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Red River, White Law

By Laura Spitz

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June 19, 2019

In the last two years, the Ganga and Yamuna Rivers were granted legal personality by the High Court of Uttarakhand, India;[1] the Te Awa Tupu was declared a 'legal entity' as part of a settlement between the New Zealand Crown and the Whanganui *iwi* people;[2] and environmentalists brought an action on behalf of the Colorado River to have it declared "capable of possessing rights similar to a 'person'" in the United States.[3] This year, voters in Toledo, Ohio, adopted the Lake Erie Bill of Rights[4] and activists in the Pacific Northwest continue in their quest to establish the Salish Sea as a person.[5] In each case, claimants seek to establish water as a rights-bearing subject. This strategy has tremendous appeal, not least because it rests on the premise that rivers, lakes, and oceans are living and essential to the health of our ecosystem and mutual well-being. This, in turn, is resonant of Indigenous teachings and practices that emphasize the connectedness among all beings, human and nonhuman, spiritual and physical, natural and supernatural.

But the U.S. attempts are troubling for their failure to meaningfully engage Indigenous laws and lifeways here in the United States.[6] In the *Colorado River* case, for example, plaintiff's amended complaint referred to the fact that "[t]hirty-four (34) Native American reservations exist within the Colorado River Basin,"[7] but did not discuss or draw on the laws or culture of any of the tribes that claim traditional authority over the river or adjacent lands. Instead, plaintiff invoked the Te Awa Pupua example from Aotearoa New Zealand and emphasized the evolution of legal personhood in the context of U.S. corporations. Contrast this with the Te Awa Pupua example, which rested on the acceptance and use of Māori legal and cultural practices in developing what Justice Joseph Williams has described as the 'third law,'[8] a legal solution "which [drew] upon both Māori and colonial legal systems to create something previously unknown to both." [9]

Not only did the *Colorado River* plaintiff fail to recognize a significant role for tribes directly affected by environmental degradation in the area, it failed to acknowledge the ways in which developments elsewhere in the world were responsive to historical disputes specific to those regions. Again, take the Te Awa Tupua example. The Whanganui River Claims Settlement Act was passed "to give effect to a deed to settle the historical claims of the Whanganui *iwi* as they relate to the river." [10] The Whanganui *iwi* had claimed that New Zealand had breached its obligations to the Māori under the 1840 Treaty of Waitangi,[11] and that they had lawful authority over the river, which flowed through traditional Whanganui *iwi* territory. Interestingly, some suggest settlement terms declaring the river a legal entity were driven, at least in part, by the fact that neither New Zealand nor the Māori could

accept the river ‘belonging’ to the other.[12] Thus, the grant of legal personality paved the way for co-management and permitted each side to ‘win’ without losing.

Ultimately, the *Colorado River* case was dismissed with prejudice on plaintiff’s unopposed motion because—in plaintiff’s words—“[w]hen engaged in an effort of first impression, [plaintiff] has a heightened ethical duty to continuously ensure that conditions are appropriate for our judicial institutions to best consider the merits of a new canon.”[13] It is not clear what plaintiff meant by “ethical duty,” nor why plaintiff came to believe the conditions for moving forward were inappropriate, but this seems the right decision. No matter how well-intended, advocates reaching for personhood on behalf of rivers in the United States must think carefully about how to meaningfully engage the Indigenous peoples directly affected, or risk continuing practices of colonization. In that sense, the *Colorado River* case was a missed opportunity to contextualize the claim in terms of local Indigenous laws and cultures. Its dismissal provides an opportunity to reset and reach out before moving forward again.

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[1] *Salim v. Uttarakhand*, (Mar. 20, 2017) PIL. No. 126 of 2014 HC of Uttarakhand at Nainital (India). The order has been stayed. Alexandre Lillo, *Is Water Simply a Flow? Exploring an Alternative Mindset for Recognizing Water as a Legal Person*, 19 *Vt. J. Envtl. L.* 164, 167, 177 (2018).

[2] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (N.Z.).

[3] The action was dismissed by consent. *Order, Colorado River Ecosystem v. State* (filed Dec. 4, 2017) (No. 1:17-cv-02316-NYW).

[4] Toledoans for Safe Water, The Lake Erie Bill of Rights Citizens Initiative, <http://www.lakeerieaction.org> (last visited May 29, 2019).

[5] Legal Rights for the Salish Sea, <http://legalrightsforthesalishsea.org> (last visited May 29, 2019).

[6] It is true that the group advocating rights for the Salish Sea recently expanded its bases to invoke Native “ways,” after the fact and without any specificity. They do acknowledge, however, that the rights of the sea may be in conflict with the rights of others, including Indigenous peoples. FAQs Salish Sea, Legal Rights for the Salish Sea, <http://legalrightsforthesalishsea.org/legal-rights-for-the-salish-sea-faqs/>.

[7] Amended Complaint for Declaratory and Injunctive Relief para. 19, *Colorado River Ecosystem v. State* (filed Nov. 3, 2017) (No. 1:17-cv-02316-NYW). For its part, the

State of Colorado only refers to Indigenous Peoples once, in its motion to dismiss the amended complaint, for the purpose of arguing that injuries (if any) cannot be traced to Colorado given the multitude of involved actors—including Native Americans—and interstate and international compacts, court decisions and statutes. Defendant State of Colorado’s Motion to Dismiss at 9-10, *Colorado River Ecosystem v. State* (filed Oct. 17, 2017) (No. 1:17-cv-02316-NYW).

[8] See Katherine Sanders, ‘*Beyond Human Ownership?*’ *Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, 30 *J. Envtl. L.* 207, 223 (2018) (citing to Justice Joseph Williams, *The Harkness Henry Lecture Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law*, 21 *Waikato L. Rev.* 1, 32-34 (2013)).

[9] *Id.*

[10] Professor Sanders, for example, argues that the “[u]se of the legal personality model was prompted by a stalemate: neither the [New Zealand] Crown nor *iwi* were prepared to relinquish their claim to authority over the ... river.” *Id.* 230.

[11] *Id.* 208.

[12] *Id.* 230. See also Andrew Geddis & Jacinta Ruru, *Places as Persons: Creating a New Framework for Māori-Crown Relations*, in *The Frontiers of Public Law* (Jason NE Varuhas & Shona Wilson Stark eds., 2019).

[13] Unopposed Motion to Dismiss Amended Complaint with Prejudice para. 8, *Colorado River Ecosystem v. State* (filed Dec. 3, 2017) (No. 1:17-cv-02316-NYW).