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SYMPOSIUM ARTICLE

Recognizing the Martuwarra's First Law Right to Life as a Living Ancestral Being[†]

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Abstract
Traditional custodians of the Martuwarra (Fitzroy River) derive their identity and existence from this globally significant river. The First Laws of the Martuwarra are shared by Martuwarra Nations through a common songline, which sets out community and individual rights and duties. First Law recognizes the River as the Rainbow Serpent: a living ancestral being from source to sea. On 3 November 2016, the Fitzroy River Declaration was concluded between Martuwarra Nations. This marked the first time in Australia when both First Law and the rights of nature were recognized explicitly in a negotiated instrument. This article argues for legal recognition within colonial state laws of the Martuwarra as a living ancestral being by close analogy with the case concerning the Whanganui River. We seek to advance the scope of native title water rights in Australia and contend that implementation of First Law is fundamental for the protection of the right to life of the Martuwarra.

Keywords: Martuwarra, First Law, Native title, Rights of nature, Indigenous rights, Cultural governance

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* Warloongarriy Law, Martuwarra Country.

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WELCOME TO COUNTRY

My name is Martuwarra.[1] *Welcome to the River Country – Martuwarra, the sacred River of Life! I pay my respects to the Traditional Custodians of this Country and to Elders past, present, and future. I thank them for their enduring guardianship and our continuing relationship of trust and respect. I welcome you all to Country, to explore, enjoy, and immerse yourself in this sacred and precious place as we go on a special journey through River Country.*

When the Europeans came to me they called me by another name, Fitzroy River. But I hold to my name which was given to me in the Bookarrakarra, the beginning of time. I hold my totem, Yoongoorrookoo, the Rainbow Serpent who formed the Martuwarra river valley tracts as Woonyoomboo, the first human being, stood and rode on my back, holding the spears firmly planted into my rainbow skin … as we twisted and turned up in the sky down in the ground together, we carved our way, forming the Martuwarra, singing the Warloongarriy River law song for Country!

I watch *the continuing colonial invasion and occupation of Kimberley Country and Indigenous peoples: initially violent, brutal and non-consensual. I see the resulting subjugation and modern-day slavery. Invasion remains defined by non-consensual development. The colonial states have been established to create wealth for private and foreign interests at the expense of Indigenous peoples, their lands and living waters. The history of development in Australia has been told from the perspective of the invaders and the improvements they have made. I am glad to see this changing, particularly as more Indigenous peoples are telling these stories from their worldview.*

I hear *the voice of Lucy Marshall, Senior Elder, guardian and custodian, saying, 'Those people who are playing with nature, they must be stopped!' As a Senior Elder, Lucy is very wise; she knows that together 'shoulder to shoulder' we can work together to look after my rights, for I am the sacred River of Life.*

Lucy's sister, Jeannie Warbie, agrees with me, and I hear *her standing strong and calling, 'No River, no people'.*[2] *Without our First Laws and without a strong and whole Martuwarra there will be no life!*

Having witnessed the continued impacts of invasion, I was so happy in 2011 to see everyone working together, black and white Australians, telling their stories of heritage, culture and environment, telling the Australian government to listen to all of this collective wisdom. This telling of wisdom and experience helped me to become listed as National Heritage. The following story is told from the collective wisdom of me and my co-authors. I, Martuwarra, River of Life, call on all people to embrace me, Yoongoorrookoo, the Rainbow Serpent ancestral being, and to protect me to keep me whole – from head to tail.

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1 The river Martuwarra is also known as Mardoowarra. In this article we adopt the name Martuwarra but recognize that the river sometimes is referred to as Mardoowarra in other publications.

2 Lucy Marshall and Jeannie Warbie, in A. Poelina & M. McDuffie, *Three Sisters, Women of High Degree*, Madjulla Association, 1 July 2015, available at: http://doi.org/10.5281/zenodo.3763387.

1. INTRODUCTION

The Martuwarra, or Fitzroy River, is in the remote Kimberley region in the far north-western corner of Australia. The Kimberley is characterized by iconic and diverse landscapes and varied assemblages of plant and animal species.[3] The Martuwarra is one of Australia's largest rivers. The catchment occurs in one of the most mega-diverse regions in the world and is globally significant because of its unique environmental, geological, and cultural characteristics. The River cuts through a variety of ancient terrain, including sandstone plateaux and 350 million-year-old Devonian limestone (former coral/stromatolite reef), which has eroded into deep and dramatic gorges. Significant fauna includes 18 endemic fish species, at least two of which are endangered, including the freshwater sawfish, as well as freshwater crocodiles, sharks, rays, turtles, mussels, goanna, waterbirds, birds of prey, bats and quolls. The fluvial vegetation, such as pandanus and freshwater mangroves, provides rich sources of food and traditional medicines.[4]

The Martuwarra is one of the few remaining rivers in Australia that are still relatively unregulated and unmodified by human development.[5] Of the 7,000 people who live in the Martuwarra catchment 64% are Indigenous.[6] The catchment encompasses the traditional lands of the Ngarinyin, Nyikina, Mangala, Warrwa, Walmajarri, Bunuba, and Gooniyandi nations. People from the various sections of the River have collectively cared for the Martuwarra since the beginning of time. In turn, the natural resources of the River and riparian ecosystems are of significant cultural, economic and subsistence importance for Indigenous communities in this area. Customary fishing, hunting and harvesting contribute substantially to local food security, as well as to cultural and medicinal practices.[7]

Historically, open-range grazing has been the most extensive land use in the catchment. Agricultural expansion, mining,[8] fracking, inappropriate fire regimes, unregulated tourism, and invasive species[9] have all impacted on underlying water systems.

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3 J. Carwardine et al., *Priority Threat Management to Protect Kimberley Wildlife* (CSIRO Australia and the Wilderness Society, 2011).

4 M. Brocx & V. Semeniuk, 'The Global Geoheritage Significance of the Kimberley Coast, Western Australia' (2011) 94(2) *Journal of the Royal Society of Western Australia*, pp. 57–88.

5 Australian Government, *Conservation Guidelines for the Management of Wild River Values* (Australian Heritage Commission, 1998), Part A – Wild River Values and Impacts, available at: http://www.environment.gov.au/node/20150.

6 S. Larson & K. Alexandridis, *Socio-economic Profiling of Tropical Rivers* (CSIRO Sustainable Ecosystems, 2009), available at: http://lwa.gov.au/products/pn30095.

7 S. Jackson, M. Finn & K. Scheepers, 'The Use of Replacement Cost Method to Assess and Manage the Impacts of Water Resource Development on Australian Indigenous Customary Economies' (2014) 135(1) *Journal of Environmental Management*, pp. 100–9, at 100.

8 Carwardine et al., n. 3 above; 'Big Jump in Mining in the Kimberley', *ABC News*, 19 Nov. 2012, available at: https://www.abc.net.au/news/2012-11-19/report-details-mining-impact-in-the-kimberley/4379584; Jackson, Finn & Scheepers, n. 7 above.

9 Carwardine et al., n. 3 above; L. Gibson & N. McKenzie, 'Identification of Biodiversity Assets on Selected Kimberley Islands: Background and Implementation' (2012) 81(I) *Records of the Western Australian Museum*, pp. 1–14, at 1.

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Meanwhile, new intensive herd management and extensive fodder mono-cropping will increase water extraction and the risk of contamination.[10]

Country, known as Booroo, in the Martuwarra catchment, is more than just a place. It is made up of human and non-human beings formed by the same substance, by the same ancestors, who continue to live in land, water and the sky. Country is family, culture and identity.[11] Country, and all it encompasses, is thus an active participant in the world.[12] Traditional Owners view Country as alive, vibrant, all encompassing, and fully connected in a vast web of dynamic, interdependent relationships; relationships that are strong and resilient when they are kept intact and healthy by a philosophy of ethics, empathy and equity. Traditional Owners also know that these relationships can quickly become fragile if not respected and attended to with utmost care and concern for the vital importance of all life on Country. Country is made up of human and non-human relations that speak Language and follow First Law. All that is incorporated under First Law is elaborated below. In summary, First Law is the collective body of Laws of the First Peoples of the land mass currently known as Australia. It is the body of laws which have governed relations between and within First Nations and between the human and non-human since the beginning of time.

It is undisputed under First Law that the River Country of the Martuwarra has an inherent right to life. At the same time, adherence to First Law is fundamental for realizing the Martuwarra's *continued* right to life. In this article we ask the question: What are the rights, obligations and legal mechanisms within colonial state laws (non-Indigenous laws) to protect the continued right to life of the River in accordance with understandings of First Law?

We, the authors, who include the River itself, take readers on an adventure into the mighty River Country of the Martuwarra. Our aim is to bring Country to life, so that it can be experienced and appreciated through the guardianship lens of Traditional Owners. We therefore adopt a transdisciplinary strategy of exploring solutions at the intersection of legal, cultural, and scientific disciplines within a methodology of attending.[13] We synthesize Indigenous traditional law (First Law) and Indigenous science with doctrinal legal research to identify how international law and state law (the Australian common law and legislative regimes of the Commonwealth of Australia and the State of Western Australia) enable or conflict with First Law and the Martuwarra's right to life as an integrated being from source to sea.

After a description of methodology, this article examines the First Laws of the River, including Warloongarriy Law (River law) and Wunan Law (regional governance

[10] S. Jackson, M. Finn & P. Featherson, 'Aquatic Resource Use by Indigenous Australians in Two Tropical River Catchments: The Fitzroy River and Daly River' (2012) 40(6) *Human Ecology*, pp. 893–908, at 893.

[11] A. Kwaymullina, 'Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country' (2005) 6(11) *Indigenous Law Bulletin*, pp. 12–5, at 12.

[12] Bawaka Country et al., 'Working with and Learning from Country: Decentring Human Author-ity' (2015) 22(2) *Cultural Geographies*, pp. 269–83, at 270.

[13] Ibid.

law).[14] We also discuss the Fitzroy River Declaration[15] – a representation of the First Law of the River in modernity. We next highlight the philosophical alignment of First Law with the emerging field of Earth jurisprudence. We extend scholarship on the rights of nature by arguing for the right to life of the River. Following this, we set out the obligations imposed under international law which support the rights of Martuwarra First Nations, particularly in relation to ecocide (ecological genocide).[16] We conclude by calling for acknowledgement of First Laws and transnational river governance by Martuwarra Nations since what they refer to as the beginning of time. This is the foundation for recognizing the River's right to life and correspondingly the need to recognize the rights of Traditional Owners to co-manage the River as guardians so that they can fulfil their responsibilities to present and future generations.

2. METHODS

Karen Martin and Booran Mirraboopa emphasize that if research is to serve Aboriginal people, it must centralize the core structures of Aboriginal ontology.[17] We therefore adopt a strategy of transdisciplinary collaboration and innovation through the intersection of worldviews, across a range of methods within an overarching methodology of attending.[18] The methodology of attending responds to calls for research approaches that are centred on Indigenous epistemologies and ontologies.[19] The methodology recognizes that research must be underpinned by an acknowledgement of the interdependence of all beings. Humans come into being through their relationships with each other and with Country. Humans, and by extension researchers, are therefore co-constituted with Country. The methodology emphasizes becoming 'sensitive, communicative and alive within a more-than-human, co-constitutive world'[20] where research is a form of creative engagement between Country and Country's human co-authors. Country is thus a key author and research partner. This approach therefore aims to decentre the privilege of human authors.[21]

[14] Wunan Law is a cooperative model based on principles that respect the sovereignty of the Indigenous nations, but ensure the wellbeing of river and desert country by viewing it holistically and treating it as an integrated, connected whole. Prior to colonization the Wunan was the Indigenous regional governance system for an extensive trade exchange based on coexistence and co-management principles across vast estates of land spanning from the Kimberley to the Northern Territory: see A. Poelina, 'A Fair Go For All', *Great Australian Story*, 21 Feb. 2015, available at: https://greataustralianstory.com.au/story/fair-go-all.

[15] Fitzroy River Declaration, Fitzroy Crossing, West Kimberley (Western Australia), 3 Nov. 2016, available at: http://www.klc.org.au/news-media/newsroom/news-detail/2016/11/15/kimberley-traditional-owners-unite-for-the-fitzroy-river.

[16] P. Higgins, 'Eradicating Ecocide', 2012, available at: http://pollyhiggins.com.

[17] K. Martin & B. Mirraboopa, 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search' (2009) 27(76) *Journal of Australian Studies*, pp. 203–14, at 206.

[18] Bawaka Country et al., n. 12 above, p. 270.

[19] Martin & Mirraboopa, n. 17 above.

[20] Bawaka Country et al., n. 12 above, p. 270.

[21] Ibid.

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In keeping with the methodology of attending, this article seeks to show the ultimate respect for Country by acknowledging the Martuwarra as its first author. This acknowledges the River as the context and the central driver of all human endeavours to understand and interact with it. In placing the Martuwarra at the centre of our concerns, the authors engaged in a patient and exploratory, but dedicated and attentive, reiterative process of evidence, theory and legal principle-gathering, both domestic and transnational. As such, the process was a circular, not lineal, system of discovery, knowledge sharing, learning, teaching, and expanding the individual and shared knowledge base of the authors to arrive at our collective conversations, new information, writing and rewriting to bring us to the conclusions in this article.

We have sought out new perspectives and innovative solutions at the intersection of various legal, cultural, and scientific disciplines. We thus triangulate across laws and disciplines. Triangulation involves the use of a range of methods to examine an issue from multiple viewpoints. This helps to cast light on the issue from many different angles.[22]

Our scholarship draws on several sources, which at the same time also represent four different ways of knowing, i.e. methods by which knowledge becomes known to us. These sources are: (i) Indigenous science and epistemologies (traditional ecological knowledge, songlines, history, culture, and language); (ii) First Law (traditional and customary law, governance models and politics); (iii) western science, including ecology, hydrology and geology; and (iv) doctrinal legal analysis. The first two Indigenous sources predominantly involve methods that theorists would describe as authority, and intuition/inspiration/revelation. By contrast, the third and fourth western sources typically involve what theorists would define as empiricism and rationalism.[23]

Thus, our transdisciplinary and multi-species alliance attempts to reaffirm the existence of new collectives that transcend disciplinary domains by consciously seeking to adopt and incorporate the first two sources and methods into our mindset and synthesis, with a view to fusing all ways of knowing simultaneously and harmoniously. The objective of the method was to immerse ourselves in a broad-minded, collaborative, holistic and multi-dimensional way of knowing which could spark innovation in the outcomes it produced. In challenging the telling of history and utilitarian individualism, these collectives also seek to bring to the fore inspiring and dialogic stories of past and present, of resistance, for a better future for the human and non-human world.[24]

2.1. *Indigenous Science and First Law*

First Law is the way of living on Country handed down through countless generations. It sustains a web of relationships between the human and non-human world and 'forms

[22] N. Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (Prentice Hall, 1989); W. Olsen, 'Triangulation in Social Research: Qualitative and Quantitative Methods Can Really Be Mixed', in M. Holborn (ed.), *Developments in Sociology* (Causeway Press, 2004), pp. 103–18.

[23] J.W. Ehman, 'Ways of Knowing' (2015) *Penn Medicine*, available at: http://www.uphs.upenn.edu/pastoral/cpe/waysofknowing.pdf.

[24] D. Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press, 2016).

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a pattern which is life itself'.[25] This pattern must be recreated and the Law followed to sustain life.[26] First Law is holistic and emphasizes the connections between the parts of the 'pattern' of life and the whole, and makes it clear that the whole is greater than the sum of the parts. Indigenous knowledge and legal systems consider reductionist worldviews to be fundamentally flawed. This is because the failure to understand connections leads to a failure to value these connections. This results in destruction for both the individual and the collective.[27] Similarly, Irene Watson has observed that western law and worldviews are so removed from the web of relationships of life on Earth that 'the greater proportion of humanity now lives in exile from the law'.[28]

In contrast, First Law recognizes the land as law and that humans are under this law and not above it. It is a relationship of trust, respect, dignity and empathy with Country as 'kin' and as one with humans. The essence of First Law is succinctly encapsulated in the quote 'Oh … that tree same as me'.[29] In this way we can learn to have a deep respect for Country. Then our values and ethics can change when we are taught not only to read the signs of Country and its wellbeing, but that Country is alive and is reading us!

2.2. *Doctrinal Legal Research*

Doctrinal legal research is familiar to scholars and practitioners in the system of state law. Here, law as a discipline is based primarily on interpretation. Laws in the form of legislation and case law, as well as other texts and documents which place the laws in context, are the main research objects of doctrinal analysis.[30] Such analysis consists of the systematic examination of specific rules and principles and the relationships between these existing rules.[31]

In this article the main legal fields researched include native title law, water law, and environmental law. Doctrinal analysis is used to examine law at the international, Commonwealth of Australia, and state levels to determine the extent to which these laws interact with each other and with First Law, and the extent to which First Law can be implemented under, or in tandem with, state law.

3. MARTUWARRA FIRST LAW: RIGHT TO LIFE

Martuwarra means the 'River of Life'. First Law governs the responsibilities of the guardians of the Martuwarra through Warloongarriy Law (the law of the River) and

[25] A. Kwaymullina & B. Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34(2) *Journal of Australian Studies*, pp. 195–208.

[26] Ibid.

[27] Ibid.

[28] I. Watson, 'Kaldowinyeri: Munaintya in the Beginning' (2000) 4(1) *Flinders Journal of Law Reform*, pp. 3–17, at 4.

[29] B. Neidjie, 'The Tree', in B. Neidjie & K. Taylor (eds), *Story About Feeling* (Magabala Books, 1989), p. 36.

[30] M. van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011).

[31] D. Pearce, E. Campbell & D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission – A Summary* (AGPS, 1987).

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Wunan Law (the law of regional governance). Since Bookarrakarra (the beginning of time) First Law has ensured the health of the living system of the Martuwarra and facilitated relationships between Martuwarra Nations and peoples.[32]

Given the complex and interdependent web of relationships within the unspoilt wild river ecosystem of the Martuwarra, Traditional Owners assert that the Martuwarra is an integrated and whole living system from source to sea, head to tail. The Martuwarra is therefore a single living entity with an equal right to life.

Warloongarriy Law sets out the obligations for all who belong to the River. It connects Martuwarra nations through a shared *songline*. Under First Law, Traditional Owners have rights to use and access water in the River and the responsibility to care for the River.[33] Warloongarriy Law acknowledges the River as a living entity represented through Yoongoorrookoo, the Rainbow Serpent. The Yoongoorrookoo is an ancestral being with its own 'life force' and spiritual essence. First Law recognizes that the River gives life and itself has the right to life.

Martuwarra Traditional Owners are river people who derive their identity and very existence from the River as belonging to the River.[34] Principles of Warloongarriy Law include the role of the Rainbow Serpent, which carved and exists in the River and underground structure of the channels. The Serpent links springs and soaks, and is in flowing surface water, river channels, gorges and billabongs (permanent waterholes). As noted in the National Heritage listing information, the River 'provides a rare living window into the diversity of the traditions associated with the Rainbow Serpent'.[35] Four distinct expressions of the Rainbow Serpent are found within the catchment of the Fitzroy River. Each represents a different expression of the way in which water flows across nations within the one hydrological system. All four expressions converge into Warloongarriy Law, which unites Martuwarra people under their Rainbow Serpent traditional law.[36]

Warloongarriy Law was given to Traditional Owners by their ancestors from the beginning of time. While the Law has evolved with its people and Country, it has not and will not change fundamentally, because it reflects and is informed by the relationships of life. The Law is in the land.[37] The survival of all life on Earth depends upon these fundamental rights being upheld.

Wunan Law is a Kimberley regional governance system of sharing, which 'traverses the whole continent and gives shape to the Law of Relationships'.[38] Wunan Law

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32 A. Poelina & M. McDuffie, *Mardoowarra's Right to Life*, Madjulla Association, 2017, available at: https://vimeo.com/205996720 (Password: Kimberley).

33 Under Indigenous law, water brings with it particular rights and responsibilities: Australian Government, 'Heritage, West Kimberley', available at: http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;place_id=106063.

34 A. Poelina, 'Blood Line Song Line Part 1', *Great Australian Story*, 12 Aug. 2016, available at: http://greataustralianstory.com.au/story/blood-line-song-line-pt1.

35 Australian Government, n. 33 above.

36 Ibid.

37 C. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011), p. 1.

38 Ibid., p. 46.

recognizes the need for trade and co-management for coexistence between human and non-human beings. This Indigenous regional governance system has facilitated extensive trade across vast estates of land spanning from the Kimberley to the Northern Territory.[39] The cooperative model of the Wunan is based on principles that respect the sovereignty of the various Indigenous nations but ensures the wellbeing of River and Desert Country by viewing it holistically and treating it as an indivisible, connected living system.[40] The Law of Relationships of the Wunan and River Law of the Warloongarriy thus combine to provide the First Law of the River and set out the content and means for maintaining the Martuwarra's right to life.

3.1. *First Law: The Pattern of Life and the Law of Relationships*

The wisdom of First Law is that it affords deference to the supreme law of the land and the pattern of life itself, rather than the law of mankind. It decentres human authority and places humanity in its natural order, as one species among millions that must live within the pattern of life and its biosphere.[41]

First Law recognizes that if mankind destroys parts of the fabric of the pattern of life, then life in the future will be different from what it was in the past. Changes will start to appear in the overall system of life, as all life is connected. At some point in time, if the fabric is destroyed or changed so greatly, this will place the whole fabric of life at risk for humanity. If we '[d]amage enough of country, unbalance the relationship of life to all other life enough, [then] the pattern that is creation will twist, warp, fall apart'.[42] First Law respects all life and its place in the pattern of life on which all life depends.

First Law principles, also known as Raw Law, are based on ancient traditional ecological knowledge. These principles have been developed through a rigorous process of scientific experimentation and observation spanning millennia.[43] First Law therefore contains tried and true rules (traditional laws) that are fit for purpose in assuring the sustainability and longevity of humanity while underpinning Indigenous peoples' 'sustainable life' on Country.

3.2. *The Fitzroy River Declaration and the Martuwarra Fitzroy River Council*

The Fitzroy River Declaration[44] represents an agreed expression of First Law by Martuwarra Nations and the priorities for implementing First Law in modernity.

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39 Poelina, n. 14 above.

40 See the High Court in *State of Western Australia* v. *Ward* [2002] HCA 28 (8 Aug. 2002), [14], quoting a passage by Blackburn J in *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 FLR 141: '[T]he fundamental truth about the [A]boriginals' relationship to the land is that whatever else it is, it is a religious relationship … There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole'.

41 Bawaka Country et al., n. 12 above, p. 271.

42 Kwaymullina, n. 11 above, p. 14.

43 I. Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015), pp. 12–3.

44 Fitzroy River Declaration, concluded at Fitzroy Crossing, West Kimberley, Western Australia, 3 Nov. 2016, Annex 1, available at: http://www.klc.org.au/news-media/newsroom/news-detail/2016/11/15/kimberley-traditional-owners-unite-for-the-fitzroy-river.

The Declaration was concluded on 3 November 2016, at Fitzroy Crossing in the West Kimberley. It acknowledges the joint and several management responsibilities of Traditional Owners of the Martuwarra catchment for their shared and individual sections of the River. In the Declaration Traditional Owners state their concern over the cumulative impacts of the wide range of development proposals on the River.[45]

This is the first time in Australia that both First Law, such as Warloongarriy, and the inherent rights of nature have been recognized explicitly in a negotiated instrument.[46] In the Declaration Traditional Owner groups agree to cooperate on a plan of action to protect the globally significant traditional and environmental values of the River. This includes the exploration of legal options and a management body that is based on cultural governance. The arguments in this article therefore seek to advance First Law and the specific objectives of First Law as embodied in the Declaration.

3.3. *Building on the Fitzroy River Declaration*

In June 2018, the Pew Charitable Trust sponsored the Kimberley Land Council (KLC) in bringing together native title Traditional Owner representatives from the region to discuss shared concerns about development proposals for the River. The meeting established the Martuwarra Fitzroy River Council to address a whole-river approach to management. The Martuwarra Fitzroy River Council is an earth-centred, regional governance cultural authority founded on the principles of the Fitzroy River Declaration. It is a federation of six Indigenous nations with custodianship for managing 733 kilometres of the sacred Martuwarra Fitzroy River.[47] The formation of the Council is a further statement of the sovereignty of Martuwarra Nations and their collective endeavour to practise First Law for the River's continued survival.

4. FIRST LAW: ALIGNMENT WITH EARTH JURISPRUDENCE AND INTERNATIONAL LAW

4.1. *First Law, Earth Jurisprudence and the Martuwarra's Right to Life*

Consistent with First Law, we contend that there exist fundamental rights of nature: the right to exist, to have a habitat, and to maintain and regenerate its vital cycles, structures, functions and evolutionary processes.[48] Such rights are expounded in the emerging field of Earth jurisprudence. Earth jurisprudence argues for nature's right to life because 'human rights are an interdependent and correlative subset of Earth rights;

[45] Ibid.

[46] M. Lim, A. Poelina & D. Bagnall, 'Can the Fitzroy River Declaration Ensure the Realisation of the First Law of the River and Secure Sustainable and Equitable Futures for the West Kimberley' (2017) 32(1) *Australian Environment Review*, pp. 18–24.

[47] Kimberley Land Council, 'Kimberley Traditional Owners establish Martuwarra Fitzroy River Council', 19 June 2018, available at: https://www.klc.org.au/kimberley-traditional-owners-establish-martuwarra-fitzroy-river-council.

[48] C. Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd edn (Chelsea Green Publishing, 2011), p. 103, citing T. Berry, *The Great Work: Our Way into the Future* (Harmony, 1999).

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humanity cannot be healthy and secure if Earth is veering towards depletion and over extraction'.[49] Under Earth jurisprudence, the Universe is the primary lawgiver, while human law is secondary and subject to the authority of the 'Great Law'.[50] Viewed in this way, the authors consider that the Great Law can be thought of as an 'Earth Constitution', whereby human laws are valid only to the extent that they are consistent with and authorized by the Great Law.

The Great Law provides the fundamental parameters of the Earth community, of which humans are part, not above or outside. Under Earth jurisprudence, like fundamental human rights, the rights of nature exist without human law because they are created by the very processes of evolution of the Earth and existence. They come from the Universe itself and are part of the natural laws of the Universe.[51] These rights are synonymous with those protected by First Law, which recognizes the Martuwarra as a living being with a right to life.

Viewed through an international human rights lens, we consider that the rights of nature are the second foundational pillar of inalienable universal fundamental rights, without which fundamental human rights cannot be upheld. That is, in our view, to recognize the human right to life, but not to acknowledge the correlative right to life of nature, is to fail to duly and properly uphold the human right to life. This is because the human right to a healthy environment is a *sine qua non* for all other human rights, in particular the human right to life.[52] The authors argue that as all humans have this right, all humans also have the duty to uphold each other's right to a healthy environment. It is this duty that creates nature's correlative right to life and protection. Each of the two pillars has its role, and each is mutually reinforcing when in harmony with each other (or mutually destructive when out of balance) as each is an interdependent part of the Earth's biosphere and ecosystems the wellbeing of which relates to and depends on the other.

Relationships are the legal basis for the existence of First Law and Earth jurisprudence. It is these interdependent relationships that create correlative rights and duties among all living beings in the Earth community.[53] Correlative rights and duties form the basis of all jurisprudence.[54] As First Law and Earth jurisprudence focus on

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49 M. Maloney & P. Siemen, 'Responding to the Great Work: The Role of Earth Jurisprudence and Wild Law in the 21st Century' (2015) 5(1) *Environmental and Earth Law Journal*, pp. 6–22, at 12.

50 P. Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2014).

51 Berry, cited in Cullinan, n. 48 above.

52 E.g., *Gabčikovo-Nagymaros Project (Hungary* v. *Slovakia)*, Judgment, 25 Sept. 1997, *ICJ Reports* (1997), p. 110, per Judge Weeramantry in the International Court of Justice (ICJ).

53 There is an interesting discussion of correlative rights and duties in the context of riparian rights before and after enactment of the New South Wales (NSW) Water Management Act in G. Lilienthal, 'Water Rights and Correlative Duties in New South Wales' (2020) *Commonwealth Law Bulletin* (forthcoming), doi: 10.1080/03050718.2020.1756882, available at: https://www.tandfonline.com/doi/abs/10.1080/03050718.2020.1756882?journalCode=rclb20. The issue is that the legislation has decoupled the rights and the correlative duties. This has caused failure in the accountability and self-enforcing nature of those correlative rights and duties and, when left to the Crown to manage or concede duties, correlative rights fail or lapse.

54 W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal*, pp. 28–59, available at: http://www.law.harvard.edu/faculty/cdonahue/courses/prop/mat/Hohfeld.pdf.

relationships across the whole Earth community and not just between humans, they are broader but inherently have the same jurisprudential basis as universal human rights. Our arguments for the River's right to life therefore stem directly from First Law and Earth jurisprudence, as well as, by deductive reasoning, from human rights and jurisprudence generally. Collectively, all of these forms of law provide support for the view that non-human beings have the right not only to live and exist but also to be protected by humans for each other and for nature itself.

The jurisprudence that recognizes rights of nature has gained tangible traction. This has occurred in Latin America even at the constitutional level. In Ecuador, Pachamama (the Indigenous Quicha and Aimara expression for Mother Earth) is included in the Constitution and in Bolivia in the constitutional preamble. This draws on Indigenous understandings to extend the conceptualization of nature beyond a nature–culture dichotomy and the dominant legal framing which sees nature as either an object to protect or exploit.[55] Furthermore, several rivers have had their legal rights recognized, including the Vilcabamba River in Ecuador (March 2011) and the Atrato River in Colombia (May 2017). Significantly, the Whanganui River in New Zealand (March 2017) was the first stand-alone river in the world to be recognized as having legal personhood with fundamental rights.[56] The legal rights of these rivers include a suite of rights that relate to water quality and quantity, ecological function and, importantly, a corresponding right to be restored.[57]

4.2. *The Martuwarra's Right to Life and International Rights of Indigenous Peoples*

The Martuwarra's right to life also finds support in the international law applicable to Indigenous peoples and their country and culture, especially in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[58] and in the laws against genocide and ecocide.

Watson stresses that Indigenous peoples are not created by international law; rather, they come to international law as entities already formed. To this end she highlights how First Nations continue to provide the opportunity for the UN and its Member States to correct injustice and their exclusion of Aboriginal peoples.[59] It is in this spirit that we examine UNDRIP and the international laws against genocide and ecocide. By highlighting the content of international law we remind the UN, and Australia as a Member State, of their obligations under customary international law, which supports adherence to First Law and the right to life of the Martuwarra.

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55 M.V. Berros, 'Rights of Nature in the Anthropocene: Towards the Democratization of Environmental Law', in M. Lim (ed.), *Charting Environmental Law Futures in the Anthropocene* (Springer, 2019), pp. 21–31.

56 G. Wilson & D. Lee, 'Rights of Rivers Enter the Mainstream' (2019) 2(2) *The Ecological Citizen*, pp. 183–7.

57 Ibid.

58 UN General Assembly, 'United Nations Declaration on the Rights of Indigenous Peoples' (13 Sept. 2007), UN Doc. A/RES/61/295, available at: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

59 Watson, n. 43 above, p. 145.

United Nations Declaration on the Rights of Indigenous Peoples

While the UNDRIP is not a treaty, it is widely held to reflect customary international law.[60] The Declaration therefore imposes on the state of Australia obligations to uphold the international law rights of Martuwarra First Nations under the Declaration. The Declaration recognizes the fundamental freedoms of Indigenous peoples and their right to life.[61] It also states that Indigenous peoples shall not be subjected to the destruction of their culture.[62] The Declaration therefore reflects international law obligations on governments to uphold the Traditional Owners' human rights to life, which include a healthy environment, and to protect the Martuwarra as a whole, integrated, living being in accordance with First Law and culture. It is to an extension of these rights that we now turn in arguing that the protection of the Martuwarra based on First Law is necessary to prevent acts of genocide and ecocide.

Prevention of ecocide and genocide

The term 'genocide', as coined by Polish Jurist Raphael Lemkin, refers to the physical and cultural destruction of social groups.[63] The practice is broader and more multifaceted than mass murder and aims to destroy the identity and foundations of a particular group.[64] Correspondingly, ecocide is the atrocity of severely destroying or wiping out a specific environment.[65] The term 'ecocide' speaks to the nexus between ecological destruction and genocide. The victims of ecocide include humans and the environment itself.[66] Ecocide has a particularly genocidal impact for Indigenous peoples who depend on Country for their survival and their cultural and spiritual health.[67] The genocidal consequences of the destruction of ecosystems which are essential life support systems represent a real and imminent risk for Indigenous peoples such as the Traditional Owners of the Martuwarra.

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60 J. Anaya & S. Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *Jurist*, 3 Oct. 2007, available at: http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php; G.I. Felipe, 'The UNDRIP: An Increasingly Robust Legal Parameter' (2019) 23(1–2) *The International Journal of Human Rights*, pp. 7–21, at 12.

61 Arts 1 and 8 UNDRIP.

62 Art. 8 UNDRIP.

63 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace, 1944), pp. 79–95; M. Crook & D. Short, 'Marx, Lemkin and the Genocide-Ecocide Nexus' (2014) 18(3) *The International Journal of Human Rights*, pp. 298–319, at 300.

64 Watson, n. 43 above, p. 112.

65 A.M. Hay, in 'David Zierler, *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment* (University of Georgia Press, 2011)' (2012) 2(1) *H-Environment Roundtable Reviews*, pp. 1–25, at 8–12 (reviewing Zierler's book, quoting Yale plant biologist Professor Arthur Galston at a Conference in 1970 on 'War Crimes and the American Conscience', available at: https://networks.h-net.org/system/files/contributed-files/env-roundtable-2-1.pdf).

66 Crook & Short, n. 63 above, p. 307.

67 Ibid., p. 308; see also Higgins, n. 16 above.

Genocide is prohibited under the International Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[68] and is also one of the few *jus cogens* principles recognized under customary international law.[69] The Genocide Convention includes, as an act of genocide, the deliberate infliction on a group of conditions calculated to cause the physical destruction of the group.[70] Watson provides an in-depth account of the various ways in which genocide has been, and continues to be, committed by the colonial state on First Nations peoples.[71] We focus here on the genocidal impacts that result from the destruction of Country and the corresponding urgency of avoiding such impacts on the Martuwarra.

In *Re Thompson, ex parte Nulyarimma*,[72] in response to an application by members of the Aboriginal Tent Embassy and other First Nations representatives, the Australian Capital Territory Supreme Court found ample evidence that acts of genocide were committed in the colonization of Australia.[73] The application, however, was ultimately rejected on the basis that genocide was not a crime known to the common law.[74] Genocide was nevertheless found to have been committed. Watson points to extensive evidence presented in *Re Thompson* that is indicative of the trauma and serious mental harm caused to Aboriginal peoples as a result of dispossession from and damage to Country. Such is the relationship that Indigenous peoples have with Country that the 'severance of this relationship is an act of genocide'.[75] Correspondingly, Watson also highlights the genocide that exists in the destruction of the natural world. She explains how the 'ripping and tearing of the body of ruwe (Country) is akin to the ripping and tearing of our own bodies, our mother and all our relations'.[76]

Inherent in First Law is the principle that all life depends on sustaining the balance of life through the coexistence of human and non-human beings. It is for this reason that the principles embodied in First Law provide a natural resistance to global and local threats of ecocide, such as those presented by climate change, fracking, water extraction, and biodiversity loss.

5. STATE LAW: THREATS AND PATHWAYS TO THE MARTUWARRA'S RIGHT TO LIFE

The right to life of the River is fundamental to First Law and Earth jurisprudence and finds support in international law. Historically, however, it has been impeded by the

68 New York, NY (US), 9 Dec. 1948, in force 12 Jan. 1951, available at: https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf.

69 D. Harris, 'The Sources of International Law', in *Cases and Materials on International Law*, 6th edn (Sweet & Maxwell, 2004), p. 40.

70 Genocide Convention, n. 68 above, Art. 11(c).

71 Watson, n. 43 above, pp. 109–36.

72 *Re Thompson, ex parte Nulyarimma & Ors* [1998] 136 ACTR 9.

73 Transcript, ACTSC No. 457 of 1998, 14 Sept. 1998, in FCA A5/99, para. 78.

74 Watson, n. 43 above, p. 114.

75 Ibid.

76 Ibid., p. 121.

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state law of the colonizing government. The landmass now known as Australia has been managed by Indigenous First Nations for thousands of years – or, as understood in Indigenous ontology, First Nations have acted as guardians of the land and living waters since the beginning of time.

The principles of state law in capitalist economies such as that of Australia are based on 'the drive to accumulate capital'.[77] This relentless pursuit of capital accumulation and derivation of profits creates an insatiable demand for materials and energy, and therefore 'tramples all over natural cycles and processes'.[78] Consequently, the 'natural rhythms of regeneration and recycling'[79] of life-supporting metabolic processes are compromised and often irreversibly destroyed. This capitalist mindset of 'development at all costs' – which has become a hallmark of human dominance of the Earth system particularly since the 1950s – is, in the authors' view, irrational. It must stop and be enlightened by a philosophy of First Law.

The European invasion of Australia commenced in the mid-1600s. Subsequent colonization by the British had occurred by the end of the 18th century. The collection of British colonies in what is now called Australia came together as a Commonwealth in a federal nation in 1901. The colonies became states that retained some autonomy under a federal Commonwealth government.

Australia inherited the common law system of the British colonizers. In Australia, therefore, law is brought into existence in two ways. The first is through legislation passed in Parliament; the other is through judicial interpretation by the courts. As Australia constitutes a federation of states, the powers to make laws are distributed between federal and state governments. At the core of the common law system is the concept that like cases be treated alike. As a consequence, a judicial decision is binding on future rulings in the court that made that ruling and lower courts.

In 1992 the decision in *Mabo* v. *Queensland (No. 2)*[80] was handed down by Australia's highest court, the High Court of Australia. It was a landmark decision as it overturned the legal myth that Australia was *terra nullius* (land belonging to no one) prior to invasion. By a majority of six to one the justices held firstly that the doctrine of *terra nullius* could not have any application in Australia as the land was inhabited land. This finding expressly acknowledged that the derogatory and discriminatory assumptions on which the doctrine was historically based had no place in contemporary Australian society.[81]

Secondly, the Court adopted the doctrine of native title for the first time. It held that such title was recognized by the common law of Australia, and reflects the entitlement of Indigenous inhabitants to their traditional lands and waters, in accordance with their laws or customs. Native title survived the Crown's acquisition of sovereignty; it continues to exist for as long as the connection is maintained and it is not extinguished

77 Crook & Short, n. 63 above, p. 300.
78 Ibid.
79 Ibid.
80 *Mabo* v. *Queensland (No. 2)* [1992] HCA 23, (1992) 175 CLR 1 (*Mabo*), per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting.
81 *Mabo*, ibid., [39] and [41]–[42].

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by the exercise of sovereign power, such as by the grant of a freehold or leasehold interest (exclusive possession), as such interests are inconsistent with the continued existence of native title.[82] Since *Mabo*, native title has been determined for most of Martuwarra[83] under the Native Title Act 1993 (NTA). The NTA provides 'a framework for the determination of native title rights and interests recognised by the common law of Australia'.[84] A determination of native title[85] is declaratory of the native title rights and interests that the fact-finding processes of the court cause to be recognized.[86] The NTA 'recognises and protects' native title, and it cannot be extinguished contrary to the NTA.[87] What occurs is '*recognition* of native title; not conferral, and not transformation into non-Aboriginal property rights'.[88]

Native title groups, however, continue to face challenges in the post-determination landscape.[89] Though native title was recognized in Australian common law almost three decades ago, subsequent legislative amendments have limited the ability of Traditional Owners to exercise these rights. At the same time, interest in developing northern Australia has led to environmental and climate change-related threats that would further undermine the right to life of the Martuwarra. This section examines these issues, reviewing some of the limitations of currently recognized native title water rights, and proposed legislative changes that could jeopardize the realization of First Law.

5.1. *Limitations of Currently Recognized Native Title Water Rights*

A key limitation of the native title regime in the current context is that associated water rights recognize only a personal right to 'use and enjoyment' of the water.[90] Specifically, the Fitzroy River native title determinations state that Traditional Owners have rights to use and enjoy flowing and underground waters. This includes the natural resources of these waters for 'personal, domestic, cultural or non-commercial communal purposes'.[91] The authors consider this to be a substantial understatement of the rights of Traditional Owners.

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82 *Mabo*, n. 80 above, per Brennan J at [4].

83 Commonwealth of Australia, National Native Title Tribunal, Geospatial Services, 'Kimberley Native Title Claimant Applications and Determination Areas as per the Federal Court', 31 Dec. 2019, available at: http://www.nntt.gov.au/Maps/WA_Kimberley_NTDA_schedule.pdf.

84 R. French, 'Western Australia v Ward: Devils and Angels in the Detail' [2002] *Federal Judicial Scholarship*, pp. 1–4, at 3.

85 Determinations are made under s. 13 NTA 1993, in accordance with s. 225, in respect of native title rights and interests as defined by s. 223.

86 *Fortescue Metals Group* v. *Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177, 18 Oct. 2019, [43]–[45] and [80]–[81].

87 NTA 1993, ss. 10 and 11 respectively. 'Native title' is defined in s. 223(1) NTA.

88 *Fortescue Metals Group*, n. 86 above, [288].

89 L. Godden & S. Cowell, 'Conservation Planning and Indigenous Governance in Australia's Indigenous Protected Areas' (2016) 24(5) *Restoration Ecology*, pp. 692–7, at 696.

90 National Native Title Tribunal, 1999: see, e.g., the Nyikina-Mangala claim, available at: http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/NNTR_details.aspx?NNTT_Fileno=WCD2014/003.

91 Ibid., para. 5(b).

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The water rights of Traditional Owners under the NTA are restricted to basic traditional rights to use water for drinking and customary uses of the River.[92] This constrains the ability of native title groups to participate in the stewardship of the River in a meaningful way. In particular, there is no ability to ensure that the natural flows of the River are maintained by ensuring that the River is not dammed, diverted, over-extracted or geologically fractured.[93] Moreover, the water rights as currently interpreted offer no power of veto against developments that pose significant contamination threats to the quality of the 'Living Waters', including subterranean groundwater, from intensive irrigated mono-cropping, in-river mining or extensive fracking in the Fitzroy River Catchment basin.[94]

As such, the Martuwarra native title custodians are left increasingly frustrated by their limited ability to participate in the regional planning and management of their ancestral 'Living Waters', despite the River forming the central and most sacred part of their native title Country.[95] The current state-governed regulation of their water resources purports to empower the state to allocate intensive water extraction permits and issue licences to undertake activities with unknown outcomes from the cumulative impact of irrigated agriculture, fracking and mining. This is far removed from the traditional Indigenous regional governance model, Wunan Law.

The Martuwarra custodians yearn for a return to the Wunan model to fulfil their birthright and duty to collectively and holistically manage their River Country as an integrated whole.[96] They therefore seek to have their traditional authority in relation to the River recognized to ensure that its care and management is based on systems thinking and informed decision making, and that it respects the fact that the River is a hydrologically, ecologically, geologically, and culturally unique living water system, which is also a National Heritage listed asset.[97]

5.2. *Emerging Legal Threats*

The White Paper on Developing Northern Australia sets out the Australian government's commitment to work with northern jurisdictions to 'support innovative changes to the arrangements governing land use'.[98] The government aims to simplify land-use

92 s. 211 NTA 1993.

93 A. Poelina, *Managing Kimberley Water Now for the Future*, Madjulla Inc., 31 Mar. 2015, available at: http://majala.com.au/mardoowarra/managing-kimberley-water-now-for-the-future.

94 NTA 1993; cumulative provisions limit the right to negotiate. See also G. Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)' (1999) 23(2) *Melbourne University Law Review*, pp. 372–415.

95 M. McDuffie & A. Poelina, *Standing Together for Kandri* (short film and paper presented at the WACOSS 2012 Conference, 8–10 May 2012, Perth (Australia)), available at: https://vimeo.com/87175648.

96 A. Poelina, personal communication, 2016.

97 Commonwealth of Australia, 'National Heritage Listing: The West Kimberley', *Commonwealth of Australia Gazette*, 31 Aug. 2011, available at: http://www.environment.gov.au/system/files/pages/ed0b4e39-41eb-4cee-84f6-049a932c5d46/files/10606305.pdf.

98 Australian Government, 'Our North, Our Future: White Paper on Developing Northern Australia', June 2015 (White Paper), p. 18, available at: https://www.industry.gov.au/data-and-publications/our-north-our-future-white-paper-on-developing-northern-australia.

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arrangements to attract further investment and to demonstrate the benefits of land tenure reform for Indigenous and non-Indigenous investors. Despite stated aspirations to work with Indigenous communities and to ensure high environmental standards, economic development underpins the government's interests in northern Australia. In this vein the government proposes amendments to the Environment Protection and Biodiversity Conservation Act (1999) (Cth) to facilitate a simpler, faster process to secure certainty for investors, with a particular view to facilitate development in northern Australia.[99]

Meanwhile, conflicting and confusing land tenure systems and the limitations of the Native Title Amendment Act 1998 (Cth)[100] threaten the long-term hydrologically, ecologically, geologically, and culturally unique living water system. They will also threaten the cultural and ecological sustainability of the Martuwarra as a National Heritage listed asset.[101] Separate Native Title Determinations along the River facilitate government 'negotiations' with separate Traditional Owner groups. The result is that the Martuwarra and its peoples are fractured into component parts at odds with the First Law of the River.[102]

Complex and overlapping legal regimes further complicate sustainable management. The River is included in the National Heritage List,[103] with the River's Geikie Gorge[104] and Geikie Gorge National Park[105] on the State Heritage List. Native title has been determined for many groups along the River with claims still being negotiated in other parts. Indigenous land-use agreements (ILUA) have been entered into for part of the River and various Indigenous and non-Indigenous pastoral leases have been granted in the area. Despite this fragmentation, mining leases have been granted throughout the catchment, including in areas of the National and State Heritage listings. The West Australian state government has granted these leases under powers conferred by the Native Title Amendment Act, which enables the state government to do so in 'the national interest'.[106]

5.3. *Support for the Martuwarra's Right to Life within Common Law Jurisprudence*

While state law threatens the Martuwarra's right to life, a pathway to secure the First Law rights of the River and the Traditional Owners may be found to exist within the

99 White Paper, ibid., p. 97.

100 Triggs, n. 94 above.

101 Commonwealth of Australia, 'National Heritage Listing: The West Kimberley', n. 97 above.

102 The Native Title Determinations of Martuwarra are broken down into six claimant groups.

103 Commonwealth of Australia, 'National Heritage Listing: The West Kimberley', n. 97 above; H. Hobbs, 'Will Treaties with Indigenous Australians Overtake Constitutional Recognition', *The Conversation*, 20 Dec. 2016, available at: https://theconversation.com/will-treaties-with-indigenous-australians-overtake-constitutional-recognition-70524.

104 Government of Western Australia, Heritage Council, State Heritage Office, 'Geikie Gorge (Place Number 04434)', *InHerit*, 21 Aug. 1995, available at: http://inherit.stateheritage.wa.gov.au/Public/Inventory/Details/931de8a8-7503-4535-883e-1cee7af9ecf5.

105 Government of Western Australia, Heritage Council, State Heritage Office, 'Geikie Gorge National Park (Place Number 18638)', *InHerit*, 21 Jan. 2009, available at: http://inherit.stateheritage.wa.gov.au/Public/Inventory/Details/0920c55d-ee8c-4bfc-9845-a0254ef6b065.

106 Subdivision P – Right to Negotiate, ss. 36A, 42 and 43. Also B. Kruse (personal communications, Broome Workshop, 28 Sept. 2016).

common law. We argue for the recognition of the traditional laws and customs of Martuwarra Traditional Owners under the native title law, by close analogy with the *Whanganui River* case.[107] If First Law is implemented in the manner we set out, this will facilitate recognition and protection of the right to life of the Martuwarra as a whole living entity.

Peter Burdon and his co-authors recommend greater recognition of Indigenous understandings of water within our legal system, particularly with regard to the interrelationship between Indigenous peoples, water flows, and cultural continuity.[108] We build on their suggestion that the law should develop to acknowledge Indigenous practices of reverence for water as a sentient being with its own rights, including the right to flow.[109]

We explore the rights of Traditional Owners based on First Law, which considers the River itself as being or embodying a living ancestral being, the Rainbow Serpent, with its own personhood and rights. This argument involves establishing the case for significantly enhanced native title water rights of the Traditional Owners in relation to the River. We contend below that the principles from the *Whanganui River* case are broadly applicable to the Martuwarra as they are consistent with and advance the common law principles of *Mabo (No. 2)*,[110] which applied the doctrine of native title, in recognizing traditional rights to lands and waters.

Overview of the Whanganui River case

In the *Whanganui River* report, the main order of the Tribunal was that the ownership and authority of the Atihaunui (the Whanganui *iwi*[111]) not only should be recognized, but also that it needed to be based on Māori understandings without reference to conceptions of river ownership in terms of riverbanks and riverbeds embodied in English law.[112] The Tribunal found:

> The conceptual understanding of the river as a tupuna or ancestor emphasises the Māori thought that the river exists as a single and undivided entity or essence. Rendering the native title in its own terms, then, what Atihaunui owned was a river, not a bed, and a river entire, not dissected into parts.[113]

Therefore, recognizing native title based on Māori concepts meant that the Atihaunui possessed the River as a whole from mountains to sea, as an entity and a resource.[114]

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107 Waitangi Tribunal, 'The Whanganui River Report, Case WAI167', available at: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68450539/Whanganui%20River%20Report%201999.pdf (Waitangi Tribunal (1999)).

108 P. Burdon et al., 'Decolonising Indigenous Water "Rights" in Australia: Flow, Difference, and the Limits of Law' (2015) 5(4) *Settler Colonial Studies*, pp. 334–49, at 343.

109 Ibid.

110 *Mabo (No. 2)*, n. 80 above, per Brennan J and majority judges (Dawson J dissenting).

111 '*Iwi*' is the Māori word which refers to a Māori tribe or nation.

112 Waitangi Tribunal (1999), n. 107 above, p. 343.

113 Ibid., p. 337.

114 Ibid., pp. 338 and 343.

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The recommendations of the Tribunal that the Crown negotiate a settlement with the Māori owners resulted in an agreement and legislation.[115] The legislation, passed by the New Zealand Parliament in 2017, establishes a co-management regime, led by the authority of the Whanganui River *iwi* as its guardians. This should empower the *iwi* to protect the River entity's right to life and retain its natural flows.

Key principles from the Whanganui River *case: Application in Australia*

Three key principles can be elucidated from the *Whanganui River* case, which are relevant in establishing the merits of the case for the Martuwarra in Australia:

(1) *Rendering native title*

The Tribunal noted that '[t]here is authority in English law, from sources as high as the Privy Council [in 1927], that native title is to be rendered conceptually as the native people saw it, and not according to concepts that developed in England'.[116] Therefore 'in rendering native title in its own terms, the river [was] to be seen as an indivisible whole',[117] not something that should be broken down into separate components of water, riverbed and banks.

The Australian common law position is entirely consistent with the above. The High Court in *Mabo (No. 2)* held:

> Native title has its origins in and is given content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[118]

Therefore, under the Native Title Act, native title should be recognized in a way that acknowledges the Martuwarra as a single, indivisible entity from head to tail – or embodies a living being with the right to life – in accordance with Warloongarriy Law and the ontology of the Rainbow Serpent being.

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115 Te Awa Tupua (Whanganui River Claims Settlement) Act, available at: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL68939_1/te-awa-tupua-whanganui-river-claims-settlement-bill. The Act declares that Te Awa Tupua is 'an indivisible and living whole and comprises the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements and is a legal person with all the rights, powers, duties and liabilities of a legal person'. The Act received Royal Assent on 20 Mar. 2017, and gives effect to the Whanganui River Deed of Settlement signed on 5 Aug. 2014, which implemented the Waitangi Tribunal decision (Case WAI167) in 1999.

116 Waitangi Tribunal (1999), n. 107 above, p. xiv.

117 Ibid., p. 39.

118 *Mabo (No.2)*, n. 80 above, per Brennan J. Yet, to date in Australia, as it has not been challenged, native title water rights have been administered in terms of the common law dissected view, contrary to the native title doctrine principle that such title must be recognized in customary law terms.

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(2) *Traditional law view of the River*

The Waitangi Tribunal found that:

> in Māori terms, the River was a single and indivisible entity, a resource comprised of water, banks, and bed, in which individuals had particular use rights of parts but where the underlying title remained with the descent group as a whole, or conceptually, with their ancestors. Thus, the River is called a *tupuna awa*, or a River that either is an ancestor itself or derives from ancestral title.[119]

In terms of their own traditions and beliefs, what the Atihaunui possessed was a River that was seen as an ancestral, living being.[120]

In the present case, the First Law of the Traditional Owners is substantively the same. Under Warloongarriy Law, the Martuwarra is, or embodies, a living ancestral Rainbow Serpent being which exists from source to sea. The Serpent, with its own 'life force' and spiritual essence, gives life and has the right to life. Like the Whanganui River *iwi*, Martuwarra people derive their identity and very existence from the River. They belong to the River. Warloongarriy Law sets out traditional community rights, powers and duties for Martuwarra Nations in relation to the flow of the River, as well as shared rights and duties to access and co-manage the River.

(3) *Common law and traditional River rights are private rights*

In response to policy concerns argued by the Crown that rivers should be publicly owned resources, the Waitangi Tribunal noted that the English law brought to New Zealand was clear: riverbeds were vested in the Crown to the tidal limit but thereafter were owned to the centre line by the landowners on either side, but with public rights of navigation. The Tribunal noted that, as a matter of law, a private ownership presumption applies, not one of public ownership.[121] The position in Australia is materially the same. The common law presumption of private ownership, and its associated riparian rights, applied in favour of landowners whose land contained or bounded a river. By virtue of such riparian water rights, owners of land could take water for ordinary domestic and stock usage. These common law riparian rights still apply, although in many states they may technically have been supplanted by statutory riparian water rights[122] under the state water allocation statutes.[123]

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119 Waitangi Tribunal (1999), n. 107 above, p. xiv.

120 Ibid., p. 338.

121 Ibid., p. 335.

122 P.N. Davis, 'Nationalization of Water Use Rights in the Australian States' (1975) 9(1) *University of Queensland Law Journal*, pp 1–25. Davis argued that the 'nationalization clauses' abolished common law riparian rights. However, in *Rapoff* v. *Velios* [1975] WAR 27, the WA Supreme Court held that common law riparian rights endure but are subject to the state's superior right to allocate to the contrary.

123 Rights in Water and Irrigation Act 1914 (WA), s. 9 (originally s. 14).

The Crown in each state or territory has been vested with 'the right to the use, flow and control' of surface and underground water.[124] The vesting of the right to the use, flow and control of water did not vest ownership of the water in the states.[125] On our analysis the Western Australia Crown's primary power of control over water under section 5A (originally section 4(1)) of the Rights in Water and Irrigation Act 1914 (WA) did not, and does not, extinguish the native title water rights and interests. In the case of *Akiba*, the majority joint judgment of Hayne, Kiefel and Bell JJ in the High Court distinguished regulating the exercise of native title rights from the question of extinguishing them.[126] The Court 'conceptualised native title as an *underlying title*, distinct from, and supporting the exercise of, incidents of title' – for example, rights to access waters, exclude others, fish, sell resources, all which are matters to be determined on the evidence.[127]

Furthermore, Sean Brennan has observed that '*Akiba* marked a turning point in native title extinguishment law, towards a greater moderation and realism with the High Court seeming now to regard extinguishment as a "legal conclusion of last resort"'.[128]

On public policy and legal grounds it is apparent that Indigenous Australians are entitled to assert privately held riparian rights at least equal to those enjoyed by non-Indigenous Australians at the time of sovereignty and, in our view, they can assert much stronger private riparian rights under traditional law.

Nature and content of Traditional Owners' rights to the River

The community native title rights to the River as an entity are unique to First Law – Warloongarriy Law and Wunan Law. The character of these rights is that of co-ownership and co-authority to manage the health and wellbeing of the River as a living entity, in the capacity of guardian of the living River. We therefore contend that the native title holders of the Martuwarra possessed and continue to possess community title rights and interests with respect to the River as both a living entity and a resource, in accordance with First Law. This is now discussed in more detail.

In *Ward*, Kirby J encouraged a broad approach to native title given its *sui generis* nature, remarking *obiter* that '[t]here has been little need to elaborate the well-established principle that native title is *sui generis* and should not be restricted to rights with precise common law equivalents'.[129]

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[124] Current provisions are Rights in Water and Irrigation Act 1914 (WA), s. 5A; Water Act 1989 (Vic), s. 7; Water Management Act 2000 (NSW), s 392; Water Act 2000 (Qld), s. 26; Water Resources Act 2007 (ACT), s. 7; Water Act 1992 (NT), s. 9.

[125] E. McPherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge University Press, 2019), p. 56 (citing *ICM Agriculture Commonwealth* [2009] 240 CLR 140).

[126] *Akiba on behalf of the Torres Strait Regional Seas Claim Group* v. *Commonwealth of Australia* [2013] HCA 33, [68].

[127] B. Keon-Cohen, 'From Euphoria to Extinguishment to Co-existence' (2017) 23 *James Cook University Law Review*, pp. 9–30, at 15.

[128] S. Brennan, quoted in R. Webb, 'The 2016 Sir Frank Kitto Lecture: Whither Native Title?' (2015–16) 19(2) *Australian Indigenous Law Review*, pp. 114–28, at 123 (Webb (2016)).

[129] *Ward*, n. 40 above, [578].

Sui generis native title is arguably best described as proprietary title, plus a bundle of other rights and entitlements which are much more extensive and significantly different in character from the ordinary constructs of rights and interests at common law.[130] The High Court has explained that 'native title is neither an institution of the common law, nor a form of common law tenure but it is recognised by the common law. There is therefore an intersection of traditional law and customs with the common law'.[131]

First Law 'songlines symbolise part of a large body of ancient and subsisting non-British Australian continental common law',[132] which may not be able to be extinguished or diminished simply through reframing them as merely religious or sacred. The unique character of songlines as 'narratives … containing and transmitting widely accepted customary laws'[133] means that many Indigenous continental common law principles underpinning communal title may be incapable of extinguishment by Australian laws as they are inherently of a different nature, character and content, and are therefore unlikely to be inconsistent. As Gary Lilienthal highlights, '[t]he linguistic evidence [shows] that classical conceptions of land-holding emphasise custodianship, belonging and landed origin, rather than absolute ownership'.[134]

Perhaps the most emphatic Australian judicial clarification of the nature and content of native title rights and interests, and the correct approach to recognizing them under the common law, is to be found in the recent decision of the Full Federal Court in *Fortescue Metals*.[135] All five justices unanimously confirmed that 'the very foundation of traditional Aboriginal law and customs … is in the spiritual, and the intermingling of the spiritual with the physical, with people and with land. That is how Aboriginal law works'. They held that 'the distinctions … between spiritual belief and real property rights, or personal property rights, are not to be imported into an assessment of the *existence and content* of Aboriginal customary law. *To do so would be to destroy the fabric of that customary law*'.[136]

Jagot and Mortimer JJ stated that it all depends on the evidence, adding that '[t]here are not necessarily any hard boundary lines, or prohibitions on how rights and interests might be articulated, and many nuances in terms of the nature and content of rights in land and waters are possible'.[137]

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130 J. Gray, 'Is Native Title a Proprietary Right?' (2002) 9(3) *Murdoch University Electronic Journal of Law* online articles, para. 62 (paper presented at the Australasian Law Teachers' Association Annual Conference, Perth (Australia), 29 Sept.– 2 Oct. 2002, available at: http://www5.austlii.edu.au/au/journals/MurdochUeJlLaw/2002/32.html).

131 *Fejo* v. *Northern Territory of Australia* (1998) 195 CLR 96, p. 128.

132 G. Lilienthal, *The Australian 'Songlines': A Re-Framed Symbol of Ancient Continental Common Law?* (Carrington Rand, 2016), p. 4.

133 Ibid., p. 3.

134 Ibid., p. 25.

135 *Fortescue Metals Group*, n. 86 above. See D. Bagnall, 'Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People' (2020) 34(9&10) *Australian Environmental Review*, pp. 226–31. Fortescue Metals' application for special leave to appeal to the High Court against the Full Federal Court's decision was rejected by the High Court on 29 May 2020.

136 *Fortescue Metals Group*, ibid., per Jagot and Mortimer JJ at [288], with Robertson and Griffiths JJ concurring at [397], and White J concurring at [528] (emphasis added).

137 *Fortescue Metals Group*, n. 86 above, [81].

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Most resoundingly, in considering where 'justice and injustice' lay, and how values and public confidence in the administration of justice were relevant to the claimed native title rights, the justices endorsed the Full Court's view in *Fazeldean*[138] that the considerations involved an '*informed recognition of the deep importance of the vindication of proven historical connection affecting generations past, present and future*'.[139]

In the authors' view, the Traditional Owners of the Martuwarra had and continue to have rights to shared possession, occupation, use and control of the River as a whole, concurrently with each of the other native title holders along the River. The co-ownership creates fiduciary duties, similar to partnership property.[140] The Traditional Owners also have a shared duty and authority to care for the River as a living entity, the Rainbow Serpent ancestral being. This means that the Martuwarra native title river rights are also in the nature of shared 'guardianship'. When Aboriginal people are born, they are given a totem. In the Nyikina culture of the second author a totem is known as *Jadiny*. In framing the concept of totemism, Deborah Bird Rose describes totem as 'a common property institution for long-term ecological management'.[141] The totem is your kin, and Aboriginal people are given a totem to teach them that they have a kinship relationship with non-human beings. This relationship creates empathy and a lifelong relationship through an ethics of care. This teaches Traditional Owners about the ecological balance between humans and nature. The River is held by the Traditional Owner groups as guardians for each other and for future generations, and it is a treasured shared totem.

Consistent with the authors' conclusions, the most recent landmark report of the Waitangi Tribunal has confirmed that Māori customary law freshwater rights are proprietary in nature, and include an economic benefit.[142] The Tribunal also held that existing regulatory frameworks do not adequately provide for the *iwi's kaitiakitanga* [guardianship] and the *tino rangatiratanga* [sovereignty] over their freshwater *taonga* [treasured possessions].[143]

In summary, based on the above reasoning, we argue that the *sui generis* Martuwarra native title river rights and interests in the nature of common property

138 *Western Australia* v. *Fazeldean (No. 2)* [2013] FCAFC 58; 211 FCR 150, [35].

139 *Fortescue Metals Group*, n. 86 above, [140] (emphasis added).

140 In *Birtchnell* v. *Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 38, p. 407, Dixon J held that the relationship of mutual agency between partners meant they are under a fiduciary duty to refrain from actions which conflict, or which might possibly conflict, with the interests of those they are bound to protect. Also, in *United Dominions Corporation Ltd* v. *Brian Pty Ltd* [1983] 1 NSWLR 490, p. 506, Samuels JA concluded that 'joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member'.

141 D. Rose, 'Common Property Regimes in Aboriginal Australia: Totemism Revisited', in P. Larmour (ed.), *The Governance of Common Property in the Pacific Region* (ANU Press, 2013), pp. 127–44.

142 Waitangi Tribunal, 'The Stage 2 Report on the National Freshwater and Geothermal Resources Claims', WAI 2358, paras 2.6.5 and 2.6.6, available at: https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_152208791/Freshwater%20W.pdf. (Waitangi Tribunal (2019)). The Tribunal recommended a percentage of water allocation to be set aside for Māori, a national co-governance/allocation body, and Resource Management Act reform.

143 Ibid., p. xxi.

and co-guardianship of the living River as an entity have no 'necessary' inconsistency with any common law water or statutory rights in relation to the water.[144] Accordingly, such traditional law rights and interests can coexist with common law rights and choses in action[145] as well as with the Crown's regulatory powers to preserve and regulate resources.[146] As the River's rights and interests are not extinguished, they must endure.[147]

5.4. *Challenges of the Australian Native Title Regime in Realizing First Law in the Colonial Context*

Similarities between Australian and New Zealand law include not only the comparable common law heritage of the two countries but also that the Post-Settlement Governance Entities (PSGE) under New Zealand's Treaty of Waitangi are similar in some respects to the Prescribed Bodies Corporate (PBC) under Australia's Native Title Act 1993.[148] Challenges and obstacles to succeeding with these arguments in the Australian native title context include that this argument is novel in this jurisdiction and the Martuwarra factual scenario is unique. As a consequence, these arguments have not previously been put to any Australian court. However, the most recent approaches of the High Court and Full Federal Court in recognizing native title rights and interests provide support for the views and reasoning in this article.[149]

While the notion of guardianship is yet to be established in Australian native title law, we contend that the unique *sui generis* nature of native title rights and interests in the form of the co-guardianship authority possessed by the Martuwarra First Nations, must be respected and recognized. It must also be cautiously navigated by state and federal government decision makers so that they do not inadvertently infringe or remove these pre-existing, private law rights and interests in relation to the River, in contravention of the rule of law.

As native title barrister Bryan Keon-Cohen AM QC has stated:

> Indigenous organisations … are looking outwards and upwards; e.g., to land-based commercial opportunities, the negotiation of domestic 'treaties', and to constitutional reform that might include rights of self-government founded on areas the subject of native title. Such 'rights' represent but a small development of the principles enunciated in *Mabo (No 2)*: the recognition of the continued vitality, and legal validity, of a system of law founded on custom and tradition not sourced in, but recognised by, Australian common

144 NTA 1993, sub-s. 4(6).

145 See the High Court in *Wik Peoples* v. *Queensland* (1996) 187 CLR 1.

146 *Yanner* v. *Eaton* (1999) CLR 351 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), p. 369, [28] and [37].

147 Contrast the High Court in *Ward*, n. 40 above. The current approach to determining extinguishment by necessary implication is outlined in *Akiba*, n. 126 above: legislation that is regulatory rather than prohibitory is consistent with the ongoing exercise and recognition of native title rights and interests; therefore there is no extinguishment. See also *Karpany* (2013) 303 ALR 216, p. 224, [32].

148 K. O'Bryan, 'Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria' (2017) 20 *Australian Indigenous Law Review*, pp. 48–77, at 72.

149 *Fortescue Metals Group*, n. 86 above; *Akiba*, n. 126 above; also, *Western Australia* v. *Brown* [2014] HCA 8.

law. Such traditional laws delivered, via *Mabo (No 2)*, enforceable rights to land: they may also yet deliver enforceable powers of self-government including increased ability to control and develop the now expansive Indigenous estate.[150]

6. PROPOSED PATHWAY: LEVERAGING NATIVE TITLE WATER CONCEPTS TO REINSTATE A TRADITIONAL WATER GOVERNANCE MODEL

First Law, the rights of nature and Earth jurisprudence align to provide the direction of the new law and new ethic needed to ameliorate the harm of 200 years of colonization. We also highlight how the laws of the colonizers (state law) impede progress to a better relationship between nature and humans. Further, we have illustrated how the River's customary law right to life could be recognized and enforced under Australian common law. In doing so, we argue that enhanced Indigenous water rights for the River and Traditional Owners provide a means for securing a co-stewardship arrangement for managing the Martuwarra.

Based on the legal arguments above, we contend that Traditional Owners have traditional title to the River as a whole living entity under both First Law and the common law. The native title groups' community title rights to the River as an entity must endure. These rights include guardianship authority, shared access, and rights to flow. Correspondingly, the rights of individual members to use the water and the River resource stem from the underlying community native title rights and interests in the River as both an entity (an integrated, whole living ancestral serpent being) and a resource. Recognition of the native title in these terms would facilitate Martuwarra Traditional Owners in negotiating a co-management structure for the River with relevant state and federal government agencies as a collective regional group in a manner similar to the Whanganui River.

Such a co-management structure could take the form of an Act of Parliament or may ideally be founded in an historic treaty between the Martuwarra custodians and the State of Western Australia. In terms of adopting a legislative approach to establish the Martuwarra as a legal entity, the Te Awa Tupua (Whanganui River claim) provides a useful reference for the Australian context. The South West Native Title Settlement (Noongar claim) in Western Australia, for example, was the first in Australia to be created by settlement legislation.[151] The political climate, however, may make it less likely that legislation would be enacted to create a separate legal entity given the politically sensitive nature of scarce water resources.[152]

While in the State of Victoria the Yarra River has been recognized through legislation as an indivisible living entity that needs protection, the Victorian legislation does not give the Yarra River legal personhood or assign it a legal guardian. The

[150] Keon-Cohen, n. 127 above, p. 30.

[151] Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA); see also O'Bryan, n. 148 above, p. 73.

[152] O'Bryan, ibid., p. 73.

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Birrarung Council acts as the independent Indigenous voice of the Yarra, but has only advisory status.[153] Therefore, we believe that the Yarra River model would not provide the Martuwarra Traditional Owners with adequate rights to participate in the stewardship of the River. We also consider that it is not necessary to incorporate the River, as it is already an entity in its own right under First Law. First Law rights and interests need simply be recognized under native title by the common law in order for the River to be an entity under the common law. As Gary Brierley and his co-authors discuss, more progressive river science and geomorphology may also have a role in this new era of socio-cultural river management.[154]

The Martuwarra Fitzroy River Council reflects the co-guardianship relationship that exists between the Traditional Owner nations along the River. It provides the formal structure for these independent agencies to discharge their fiduciary duties to their members. The Martuwarra Fitzroy River Council and independent registered native title agencies acknowledge and respect that their native title must coexist with non-Indigenous rights such as water allocation rights under state statutes and pastoral lease rights. However, by the same token, they assert that their native title rights to the River must be respected, validated and recognized under Australian law. These rights should ultimately be reflected in a formal legal co-management arrangement that aligns with regional Wunan Law, which governs guardianship across the River Country's native title estates.[155]

We argue that enhanced Indigenous water rights for the River and Traditional Owners would provide a means for negotiating a co-stewardship structure in relation to the Martuwarra that enables meaningful participation in planning, management and decision making, and is better aligned with traditional water governance models and First Law ontology of the River as the Rainbow Serpent ancestral being.

7. CONCLUSION

In these final paragraphs, it is only fitting that as lead author, I – Martuwarra, voice my conclusions.

My future and that of Martuwarra Nations and peoples rests on principles of First Law founded in the beginning of time. At this time of growing uncertainty the threats

153 O'Bryan, ibid.

154 G. Brierley et al., 'A Geomorphic Perspective on the Rights of the River in Aotearoa New Zealand' (2018) 35(10) *River Research and Applications*, pp. 1–12.

155 Note that this governance model would also effectively implement the concept of 'Earth Community' as advocated by P. Burdon, 'Earth Jurisprudence and the Murray Darling: The Future of a River' (2012) 37(2) *Alternative Law Journal*, pp. 82–5, as Indigenous custodians manage Country in a way that values and respects ecological integrity and equilibrium within connected systems: 'Earth Jurisprudence seeks to catalyse a paradigm shift in law from anthropocentrism to the eco-centric concept of "Earth Community". This term refers specifically to two ideas. First, human beings exist as one interconnected part of a broader community that includes both living and nonliving entities. Second, the Earth is a community of subjects and not a collection of objects that exist for human use and exploitation' (ibid., p. 84); 'Earth Jurisprudence advocates the concept of Earth Community as an alternative paradigm for law and recognises the intrinsic value of ecosystems. This alternative focus offers a unique holistic insight into the management of the Basin and suggests modelling founded on the principle of ecological integrity' (ibid., p. 85).

of environmental, economic and social change pose significant challenges to my continued existence as the Rainbow Serpent ancestral being.

In the words of Irene Watson:

> Citizens and the courts have a responsibility not to blindly uphold the authority of those holding power, but instead to utilise the jurisdiction of the common law to ensure that human rights standards are maintained and not abused.[156]

My fundamental right to life as the Martuwarra needs to be respected not only through obligations from the common law but also international law, the fundamental rights of nature under Earth jurisprudence and, ultimately, First Law. Failure to acknowledge my inherent right to life as the Martuwarra would be a breach of First Law and the human right to life and cultural practice. It would also leave Traditional Owners, who remain my guardians, exposed to the threat of ecological genocide, with no ability to protect their life-supporting land and water ecosystems.

My right to life as a vital living River system is not only the expression of a growing international legal trend[157] *but is also part of a global movement which recognizes the rights of nature.*[158] *I therefore urge legal scholars, courts, law and policy makers, and the citizens of our world to embrace me as an integrated living ancestral being – the Martuwarra, Rainbow Serpent. In doing so, remember your duties to protect me from my head to my tail for past, present and future generations.*

156 Watson, n. 43 above, p. 15.

157 See, e.g., E. O'Donnell & J. Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand and India' (2018) 23(1) *Ecology and Society* online articles, Art. 7, available at: https://www.ecologyandsociety.org/vol23/iss1/art7; E. O'Donnell & E. Macpherson, 'Voice, Power and Legitimacy: The Role of the Legal Person in River Management in New Zealand, Chile and Australia (2019) 23(1) *Australasian Journal of Water Resources*, pp. 35–44.

158 See Global Alliance for the Rights of Nature, available at: http://therightsofnature.org.