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A New Approach to Protecting Ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

Christopher Rodgers*

The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017¹ settled the longest running litigation over Maori land claims in New Zealand history. The Whanganui river is New Zealand's longest navigable river, stretching from Mount Tongariro in the North Island to the Tasman Sea. The settlement resolves historical claims to restitution for alleged breaches by the Crown of the principles enshrined in the Treaty of Waitangi, by which the territory of New Zealand was annexed to the British Crown in 1840. The claims of the indigenous Maori were initially brought before the Waitangi Tribunal, established under the Waitangi Tribunal Act 1975 to assess Maori claims as part of the Waitangi Treaty settlement process.² The Waitangi Tribunal produced a comprehensive report in 1999,³ and recommended that the Crown should negotiate with the indigenous Maori through the Whanganui River Trust Board to settle the outstanding claims to restitution for natural resources and customary lands in dispute, and settle the future governance of the river system.⁴ This was followed in 2015 by the publication of the Whanganui Land Report by the Tribunal, which largely upheld 83 claims by Maori iwi and hapu in the Whanganui district to land and resources acquired by or through the Crown in breach of the Treaty's principles.⁵ The 2017 legislation gives effect to a comprehensive settlement agreed by the Crown and the Whanganui Iwi in 2012.⁶

* Professor of Law, Newcastle University. I am grateful to Ken Palmer, David Grinlinton, Ole Pedersen and the referees for comments on earlier drafts, and for helpful references and insights. Any errors that remain are mine alone.

¹ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017 No 7 (New Zealand). Royal Assent was granted on 20 March 2017.

² Treaty of Waitangi Act 1975. By virtue of s.5 (2) the Tribunal has exclusive authority to determine the meaning and effect of the Treaty.

³ See Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999) available at https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68450539/Whanganui%20River%20Report%201999.pdf (last accessed 9 October 2017).

⁴ *The Whanganui River Report* (Wai 167, 1999) *ibid* at 11.7 and 11.8.

⁵ *He Whiritanoka: The Whanganui Land Report* (Waitangi Tribunal, 2015): available at: <https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-Whanganui-land-report.pdf> (last accessed 9 October 2017)

⁶ Whanganui Iwi and the Crown, *Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement* (30 August 2012). Available at: <https://www.govt.nz/dmsdocument/3706.pdf> (last accessed 4 August 2017)

The settlement, and the legislation to which it has now given rise, is founded on two principles: recognising promoting and protecting the health of and wellbeing of the river and its status as ‘Te Awa Tupua’ (‘Te Mana o Te Awa’), and recognising and providing for the mana and relationship of the indigenous Whanganui Iwi in respect of the river (‘Te Mana o Te Iwi’).⁷ The 2017 Act confers legal personality on the river system, giving it a unique legal status, and recognises not only the need to protect the ecosystem it represents, but also to provide a legal forum in which to implement Maori cultural and spiritual attitudes to the relationship of land and people. This is an innovative approach to protecting the environment, focussing at the ecosystem level and incorporating spiritual values in a manner unknown in environmental law in most Western legal systems. This article will consider the 2017 Act and its principal objectives, and then briefly assess whether, and if so what, lessons can be drawn from this innovative approach to the environmental governance of the natural environment. In so doing, it will compare and contrast the approach adopted in the 2017 New Zealand legislation with that to protecting natural resources in English Law.

‘Standing’ and Legal Status

If abstract entities such as companies or charities can be treated as legal persons with the ability to sue (and be sued) in their own right, why cannot birds, plants, trees or other elements of the natural environment? This was a problem famously pondered by Christopher Stone in 1972.⁸ Most legal systems deny elements of the natural environment (whether animate or inanimate) the right to legal personality in this sense. In a dispute, or in proceedings against a public body to challenge a regulatory decision potentially impacting the environment, there are often problems for parties in establishing they have a right to sue (that they have locus standi, or ‘standing’) - either on behalf of themselves or, in the case of NGOs, on behalf of the wider public. The link between the individual seeking to initiate legal proceedings and the damage that is alleged to have occurred (or which will occur) is usually located, in English Law, by proving that damage to the property or commercial interests of the claimant has occurred (or will occur if a public body’s decision is implemented).⁹ In

⁷ Whanganui Iwi and the Crown, *Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement* (30 August 2012), *ibid.* at para. 1.11.

⁸ Christopher D. Stone, ‘Should trees have standing? towards legal rights for natural objects’ (1972) 45 S Cal L Rev 450.

⁹ In English Law see for example *Inland Revenue Commissioners v Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617.

English law, if a claimant simply wishes to protect the environment, and not to safeguard property or commercial interests, then establishing a ‘sufficient interest’ in the subject matter of the decision is more problematic.¹⁰

This has proved to be a central problem for improving access to justice in environmental cases in England and Wales. Litigation to consider the tests for establishing sufficient standing, for both individual complainants and for pressure groups bringing representative actions to protect the environment, has occupied the English courts on many occasions. While they have widened the scope of the interests which will be recognised as giving a right to initiate judicial review proceedings against public bodies,¹¹ the focus on protecting individual property rights remains problematic, and is – in particular - unhelpful to attempts to establish a broader system of environmental protection focused at a landscape level and based on protecting ecosystems and their constituent elements.

The legislative context for access to justice in environmental cases is very different in New Zealand, as is the legal culture. This is important to a consideration of the significance (or otherwise) of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, and of any potential lessons that may be drawn from the very distinctive manner in which it approaches questions of access to justice, and of sustainable development and the manner in which it can (or should) be implemented in the New Zealand context.¹² The ‘internal legal culture’ in New Zealand is very different to that in England and Wales, a fact reflected not only in the internal elements by which legal concepts and rules are expressed (such as case law and legislation) but also in the wider cultural and social context which informs and contextualises legal interpretation, one which includes the relevance of Maori cultural and customary norms and principles, and an institutional context shaped by the Waitangi treaty and settlement process.

¹⁰ See for example *R. v Secretary of State ex parte Rose Theatre Trust* [1990] 1 QB 504

¹¹ See *R. v Secretary of State for Foreign and Commonwealth Affairs Ex parte World Development Movement Ltd* [1995] 1 WLR 386; *R. v Somerset County Council ex parte Dixon* [1998] Env LR 111 on representational standing for NGOs and interest groups; and *R (Edwards) v Environment Agency* [2004] Env LR 43 widening the test for individual claimants to include those living in close proximity to the site which was the subject of a regulatory decision to grant and environmental permit.

¹² See Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017) at 18-20 for a discussion of both the limitations and potential utility of comparative scholarship in relation to the implementation in different jurisdictions of environmental principles – including (but not limited to) that of sustainable development. And see David Nelken, ‘Defining and Using the Concept of Legal Culture’ in Esin Orucu and David Nelken (eds.) *Comparative Law: A Handbook* (Hart Publishing, 2007) 117.

The Environment Court of New Zealand exercises specialist jurisdiction as a court of record over many environmental matters, in particular civil jurisdiction under the Resource Management Act 1991 concerning spatial development plans and development control, environmental permits and a range of other matters.¹³ And in exercising its general supervisory role through judicial review, the New Zealand High Court has developed a liberal stance to issues of standing in cases where damage to the environment is in issue.¹⁴ In particular, public interest groups are afforded standing in cases where the decision challenged will have a community impact, as is the case in most resource management cases.¹⁵ The Resource Management Act 1991 was introduced to provide an integrated approach to the management of all aspects of the environment – water, air, soil, land and ecosystems – and is underpinned by a strongly participatory approach which promotes wide representation in decision making on environmental matters under the Act. Importantly, the 1991 Act recognises the relationship of Maori and their culture and traditions with their ancestral lands, water and sites etc. as a matter of national importance, and requires decision makers to take them into account when making decisions.¹⁶ They must also have ‘particular regard’ to Maori ‘kaitiakitanga’ and the ethic of stewardship when making decisions on the management, use and development of natural and physical resources.¹⁷ An assessment of the significance of the 2017 Act, in its New Zealand setting at least, therefore requires a consideration of the wider context of Resource Management Act decision making, and of the wide range of ‘environmental’ interests that the latter already encompasses and protects. We will return to this in the discussion of the implications of the 2017 legislation in the conclusion to this article below.

The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 addresses the question of standing by conferring full legal personality on the Whanganui river with attendant rights and responsibilities. The legislation is complex, in that it provides for a form of trusteeship over the river’s natural environment, and sets out principles by which decisions taken by the trustees and by regulatory bodies must be made. The 2017 Act adopts an imaginative

¹³ Resource Management Act 1991, s. 247 (New Zealand)

¹⁴ See *Quarantine Waste (NZ) Ltd. v. Waste Resources Ltd.* [1994] NZRMA 529 (HC)

¹⁵ *Quarantine Waste (NZ) Ltd. v. Waste Resources Ltd.* [1994] NZRMA 529 at 535, 536. And see generally Trevor Daya-Winterbottom, in (Salmon and Grinlinton eds.) *Environmental Law in New Zealand* (Thomson Reuters, 2015), Chapter 6 at pp 260-261.

¹⁶ Resource Management Act 1991, s. 6 (e) (New Zealand).

¹⁷ Resource Management Act 1991, s. 7 (a) (aa).

approach to delivering effective protection of the environment, and provides potentially effective mechanisms by which a wide range of environmental interests can be protected. It also takes an expansive approach to defining the interests which the law will protect. In the first place, it recognises the Te awa Tupua (River Whanganui) as ‘an indivisible and living whole’, and this is expressed to ‘represent the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements’.¹⁸ The Act declares the Te awa Tupua to be a legal person in its own right, with all the rights, powers, duties and liabilities of a legal person.¹⁹ The express recognition of the river system’s metaphysical elements is important, for it represents the mutual interrelationship between the Maori iwi and the river, which for them has spiritual as well as physical significance. This is a key issue for the Trusteeship principles, by reference to which the river is to be protected under the terms of the 2017 Act, and which are discussed further below. Notably, the 2017 Act not only grants legal personality to an entire ecosystem, but also recognises the spiritual values of indigenous peoples and gives legal recognition and sanction to the special characteristics of their relationship with the environment.

The declaration of Te awa Tupua status for the Whanganui river also has implications for the way in which pre-existing environmental governance measures apply within the area affected e.g. under the Resource Management Act 1991. The 2017 Act establishes two categories of legal duty that apply to any person exercising or performing functions, powers or duties under an Act, if the exercise or performance of those functions relates to the Whanganui river, or to an activity within the river catchment that affects the Whanganui river.²⁰ Decision makers exercising regulatory functions under environmental legislation listed in Schedule 2 Part 1 of the Act must ‘recognise and provide for’ the Te awa Tupua status and Tupua te Kawa in their decision making.²¹ This applies to the most important environmental governance measures in New Zealand, and is intended to ensure that the unique status of the Te awa Tupua is reflected in plans and project governance under inter alia the National Parks Act 1980, Local Government Acts 1974 and 2002, River Boards Act 1908, the Walking Access Act 2008, the Reserves Act 1977 and the Resource Management Act 1991. Importantly, this obligation applies in relation to the preparation and changing of regional

¹⁸ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s. 12.

¹⁹ 2017 Act, s. 14 (1).

²⁰ 2017 Act s. 15 (1).

²¹ 2017 Act s 15 (2), Schedule 2 Part 1. Tupua te Kawa refers to the stewardship principles to be applied by the trustees – this is discussed further below.

policy statements or district plans under the Resource Management Act 1991, which governs spatial planning and development plan making in New Zealand. A weaker duty – ‘to have particular regard to’ the Te awa Tupua status and Tupua te Kawa – applies to decision making under the Resource Management Act 1991 e.g. to decisions on the issuance or otherwise of individual environmental permits.²²

Principles of Trusteeship for the Environment

The ‘human face’ of Te awa Tupua (the Whanganui River) is to be provided by two trustees who will act on behalf of, and uphold the stewardship of, the river system.²³ The Act establishes the office of Te Pou Tupua.²⁴ They will carry out functions analogous to those of a trustee, with an overriding duty to uphold the Te awa Tupua status, to promote and protect the health and wellbeing of Te awa Tupua, to carry out landowner functions on land held by the Te awa Tupua, and to carry out various ancillary functions of a trusteeship nature.²⁵ One trustee will be nominated by the iwi with interests in the Whanganui river, and one nominated on behalf of the Crown.²⁶

A distinctive facet of the trusteeship role of the Te Pou Tupua is their obligation to uphold the *Tupua te Kawa*. This is a broad concept that encompasses both the physical and spiritual aspects of the environment provided by the Whanganui river system (the ‘intrinsic values that represent the essence of Te awa Tupua’).²⁷ The concept encompasses the Maori belief system that regards people and their environment as one indivisible, mutually interdependent, whole. Traditional Maori concepts of stewardship reflect a different relationship between kinship groups and the land to that in most Western legal systems. The relationship of people to the land and its resources, and the associated customary concept of stewardship, are reflected in the Maori understanding of *Kaitiakitanga*. This is a concept that has been developed through the need to articulate Maori spiritual and cultural concepts in the process of settling claims in the Waitangi Tribunal claims process. Its central tenet is an understanding that people live in a symbiotic relationship with the earth and all living organisms, and have a responsibility to

²² 2017 Act s 15 (3) and Schedule 2 Part 2.

²³ 2017 Act s. 20(2).

²⁴ 2017 Act s 18.

²⁵ See 2017 Act s 19.

²⁶ Initially by the Minister for Treaty of Waitangi Negotiations and thereafter for subsequent appointments by the Minister for the Environment: 2017 Act s 20 (3), (4)

²⁷ 2017 Act s 13.

enhance and protect its ecosystems.²⁸ Humans are not superior to the land; the land sustains the people, and humans therefore have a reciprocal relationship with the environment that requires them to sustain the land's resources through their role as *kaitiaki* (that is, guardians and managers).²⁹

In the context of the 2017 legislation, these responsibilities are given very specific legislative form and definition, and will be exercised and overseen by the Te Pou Tupua for the Whanganui river. In other contexts, *kaitiakitanga* might be exercised by one or several of the recognised Maori kinship groups, for example the *iwi*, *hapu* or *whanu*. The stewardship role is reflected in the wide definition in the 2017 Act of the Tupua te Kawa itself, which is declared to be a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui river and the health and well-being of the *iwi*, *hapu* and other communities of the river.³⁰ It is, further, an indivisible and living whole from the mountains to the sea, incorporating the Whanganui river itself and all its physical and metaphysical elements.³¹ The inclusion of both spiritual elements, and of the well-being of communities living within the river catchment, as elements of the 'environment' of the Whanganui river protected under the 2017 Act, is a distinctive feature that marks this legislation out as very different from most environmental legislation enacted in western jurisdictions, including England and Wales. The 2017 Act is not only distinctive in declaring the river itself to be a 'legal person' and providing for its rights and obligations; it also views the environment in holistic terms that encompass both human and non-human elements of the ecosystem that the river supports.

The conferment of legal personality on the Whanganui river is not simply symbolic. It is given operational effect by provisions in the 2017 Act that implement, for example, the reparation provisions agreed by the *iwi* and the Crown as part of the settlement concluded under the Waitangi Treaty process in 2012.³² The agreement also sought to bring together all relevant organisations and persons with interests in the Whanganui River, in order to

²⁸ Anna Shakell, 'Ownership Rangatiratanga and Kaitiakitanga: Different Ways of Viewing Land Entitlements in Aotearoa/New Zealand', Vol. 2 *Te Tai Haruru/Journal of Maori Legal Writing* 82, at 86

²⁹ Anna Shakell, *ibid.* Vol. 2 *Te Tai Haruru/Journal of Maori Legal Writing* 82, at 86-87.

³⁰ 2017 Act s 13 (a) for the purpose of providing to advise about that specific function.

³¹ 2017 Act s 13 (b).

³² See Whanganui Iwi and the Crown, *Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement*, above n.6, recitals and paras 1.1 – 1.16 for the background and context to the agreement and subsequent legislation.

establish a ‘whole of river’ strategy for its future environmental, social, cultural and economic health, well-being and development.³³ The 2017 Act enshrines key aspects of the settlement in statute. So, for example, Crown owned parts of the river bed are vested in Te awa Tupua from the settlement date,³⁴ as are accretions to the river bed³⁵ and land held under the Public Works Act 1981 that is no longer required for public works.³⁶ The Act also provides for the establishment of an advisory group (‘Te Karewao’) to provide advice and support to the Te Pou Tupua (trustees).³⁷ The advisory group comprises three persons – one appointed by the iwi with interests in the Whanganui river, one by the trustees and one by the relevant local authorities.³⁸ The trustees can invite others to assist them or to assist Te Karewao, including representatives of the iwi, local authorities, relevant government departments of State or other agencies that are considered relevant in the circumstance. If they exercise their trusteeship functions in relation to a discrete part of the Whanganui river, moreover, the advisory group must also include one person appointed by the iwi and hapu with interests in that part of the river, but only for the purposes of providing advice and support about that function.³⁹ The trustees can delegate functions to it as well as seeking its advice and assistance in the exercise of their functions.⁴⁰

General oversight of the implementation of the whole river strategy is to be exercised by a separate ‘strategy group’ (‘Te Kopuka’).⁴¹ This has responsibility for the development of a strategy document, to be put to public consultation not later than 18 months after the settlement date,⁴² and for its adoption following consultation and amendment. It will thereafter be responsible for monitoring the implementation of the strategy.⁴³

³³ Whanganui Iwi and the Crown, *Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement*, at para 2.24.

³⁴ 2017 Act, s 41 (1).

³⁵ 2017 Act s 53.

³⁶ 2017 Act s 55.

³⁷ 2017 Act s 27,

³⁸ 2017 Act s 28

³⁹ 2017 Act s 28 (2).

⁴⁰ See 2017 Act Schedule 3 Part 2.

⁴¹ See 2017 Act s 29 and Schedule 4

⁴² 2017 Act Schedule 4 Part 2 Para 12.

⁴³ 2017 Act Schedule 4 paras 13-16.

Protecting Ecosystems: What Lessons for Environmental Governance?

This is not the first example in New Zealand of an innovative approach to environmental management employing a trusteeship approach. Legislation was introduced in 1990 providing for the appointment of guardians for Lakes Manapouri, Monowai and Te Anau, with a primarily advisory role to make recommendations to government on the environmental, ecological and social effects of the operation of the hydro-electric power scheme on the lakes and their communities.⁴⁴ Like the Whanganui settlement, the guardians are to take into account not only environmental impacts and concerns, but also a wide range of social values and issues (for example tourism, recreation and amenities) when making recommendations, and in their annual reports to government.

A similar approach was taken in New Zealand's Te Urewera Act of 2014.⁴⁵ Until 2014, Te Urewera was a large area of forest, lakes, and rivers managed by the Crown as a National Park. The 2014 Act recognises the spiritual significance of the area for its indigenous people, the Tuhoe, and granted Te Urewera full legal personality.⁴⁶ The land formerly within the National Park was vested in Te Urewera, and both Crown ownership and the National Park designation ceased on its establishment.⁴⁷ The 2014 Act⁴⁸ established a board of management consisting of four to six Tuhoe trustees, and four trustees appointed by government, which is to prepare a management plan for Te Urewera, and oversee its implementation and administration.⁴⁹ In particular, it is to exercise its management functions having regard to Tuhoe management concepts. These include spiritual elements, such as *mana me mauri* – which conveys a 'sense of the sensitive perception of a living and spiritual force in a place'.⁵⁰ The broad approach in both the Whanganui and Te Urewera Acts is similar – the creation of legal personality for the ecosystem that each represents and comprises, and the appointment of trustees to oversee a strategic management plan for the area - one that encompasses spiritual and social values, as well as protection of the natural environment. It is important to recognise, also, that each contains elements that are specific to the locality and to the beliefs

⁴⁴ Conservation Act 1987, s. 6X, inserted by Conservation Law Reform Act 1990, s. 5

⁴⁵ Te Urewera Act 2014, Public Act 2014, No 51 (New Zealand)

⁴⁶ 2014 Act, s. 11.

⁴⁷ 2014 Act s 12

⁴⁸ 2014 Act s 21.

⁴⁹ 2014 Act s 17, 18.

⁵⁰ 2014 Act, s.18 (2), (3).

and customs of their distinctive indigenous peoples, and this is reflected in the legislation itself and in the duties placed upon the trustees.

The conferment of legal personality on the river Whanganui was explicitly intended to reflect the iwi view that the river is a living entity in its own right and is incapable of being ‘owned’ in an absolute sense.⁵¹ Similarly, in the case of Te Urewera, the 2014 Act conferred legal personality on Te Urewera in order to preserve for perpetuity its ‘intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and its national importance’; to preserve its cultural heritage; and to strengthen the connection between its indigenous people (the Tuhoe) and Te Urewera.⁵² This is a very different starting point for environmental governance than that expressed in English Law, where environmental law is concerned primarily with modifying property rights in order to protect the environment. Or, to be more precise, with modifying the pre-existing resource allocations that property rights represent.⁵³ There is very little room, if any, in this approach for the recognition of spiritual or cultural values. It is dominated instead by a concern with property rights as exploitative resource use entitlements - and with how, whether and when they can be modified to protect features of the natural environment.

The far sighted and innovatory approach taken in the New Zealand legislation can teach us much about the management and protection of ecosystems and biodiversity. This could be especially important as English law attempts to move towards adopting a larger landscape level approach to protecting natural habitats and ecosystems. Of the many notable features of the New Zealand legislation, perhaps three aspects merit special attention here: (i) the wider legal representation for the environment that the 2017 Act affords; (ii) the adoption of a holistic definition of the ‘environment’, and (iii) the implications for environmental governance of eschewing a ‘property’ based approach to both defining the ‘environment’ itself and to structuring remedies to protect it.

⁵¹ See Whanganui Iwi and the Crown, *Tutohu Whakatupua – Record of Understanding in Relation to the Whanganui River Settlement*, at para. 2.7.1

⁵² 2014 Act s. 4.

⁵³ There is a substantial literature. See for example K.Gray and S.F.Gray, “Private property and Public propriety”, Chapter 2 in (McLean ed.) *Property and the Constitution*, (Hart, 1999); Christopher Rodgers, *The Law of Nature Conservation: property, environment and the limits of Law* (2013, OUP) at pp.25ff; J. Waldron, “What is Private Property?” (1985) 5 OJLS 313; W.N.R. Lucy and C. Mitchell, “Replacing Private Property: The Case for Stewardship” (1996) 55 *Cambridge Law Journal* 566; Murray Raff, “Environmental Obligations and the Western Liberal Property Concept”, [1998] 22 *Melbourne University Law Review* 657; T.W. Frazier, “The Green Alternative to Classical Liberal Property Theory” (1995) *Vermont LR* 299

(i) Widening Legal Redress for Environmental Protection

By conferring legal status on the Whanganui river system, and providing for the appointment of Te Pou Tupua (trustees) to uphold its status and ensure its protection, the 2017 Act will ensure effective access to legal redress to ensure the protection of the river and its ecosystem as a whole, and its individual constituents. By contrast, the problems of establishing a ‘sufficient interest’ in an environmental dispute in English Law, for the purpose of establishing ‘standing’ to initiate legal proceedings, are well known.⁵⁴ If an individual wishes to initiate judicial review of a decision by a public body that impacts the environment, s/he will usually have to demonstrate either that it potentially affects a property or commercial interest of the claimant, or that s/he lives in close proximity to the site which is affected by the decision.⁵⁵ Widening the scope of legal standing in English law by reference to a ‘proximity’ test has greatly strengthened the ability of those adversely impacted by decisions affecting their local environment to challenge regulatory decision making. But, of course, the concept of ‘close proximity’ is itself open to interpretation, and will vary on the facts of individual cases.⁵⁶ And a claimant’s ability to bring a private law action to protect the environment – for example in private nuisance – will still largely be determined in English law by his or her ability to establish that damage to a property interest has occurred (or will do so if a remedy is not forthcoming).⁵⁷

In the case of an environmental pressure group or other representative body, access to justice in environmental cases raises different problems.⁵⁸ The English courts have, admittedly, greatly widened the scope for representational judicial review actions to be brought in environmental cases.⁵⁹ In many representational public law cases in English law, however, the issue is concerned as much with abuse of power by public bodies exercising regulatory functions, as with issues of ecological or environmental protection. The consequences to which this gives rise were criticised by Lord Hope in a powerful dissenting judgment in

⁵⁴ See *Inland Revenue Commissioners v Federation of Self Employed and Small Businesses Ltd.* [1982] AC 617.

⁵⁵ See on the proximity test *R (Edwards) v Environment Agency* [2004] Env LR 43.

⁵⁶ See for example *R. North West Leicestershire District Council ex parte Moses* [2000] JPL 733

⁵⁷ For example, *Salvin v Brancepeth Coal Co. Ltd.* (1874) 9 Ch. App. 705; *Dennis v Ministry of Defence* [2003] Env LR 34; *Hunter v Canary Wharf* [1997] 2 WLR 684

⁵⁸ See for example *R. v Secretary of State ex parte Rose Theatre Trust* [1990] 1 QB 504

⁵⁹ See *R. v Secretary of State for Foreign and Commonwealth Affairs Ex parte World Development Movement Ltd* [1995] 1 WLR 386; *R. v Somerset County Council ex parte Dixon* [1998] Env LR 111.

Walton v Scottish Ministers.⁶⁰ What if the route of an Osprey to and from its favourite feeding loch will be impeded by the building of a cluster of wind turbines? If the proposed development does not impact upon the property rights of any individual, does this mean that it is not open to anyone to challenge the development on this basis? As Lord Hope observed, this would seem to be contrary to the whole purpose of environmental law, which is to recognise that the value of the environment is a legitimate concern to all, and to provide legal means to ensure that this concern can be brought before the courts when appropriate.⁶¹ And, of course, to ensure that the Osprey be given a voice in legal proceedings to challenge the decision-making process if its natural habitat is arguably threatened by a proposed development.

The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 avoids these complications by giving the Te Pou Tupua – the Whanganui river’s statutory trustees – wide powers to take legal action on behalf of both the river itself and the constituent elements of its ecosystem. The trustees are a public authority for the purposes of New Zealand’s Resource Management Act 1991 and, as such, are entitled to be heard or to make any submission on any matter in relation to the river.⁶² The 2017 Act expressly provides that they must be recognised as having an interest in Te Awa Tupua greater than, and separate from, any interest in common with the general public.⁶³ They are also to be treated as interested persons in relation to any other statute, and have a statutory right to lodge submissions and to be heard in any matter affecting the Whanganui river.⁶⁴

As noted above, the rules for ‘standing’ to bring judicial review in environmental cases are somewhat more liberal in New Zealand than they are in English Law.⁶⁵ In the case of legal action to protect the Whanganui river and its ecosystems, however, these issues will in future be of less central importance, in that the Te Pou Tupua (trustees) will have the responsibility for enforcing the terms of the very wide ‘public trust’ that is enshrined in the terms of the 2017 Act, and which is laid on their shoulders. It is important, however, to recognise that the conferment of full legal personality on Te Awa Tupua brings with it duties as well as rights

⁶⁰ *Walton v Scottish Ministers* [2012] UKSC44.

⁶¹ See [2012] UKSC 44, per Lord Hope, judgement at para 152

⁶² 2017 Act, s 72 (a) – (c).

⁶³ 2017 Act s. 72 (d).

⁶⁴ 2017 Act, s. 73.

⁶⁵ Above, footnote 8.

and powers.⁶⁶ It also carries responsibility for the liabilities of Te Awa Tupua. As the ‘legal face’ of Te Awa Tupua, the trustees will be potentially liable in private law suits brought against it e.g. in private nuisance as regards the use of land in which it has title. And as a public body, their decisions will also be potentially open to judicial review.

(ii) **Widening the Scope and Focus of Environmental Protection**

Another lesson that can be drawn from the Whanganui settlement – and indeed from the wider legislation on resource management in New Zealand - concerns the importance of modifying or abandoning a property based approach to environmental protection if we are to ‘upscale’ the protection of the natural environment and adopt a landscape scale – or ecosystem scale – approach. The 2017 Act adopts a far-sighted approach to implementing sustainable development, by recognising the importance of not only the natural environment itself, but also the well-being, both physical and spiritual, of the communities that depend upon it. Furthermore, it establishes the administrative means to base decisions about future development on spatial planning at the ecosystem level - through, for example, the strategic planning process and advisory group structure for Te awa Tupua.

This provides a marked contrast to the legal framework for protecting the natural environment in English law, where the focus on individual property rights remains problematic, and is – in particular - unhelpful to attempts to establish a broader system of environmental protection focused at a landscape level and based on protecting ecosystems and their constituent elements. Public policy in England and Wales has recently moved strongly towards favouring a landscape level approach to protecting natural habitats and ecosystems.⁶⁷ The English common law’s preoccupation with protecting private property rights makes this difficult to plan at a strategic level and to achieve. Unlike New Zealand’s Resource Management Act, and the 2017 Whanganui legislation, English law continues to give priority to private property interests. The dominance of a ‘property-centric’ ethic permeates the law of nature conservation in England and Wales, and can be seen in both the

⁶⁶ See 2017 Act, s 14(1): ‘Te Awa Tupua is a legal person and has all the rights, powers, *duties and liabilities* of a legal person’ (emphasis added). And the 2017 Act expressly imposes on Te Pou Tupua ‘responsibility for its liabilities’ (see s. 14 (2)).

⁶⁷ See for example Natural England’s recently published conservation strategy: *Conservation 21: Natural England’s Conservation Strategy for the 21st Century* (NE 642, Natural England 2016) at pp. 5-6.

rules applicable to species protection, and in the legal mechanisms developed to implement habitat protection.

As far as species protection is concerned, animals, plants and birds enjoy little direct protection in English common law. Neither do the habitats on which they depend for their long-term survival. The focus of common law remedies is on private interests, and in particular on (i) the protection of private property rights in animals, birds and plants, and (ii) on the property rights of the owners and occupiers of the land on which their habitats are to be found. Neither does English law impose a duty of environmental stewardship on landowners – at least not as an attribute of their ‘property’ interest at common law. The common law’s primary concern when protecting property rights in land is with the owner’s use and enjoyment of the land and its produce, and not those attributes or features that make it valuable as a habitat for wildlife. Such stewardship duties as exist in English law are of limited application and scope, and have been introduced using statutory or administrative powers.⁶⁸ Common law remedies are also neutral as to the environmental characteristics – or otherwise – of property interests unless they have a quantifiable monetary value that can be reflected in an award of damages. The development of the law protecting natural species and their habitats in New Zealand has taken a different path, one that is somewhat closer to recognising a need to recognise the ecological needs of individual species, and the spatial interconnectedness of the ecosystems on which they rely.⁶⁹ And public bodies in New Zealand must also have ‘particular regard’ to the ethic of stewardship in managing, developing and protecting natural and physical resources when making decisions under the Resource Management Act.⁷⁰

A duty of stewardship of the natural environment is therefore intrinsically recognised in New Zealand environmental law. The 2017 Whanganui legislation makes this focus both direct

⁶⁸ For example, the introduction of a remedy for ‘biodiversity damage’ to protected wildlife sites: see the Environmental Damage (Prevention and Remediation) Regulations 2009, SI 2009/153, made under the European Communities Act 1972, section 2 (2) and Schedule 2 para. 1A. See further, W.N.R. Lucy and C. Mitchell, “Replacing Private Property: The Case for Stewardship” (1996) 55 *Cambridge Law Journal* 566; Rodgers, C.P., “Nature’s Place? Property Rights, Property Rules and Environmental Stewardship” (2009) 68 *Cambridge Law Journal* 550-574; McGillivray, D., “Water Rights and Environmental Damage: an enquiry into stewardship in the context of abstraction licensing reform in England and Wales” (2013) 15 *Environmental Law Review* 205-224.

⁶⁹ See Pip Wallace, “Integrated Conservation Management: Spatial Planning for the Movement of Species in the Landscape” (2011) 15 *NZJEL* 185-211; Pip Wallace and Shaun Fluker, “Protection of Threatened Species in New Zealand” (2015) 19 *NZJEL* 179-205.

⁷⁰ Resource Management Act 1991, s.7 (aa) (New Zealand).

and explicit in its application to the protection of the Whanganui river ecosystem. It imposes on the trustees of Te awa Tupua a stewardship duty that reflects human interconnectedness with the environment in the widest sense, and reflects our responsibility to nurture and protect both the natural environment and its cultural values for future generations. A similar duty is placed on the trustees of Te Urewera.⁷¹ The trusteeship of Te awa Tupua established by the 2017 Act reflects ideas of earth jurisprudence and aligns with Aldo Leopold's 'land ethic', which stresses the natural person's (or human) responsibility to land, air, plants, animals – the whole of nature – and the importance of intergenerational equity.⁷² The idea of nature - its ecosystems and constituent elements – as beneficiaries of a trust founded on the principles of a land ethic is powerfully present in the belief systems of many indigenous peoples.⁷³ The trusteeship created over both Te awa Tupua and Te Urewera by the New Zealand legislation is paradigmatic of this approach, and gives practical manifestation to very different ideas of trusteeship and 'property' to those found in English Law.

In contrast to this more expansive approach, many of the limitations of the English common law for protecting wildlife habitats are largely attributable to the narrow approach that it adopts to notions of "property" and to property rights in land. The theoretical basis of title to land in English Law is an intention to control the land and exclude others. This finds its ultimate expression in the fundamental rule of English property law that title to property depends solely upon a claim to prior possession (evidenced in practice by title documents or, in the case of registered land, by the registered title to the land in question). This is also the basis of the law of adverse possession, which enables someone to acquire title to unregistered land by factual possession for a period in excess of 12 years,⁷⁴ provided the claimant can show the necessary intention to exclude others from its possession and enjoyment.⁷⁵ Where the title to land is registered, a claimant can apply to be entered on the title register as registered proprietor after a period of ten years adverse possession, but the rightful owner has the right to object by counter notice.⁷⁶ The exploitation of the land's resources can be

⁷¹ Te Urewera Act 2014, s.5 (New Zealand)

⁷² See Aldo Leopold, *A Sand County Almanac; with other essays on conservation from 'Round River'* (enlarged edition, 1986, Oxford University Press).

⁷³ For a discussion of this see Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (CUP, 2014) esp. at pp.263ff.

⁷⁴ Limitation Act 1980, section 15(1);

⁷⁵ As to which see *Buckingham CC v Moran* [1990] Ch. 623; *J. A. Pye (Oxford) Ltd v Graham* [2003] AC 419.

⁷⁶ See Land Registration Act 2002, section 97 and Schedule 6 para 1; section 73 and Schedule 6 para 5 (procedures for objection by registered owner). The procedure in the 2002 Act makes it very difficult for a

evidence of “possession” for these purposes, but it is the *occupation of land* – and not its environmental *stewardship* – that is the hallmark of possessory title in English Law.

The possessory basis for notions of ownership is also reflected in the strongly anthropocentric rules governing the exploitation of birds, animals and plants in English Law. Plants growing in the soil are regarded as the property of the owner of the soil. The common law also gives the owner the right to exploit wild animals (animals *ferae naturae*) that come onto the land. While they are alive, wild animals and birds are not subject to absolute ownership in English law.⁷⁷ The landowner has a right to hunt and catch wild creatures, however, and to reduce them into possession. This is sometimes referred to as a right of “qualified property” in those wild animals present on the owner’s land,⁷⁸ and interference with this right is actionable.⁷⁹ Once a wild creature has been killed or captured, however, it becomes the property of the owner of the land on which it was found.⁸⁰ In Scotland, the possessory rationale for property rights is taken to its logical conclusion, and a wild animal taken by a poacher or trespasser will become the property of the latter, and not of the owner of the land on which it was taken – although the landowner may have a right to compensation from the trespasser in these circumstances.⁸¹

This narrow, strongly anthropocentric, and somewhat pragmatic, approach to defining ‘property’ in English common law goes a long way to explain the way in which the legal protection of individual species of bird animal and plant is structured and organised in English environmental legislation. It also explains how the statutory arrangements for protecting wildlife habitats have been developed in English law. Because wild animals and birds are not “property” they have not, historically, been given legal protection by the common law. In the absence of special statutory provision in modern environmental legislation, therefore, it follows that the killing or destruction of wild animals is not in itself a

squatter to claim adverse possession as the owner will be given notice and an opportunity to “warn off” any claim to title: this was not the case prior to the 2002 Act, and is not the case where land remains unregistered.

⁷⁷ Blackstone’s Commentaries on the Laws of England, Vol II, 391. And see *The Case of Swans* (1592) 7 Co Rep 15b at 7b; *Blades v Higgs* (1865) 11 HL Cas 621.

⁷⁸ See Blackstone Commentaries II op.cit. 393; Gray and Gray *Elements of Land law* (5th edition 2009) at 1.2.84, 1.2.85.

⁷⁹ *Kearry v Pattinson* [1939] 1 KB 471.

⁸⁰ Blackstone Commentaries op. cit. II 389-92. See *Blades v Higgs* (1865) 11 HL Cas 621. Ownership will vest in the property owner in English law even if an animal or bird is killed and reduced into possession by a trespasser.

⁸¹ See Colin T Reid, *Nature Conservation Law* (3rd ed 2009) at 1.3.5

wrong against anyone and – unless a recognised ‘property’ right is incidentally affected⁸² – it cannot be remedied in a civil action for damages or an injunction. This fundamental proposition explains the development of extensive statutory protection for wild animals, birds and plants since World War 2, and in particular the introduction by statute of criminal liability for the protection of many endangered and vulnerable species of bird, animal and plant e.g. by Part 1 of the Wildlife and Countryside Act 1981 and by species-specific legislation such as the Protection of Badgers Act 1992 and the Conservation of Seals Act 1970.

The emphasis on private property rights in English Law also explains why the draftsmen of the principal legislation on habitat protection – Part 2 of the Wildlife and Countryside Act 1981 – focussed narrowly on ensuring that landowners preserve special conservation features to be found on their land. The 1981 Act, as amended, requires the statutory conservation bodies in the UK⁸³ to notify land as a Site of Special Scientific Interest if they of opinion that it is of special interest by reason of any of its flora, fauna, or geological or physiographical features.⁸⁴ Site selection is made exclusively by reference to scientific criteria, guided by the endangered status of wildlife species which the site hosts, or for habitats by reference to its representivity, its rarity, or the fragmentation or loss of the habitat to be protected.⁸⁵ The 1981 Act then requires the conservation bodies to notify the landowner of those operations that they consider are likely to damage the conservation interest of the site; and it is a criminal offence to carry out any of these without a prior consultation with the conservation body, and either its operational consent or a management agreement for the site.⁸⁶ The consultation mechanism for potentially damaging operations in SSSIs reflects a key focus and objective of the 1981 Act - to reconcile the property rights of the landowner with the management requirements for the ecological protection of the site’s natural features. The exploitative land use rights conferred by property rights in English law are the starting point for this exercise and underpin much of the legislation on habitat conservation in English law.

⁸² As, for example, in *Pride of Derby Angling and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] Ch. 149 (pollution causing fish kill restrained by an injunction awarded to protect riparian rights owned by the angling association).

⁸³ Natural England, Scottish Natural Heritage and Natural Resources Wales in (respectively) England, Scotland and Wales.

⁸⁴ Wildlife and Countryside Act 1981, s. 28(1).

⁸⁵ Joint Nature Conservation Committee, *Guidelines for the Selection of Biological SSSIs* (1989, revised 1992, 1995, 1996, 1997, 1998, 2015) available at:

<http://jncc.defra.gov.uk/page-2303>

⁸⁶ 1981 Act s. 28(4). See further Rodgers, *The Law of Nature Conservation* at pp. 84-90.

When compared with the New Zealand legislation, two points stand out. In the first place, in current English Law the identification and notification of protected areas such as SSSIs is guided by scientific criteria – there is no room in this exercise for recognising the cultural or spiritual significance of the land in question, or any wider ecosystem of which it may be part. And, secondly, the legal mechanisms used to deliver habitat protection in English law are ‘inward-looking’, focussed primarily to controlling the land use activities of the landowner, and not the needs and requirements for the management of any wider ecosystem of which the SSSI may form a part. This approach has also led to a fragmentation of conservation management, in which protection is focussed on a large number of sites of varying sizes, and which are not necessarily interconnected. So, for example, there are currently 4126 notified SSSIs in England, covering 1093315.73 hectares of land.⁸⁷ A major ecosystem, such as a river catchment, may contain a large number of individual SSSIs, and co-ordinating the protection of individual sites within a larger strategy for managing the wider river ecosystem will be challenging. It is also a problem which has largely been ignored in English law, which has until recently eschewed strategic planning for ecosystem management of the kind to be found in the Whanganui and Te Urewera legislation in New Zealand.

Conclusion

The debate around the ‘rights’ of the environment and how best we can protect it have moved on somewhat since Christopher Stone wrote his seminal article in 1972 questioning why the environment should not be given formal legal standing. Many now accept that the environment – or its constituent parts, such as ecosystems – should be given formal legal recognition, and the right to act on its own behalf to protect them. The recent New Zealand legislation, while far sighted, is not wholly unique in this regard. Constitutional provision, with an eco-centric focus on giving the ‘environment’ legally enforceable rights, has also been made in some other jurisdictions. The constitution of Ecuador, for example, was revised in 2008 to recognise the rights of nature, and the Bolivian legislature introduced a ‘Law of the Rights of Mother Earth’ in 2010.⁸⁸

⁸⁷ For a breakdown of the statistics for England see:

<https://designatedsites.naturalengland.org.uk/ReportConditionSummary.aspx?SiteType=ALL> (last accessed 15 August 2017)

⁸⁸ Constitution of the Republic of Ecuador, 2008, Title 11 Ch. 7, articles 71-74. See further: Kotzé, L., & Villavicencio Calzadilla, P. (2017). ‘Somewhere between Rhetoric and Reality: Environmental

The Whanganui Settlement legislation offers an example of *how* principles of sustainable development can be developed and implemented, albeit in a context where the internal legal culture is very different to that in English Law. It offers a vision for a holistic and value-centred approach to environmental protection, 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. The 2017 Act recognises the metaphysical attributes of the Whanganui river, and in so doing stresses both the physical and spiritual interrelationship between the Whanganui Iwi and the river (its intrinsic values or Tupua te Kawa).⁸⁹ In a New Zealand context, this is not a wholly new approach. As we have seen, the Resource Management Act 1991 already recognises the relationship of Maori and their culture and traditions with their ancestral lands and the natural environment as a matter of national importance, and requires decision makers to take them into account when making decisions.⁹⁰ They must also have ‘particular regard’ to Maori ‘kaitiakitanga’ and the ethic of stewardship when making decisions on the management, use and development of natural and physical resources.⁹¹ Set within the existing New Zealand legal context, therefore, one consequence of the 2017 Act will be to give additional weight to the significance of the interpretation placed on the Tupua te Kawa (intrinsic values) of the river by the Whanganui iwi in Resource Management Act decision making. This is underlined by the express requirement that the Whanganui trustees be recognised as having an interest in Te awa Tupua greater than any interest in common with the general public.⁹² The principal innovation in the 2017 legislation will arguably be, therefore, not simply the legal recognition of the spiritual and cultural significance of the river as part of its wider ecosystem – but rather the incorporation of a specific trusteeship duty to respect and uphold the spiritual relationship between the Whanganui iwi and the river in the public trust over the river and its ecosystem established by the 2017 Act.

Constitutionalism and the Rights of Nature in Ecuador’. *Transnational Environmental Law*, 1-33. doi:10.1017/S2047102517000061; Mary Christina Wood, *Nature’s Trust: Environmental Law for a New Ecological Age* (CUP, 2014) at pp. 269-270; Simon Keiser, “A Place Where Nature Has Its Own Rights” (2016) 11 *Resource Management Bulletin* 161-164 (New Zealand).

⁸⁹ 2017 Act, s. 13 (a)

⁹⁰ Resource Management Act 1991, s. 6 (e) (New Zealand).

⁹¹ Resource Management Act 1991, s. 7 (a) (aa).

⁹² 2017 Act s. 72 (d).

The recognition of the metaphysical relationship between humankind and the environment in the New Zealand legislation nevertheless offers a radically different vision for the sustainable management of the natural environment than that currently evident in English Law. It provides an important example of the very different way in which legal principles like the ‘sustainable’ management of natural resources are differentially interpreted and applied by legal systems, governments and decision makers.⁹³ Rather than viewing the natural environment through the prism of private property rights - a narrow social construct which focuses attention on the ‘owners’ relationship to other human actors and which is, consequently, an inherently anthropocentric construct - the New Zealand legislation recognises that legal standing should reflect the relationship of natural persons with an ecosystem as a living entity.⁹⁴ Whether the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 marks a radical new departure for environmental protection in New Zealand itself will depend upon how the trustees carry out their new role. In promoting a strategic view of the environment that is cast in holistic terms that encompass both human and non-human elements of the ecosystem that the river supports, and that the 2017 Act seeks to protect, it nevertheless provides an interesting model for promoting sustainable development in a manner that integrates its social, environmental and economic elements.

⁹³ Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2nd edition, Routledge, 2017) at 61ff.

⁹⁴ Another way to look at this is to consider the different concepts of ‘property’ in Western and indigenous legal and belief systems. As noted above, in English law, ‘property’ is characterised as conferring entitlements to resource use upon individuals; in most indigenous systems, on the other hand, ‘property’ systems treat ecological resources as ‘intrinsically communal, intergenerational and spiritually imbued with obligation’: Mary Christina Wood, *Nature’s Trust: Environmental Law for a New Ecological Age* (CUP, 2014) at 271