

WATCHING WHANGANUI & THE LESSONS OF LAKE ERIE: EFFECTIVE REALIZATION OF RIGHTS OF NATURE LAWS

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ABSTRACT

The rights of nature movement has become a hot topic among environmental lawyers and the number of communities around the world that have recognized some version of rights of nature or legal personhood for nature has grown rapidly over the past decade. Whether the result of constitutional amendments like in Ecuador, legislation in New Zealand and Uganda, or judicial decisions in India, Bangladesh, and Colombia, more communities are adopting rights of nature laws. Yet, despite this proliferation, we have not seen a great deal of successful implementation and enforcement of these laws. This paper examines this issue and considers the roles cultural and institutional factors play in the acceptance and internalization of rights of nature law. Using the cases of Te Awa Tupua (Whanganui River Claims Settlement Agreement) from New Zealand and the Lake Erie Bill of Rights from the United States, this article explores how these two communities, while both grounded in the common law legal tradition, have very different outcomes for their efforts at enacting rights of nature law. This article argues that understanding the context in which rights of nature laws are created is essential for the ultimate success of this new legal movement. Drawing on in-person interviews conducted by the author in New Zealand in April 2019 and analysis of primary source documents, this article highlights some lessons to guide future efforts to craft effective laws recognizing the rights of nature.

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I. INTRODUCTION

In 2017, the New Zealand Parliament passed the Te Awa Tupua (Whanganui River Claims Settlement Agreement) Act recognizing the legal personhood and intrinsic values of the Wanganui River.¹ This new law was the culmination of decades of efforts by the local iwi to redress wrongs of the past related to sovereignty over the land and treatment of nature. The new law recognizes the intrinsic values of the river, always part of the Māori cosmology, through codification in the State’s secular legal framework. While still new and relatively untested, Te Awa Tupua, is probably the most successful rights of nature law in existence.²

Halfway across the world, in February 2019, the citizens of Toledo, Ohio voted on the Lake Erie Bill of Rights (LEBOR), a citizen-led effort to protect the right of Lake Erie to exist and flourish.³ LEBOR was the culmination of a grass-roots campaign that began in 2014 after toxic algae blooms made the water in the region undrinkable.⁴ The day after the legislation was passed, a local farm filed a lawsuit that argued LEBOR violated the farm’s constitutional rights.⁵ After a year in court, a judge issued a decision that LEBOR was unconstitutional and struck down the law.⁶

Two communities, two bodies of water, two efforts to incorporate the recognition of the rights of nature into a legal framework. Yet two very different outcomes. Why?

This article considers the “why?” and examines the role that cultural and legal factors play in the respective communities and their acceptance of the concept of rights of nature. While both common law states, the legal

1. Te Awa Tupua (Whanganui River Claims Settlement Agreement) Act 2017 (N.Z.).
2. Toni Collins & Shea Esterling, *Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand*, 20 MELB. J. INT’L. L. 197, 200 (2019).
3. Dana Zartner, How Giving Legal Rights to Nature Could Help Reduce Toxic Algae Blooms in Lake Erie, THE CONVERSATION (Sept. 10, 2019), <https://theconversation.com/how-giving-legal-rights-to-nature-could-help-reduce-toxic-algae-blooms-in-lake-erie-115351>.
4. *Id.*
5. *Id.*
6. *Id.*

traditions in the U.S. and New Zealand are very different on a number of key points relevant to realizing the rights of nature. Understanding the context in which rights of nature laws are created is essential for this new legal movement's ultimate success. After examining the development of rights of nature law in Whanganui and Toledo, and considering the respective outcomes, this article draws together some lessons for future efforts to craft laws recognizing the legal personhood or the rights of nature. Seen by many as effective new tools of environmental protection, the rights of nature movement also has the potential to fundamentally shift our understanding of the human-nature relationship, providing a better global environment for all living things.

II. WHAT IS THE 'RIGHTS OF NATURE'?

The rights of nature movement is a growing effort to recognize, through existing legal frameworks, the rights of natural entities such as rivers, mountains, forests, and in some cases, entire ecosystems to exist, flourish, and defend themselves through legal mechanisms.⁷ Countries around the world, including New Zealand, India, Bangladesh, Colombia, Ecuador, Peru, and Uganda recognize some version of the rights of nature in their national laws.⁸ In other places such as in the United States, Mexico, and Brazil, sub-state communities such as indigenous groups and municipalities also recognize rights of nature.⁹

These laws have taken many different forms. Some, as in Ecuador and, perhaps soon, Sweden, have come through changes to the country's constitution.¹⁰ New Zealand and Uganda enacted new legislation.¹¹ India, Bangladesh, and Colombia have all seen the rights of nature recognized through judicial decisions.¹² Finally, in the case of the Lake Erie Bill of Rights, recognition came through a public referendum to amend the city charter.¹³ While in each of these cases there is a natural entity or ecosystem

7. *What is Rights of Nature?*, GLOB. ALL. RTS. NATURE, <https://therightsofnature.org/what-is-rights-of-nature/> (last visited Nov. 29, 2020).

8. *Advancing Legal Rights of Nature: Timeline*, CMTY. ENV'T LEGAL DEF. FUND (last updated Dec. 3, 2020), <https://celdf.org/advancing-community-rights/rights-of-nature/rights-nature-timeline/>.

9. *Id.*

10. THE CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, RO 449, (N.Z.); Jon Queally, *In European First, Proposed Constitutional Amendment in Sweden Would Enshrine Rights of Nature*, COMMON DREAMS (Oct. 8, 2019), <https://www.commondreams.org/news/2019/10/08/european-first-proposed-constitutional-amendment-sweden-would-enshrine-rights-nature>.

11. CMTY. ENV'T LEGAL DEF. FUND, *supra* note 8.

12. *Id.*

13. *Id.*

being identified, what is being recognized for the nature in question differs.¹⁴ This is one of the difficulties of the rights of nature movement. The concept of this right is being realized in different ways by different communities. It is not a one-size-fits-all effort.¹⁵ The issues driving the creation of such laws, the content of the legal provisions themselves, and the mechanisms through which they manifest, draw on the contexts of the communities from which they emerge.¹⁶ In general, rights of nature laws provide one of several things: legal personhood for a natural entity to enable it to file legal claims; rights of the natural entity, such as the right to exist or flourish; and rights for persons related to the natural entity, such as a right to clean water or a healthy environment.¹⁷

A. Legal Personhood

Most rights of nature laws contain some form of legal personhood for the natural entity in question. There are different definitions of legal personhood, and in fact, this is one of the main points of debate that emerges in an attempt to recognize the rights of nature.¹⁸ In general, however, legal personhood enumerates privileges and obligations for a specified entity under the law, including various rights and the ability to appear before legal bodies to defend these rights.¹⁹ Some entities for whom legal personhood have been created include states, corporations, churches, and animals.²⁰ We speak of the United States as an actor in the international system.²¹ It has rights and responsibilities under international law and through its membership in organizations like the United Nations. But, these are legal creations and only as extensive as the law provides. Similarly, in the United States, corporations have rights, including Constitutional rights, and they are able to defend those rights in court.²²

14. Dinah Shelton, *Nature As A Legal Person*, VERTIGO (2015), <https://journals.openedition.org/vertigo/16188>.

15. See Lidia Cano Pecharroman, *Rights of Nature: Rivers That Can Stand in Court*, 7 RES. 13, 19 (2018) (describing how the Whanganui River gained legal rights).

16. Dana Zartner, *Courts, Codes, And Custom: Legal Tradition And State Responsibility Toward International Human Rights and Environmental Law 25* (Oxford Univ. Press 2014).

17. GLOB. ALL. FOR RTS. NATURE, *supra* note 7.

18. Alexis Dyschkant, Note, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. ILL. L. REV. 2075, 2090 (2015).

19. Shelton, *supra* note 14.

20. Jon Garthoff, *Corporations, Animals, and Legal Personhood*, SCHOLARS STRATEGY NETWORK (May 30, 2018), <https://scholars.org/brief/corporations-animals-and-legal-personhood>.

21. See generally Carmen Gebhard, *One World, Many Actors: Levels of Analysis in International Relations* (Dec. 28, 2016), <https://www.e-ir.info/pdf/67033> (discussing how States play a major role in discourse of challenges globally).

22. Ciara Torres-Spelliscy, *Does “We The People” Include Corporations?*, 43 A.B.A HUM. RTS.

Giving legal personhood to a natural entity is, in essence, no different: the law constructs whatever rights, responsibilities, and legal standing the natural entity may have within that particular legal system. The “right” in rights of nature includes a right of the entity through its guardians or representatives to file a legal claim for damage that is, or that may be, inflicted upon it.²³ In essence, this provides standing for the natural entity to bring a lawsuit on its own behalf rather than having to wait for someone else to have standing based on a harm to them. Of course, this requires a representative to bring the claim on behalf of the natural entity, but this is not a new concept. Representatives, guardians, and trustees have long protected the legal interests of those who cannot represent themselves; whether that is because they do not possess the capacity (children, the mentally unwell) or because they are fictitious persons created under the law that require representation (animals, corporations, states).²⁴

B. Rights of Nature and Rights of Persons Related to Nature

The second and third components of many rights of nature laws go beyond the idea of legal personhood and recognize rights attaching to the natural entity at issue, or in some cases, rights of persons related to the natural entity.²⁵ For example, in the case of the Whanganui River, Te Awa Tupua recognizes that the River “has all the rights, powers, duties, and liabilities of a legal person.”²⁶ Similarly, the Lake Erie Bill of Rights recognizes the right of Lake Erie and its watershed to “exist and flourish” as well as the right of citizens of Toledo to bring a legal claim on behalf of the lake.²⁷ Other examples include the Constitution of Ecuador, which recognizes the rights of Pachamama (Mother Earth) itself, as well as the rights of Ecuadorian citizens to clean water and a healthy environment.²⁸

MAG. 2 (Jan. 6, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/we-the-people-corporations/.

23. Lindsay Fendt, *Colorado River ‘Personhood’ Case Pulled By Proponents*, ASPEN JOURNALISM (Dec. 5, 2017), <https://www.aspenjournalism.org/colorado-river-personhood-case-pulled-by-proponents/>.

24. *Public Interest Litigation: Its Origin and Meaning*, LEGAL SERVICE INDIA, <http://www.legalserviceindia.com/article/I273-Public-Interest-Litigation.html> (last visited Nov. 29, 2020).

25. Dyschkant, *supra* note 18.

26. Te Awa Tupua Act, s 14, subs 1.

27. Kenneth Kilbert, *Lake Erie Bill of Rights: Legally Flawed But Nonetheless Important*, JURIST: COMMENTARY (Mar. 14, 2019), <https://www.jurist.org/commentary/2019/03/kenneth-kilbert-lebor-important/>.

28. THE CONSTITUTION OF THE REPUBLIC OF ECUADOR Oct. 20, 2008, RO 449.

As with the idea of legal personhood, granting rights to non-human entities is not completely unheard of. The familiar analogy is to corporations, which in some jurisdictions, like the United States, are considered to have certain rights that may be enforced in court.²⁹ Recent examples of this are the *Citizens United* and *Hobby Lobby* cases before the U.S. Supreme Court, which recognized the entities' freedom of speech and freedom of religion, respectively.³⁰ In those cases, the rights of the fictional legal persons (the corporations) were represented in court by actual legal persons who had standing on their behalf. This is the same logic that is put forward by the rights of nature movement.

C. Cultural Connections and the Human-Nature Relationship

Despite the fact that providing legal personhood to nature and recognizing its rights are building on other examples of non-human entities receiving such treatment, there are still significant hurdles facing these efforts.³¹ Often, this is because the views of the human-nature relationship that exist within a culture have not incorporated this shifting positioning of nature as an equally important entity in the broader ecosystem. In some places, such as New Zealand, Ecuador, and among many indigenous communities around the world, this recognition of a natural entity as a living being which is equally deserving of rights is part of the greater cosmology. In other places, such as many in the developed world with their secular legal systems based in common or civil laws, nature is still largely thought of as a commodity, as something that is here for the use of, or pleasure of, human beings, without recognizing its importance in the overarching ecosystem. These different cultural approaches to nature and varying views on the human-nature relationship greatly impacts community acceptance of rights of nature laws.

Even for those communities reluctant at this moment to accept rights of nature law, it is important to remember that community beliefs can change. Sometimes this change can be pushed by the law and sometimes the law is pushed by change in community values.³² Often the two are moving side-by-

29. Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution*, NAT'L PUB. RADIO (July 28, 2014), <https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution>.

30. *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

31. Shannon Biggs et al., *Rights of Nature & Mother Earth: Rights-Based Law for Systematic Change* (2017), <https://www.iencarth.org/wp-content/uploads/2017/11/RONME-RightsBasedLaw-final-1.pdf>.

32. Richard Ayres et al., *The Paths to Change in Environmental Law*, in *LEGAL CHANGE: LESSONS*

side to produce change. There are many examples of this, but some recent ones include changes in ideas and laws regarding LGBTQ rights, same-sex marriage, and the death penalty, especially for juveniles. In these cases, we have seen community values and the law shift over time to a place of acceptance of different normative standards and expanded views of rights that should attach to different groups of legal persons.³³ That is where we currently find debates over rights of nature laws. In some places, culture and values have already shifted to recognize this place for nature within the community and in the law. In other communities this has not yet occurred. Rights of nature laws, and the conversations, debates, and even setbacks surrounding these laws, can help shape cultural understandings on this issue.

III. THE ROLE OF LEGAL TRADITION AND EFFECTIVE LEGAL CHANGE

A. Legal Tradition

The successful development of rights of nature law includes several components. First, there must be a change in the laws and legal processes to recognize and protect the rights of natural entities and ecosystems. This may be done through constitutional amendment, legislation, court decision, public referendum, or other means. Second, there must be a shift in a community's understanding of the human-nature relationship to recognize a more balanced and equitable connection between human beings and nature. While the former is the focus of many rights of nature efforts and is the tangible legal outcome desired in the short-term, the latter is a necessary component of this process to ensure communal acceptance of these new laws, as well as successful compliance and change for the long-term. Successful rights of nature law will consider both the institutional and the cultural, through an understanding of the legal tradition in a place.

Legal tradition is the “set of deeply rooted, historically conditioned attitudes about the nature of law, the role of law in society and the polity, and the proper organization and operation of a legal system in existence within a state.”³⁴ A legal tradition is more than “the institutions and processes that

FROM AMERICA'S SOCIAL MOVEMENTS (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds. 2015) 63, 63–64,

https://www.brennancenter.org/sites/default/files/publications/Legal_Change_Lessons_from_America%27s_Social_Movements.pdf.

33. *Addressing the Social and Cultural Norms That Underlie the Acceptance of Violence Proceedings of a Workshop—in Brief*, THE NAT'L ACADEMIES PRESS (Apr. 2018), <https://www.nap.edu/read/25075/chapter/1>.

34. ZARTNER, *supra* note 16, at 27.

make up a state's legal system."³⁵ Legal systems are a part of legal tradition, but legal tradition is a broader concept that also includes legal culture.

Legal systems are the legal institutions and processes present in a place. Legal institutions include the forms of law that are recognized, the authority granted to different branches of government, and the process by which law is implemented and enforced.³⁶ For example, the U.S. legal system relies on a hierarchical structure of laws. The Constitution is at the top with a very strong system of checks and balances, including a judicial branch with authority to declare acts of the other government branches unconstitutional. Other legal systems might have a more horizontal system of law that concentrates legal authority in a non-judicial branch of government such as a parliament or even in a religious council or customary framework.³⁷

Legal culture, on the other hand, encompasses "a general consciousness of experience of law" shared among community members and includes values, beliefs, traditions, cosmologies, and the underlying view that a community has towards the law and legal processes.³⁸ Legal culture can be understood by looking at legal history, contextual development, and the origins of a country's normative belief systems.³⁹ Factors like whether a society tends to be more communal or more individual also shapes legal culture.⁴⁰ Legal culture centers on community perceptions of appropriate behavioral standards, which encompass the values and beliefs behind a law. In New Zealand, for example, the primary legal system is a secular common law system derived from England.⁴¹ But, the incorporation of indigenous law and Māori norms has had an impact on the overarching legal culture of the country and thus has shaped the development of rights of nature law.

Legal tradition is a framework that shapes how the law is made and implemented.⁴² However, it does more than that: it can help us understand what kind of law might best suit a particular community, and can guide in crafting this law so that it is accepted by that community. This ultimately leads to better compliance and long-term change.⁴³ Consideration of these factors can help explain the different outcomes we can see in the Whanganui and Lake Erie cases and also help provide guidance for future efforts to develop similar kinds of laws.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 28.

42. *Id.* at 27.

43. *Id.*; Dana Zartner, *The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies*, 22 *IND. INT'L & COMPAR. L. REV.* 297, 297–98 (2012).

B. How Legal Tradition Creates Effective Legal Change

Any law is only as good as its ability to be understood, implemented, and enforced.⁴⁴ Sustainable change in the law requires consideration of two things: legal culture and legal institutions.⁴⁵ Change in both is necessary for acceptance and implementation of new legal ideas, such as legal personhood for, or the rights of, nature. Law alone is not always enough. Law does not “offer iron-clad protections,” but the creation of law does often mean that the principle “stands a better chance.”⁴⁶ In other words, simply passing a law recognizing legal personhood for a river is not enough to make that law successful. A law requires community support. However, a law can push the conversation with the community forward and contribute to shifting the underlying values of a community towards internalizing the law in the long-term.

In the case of new rights of nature laws, issues that must be addressed include not only how to implement these new laws, but also how to convince communities that these laws are a good thing. Rights of nature law “has the power to drive long-term change”, but to do so it is necessary to develop the law in a way that is going to encourage and facilitate community acceptance.⁴⁷ In considering the rights of nature movement, it is important to really understand what is being talked about with these new laws in terms of personhood and rights granted and the effects on existing practices. Without these considerations it will not be possible to address the concerns or questions people have about this novel type of law, as well as how to ensure effective implementation. It isn’t enough to simply pass a law. It is also essential to be able to implement that law so that the population to whom it applies can both understand it and abide by it, and that those in charge of implementation have a mechanism by which to do so.

In order for the rights of nature laws to be effective, they must develop from the legal tradition in a particular community.⁴⁸ The movement is not one-size-fits-all. The underlying principles of the rights of nature movement are two-fold. First, it is a legal and policy mechanism for protecting the environment and human rights related to the environment, including indigenous rights.⁴⁹ However, it is also a worldview—a way of thinking

44. Dana Zartner, *Internalization of International Law*, OXFORD RSCH. ENCYC. (Sept. 28, 2020), <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-225?print=pdf>.

45. Zartner, *supra* note 43.

46. Jeremy Lurgio, *Saving the Whanganui*, GUARDIAN (Nov. 29, 2019), <https://www.theguardian.com/world/2019/nov/30/saving-the-whanganui-can-personhood-rescue-a-river>.

47. *Id.*

48. Shelton, *supra* note 14.

49. *Id.*

about the natural world and the human-nature relationship. Successfully realizing the rights of nature within a community, whether on a local- or global-level, requires consideration of both of these facets. We need to understand the cultural context that exists in a place and surrounds the natural entity in question to create the best legal mechanisms, within current structures, to protect the rights of nature. We must also take into account the legal culture and worldviews of a community, their understandings of the human-nature relationship, and the historical treatment of nature, both within and without the law. We need to consider the legal tradition and belief systems present in a place and draw on these to craft legal mechanisms that will work effectively within that community.

IV. AOTEAROA & TE AWA TUPUA

A. The Living River

“The River flows from the mountain to the sea I am the River and the River is me.”⁵⁰

Te Awa Tupua has garnered significant international attention since its enactment in 2017.⁵¹ The legislation recognizes the river as “an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”⁵² Within this recognition are four intrinsic values of the river (Tupua te Kawa).⁵³ These values are ultimately what the guardians of the river will stand for and uphold in any actions taken on the Whanganui’s behalf.⁵⁴

In recognizing the River as an indivisible and living whole, Te Awa Tupua creates for it a legal personality, including all the “rights, powers, duties, and liabilities of a legal person.”⁵⁵ Now codified as national legislation, Te Awa Tupua is on equal legal footing with other laws such as the Resources Management Act.⁵⁶ It “sits alongside other statutes,” but it doesn’t invalidate existing laws.⁵⁷ Correspondingly, other laws cannot

50. *Our Story*, NGĀ TĀNGATA TIAKI O WHANGANUI, <https://www.ngatangatiaki.co.nz/our-story/> (last visited Nov. 29, 2020).

51. Anna M. Gade, *Managing the Rights of Nature for Te Awa Tupua*, EDGEEFFECTS (Oct. 12, 2019), <https://edgeeffects.net/te-awa-tupua/>.

52. Te Awa Tupua Act, s 12.

53. *Id.* s 13.

54. Interview with Gerrard Albert, in Whanganui, N.Z. (Apr. 10, 2019).

55. Te Awa Tupua Act, s 14.

56. Resource Management Act 1991, s 6 (N.Z.).

57. Albert, *supra* note 54.

invalidate consideration of Te Awa Tupua and the interests of the Whanganui.⁵⁸

It is understandable why Te Awa Tupua and the Whanganui River have become the face of the rights of nature movement. The Whanganui is a majestic river, running through a national park, farmland, and out to the Tasman Sea. But it is more than that—it is a dynamic, living part of the ecosystem through which it wends, sustaining local communities in many ways. In recognizing this, the detailed piece of legislation crafted through collaboration of the Māori, the Crown, and other local stakeholders, is a model for the creation of new laws of this sort. While still relatively untested in terms of implementation and enforcement, there is much to be learned from Te Awa Tupua.

B. The Long Road to Te Awa Tupua

Te Awa Tupua is often written about, particularly in the international press, as the development of contemporary legislation codifying the rights of nature.⁵⁹ Most often, there is little mention that the Te Awa Tupua is a culmination of 150 years Māori efforts to correct the wrongs inflicted by colonialism, the Treaty of Waitangi, and decades of government policies and gain Crown acknowledgment of their rights and relationship to the river.

The Treaty of Waitangi came into existence in 1840.⁶⁰ It delineated the relationship between the Māori and the Pākehā (White settlers), as well as determined the sovereignty over the land and resources of New Zealand.⁶¹ While long heralded by the New Zealand government as an example of positive indigenous-settler relationships, the treaty, for the Māori people, has been a point of contention and a mechanisms used to divest them of their lands, and spiritual and cultural connection to the natural ecosystems of Aotearoa. Beginning in the last third of the 20th century, after decades of efforts by Māori, a slow turnaround by the Crown on this issue began.⁶² This led to the creation of the Waitangi Tribunal and a series of claims, settlements, apologies, and reparations.⁶³ A full discussion of the history surrounding this treaty is outside the scope of this article, but it is important to highlight that from the beginning there were questions concerning the

58. *Id.*

59. See Pecharroman, *supra* note 14, at 7 (describing how the Whanganui River gained legal rights).

60. *Id.*

61. Sandra Morrison & Ingrid L.M. Huygens, *Explainer: The Significance Of The Treaty Of Waitangi*, CONVERSATION, (Feb. 5, 2019), <https://theconversation.com/explainer-the-significance-of-the-treaty-of-waitangi-110982>.

62. *Id.*

63. *Id.*

language of the treaty, the translation of the treaty from English to te reo Māori, and the different understandings of the terms of the treaty that were held between the Māori chiefs and the Crown representatives.⁶⁴ There is even historical evidence of a discussion between William Hobson, Governor of New Zealand and co-author of the treaty, and missionary William Colenso during the February 6, 1840 signing ceremony, where Colenso questioned whether the Māori understanding of the terms of the treaty was the same as that of the Crown.⁶⁵ Hobson admitted that it was not.⁶⁶

One provision in particular, that has been at issue in the decades of debate and protest over the terms of the treaty is Article 2, which states in the English version:

Her majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession....⁶⁷

Records of what the Māori chiefs understood at the time of signing in regard to this provision show that they believed the *Rangatiranga* and the mana of the land remained with the Māori peoples:

To Māori signing the Treaty, its confirmation of Rangatiranga was undoubtedly crucial, ‘Rangatiranga’ is a complex word for which there is no exact English equivalent (‘possession’ is the word in the English text). In 1840, it stood for Māori authority and autonomy. ... Māori no doubt thought that the mana of the land – the chiefs’ authority over its resources and their allocation – would be retained....⁶⁸

This, of course, was not how the Crown interpreted the provisions of the treaty.⁶⁹ In the view of the government, the Māori ceded control over their lands and resources, and the government was free to dispose of them in any

64. See generally CLAUDIA ORANGE, *THE STORY OF A TREATY* (2nd ed, Bridget Williams Books 2013) (discussing the history, language, and issues surrounding the Treaty of Waitangi).

65. *Id.* at 28.

66. *Id.*

67. *Id.* at 39.

68. *Id.* at 44.

69. See *The Story of the Treaty: Part 2*, STATE SERV. COMM’N 21(2005), https://nzhistory.govt.nz/files/documents/The_Story_Part_2.pdf (describing the original intent of interpretation of the Crown).

manner they saw fit. Over time, the legacy of the Treaty of Waitangi led to the marginalization of the Māori population, though perhaps not as significantly as found in fellow former British colonies like Canada, Australia, and the United States.⁷⁰

The Māori, however, soon began to protest the terms of the Treaty of Waitangi and the corresponding impacts of Crown policies on their use of, and connection to, their lands.⁷¹ In the case of the Whanganui River, petitions to the New Zealand Parliament to regain *Rangatiranga* with the river began as early as the 1870s.⁷² It continued until Parliament finalized the Deed of Settlement in 2014, and the Te Awa Tupua legislation passed in 2017.⁷³ During this 140-plus year period, Māori efforts included:

The pursuit of one of the longest running cases in New Zealand legal history concerning the ownership of the bed of the River between 1938 and 1962; litigation concerning the operation of, and diversion of waters by, the Tongariro Power Scheme; claims to, and a report in 1999 from, the Waitangi Tribunal; and extensive efforts in negotiation with the Crown over a long period.⁷⁴

The Whanganui River and corresponding recognition of the Māori's relationship with the river was also part of one of the longest protests in New Zealand's history. In 1995, a 79-day occupation of Pakaitore (Moutoa Gardens) occurred in Whanganui, with protesters, comprised of members of many local hapū, who sought to regain control over their traditional spaces, including the river.⁷⁵

These actions had an effect and led to the opening of different negotiations between Māori communities and the Crown. Discussions about

70. Dominic O'Sullivan, *Why the Indigenous in New Zealand Have Fared Better Than Those in Canada*, CONVERSATION (Oct. 15, 2017), <https://theconversation.com/why-the-indigenous-in-new-zealand-have-fared-better-than-those-in-canada-84980>; *Why New Zealand's Māori do Better than Australia's Aboriginals*, ECONOMIST (Dec. 1, 2018), <https://www.economist.com/international/2018/12/01/why-new-zealands-maori-do-better-than-australias-aboriginals>.

71. ORANGE, *supra* note 64.

72. *Innovative Bill Protects Whanganui River with Legal Personhood*, N.Z. PARLIAMENT (Mar. 28, 2017), <https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/>.

73. Treaty Settlement Ruruku Whakatupua Te Mana O Te Awa Tupua, Iwi-N.Z., (Aug. 5, 2014), <https://www.govt.nz/assets/Documents/OTS/Whanganui-Iwi/Whanganui-River-Deed-of-Settlement-Ruruku-Whakatupua-Te-Mana-o-Te-Awa-Tupua-5-Aug-2014.pdf>.

74. *Id.*; See also WHANGANUI RIVER MAORI TR. BD., THE WHANGANUI RIVER REPORT 195-232 (1999), <http://www.wrmtb.co.nz/pages/claim.html> (explaining the history of the legal dispute over ownership of Whanganui Riverbed).

75. *Moutoa Gardens Protest*, NEW ZEALAND HISTORY, <https://nzhistory.govt.nz/media/photo/moutoa-gardens-protest> (last visited Nov. 29, 2020).

the Whanganui were part of this process and led to, after decades of protests and social movements, the creation of Te Awa Tupua.

C. What does Te Awa Tupua Say?

The passage of the Te Awa Tupua (Whanganui River Settlement Agreement 2017) Act did not happen overnight. Nor was it drawn up on a whim. This legislation, with its recognition of values and legal personhood of the Whanganui River, is the culmination of years of efforts by the local Māori to regain what was lost to them in 1840.

The legislation, which was finalized and received Crown Assent on March 30, 2017, is comprised of two main sections.⁷⁶ The first of these, and the section on which this article focuses, centers on the values and personhood of the Whanganui River and the institutional frameworks created to manage the implementation and enforcement of this legislation.⁷⁷ The second focuses on apology and reparations under Treaty of Waitangai negotiations.⁷⁸

In the first section of the Te Awa Tupua legislation there are a number of key subparts, some focusing on the values and living nature of the River, and others establishing the representative frameworks that will ensure the protection of these values and rights.⁷⁹ These two parts of the legislation roughly correspond to the legal culture and legal institution components of legal tradition described in the previous section, both of which, as mentioned, are necessary for effective legal change and community acceptance.

It is important to understand what Te Awa Tupua actually says regarding the River and what mechanisms are included in the legislation to ensure its effectiveness. Much of the recent news about this new law gives the impression that it simply grants rights to the Whanganui and provides punishment for those who violated those rights, but there is so much more to it than that.⁸⁰ The care, collaboration, and detail with which Te Awa Tupua was drafted make it a leading example of the rights of nature law. This is very different from the way in which the Lake Erie Bill of Rights was written, which was one of the challenges that the LEBOR faced.

76. Te Awa Tupua Act.

77. *Id.* ss 3–68.

78. *Id.* ss 69–128; ORANGE, *supra* note 64.

79. *Id.* ss 3–68.

80. See generally Kennedy Warne, *A Voice For Nature*, NAT'L GEO. (Apr. 2019), <https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/> (explaining in the new legislation, the Crown issued an apology for its historical wrong-doing, acknowledging that it breached the treaty, undermined the ability of Whanganui tribes to exercise their customary rights, and responsibilities in respect of the river, and compromised their physical, cultural, and spiritual well-being).

D. Legal Status of the River

The text of the legislation recognizes that: “Te Awa Tupua is an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements.”⁸¹

The legislation goes on to state, in one of its most oft-quoted sections that:

Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.⁸² The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of and in the name of, Te Awa Tupua, in the manner provided for in this Part⁸³

These provisions both codify the legal personhood of the river, as well as define what is encompassed in this concept of personhood. They also provide for the mechanism by which the River will be represented in its personhood through Te Pou Tupua.

E. Values of the River

As members of Ngā Tāngata Tiaki, the body responsible for supporting the care of the river, are careful to point out, the recognition codified into the legislation is not just about legal personhood and protections, it is also about publicly recognizing the Whanganui River for the living entity that the Māori have always known it to be.⁸⁴ This is encompassed in the River’s four values (Tupua te Kawa).⁸⁵

The first of these values states that the “River is the source of spiritual and physical sustenance. . . that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.”⁸⁶ While this value recognizes the “inalienable relationship of responsibility of hapū and iwi and the River,” it is not exclusive. It does not say that the Māori are the only ones with such

81. Te Awa Tupua Act, s 12.

82. *Id.* s 14, subs 1.

83. *Id.* s 14, subs 2.

84. Albert, *supra* note 54.

85. Linda Te Aho, *Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River*, MĀORI L. Rev. (2014).

86. Te Awa Tupua Act, s 13, subs a.

a connection to the River, but that their connection is cultural, historical, and fundamental and therefore careful consideration must be paid.⁸⁷

The second value brings forward the understanding that the “great River flows from the mountains to the sea,” and recognizes that “Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.”⁸⁸ This value is designed to ensure that, even when all the different stakeholders along the River have a voice, the underlying consideration in any decision is the River in its entirety.⁸⁹

The third value codifies the now famous statement, “I am the River and the River is me,” which means the “iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.”⁹⁰ This does not mean that the Māori are the only ones who have a relationship to the River, rather it recognizes that their relationship is longstanding and deep, and therefore they have an important role in any actions involving the River.⁹¹

Finally, the fourth value recognizes “the small and large streams that flow into one another form one River,” highlighting that “Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.”⁹² These many elements work together for the health of the River, which “becomes a common obligation” of all members of the community.⁹³

These values together reflect the beliefs and normative practices of the Māori, who recognize the River as an ancestor that should be accorded the same respect, protection, and love of any ancestor. It is these values that provide the cultural support for this legislation and create the understanding of the relationship between human beings and the natural world that is necessary for successfully recognizing the rights of nature. As stated by Gerrard Albert, lead negotiator for the Whanganui Iwi and Chair of Ngā Tāngata Tiaki o Whanganui Trust and recently appointed Chair of Te Kōpuka nā Te Awa Tupua,⁹⁴ regarding the river’s values:

87. Albert, *supra* note 54.

88. Te Awa Tupua Act, s 13, subs b.

89. Albert, *supra* note 54.

90. Te Awa Tupua Act, s 13, subs c.

91. Albert, *supra* note 54.

92. Te Awa Tupua Act, s 13, subs d.

93. *See id.* (“Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.”).

94. *See* Te Awa Tupua Act, sch 4, cl 3 (requiring appointment of a chairperson at the first meeting of each term of Te Kōpuka); *See generally id.* ss 29–32 (explaining the nature, purpose, functions, general powers, and membership of Te Kōpuka).

[W]e put those in because we wanted to have the community understand our indigenous values . . . Not in a way that they necessarily have to uphold them in the exact way that we do, but that they recognize that there is validity and power to those values as a community. That's been real change.⁹⁵

These four values reflect the recognition the Māori iwi of the region have always accorded the River.⁹⁶ The codification of the values into the Te Awa Tupua legislation is important because it “provides an acknowledgment of a common view of the river,” which serves as a framework for the rest of the legislation.⁹⁷ This “really does rely on the general community having the capacity to recognize that the river is both physical and spiritual.”⁹⁸

F. Legal Framework to Uphold the Law and Protect the River

The recognition of the rights, values, and legal personhood of the River is monitored by a number of institutional entities established through the legislation. These include the Guardians of the River (Te Pou Tupua), as well as both an advisory group and a strategy group.⁹⁹

1. Te Pou Tupua

Te Pou Tupua is the “human face of the Te Awa Tupua and act[s] in the name of Te Awa Tupua,” and “has full capacity and all the powers reasonably necessary to achieve its purpose and perform and exercise its functions, powers, and duties in accordance with [Te Awa Tupua].”¹⁰⁰ The functions of Te Pou Tupua include speaking on behalf of the River; upholding the values of the River; promoting the health and well-being of the River; performing landowner functions on behalf of the River; and “any other action reasonably necessary to achieve its purpose and perform its functions.”¹⁰¹ In carrying out these functions, Te Pou Tupua must “[a]ct in the interests of Te Awa Tupua and consistently with Tupua te Kawa,” must develop appropriate engagement and reporting mechanisms for the iwi and hapū with interests in the

95. Albert, *supra* note 54.

96. *Id.*

97. *Id.*

98. *Id.*

99. See Te Awa Tupua Act, ss 27–33 (N.Z.) (creating the advisory group, Te Karewao, and strategy group, Te Kōpuka.); *The Rise of the Rights of Nature*, RAPID TRANSITION ALL. (Mar. 11, 2019), <https://www.rapidtransition.org/stories/the-rise-of-the-rights-of-nature/>.

100. Te Awa Tupua Act, s 18, subs 2–3.

101. *Id.* s 19, subs 1.

Whanganui River “as a means of recognising the inalienable connection” with the River, and develop engagement and reporting functions for other interested and relevant parties.¹⁰²

There are two representatives of the River that make up Te Pou Tupua. One is nominated by the Crown and one is nominated by the iwi with interests in the Whanganui River.¹⁰³ There should be consultation among the parties on the nominations and nominees must possess the “mana, skills, knowledge, and experience” necessary to “achieve the purpose and perform the functions of Te Pou Tupua.”¹⁰⁴ The first two guardians of Te Pou Tupua are Dame Tariana Turia and Mr. Turama Hawira.¹⁰⁵ While still relatively untested, this appointment structure is a “relatively innovative way to hold the Crown to account,” which has not always been easy to do.¹⁰⁶

2. Advisory Board and Strategy Group

In addition to Te Pou Tupua, Te Awa Tupua creates a number of other groups to allow for participation by all members of the community. The first of these is Te Karewao, which is an advisory group “established to provide advice and support to Te Pou Tupua in the performance of its functions.”¹⁰⁷ The advisory board consists of three members: one appointed by Te Pou Tupua, one appointed by iwi with interests in the Whanganui River, and one appointed by relevant local authorities.¹⁰⁸ Te Karewao “in providing advice and support to Te Pou Tupua ... must act in the interests of Te Awa Tupua” and consistently with the values of the River.¹⁰⁹

The third group is Te Kōpuka nā Te Awa Tupua, which is a strategy group for Te Pou Tupua.¹¹⁰ Representatives of Te Kōpuka include “persons and organisations with interests in the Whanganui River, including iwi, relevant local authorities, departments of State, commercial and recreational users, and environmental groups.”¹¹¹ The purpose of this group is to “act collaboratively to advance the health and well-being of Te Awa Tupua” through a number of functions, including: develop and approve the strategy (Te Heke Ngahuru) for the River; monitor its implementation; provide

102. *Id.* s 19, subs 2.

103. *Id.* s 20, subs 1–2.

104. *Id.* s 20, subs 3–5.

105. Christopher Finlayson & Gerrard Albert, *First Te Pou Tupua Appointed*, SCOOP INDEP. NEWS (Sept. 4, 2017), <https://www.scoop.co.nz/stories/PA1709/S00132/first-te-pou-tupua-appointed-4917.htm>.

106. Albert, *supra* note 54.

107. Te Awa Tupua Act, s 27, subs 1.

108. *Id.* s 28.

109. *Id.* s 27, subs 2.

110. *Id.* s 29, subs 1.

111. *Id.* s 29, subs 2.

periodic review of the strategy; and provide a forum for discussion of issues related to the health and well-being of the River.¹¹² Members of Te Kōpuka include one member appointed by the guardians; up to five members appointed by iwi with interests in the River; up to four members appointed by the relevant local authorities; and one member each appointed by the Director-General of Conservation, the New Zealand Fish and Game Council, Genesis Energy Limited, environmental and conservation interests, tourism interests, recreational interests, and the primary industries sector.¹¹³ This is designed to be a collaborative body to provide strategy for interests in the Whanganui, while upholding the River's health, well-being, and values.

3. Scope and Implementation of Te Awa Tupua

The legal effect of the Whanganui River legislation applies to “persons exercising or performing a function, power, or duty” under Te Awa Tupua.¹¹⁴ The reach of the legislation is not unlimited, however. One of the most important clauses inserted in the legislation in terms of gaining broad public acceptance is that it does not infringe on any existing rights of use regarding the River. The legislation states:

Unless expressly provided for by or under this Act, nothing in this Act— (a) limits any existing private property rights in the Whanganui River; or (b) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, water; or (c) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, wildlife, fish, aquatic life, seaweeds, or plants; or (d) affects the application of any enactment.¹¹⁵

While this provision of the legislation may reduce the immediate effectiveness of the legislation in protecting the river from degradation or pollution, it is a key factor in fostering acceptance by the community. As discussed below in relation to the Lake Erie Bill of Rights, blanket statements of liability, even for those who have been using Lake Erie for decades, were part of what led to a decision that the LEBOR was unconstitutional.¹¹⁶

112. *Id.* s 29, subs 3; *See id.* s 30 (outlining the functions of Te Kōpuka nā Te Awa Tupua).

113. *Id.* s 32, subs 1.

114. *Id.* s 15.

115. *Id.* s 16.

116. Tom Henry, *Lawsuit Filed Against Lake Erie Bill of Rights*, BLADE (Feb. 27, 2019), <https://www.toledoblade.com/local/environment/2019/02/27/lawsuit-filed-against-lake-erie-bill-of-rights-district-court-lebor/stories/20190227090>.

4. Recognition of Te Awa Tupua in the Legal Hierarchy

A final key component of the Te Awa Tupua legislation is that it is national legislation on par with New Zealand's overarching environmental law, the Resource Management Act of 1991.¹¹⁷ This means, when addressing issues pertaining to the rights of the Whanganui, all of the law must be considered in its entirety.

This sets up a vastly different scenario than what is found in other states, where rights of nature law either is the result of a court decision, which then needs to be implemented, or part of a legal push that is subject to a higher law, such as in the case of the Lake Erie Bill of Rights. The provisions of Te Awa Tupua must be read alongside, and considered as important as, provisions of any other law. Correspondingly, other legislation, when potentially affecting the Whanganui River, must follow the consultation procedures outlined in Te Awa Tupua.¹¹⁸

5. Implementation and Enforcement

Even with the years of negotiation, the overall good working relationship between the Māori and the Crown during the drafting, and the general support of the public, the real test of Te Awa Tupua will be its successful implementation and enforcement. Having only been in existence for three years, there has not yet been much time to test the authority of this legislation. There have been a few cases that have come up, however, regarding the use of the Whanganui River that have triggered the legislation's consultation procedures with Te Pou Tupua and provide guidance for the future.

One of the first situations to emerge pertained to the Papaiti abutment for the Upokongaro Cycle Bridge project, which required the removal of power lines and the addition of a bridge over the river.¹¹⁹ Under the terms of Te Awa Tupua "[n]avigation by the public and existing river structures in or above the bed of the river don't need Te Pou Tupua involvement – but any new structure or activity, such as removing power lines, does."¹²⁰ In the case of the power lines, "[a]s effective landowner," Te Pou Tupua must "be made aware of Powerco's measures for public safety as it removed the powerlines" and the company is required to "work with any relevant local hapū."¹²¹ The line removal was delayed twice due to the lack of this required notification,

117. Resource Management Act.

118. Te Awa Tupua Act, s 17.

119. *Whanganui River Work Triggers Te Awa Tupua Legislation*, WHANGANUI CHRON. (Mar. 15, 2019), <https://www.nzherald.co.nz/whanganui-chronicle/news/whanganui-river-work-triggers-te-awa-tupua-legislation/VOU5EVLN457XJ77VQD7R7EEHTU/>.

120. *Id.*

121. *Id.*

but the appropriate consultations finally occurred and the work was able to proceed.¹²²

The Upokongaro Cycle Bridge is part of the Mountain to Sea cycling trail that runs from Tongariro National Park to the Tasman Sea, covering 200 kilometers of trails.¹²³ Prior to beginning construction, the new bridge required a resource consent variation as the height of the Papaiti abutment needed to be increased by 800mm.¹²⁴ According to the general property manager of the Whanganui District Council, the need to increase the height of the abutment is “to reduce risks to the structure from climate change.”¹²⁵ The Whanganui District Council had to apply to the Horizons Regional Council for a variance to the resource consent, and that that then should have gone to consultation “under both the Resource Management Act and the Te Awa Tupua (Whanganui River Claims Settlement) Act.”¹²⁶ The requisite consultation with Te Pou Tupua was not sought at first, but this was later remedied and, according to Leighton Toy, the “parties involved in the consultation want to ensure we establish a really good, agreed process under this relatively new legislation.”¹²⁷ On March 25, 2020, hours before New Zealand went into COVID-19 lockdown, the new cycle bridge was finally rolled into place across the river.¹²⁸

A future scenario that will likely test the effective functioning of Te Awa Tupua concerns the diversion of the Whanganui River by Genesis Power Company.¹²⁹ Genesis Power “operates the Tongariro Power Scheme that provides 4% of New Zealand’s energy.”¹³⁰ “The hydropower system diverts the water of the Whanganui River and five of its upper tributaries, including the Mangatepopo.”¹³¹ The intake structure “draws 75% of the water, leaving 25% to flow back into the river.”¹³² The intake is just outside the park, 15

122. *Id.*

123. *Mountains to Sea - Ngā Ara Tūhono*, VISIT RUAPEHU (last visited Dec. 8, 2020), <https://www.visitruapehu.com/things-to-see-and-do/cycling-and-mountain-biking/mountains-to-sea-ngā-ara-tūhono/>

124. WHANGANUI CHRON., *supra* note 119.

125. *Id.* (quoting Whanganui District property general manager Leighton Toy).

126. Laurel Stowell, *Upokongaro Cycle Bridge Awaits Variation to Consent*, WHANGANUI CHRON. (June 25, 2019), <https://www.nzherald.co.nz/whanganui-chronicle/news/upokongaro-cycle-bridge-awaits-variation-to-consent/Q4C744KPROPNRZKWLQAZCXJAX4/>.

127. WHANGANUI CHRON., *supra* note 119.

128. Laurel Stowell, *Finally! Upokongaro Cycle Bridge Launched Across Whanganui River*, WHANGANUI CHRON. (Mar. 25, 2020), <https://www.nzherald.co.nz/whanganui-chronicle/news/finally-upokongaro-cycle-bridge-launched-across-whanganui-river/JS265O2HQZAKRDAXWYNNT2D2N1/>.

129. See Michelle Bryan, *Valuing Sacred Tribal Waters Within Prior Appropriation*, 57 NAT. RES. J. 139, 173–74 (2017) (discussing the Environmental Court’s determination on non-tribal water uses and the iwi).

130. Lurgio, *supra* note 46.

131. *Id.*

132. *Id.*

kilometers from the stream's source and 15km from its confluence with the Whanganui."¹³³ These resource consents are in place for another 20 years.¹³⁴

Reflecting the terms of Te Awa Tupua, many believe that the power scheme causes environmental, spiritual, and cultural damage to the river and the Māori “categorically oppose the extraction of their river’s water.”¹³⁵ Given this, an extension of Genesis Power’s rights beyond the current agreement would trigger consultation under Te Awa Tupua and it is likely the concessions would not be continued.¹³⁶ Te Awa Tupua, however, while giving the river these newfound rights, does not “reverse pre-existing laws, including the consent granting Genesis the rights to divert water for hydroelectric power until 2039.”¹³⁷

G. What does Te Awa Tupua Mean for the Rights of Nature?

The questions that arise with all the rights of nature laws being enacted, including Te Awa Tupua, are how are they going to work in practice, and how will they be interpreted and enforced? In the case of Te Awa Tupua, under the law, which is grounded in the Māori cultural, spiritual and historical worldview, the legal personhood provides protection in that the River, in essence, must be part of the discussion. Any new undertaking that might involve the Whanganui must include the river through its representative body, Te Pou Tupua, as well as consultation and participation of other stakeholders.

Te Awa Tupua, however, is not just about adopting new legislation that provides a requirement of consideration of the life and values of the river as an important living entity in its own right. This law also promotes shifts in the view of the human-nature relationship and the place of nature in our worldview. Historically, the “Western” worldview, shared by many people in the developed, industrial democracies, tends to focus on nature as nothing more than a commodity—something that is there for the use of human beings as we see fit.¹³⁸ This is true as well for New Zealand where the “Pākehā view was to see the land as having a utilitarian use and in New Zealand that meant farming.”¹³⁹ Traditionally, much environmental law in these types of locales

133. *Id.*

134. *Id.*

135. *Id.*

136. Te Awa Tupua Act, s 69, subs 5.

137. Lurgio, *supra* note 46.

138. Simon Day, *If the Hills Could Sue: Jacinta Ruru on Legal Personality and a Māori Worldview*, SPINOFF (Nov. 27, 2017), <https://thespinoff.co.nz/atea/atea-otago/27-11-2017/if-the-hills-could-sue-jacinta-ruru-on-legal-personality-and-a-maori-worldview/>.

139. *Id.*

focuses on how much allowable damage or pollution can be done, rather than on how much protection is owed to a particular natural space or resource.

A key point of significance of Te Awa Tupua is that this legislation enshrines into law the Maori cosmology, which encapsulates a different way of thinking about nature. It is hard to overemphasize how important a step this is. As stated by Gerrard Albert, one of the key negotiators of the legislation: “For the first time, a framework stems from the intrinsic spiritual values of an indigenous belief system.”¹⁴⁰

While for the Māori who have long lived in the presence of the river this has always been the view of the river’s role and its relationship with other living beings, for many others this is a new approach and one that might be hard for some to accept. In conversations with citizens of Whanganui in April 2019, there were a number of people who commented on how the idea of the River having rights “just doesn’t make sense.”¹⁴¹ And it can be hard to imagine, in the absence of many concrete examples, how Te Awa Tupua will alter the framework of decision-making along the river. But, as often happens, the change in the law may bring about change in the approach everyone in the community takes towards the River. Sometimes an external push from a law already enacted is just what people need to reconsider how they view the world.

This is clearly already happening for some. While there are those still struggling to accept the idea of personhood for the River, there were more community members who commented that all the discussion leading up to the Te Awa Tupua legislations had, in fact, changed their view of nature and the way they think about their relationship to the river. When the river is taken into account—and thought about in the context of its four underlying values—it impacts the communal view of how activities that involve the river should be considered. These new perspectives have not been tested yet, of course, with a contentious issue involving the river. But, the fact that Te Awa Tupua is causing people to think about their own relationship to their community, including the river, is extremely important. The key change has been the lens through which community and government, both central and local, view the river and its needs.¹⁴²

V. TOLEDO AND THE LAKE ERIE BILL OF RIGHTS

While Te Awa Tupua and the realization of the legal personality and intrinsic values of the Whanganui River has had a generally positive reception, the same cannot be said for the Lake Erie Bill of Rights (“LEBOR”

140. Lurgio, *supra* note 46.

141. Interview with Citizens of Wanganui, N.Z. (Apr. 2019).

142. Albert, *supra* note 54.

or “the Bill”).¹⁴³ LEBOR was not the first attempt to introduce rights of nature-style laws in the United States. One of the earliest efforts was in Tamaqua Borough, Pennsylvania, where, in September 2006, the town council voted on an ordinance that would recognize and enforce “the rights of residents to defend natural communities and ecosystems.”¹⁴⁴ Since then, a number of other municipalities have drafted variations on Tamaqua’s ordinance, including Pittsburg, Pennsylvania; Exeter, New Hampshire; and Lafayette, Colorado.¹⁴⁵

A number of indigenous peoples in the U.S. have also codified their longstanding cosmologies about nature into their tribal laws.¹⁴⁶ In these cases, as with the Māori in New Zealand, these laws are not something new, but rather are putting into written legal form the beliefs regarding the place of nature in the world that have been long-held by the indigenous community. One example is the Ho Chunk Nation in Wisconsin, which enshrined the rights of nature into their law stating: “Ecosystems, natural communities, and species within the Ho-Chunk Nation territory possess inherent, fundamental, and inalienable rights to naturally exist, flourish, regenerate, and evolve.”¹⁴⁷ In neighboring Minnesota, in November 2018, the White Earth Band recognized the rights of Manoomin (wild rice), a culturally important food for the Anishinaabe people of Minnesota that is in danger from a proposed new pipeline.¹⁴⁸ And in May 2019, the Yurok Tribe in Northern California recognized the rights of the Klamath River.¹⁴⁹

The status of these existing laws referring to the rights of nature is in constant flux.¹⁵⁰ While for the indigenous communities, the rights are recognized within tribal lands, the question of those resources that span tribal

143. Michael Bratton, *Lake Erie Bill of Rights Backers Plan to Fight Court Ruling Against it*, ABC ACTION NEWS (Mar. 2, 2020), <https://www.13abc.com/content/news/Lake-Erie-Bill-of-Rights-backers-plan-to-fight-court-ruling-made-against-it-568424791.html>.

144. *Tamaqua Borough, Pennsylvania*, CMTY. ENV’T LEGAL DEF. FUND (Aug. 31, 2015), <https://celdf.org/2015/08/tamaqua-borough/>.

145. CMTY. ENV’T LEGAL DEF. FUND, *supra* note 8.

146. *Rights of Nature*, HONOR THE EARTH (last visited Dec. 8, 2020), http://www.honorearth.org/indigenous_rights; *Press Release: Ho-Chunk Nation General Counsel Approves Rights of Nature Constitutional Amendment*, CMTY. ENV’T LEGAL DEF. FUND (Sept. 18, 2016), <https://celdf.org/2016/09/press-release-ho-chunk-nation-general-council-approves-rights-nature-constitutional-amendment/>; John Ahni Schertow, *The Yurok Nation Just Established the Rights of the Klamath River*, CULTURAL SURVIVAL (May 21, 2019), <https://www.culturalsurvival.org/news/yurok-nation-just-established-rights-klamath-river>.

147. CMTY. ENV’T LEGAL DEF. FUND, *supra* note 146.

148. Joseph T. Bowen, *White Earth Recognizes the Rights of Wild Rice, Officials Hope Ordinance Bolsters Challenge to Line 3*, BEMIDJI PIONEER (Feb. 20, 2019), <https://www.bemidjipioneer.com/4574191-white-earth-recognizes-rights-wild-rice-officials-hope-ordinance-bolster-challenge-line-3>.

149. Schertow, *supra* note 146.

150. CMTY. ENV’T LEGAL DEF. FUND, *supra* note 8.

and non-tribal territories remains to be seen. Additionally, very few of the situations involving local ordinances have been without complication, and there have been a number of lawsuits filed by governments and corporations against some of these communities.¹⁵¹

It was the effort to enact the Lake Erie Bill of Rights, however, that has garnered the most attention in the United States. Whether this is because Toledo is one of the largest cities to date to try and enact such a law, whether it is because Lake Erie is a shared resource, or whether it is because the opposition by neighboring farmers was so fierce, the effort to pass LEBOR is probably the most well-known attempt in the U.S. concerning rights of nature.¹⁵² The fact that this campaign drew so much attention in itself is important because this has created a conversation around these issues, and there are lessons to be learned from the Lake Erie case that might help the development of rights of nature law in the future.

A. History of the Lake Erie Bill of Rights

The Lake Erie Bill of Rights was the first attempt at a public referendum on such a legal statement of rights for a large, shared body of water.¹⁵³ Lake Erie provides water to over 11 million people, but has increasingly become more polluted and susceptible to toxic algae blooms.¹⁵⁴ In 2014, the level of toxicity in the lake reached such alarming levels that citizens of Toledo were forbidden from drinking the water.¹⁵⁵ In response, a group called Toledoans for Safe Water began organizing a campaign to protect the lake with the

151. Chauncey Ross, *Grant Township Ordered to Pay \$103,000 in Legal Fees*, IND. GAZETTE (Apr. 5, 2019) (discussing a ruling against Grant Township, Indiana, awarding an electrical company \$600,000 of court-related expenses), https://www.indianagazette.com/news/grant-township-ordered-to-pay-103-000-in-legal-fees/article_52694630-57ac-11e9-990a-8fc0d7cf9f0e.html; see also Fendt, *supra* note 23 (reporting a local attorney opted to pull a complaint against the state of Colorado); but see Justin Nobel, *Nature Scores a Big Win Against Fracking in a Small Pennsylvania Town*, ROLLING STONE (Apr. 1, 2020) (discussing Pennsylvania Department of Environmental Protection's decision to revoke a permit for an injection well after seven years of community efforts), <https://www.rollingstone.com/politics/politics-news/rights-of-nature-beats-fracking-in-small-pennsylvania-town-976159/>.

152. *Rights of Lake Erie Recognized in Historic Vote*, CMTY. ENV'T LEGAL DEF. FUND (Feb. 27, 2019), <https://celdf.org/2019/02/rights-of-lake-erie/>.

153. CMTY. ENV'T LEGAL DEF. FUND, *supra* note 8 (“In 2019, Toledo, Ohio, residents adopted the Lake Erie Bill of Rights, following three years of fighting for the right to vote on the measure. It is the first law in the U.S. to secure legal rights of a specific ecosystem.”).

154. Tom Henry, *Lake Erie Bill of Rights Gets Approval from Toledo Voters*, BLADE (Feb. 26, 2019), <https://www.toledoblade.com/local/politics/2019/02/26/Lake-Erie-Bill-of-Rights-gets-approval-from-Toledo-voters/stories/20190226159>; Michael Wines, *Behind Toledo's Water Crisis, a Long-Troubled Lake Erie*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/us/lifting-ban-toledo-says-its-water-is-safe-to-drink-again.html>.

155. Henry, *supra* note 154.

assistance of the Community Environmental Legal Defense Fund.¹⁵⁶ It was not an easy task to even get the bill on the ballot. Originally intended for the November 2018 election, the Lucas County Board of Supervisors refused to place the bill on the ballot, even though it had the requisite signatures.¹⁵⁷ This was followed by first a negative court decision,¹⁵⁸ and then a positive one,¹⁵⁹ which finally allowed the City of Toledo to place the measure on the ballot for the special election.

On February 26, 2019, voters in Toledo, Ohio approved the Lake Erie Bill of Rights. Nine percent of eligible voters cast their ballots in this special election, and of those, 61% voted in favor of the measure.¹⁶⁰ The following day, on February 27, 2019, a lawsuit was filed by Drewes Farm Partnership, LLC (“Drewes” or “the Plaintiff”), claiming the new bill violated its constitutional rights as well as the authority of the State of Ohio and the United States Federal Government.¹⁶¹ One year later, on February 27, 2020, the court agreed, striking down the law in its entirety.¹⁶² While initially indicating an intent to appeal the decision, in May 2020, the City of Toledo voluntarily withdrew its appeal of the ruling for budgetary reasons.¹⁶³

B. What did the Lake Erie Bill of Rights Say?

The Lake Erie Bill of Rights recognized that Lake Erie and the Lake Erie watershed “possess the right to exist, flourish, and naturally evolve.”¹⁶⁴ The Bill further provided that the people of Toledo “possess the right to a clean and healthy environment, which shall include the right to a clean and healthy

156. CMTY. ENV’T LEGAL DEF., *supra* note 8.

157. Matt Reynolds, *Legal Rights for Lake Erie on Ballot in Ohio City*, COURTHOUSE NEWS SERVICE (Feb. 25, 2019), <https://www.courthousenews.com/legal-rights-for-lake-erie-on-ballot-in-ohio-city/>.

158. *State ex rel. Twitchell v. Saferin*, 119 N.E.3d 365, 375–76 (Ohio 2018) (Kennedy, J., concurring).

159. *State ex rel. Maxcy v. Saferin*, 122 N.E.3d 1165, 1172 (Ohio 2018) (“Because the proposed charter amendment was never properly before the board, we cannot say that relators had a clear legal right to their requested relief or that the board had a clear duty to provide it. Therefore, mandamus does not lie against the board, and relators have not sought a writ compelling the city council to submit the proposed charter amendment to the electors by ordinance.”).

160. Henry, *supra* note 154.

161. Henry, *supra* note 116.

162. Tom Henry, *Lake Erie Bill of Rights Ruled Invalid by Judge Zouhary*, BLADE (Feb. 27, 2020), <https://www.toledoblade.com/local/environment/2020/02/27/lake-erie-bill-of-rights-ruled-invalid-judge-jack-zouhary-toledo-lucas-county/stories/20200227155>; Eric Heisig, *Federal Judge Strikes Down Toledo’s Lake Erie Bill of Rights as Unconstitutional, Says Sweeping Law Too Vague*, CLEVELAND: COURTS AND JUSTICE (Feb. 27, 2020), <https://www.cleveland.com/court-justice/2020/02/federal-judge-strikes-down-toledos-lake-erie-bill-of-rights-as-unconstitutional-says-sweeping-law-is-too-vague.html>.

163. Caroline Llanes, *Lake Erie Bill of Rights Appeal Dropped*, MICH. RADIO (May 11, 2020), <https://www.michiganradio.org/post/lake-erie-bill-rights-appeal-dropped>.

164. Kilbert, *supra* note 27.

Lake Erie and Lake Erie ecosystem.”¹⁶⁵ Finally, the Bill recognized both collective and individual rights to self-government by the people of Toledo and to a system of government that protects those rights, along with a statement that all these rights are “self-executing” and enforceable without implementing legislation.¹⁶⁶

Section 2 of the Lake Erie Bill of Right stated that it “shall be unlawful for any corporation or government to violate the rights recognized and secured by this law.”¹⁶⁷ This section goes on to invalidate any permit, license or similar authorization issued to a corporate entity that would violate the rights enumerated in the law.¹⁶⁸

Finally, Section 3 of LEBOR focused on enforcement, stating that any “corporation or government that violates any provision of this law shall be guilty of an offense” and that the City of Toledo or any of its residents may enforce the provisions of the Bill.¹⁶⁹ This section also provided that the rights of Lake Erie may be exercised by either the City of Toledo or a resident or residents of the city and brought before the court in the name of the Lake Erie Ecosystem.¹⁷⁰

Other important principles to note that are included in the Bill are a section that strips corporations of their personhood if they are accused of violation the law,¹⁷¹ the application of the law to all actions regardless of whether a preexisting permit existed,¹⁷² and a statement of severability.¹⁷³ The approximately three-page document concluded with a statement regarding the requirement to repeal of any inconsistent provisions of prior laws.¹⁷⁴

C. The Legal Arguments Made Against LEBOR

Drewes Farm Partnership LLC is an Ohio general partnership with legal personhood status pursuant to Ohio Revised Code Chapter 1776.¹⁷⁵ In their complaint filed before the United States District Court for the Western District of Ohio, Drewes argued that, if enacted, LEBOR would infringe on its constitutional rights, including freedom of speech; equal protection; rights

165. *Id.*

166. *Id.*

167. *Id.* (describing Lake Erie Bill of Rights § 2).

168. *Id.*

169. *Id.* (describing Lake Erie Bill of Rights § 3).

170. *Id.*

171. *Id.* (describing Lake Erie Bill of Rights § 4).

172. *Id.* (describing Lake Erie Bill of Rights § 5).

173. *Id.* (describing Lake Erie Bill of Rights § 6).

174. *Id.* (describing Lake Erie Bill of Rights § 7).

175. Complaint at 3, *Drewes Farm P’ship LLC and State of Ohio v. City of Toledo*, (N.D. Ohio 2019) (No. 3:19-cv-00434-JZ).

of due process; and 5th Amendment protections against vague laws.¹⁷⁶ The lawsuit also claimed that the Bill infringed on state and federal authority over the Lake.¹⁷⁷ It is interesting to note that nowhere in the Drewes's complaint is an issue taken with the recognition of the rights or legal personhood of Lake Erie, *per se*, but rather that the Lake Erie Bill of Rights, infringes on the laws outlined above.¹⁷⁸

The lawsuit focused largely on legal institutions and issues of definition and procedure. The Plaintiff argued that, if enacted, this city law would infringe on both federal and state powers.¹⁷⁹ In terms of the former, Lake Erie is governed by treaty law between the U.S. and Canada on transboundary water resources, and Drewes claimed that LEBOR would infringe upon the U.S. government's authority under these agreements.¹⁸⁰ Unlike some other efforts to provide rights to nature that focus on a single natural entity, LEBOR encompasses an ecosystem, and it is an ecosystem that is not within the jurisdiction of a single entity. Lake Erie is shared by two countries (the U.S. and Canada) and four states (Ohio, Michigan, Pennsylvania, and New York). Under laws governing transboundary water resources, actions taken that might impact the shared body of water need to take into account the interests of all parties sharing the resource.¹⁸¹ Since 1909, governance of Lake Erie has been handled under the Boundary Waters Treaty, which is monitored by the International Joint Commission.¹⁸² Additionally, since 1972 the Great Lakes Water Quality Agreement has outlined the commitment of the U.S. and Canada to protect and restore the shared waters of the Great Lakes.¹⁸³ As the enactment of the Lake Erie Bill of Rights has the potential to impact the interests of Canada and the U.S. Federal Government, opponents of the new law argued that this infringed on the power of the U.S. to engage in foreign relations.¹⁸⁴

The plaintiff also argued that LEBOR was too vague and therefore violated both Drewes Farm's rights of due process and equal protection.¹⁸⁵ LEBOR recognized the right of Lake Erie and its ecosystem to "exist,

176. *Id.*

177. *Id.*

178. *Id.* at 19.

179. *Id.* at 3.

180. *See generally* *Boundary Waters Treaty of 1909*, INT'L JOINT COMM'N, <https://www.ijc.org/en/boundary-waters-treaty-1909> (describing situations where both countries must give notice to the other when proposed actions would impact the water).

181. *Id.*

182. *Id.*

183. Great Lakes Water Quality Agreement, Can.-U.S., Apr. 15, 1972, 36 Stat. 2448.

184. Complaint at 16, *Drewes Farm P'ship LLC and State of Ohio v. City of Toledo*, (N.D. Ohio 2019) (No. 3:19-cv-00434-JZ).

185. *Id.* at 2–f3.

flourish and naturally evolve.”¹⁸⁶ It also gave citizens the right to a clean and healthy environment, including a clean Lake Erie, and provided them with the ability to enforce these rights by holding corporations like Drewes liable.¹⁸⁷ For none of these provisions, however, is much more detail provided; none of the key terms or concepts were defined and it was not made clear what kinds of actions could be held to violate the rights that LEBOR was providing for the Lake. This lack of detail as to what the rights enumerated mean, and what would constitute a violation, was argued to be contrary to the prohibition against law that is too vague under the 5th Amendment.¹⁸⁸ Additionally, the lawsuit argued that LEBOR violated the farm’s rights to equal protection under the 14th amendment since only corporations and governments are singled out as potential defendants.¹⁸⁹

D. The Judgment of the Court

Arguments in this case were heard in late January 2020 in the U.S. District Court for the Northern District of Ohio (Western Division) in front of Judge Jack Zouhary.¹⁹⁰ The decision by Judge Zouhary was rendered on February 27, 2020, one year to the date that Drewes Farms filed the lawsuit.¹⁹¹

Judge Zouhary focused on two primary points in his decision striking down the Lake Erie Bill of Rights.¹⁹² First, he held that LEBOR violated Drewes Farm’s right to due process under the U.S. Constitution because the language of LEBOR was too vague and does not provide clear guidance on to whom the law applies and when such application is triggered.¹⁹³ An essential criterion for any law’s legality is that it can be understood and followed by “persons of common intelligence.”¹⁹⁴ The judge applied this ruling to the substantive provisions of the Lake Erie Bill of Rights, such as the those providing for the right of the lake to “exist, flourish, and naturally evolve” and the “right to a clean and healthy environment.” He also found

186. Kilbert, *supra* note 27, §1.

187. Toledo, No. 3:19-cv-00434-JZ at 9.

188. *Id.* at 16.

189. *Id.* at 16–17.

190. *Press Release: Lake Erie Bill of Rights and Rights of Nature Argued in US Federal Court*, CMTY. ENV’T LEGAL DEF. FUND (Feb. 6, 2020), <https://celdf.org/2020/02/press-release-lake-erie-bill-of-rights-and-rights-of-nature-argued-in-us-federal-court/#:~:text=TOLEDO%2C%20OH%3A%20Last%20week%2C,resIdents'%20right%20to%20clean%20water.&text=This%20is%20the%20first%20time,in%20a%20U.S.%20federal%20court>.

191. *Drewes Farms P’ship v. City of Toledo*, 441 F. Supp. 3d 551 (N.D. Ohio 2020).

192. *Id.* at 554–55.

193. *Id.* at 555–57.

194. *Id.* at 555.

that, in its entirety, the Bill was “impermissibly vague.”¹⁹⁵ Reviewing the case law on the issue of vagueness, Judge Zouhary found the rights enumerated in LEBOR “to be even less clear” and highlighted this lack of clarity in terms of what conduct might infringe on the rights of Lake Erie and its watershed; how would one render a decision on this; as well as what determines the line between a clean and healthy environment and one that is unclean and unhealthy.¹⁹⁶ Judge Zouhary also held that the defendant’s argument that the passage of LEBOR was within the Toledoans’ right to “self-government in their local community” was “impermissibly vague” as well.¹⁹⁷

Finally, the judge held that, given the substantive provisions are void for vagueness, the entirety of LEBOR must be struck down.¹⁹⁸ Supporters of LEBOR argued that based on the severability provision found in the Bill, even if parts of the law were struck down, the rest must stand. Judge Zouhary disagreed, holding that once the “vague rights are stripped away, the remainder is meaningless.”¹⁹⁹ In the end, the Judge stated:

Frustrated by the status quo, LEBOR supporters knocked on doors, engaged their fellow citizens, and used the democratic process to pursue a well-intentioned goal: the protection of Lake Erie. As written, however, LEBOR fails to achieve this goal.²⁰⁰

While the City of Toledo originally filed an appeal in this case, it was subsequently withdrawn.²⁰¹

VI. REALIZING THE RIGHTS OF NATURE: LESSONS TO LEARN FROM TE AWA TUPUA & LEBOR

In the past decade, efforts at realizing the rights of nature have grown around the world, including the cases presented here in New Zealand and the United States. As outlined in the previous sections, however, the results in these two countries are very different. The question then becomes: why do we see such vastly different outcomes in these two cases? In New Zealand and the U.S., the underlying legal systems stem from the same source and are grounded in the common law. In both cases, the “nature” at issue touches many different communities that use the body of water in question in

195. *Id.* at 556.

196. *Id.*

197. *Id.* at 554.

198. *Id.*

199. *Id.* at 557.

200. *Id.* at 557–58.

201. Llanes, *supra* note 163.

different ways. Yet, the outcomes are so different; we must ask why. Why is the Whanganui River legislation held up around the world as a model of rights of nature law, and in the case of the Lake Erie Bill of Rights, the law was struck down in its entirety only a year after its passage?

This section strives to answer these questions by highlighting some of the key lessons we can learn from these two cases. Drawing on the importance of legal tradition, and the consideration of both legal culture and legal institutions highlighted earlier, there are a number of considerations to take into account for future efforts at realizing the rights of nature.

A. Lesson 1: The Importance of Legal Culture

The importance of recognizing and considering legal culture in efforts to pass rights of nature law is the first lesson to be drawn from the cases presented here. As legal culture is reflective of the beliefs and values of a community, it provides indicators of how that community may respond to new laws, particularly laws presenting novel ideas that require a fundamental shift in worldview. In the case of the rights of nature, it is important to consider the fundamental connection between humans and nature that exists in a particular place, how this connection has been implemented into the law, and whether it leaves room for change. While it is possible to enact legal provisions without grounding the law in communal values and understandings of the world, the law is much more likely to be effective if this legal culture is reflected in its provisions.

In New Zealand, the legal culture certainly incorporates aspects of the secular common law view of law as the mechanism for the protection of individual rights, including property rights, and the idea that nature is a commodity. However, other factors at work in New Zealand's legal culture mitigate the impact of these common law tendencies.

First is the recognition of Māori norms and values within the national legal framework. This is fundamental when considering rights of nature law, as the origins of these legal principles are found in Māori cosmologies. For the Māori, the Whanganui River is an ancestor and a living entity as integral to the ecosystem as any other, and therefore as deserving of respect and life. This is tied to *Kaitiakitanga*, the Māori worldview that means guardian, protection, or preservation.²⁰² *Kaitiakitanga* holds that there is “a deep kinship between humans and the natural world. All life is connected. People are not superior to the natural order; they are part of it.”²⁰³

202. Te Ahukaramū Charles Royal, *Story: Kaitiakitanga – Guardianship and Conservation*, TE ARA, <https://teara.govt.nz/en/kaitiakitanga-guardianship-and-conservation> (last visited Dec. 8, 2020).

203. *Id.*

Te Awa Tupua is deeply grounded in *Kaitiakitanga* and recognizes the values and life of the River, both in its own right and as part of the whole ecosystem. For the Māori communities that have long lived in harmony with the River, this is a natural extension of their underlying normative values and the account they take of the Whanganui in everyday life. For non-Māori communities, the law promotes a shift in the view of the human-nature relationship. Historically, the ‘Western’ worldview focuses on nature as nothing more than a commodity – something that is there for the use of, and abuse by, human beings. Similarly, a great deal of environmental law focuses on allowable levels of damage or pollution is allowed, rather than on how much protection is owed to a particular natural space or resource. In U.S. environmental law, “when industrial and commercial reality conflicts with environmental ideology, industrial and commercial reality prevails.”²⁰⁴

By enacting Te Awa Tupua, a different legal culture, a different way of thinking about the relationship to nature, is enshrined into law; and it is hard to overemphasize how important a step this is. While the Māori have long had a living relationship to the River, for many others in the community this is a new approach that will require acknowledgment and acceptance. It can be hard to imagine, in the abstract, how Te Awa Tupua will alter the framework of decision-making along the Whanganui. But, as often happens, the process of developing the legislation, and the passage of the law, has begun to bring about a change in attitude. Having to take the Whanganui into account—and having to think about the River in the context of its four underlying values—has had an impact on those who live along the River and on their view of how activities that involve the river should be considered. As stated by Marianne Archibald, CEO of the Whanganui Chamber of Commerce, “Te Awa Tupua created a shift in my world view. I learned that the River is. . . a living, spiritual being in itself.”²⁰⁵

In contrast to the consideration and incorporation of legal culture into the rights of nature process in New Zealand, in the case of the Lake Erie Bill of Rights, the law was at odds with the existing legal structures and the widespread legal culture. Cultural views of the role of nature and the human-nature relationship in the United States are still largely grounded in beliefs about individual rights, the rights of property, and the spirit of Manifest Destiny.²⁰⁶ Even some of the most sweeping environmental laws in the U.S., such as the Clean Air Act, the Clean Water Act, and the Endangered Species Act, are framed in terms of the freedom to use the environment, except in certain circumstances, rather than protection of the environment, except for

204. Kenneth M. Murchison, *Environmental Law in Australia and the United States: A Comparative Overview*, 22 BOS. COLL. ENV'T AFFS. L. REV. 503, 508 (1995).

205. Interview with Marianna Archibald, Whanganui, in N.Z., (Apr. 8, 2019).

206. See ZARTNER, *supra* note 16.

limited cases of sustainable use.²⁰⁷ It is a small shift in language, but one of fundamental importance for how the law is viewed and implemented.

There are indigenous communities in the United States whose worldviews are similar to the Māori when it comes to the human-nature relationship. As mentioned above, some of these have codified this recognition into their own laws. Unlike the New Zealand case, however, where the Whanganui iwi fought hard for decades and then worked in partnership with the Crown to draft Te Awa Tupua in way that realized *Kaitiakitanga*, the relationship between the indigenous peoples in the U.S. and federal and state governments has not been one of cooperation and consultation due to longstanding government policies.²⁰⁸ While the relationship between the Māori and the New Zealand government is by no means perfect as the legacies of colonialism and the Treaty of Waitangi still linger, it is far better and more constructive than the relationship between the indigenous peoples in the territory that is now the United States and the various governments in this country. This historical separation has lessened the extent to which indigenous views of nature have seeped into the historical values underlying much U.S. law.

The recognition and understanding of indigenous cosmologies relating to nature and the human-nature relationship, while starting to gain more understanding among the general population in certain areas of the U.S., is still very limited. The recognition of the independent life force of nature by indigenous communities such as the Ho Chunk Nation in Wisconsin, the White Earth Band in Minnesota, the Ponca Tribe of Indians in Oklahoma, and the Yurok Tribe in Northern California has not become a common thread among members of non-indigenous communities, which means that drawing on this as a cultural basis for rights of nature law is not yet a strong possibility.²⁰⁹

One of the reasons for the failure of the Lake Erie Bill of Rights, therefore, is that it did not develop out of the legal culture present in Toledo, or in the U.S. more broadly. There was no inherent cultural, spiritual, or historical connection present in the Lake Erie Bill of Rights to ground the proposed law in the appropriate relationship between humans and the natural entity, in this case the Lake Erie ecosystem. Lacking this cultural connection, gathering support for a new law or legal change is difficult, even if, as in the case of the public referendum on the Bill, you have the legal processes in place. Proposing such a novel idea as the rights of natural entities

207. Clean Air Act, 42 U.S.C. §§ 7401-7671; Clean Water Act, 33 U.S.C. §§ 1251-1387; Endangered Species Act, 16 U.S.C. §§ 1531-1544.

208. *The United States Government's Relationship with Native Americans*, NAT'L GEO., <https://www.nationalgeographic.org/article/united-states-governments-relationship-native-americans/> (last visited Dec. 8, 2020).

209. GLOB. ALL. FOR RTS. NATURE, *supra* note 7.

and ecosystems, without grounding it in the legal culture of a place, will make enactment much more challenging. This is evident even with the vote on LEBOR because, while it is true that 61% of the voters in the February 2019 special election voted in favor of the Bill, only about 9% of eligible voters turned out for the election.²¹⁰ This means that around 16,000 people out of a possible 180,000 eligible voters voted in favor of the measure.²¹¹ This is far from the kind of support that would be needed among a community to enact this kind of law codifying such a fundamental change in the view of nature and its place in U.S. society.

Unlike in New Zealand where Māori worldviews are better known and understood by the public at large, and Māori participation in the process of drafting Te Awa Tupua led to a cultural understanding of the values of the river prior to the law's enactment, this did not happen in the case of Lake Erie. But, it does not mean that this can't happen. In fact, even though it was ultimately struck down by the Court, the efforts surrounding the Lake Erie Bill of Rights have increased awareness of rights of nature movement and moved the idea of natural entities being in equal relationship with human beings, and therefore deserving legal protections, to more mainstream discussion. This is an important first step in changing cultural beliefs about nature, and subsequently, the law.

B. Lesson 2: Build Relationships and Ensure Community Participation

In addition to the differences in legal culture in the two efforts to enact rights of nature law, the differences in the resulting outcomes for the two pieces of law described here are also encapsulated by the institutional process through which each was created. As discussed in Section II, both legal culture and legal institutions, which include the processes by which new laws are created, must be considered when seeking legal change. LEBOR was put forward by a citizen group and voted on in an election. Te Awa Tupua resulted from extensive negotiation that brought together multiple stakeholders, drew on existing law, and offered community inclusion. Both of the primary negotiators of Te Awa Tupua, Gerrard Albert, Chairman of the Ngā Tāngata Tiaki o Whanganui, representing the Maori in the process,²¹² and Christopher Finlayson, Former Member of the New Zealand Parliament and Minister of Treaty Negotiations who represented the Crown in

210. See *Toledo Votes Yes on Laker Erie Bill of Rights*, WKSU (Feb. 26, 2019), <https://www.wksu.org/post/toledo-votes-yes-lake-erie-bill-rights#stream/0> (showing Toledo voters approved ballot amendment to include Laker Erie Bill of Rights).

211. Tom Henry & Ryan Dunn, *Polls Close With 9 Percent Turnout in Special Election*, BLADE (Feb. 26, 2019), <https://www.toledoblade.com/local/politics/2019/02/26/polls-open-tuesday-special-election-in-toledo-turnout/stories/20190226102>.

212. NGĀ TĀNGATA TIAKI O WHANGANUI, *supra* note 50.

negotiations, emphasize the collaborative conversations between relevant stakeholders as key to the success of the legislation.²¹³ This type of shared process was missing in LEBOR, which is evident in the difficulties putting the initiative on the ballot as well as the immediate lawsuit.²¹⁴ This is not to say the Whanganui process is the only way to enact rights of nature law, but it does demonstrate the importance of considering both legal culture and legal institutions in such an effort.

The Te Awa Tupua legislation took a long time. In fact, the Whanganui iwi argued for recognition of the river for over 100 years.²¹⁵ The drafting of the actual legislation also took over a decade as the parties moved from outlining terms of negotiation from 2003-2012, to drafting the Deed of Settlement in 2014, and finally, creating the Tw Awa Tupua legislation in 2017.²¹⁶ Moreover, it was a process that included not only the Whanganui Iwi and the Crown, but also provided opportunity for members of the communities along the river, including businesses, local governments, and individual citizens to voice their opinions in the process.²¹⁷ While certainly too long a wait for the iwi to have their relationship to the Whanganui officially recognized, the time it took to draft the legislation allowed for the development of deep working relationships between the parties involved, which, ultimately, according to all sides, was a crucial component of the legislation's success.

In the end, both the communities in the Whanganui region and members of the government were left with positive impressions of the collaboration and its impact on the future of the law. According to Whanganui lawyer John Unsworth, the Te Awa Tupua process left communities along the River with a general feeling of “let’s work together to make things positive for everyone” and that the local iwi were “very keen to work with the community.”²¹⁸ Similarly, a Ministry for the Environment spokesperson

213. Albert, *supra* note 54; Interview with Christopher Finlayson, in Wellington, N.Z. (Apr. 3, 2019).

214. Michael Bratton, *Lake Erie Bill of Rights Backers Call on Toledo City Council to Include Ordinance in Special Election*, 13 ABC ACTION NEWS (Nov. 28, 2018), <https://www.13abc.com/content/news/Lake-Erie-Bill-of-Rights-backers-call-on-Toledo-City-Council-to-include-ordinance-in-special-election-501503271.html>.

215. ORANGE, *supra* note 64.

216. Whanganui Iwi (Whanganui River) Deed of Settlement Summary, N.Z. GOV'T (Aug. 5, 2014), <https://www.govt.nz/assets/Documents/OTS/Whanganui-Iwi/Whanganui-Iwi-Whanganui-River-Deed-of-Settlement-Summary-5-Aug-2014.pdf>.

217. *Regulatory Impact Statement: Te Awa Tupua (Whanganui River) Framework*, OFF. OF TREATY SETTLEMENTS (Apr. 6, 2016), <https://www.govt.nz/assets/Documents/OTS/Whanganui-Iwi/Regulatory-Impact-Statement-Te-Awa-Tupua-Whanganui-River-framework.pdf>.

218. Interview with John Unsworth, Whanganui, N.Z. (Apr. 10, 2019).

reiterated this idea that relationships among iwi and the many stakeholders involved are key.²¹⁹

This same kind of process did not happen in the case of the Lake Erie Bill of Rights. There were efforts by the proponents of LEBOR to hold community conversations on the Bill and several years were spent attempting to convince the State of Ohio to take action on the toxic algae blooms. Given the lack of state action on the algae blooms, subsequent collaborative efforts were unsuccessful. Additionally, from inception of the idea of LEBOR, there was strong resistance not only from the corporations and farms that feared negative impacts from the legislation, but also from government entities. Whereas Te Awa Tupua was done in a spirit of partnership with the government, and under the framework of the Treaty of Waitangi negotiations set up for this very purpose, no institutional support was present in the case of LEBOR. As with legal culture, having this support is an important step to achieve a positive outcome for new rights of nature law.

C. Lesson 3: Language Matters

In addition to considering existing cultural perception of law and legal processes, it is also important when drafting rights of nature legislation to carefully consider the language used, as it is with the creation of any new law. As discussed above, however, there are particular difficulties that can emerge when ideas about “rights” are involved because there can be so many strongly held views about what this entails. In crafting legal personhood through the law for a non-human entity, providing specificity can facilitate the acceptance and internalization of the subsequent law and avoid the oft-heard response of “how can nature have the same rights as people?”

Te Awa Tupua very clearly defines its terms. In fact, the entire first section of the legislation provides definitions and clarification as to the meaning of the terms used throughout the law.²²⁰ This level of detail is carried forward through all the subsequent sections, some of which are highlighted in the description of Te Awa Tupua in Section IV of this article. It is not just about providing clear definition, however. It is also important to provide enough detail and context that those responsible for the law can actively and effectively work to implement it. Te Awa Tupua goes to great lengths, not only to outline the different groups and committees responsible for overseeing the implementation and enforcement of the law, but also to provide provisions to assist people in knowing when and how the law might apply to them.

219. Interview with Ministry for the Env't, in Wellington, N.Z. (Apr. 4, 2019).

220. Te Awa Tupua Act, s 7.

All of this is absent in the Lake Erie Bill of Rights, and, as discussed in Section V(D) above, this lack of specificity and clarity was the primary basis on which Judge Zouhary struck down the Bill. While disappointing for those who had worked so hard to bring LEBOR to life, Judge Zouhary's decision was not surprising. The Lake Erie Bill of Rights was not written in a way that was likely to withstand judicial scrutiny given the current state of the law in the United States. It did not provide any detail or explanation that would have allowed those to whom it applied to understand its implications, or for those who would enforce it to understand when or how it was to be enforced.

One of the main features that distinguishes the Whanganui legislation from LEBOR is its clarity regarding legal institutions. Te Awa Tupua establishes institutional bodies for implementation and enforcement, including guardians who serve as the "human face of the river," an advisory body that supports them and a strategy group of community, business, political and Māori representatives that serves as a forum for recommendations concerning the River.²²¹ Members of the community know their existing rights vis-à-vis the River are not in danger, and processes are spelled out for approval of new activities or projects involving the river. The Lake Erie Bill provided none of that. Had more detail and greater specificity of language been used in drafting the Lake Erie Bill of Rights perhaps it would have received a different outcome. One could argue Judge Zouhary was even making this suggestion in his decision for at one point he states:

With careful drafting, Toledo probably could enact valid legislation to reduce water pollution. ... LEBOR was not so carefully drafted. Its authors ignored basic legal principles and constitutional limitations, and its invalidation should come as no surprise.²²²

Judge Zouhary may deny this was his intent, but this text in the second to last paragraph of his decision could be read as a suggestion for future iterations of a law such as the Lake Erie Bill of Rights. To effectively realize rights of nature laws in existing legal systems, we must work with the legal culture and institutions in place. Even if the long-term goal is ultimately to revamp the entire legal system and push great shifts in cultural norms about the human-nature relationship, enacting such laws in the short-term today requires drafting language that will be useful to the community and withstand the scrutiny of the courts.

221. Dan Cheater, *I am the River, and the River is Me: Legal Personhood and Emerging Rights of Nature*, WEST COAST ENV'T L. (Mar. 22, 2018), <https://www.wcel.org/blog/i-am-river-and-river-me-legal-personhood-and-emerging-rights-nature>.

222. *City of Toledo*, 441 F.Supp.3d at 557.

VII. CONCLUSION

Many are heralding the rights of nature movement as the next wave of environmental protections and a new way of thinking that is necessary if we are going to address the daunting environmental problems facing us as a global community. Certainly, the last decade has seen a proliferation of rights of nature laws around the world. In many of these instances, however, the passage of the law has not necessarily led to its internalization and enforcement, which ultimately means it is not achieving its goals of better environmental protections, nor is it necessarily creating shifts in cultural understandings about the values underlying the laws.

Given the potential for rights of nature laws, however, to both change how we think about nature and the human-nature relationship and provide concrete legal protections for natural entities, understanding how to craft such laws effectively is crucial. In order to do so, it is important to take into account both the legal culture and the legal institutions present in a given society or community and build the law from those foundations. This article has provided two cases of communities and their efforts at crafting such laws. In the first case, New Zealand, the new legislation built on the existing legal traditions within the state and came away with what is largely held to be the most successful example of rights of nature law to date, Te Awa Tupua.

In the second, the United States, neither the legal culture nor the legal institutions of the U.S. legal tradition appear to have been carefully considered when drafting the Lake Erie Bill of Rights. While based on important values regarding the rights of nature to exist and flourish, the text of the Lake Erie Bill of Rights pushed too far ahead of the cultural understandings in the U.S. when it comes to the place of nature. The law also lacked the legal clarity required by existing legal institutions within the U.S., leading to its ultimate defeat.

In both of these examples, however, are lessons for other communities around the world interested in creating rights of nature laws. These include drawing on the legal culture and institutional structures present in the community; ensuring that the law is clear in its intent, purpose, and operation; and working to ensure that all members of a community are able to be part of the discussion. Rights of nature law requires, for many, new ways of thinking, not just about nature, but about rights and the law. The more that people are invited to be part of the process, the more likely the underlying values embedded in the law will become part of the underlying values of the community and the rights of nature will achieve more effective implementation and gain widespread support.