ibid 458.

- 64 Stone used the following example to illustrate his point: '... even as between two societies that condone slavery there is a fundamental difference between S_1 , in which a master can (if he/she chooses), go to court and collect reduced chattel value damages from someone who has beaten his slave, and S_2 , in which the slave can institute the proceedings *himself*, for *his* own recovery, damages being measured by, say, *his* pain and suffering. Notice that neither society is so structured as to leave wholly unprotected the slave's interests in not being beaten. But in S_2 as opposed to S_1 there are three operationally significant advantages that the slave has, and these make the slave in S_2 , albeit a slave, a holder of rights.' In both situations, one's rights are protected, but there are 'operationally significant advantages' to holding those rights yourself because of the above three legal components. The contrast to the environment is important here because it lacks the three 'legal-operational' advantages from Stone's above example. The current legal reality is that the environment is the slave in S_1 and is therefore right-less. Ibid 458–459.
- 65 Ibid 459.
- 66 Ibid 460–461.
- 67 'So long as the natural environment itself is right-less, these are not matters for judicial cognisance [sic]. ... The stream itself is lost sight of in "a quantitative compromise between two conflicting interests".' Ibid 460–461.
- 68 Ibid 461.
- 69 Stone notes that the use of 'address the problem' rather than 'remedy' is indicative of this fact. Ibid 461.
- 70 Ibid 462.
- 71 This is along the same lines as where incompetents (de jure incompetent) are assigned people to manage their affairs – the court gives this person authority to manage the incompetent's affairs. Ibid 464.
- 72 Ibid 466.
- 73 Similar provisions exist for removal of trustees from the various kinds of special Maori trusts that can be established. See, eg, *Te Ture Whenua Maori Act 1993* (NZ)/*Maori Land Act 1993* (NZ) s 240, where trustees can be removed because of failure to carry out duties satisfactorily, or because of lack of competence or prolonged absence.
- 74 Stone suggests that courts could designate 'guardians de jure' as representatives of the natural object, with rights of discretionary intervention by others, but with the understanding that the natural object is 'bound' by any adverse judgment to avoid a floodgate of litigation. See Stone, above n 9, 470–471.
- 75 Ibid 474.
- 76 Ibid 474–475.
- 77 Ibid 475 (emphasis added).
- 78 Ibid 475–476.
- 79 Ibid 476.
- 80 Ibid 477.
- 81 Stone presented the following hypothetical nuclear generator scenario to underscore the difficulty in weighing factors to assess costs: 'Nevertheless, whatever the merits of such a goal in principle, there are many cases in which the social price tag of putting it into effect are going to seem too high to accept. Consider, for example, an oceanside nuclear generator that could produce low cost electricity for a million homes at savings of \$1 a year per home, spare us the air pollution that comes of burning fossil fuels, but which through a slight heating effect threatened to kill off a rare species of temperature-sensitive sea urchins; suppose further that technological improvements adequate to reduce the temperature to present environmental quality would expend the entire \$1 million dollars in anticipated fuel savings. Are we prepared to tax ourselves \$1 million dollars a year on behalf of the sea urchins?' Ibid 477–478.
- 82 Rather than ban all pollutants, the legal trust construction would: '(a) help assure that pollution would occur only in those instances where the social need for the pollutant's product (via his present method of production) was so high as to enable the polluter to cover all homo-centric costs, plus some estimated costs to the environment per se, and (b) would be a corpus for preserving monies, if necessary, while the technology developed to a point where repairing the damaged portion of the environment was feasible. Such a fund might even finance the requisite research and development.' Ibid 481.
- 83 *National Environment Policy Act* 1970 (92 USC) s 4332. This Act is still in force, though some amendments have been made.
- 84 Stone, above n 9, 483–484.
- 85 Ibid 484. Note: Stone provided no citation for the case mentioned.
- 86 Stone went further to consider other ways in which rights might be recognised, such as through representation in government. He said that it is not that trees, for example, will have voting rights equal to people, but Stone did consider that there might be a prevailing case for electoral apportionment to represent non-human life. Stone went on to say that 'I suspect that a society that grew concerned enough about the environment to make it a holder of rights would be able to find quite a number of 'rights' to have waiting for it when it got to court.' Ibid 487.
- 87 Note that Stone has since added to this work, in particular, see Christopher Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450 and Christopher Stone, *Should Trees Have Standing? And other essays on law, morals and environment* (Oceana, 1996). Stone's work has attracted much commentary. See, eg,

- David Hoch, 'Stone and Douglas Revisited: Deep Ecology and Case for Constructive Standing' (1988) 3 *Journal of Environmental Law & Litigation* 131; Phil Elder, 'Legal Rights for Nature – The Wrong Answer to the Right(s) Question' (1984) 22 *Osgoode Hall Law Journal* 285; Robert A Phillips and Joel Reichart, 'The Environment as a Stakeholder? A Fairness-Based Approach' (2000) 23 *Journal of Business Ethics* 185.
- 88 For example, these papers released to the authors under the *Official Information Act 1982* (NZ) indicate this early exploration: Alex Frame, 'Legal Models for Cooperation Between Maori and the Crown in Control of Land and Resources' (13 September 1991) Ministry of Justice, released pursuant to s 16(1)(b) of the *Official Information Act 1982* (NZ); Alex Frame, 'Natural Resources and the Treaty of Waitangi : An Analysis of Law and Policy' (11 February 1992) Ministry of Justice, released pursuant to s 16(1)(b) of the *Official Information Act 1982* (NZ). One further document which was not released, but is relevant to this article, was a 1994 legal opinion by Frame regarding the Treaty of Waitangi and Claims to Rivers, withheld under s 9(2)(h) of the *Official Information Act 1982* (NZ) in order to maintain professional legal privilege.
- 89 See above n 41, for a brief discussion of this controversy.
- 90 Alex Frame, 'Submission to the Fisheries and Other Sea-Related Legislation Select Committee' (12 July 2004). A copy appears in: A Frame, 'Treaty Title Proposed for Foreshore and Seabed' *Te Matahauriki : Laws and Institutions for Aotearoa/New Zealand*, Issue 8, September 2004, 6.
- 91 Ibid para 3.3. Note that Frame started his submission by un-wrapping the problems in cl 9 of the Bill, which would extinguish customary (common law) rights in the foreshore and seabed, and limit or eliminate the duty of the Crown. Clauses 42 and 61 also concerned Frame as they required Maori to show that any activity, use or practice must have been carried on in a 'substantially uninterrupted manner' in order to assert some right in an area of the foreshore or seabed. These clauses were the precursor to ss 48–53 of the *Foreshore and Seabed Act 2004* (NZ) that created and now regulate customary rights orders. Customary Rights Orders are authorised by the Maori Land Court under the *Foreshore and Seabed Act 2004* (NZ).
- 92 Ibid 8.
- 93 Ibid 8–9. Clause 3 of Alex Frame's Treaty Title Bill.
- 94 Three appointed by the Prime Minister, three appointed by Maori, and one judicial member who would oversee and advise on procedure, see cl 4.
- 95 Above n 90, cl 6.
- 96 This phrase is from s4 of the *Conservation Act 1987* (NZ).
- 97 This definition is from s 2 'rivers' of the *Resource Management Act 1991* (NZ).
- 98 For example, there are times when the legal personality concept might need to be temporarily set aside, such as in the case of a biohazard emergency under the *Biosecurity Act 1993* (NZ): see ss 143–146.
- 99 *Environment Act 1986* (NZ) s 16(1)(a).
- 100 Ibid s 16(1)(b)
- 101 See *Resource Management (Simplifying and Streamlining) Amendment Act 2009* (NZ) s 41, which amended the *Resource Management Act* (NZ) by adding s 42B that creates this new body.
- 102 See *Resource Management Act* (NZ) s 42C(e). For more information on the EPA, see its homepage at <<http://www.epa.govt.nz/>>.
- 103 See *Environment Act 1986* (NZ), (c)(iii).
- 104 Kiri Chanwai and Benjamin Richardson, 'Re-working Indigenous Customary Rights? The Case of Introduced Species.' (1998) 2 *New Zealand Journal of Environmental Law* 157, at 162.
- 105 Mere Roberts et al, "Kaitiakitanga: Māori perspectives on conservation" (1995) 2 *Pacific Conservation Biology* 7, 15.
- 106 For more information on the application of this concept to New Zealand's rivers, see James Morris. *Affording New Zealand rivers legal personality: a new vehicle for achieving Maori aspirations in co-management? A thesis submitted for the degree of Master of Laws at the University of Otago, Dunedin, New Zealand* (2009) <<http://ourarchive.otago.ac.nz/handle/10523/191>>.