APPENDIX A – PROCEDURAL BACKGROUND

He Toa Takitini deed of mandate

1. In 2010, He Toa Takitini sought the mandate to represent Heretaunga Tamatea claimants in treaty settlement negotiations with the Crown. The proposed claimant definition in He Toa Takitini's deed of mandate included Ngāti Hinemanu (although not Ngāti Paki) and the claimed mandate therefore encompassed the Wai 1835 claim, which had been filed by Pātea-based members of Ngāti Hinemanu, including Ngahape Lomax. On 18 April 2010, both Mr Lomax and Jordan Winiata-Haines wrote to the Minister of Treaty Negotiations on behalf of the Heritage Trust asking for the claim to be excluded from the Heretaunga Tamatea settlement.[107] The Minister, however, considered that the claim would be settled through the Heretaunga Tamatea negotiations, but encouraged Ngāti Hinemanu and Ngāti Paki to make a submission on He Toa Takitini's deed of mandate.[108]

2. The final draft deed of mandate included a map depicting the Heretaunga Tamatea claims area. Although the map noted that 'The He Toa Takitini area of interest matches directly with the Waitangi Tribunal District Inquiry areas' (that is, encompassing the Hawke's Bay inquiry district as bordered by the Wairarapa ki Tararua, Mohaka ki Ahuriri, and Taihape district boundaries), the boundary included both all of the Te Kōau and Awarua o Hinemanu blocks and part of Awarua,[109] which had been included as part of the Taihape inquiry district in July 2010.[110] In confirming the Taihape inquiry district at the time, just before the He Toa Takitini deed of mandate was advertised, the chairperson had remarked that

> He Toa Takitini support the inclusion of Kaweka, Te Koau and Awarua o Hinemanu only within the eastern boundary of the Taihape inquiry district. They note their own customary interests in these blocks and within the Kaweka and Ruahine Ranges in general. They consider this area to be a Tatau Pounamu between the Taihape and Heretaunga-Tamatea inquiry districts, and may wish to provide evidence of their interests with[in] the Tatau Pounamu.[111]

3. The final draft deed of mandate further set out an acknowledgement that overlapping claimants were participating in the Taihape district inquiry but noted that '[p]articulars of the claims of these claimants are still to be determined'. The document explained that a process of engagement with these Taihape claimants had begun.[112] As it happened, in the lead-up to the deed's finalisation a series of written exchanges had taken place between the Heritage Trust and He Toa Takitini.[113] This culminated in the chair of He Toa Takitini writing separately on 10 September 2010 to both the Heritage Trust and the Crown to acknowledge that Ngāti Hinemanu me Ngāti Paki had a distinct whakapapa (including links to Raukawa and Tūwharetoa), that Wai 1835 was a Taihape rather than Heretaunga claim and raising the possibility of the Heritage Trust and He Toa Takitini signing a memorandum of understanding (MOU) over their future interaction.[114]

[107] Wai 2542, #A10(a), pp 2, 62
[108] Wai 2542, #A10(a), pp 3-5
[109] Wai 2542, #A10(a), pp 21, 365
[110] Wai 2180, #2.5.13, pp [10]-[11]
[111] Wai 2180, #2.5.13 at [3.1.110]
[112] Wai 2542, #A10(a), p 22
[113] Wai 2542, #A10(a), pp 64, 66-77
[114] Wai 2542, #A10(a), pp 88-89

4. This letter came only three days before objections to the publicly advertised He Toa Takitini deed of mandate were due, on 13 September 2010. The Heritage Trust lodged a submission on the deadline, arguing that the deed should not have included both Wai 1835 and Wai 1868 as these were Ngāti Hinemanu me Ngāti Paki claims to be heard in the Taihape inquiry district. They asked for the deed to explicitly state their exclusion. They noted that their mana whenua interests in Taihape were 'through the matriarchal lineage of Ngati Hinemanu', as opposed to the 'patriarchal lineage of Taraia 2nd'.[115] This squared with an explanation that the Heritage Trust had provided separately to the Office of Treaty Settlements (OTS) on 8 September 2010 that stated:

> There is no difference in whakapapa for Ngati Hinemanu me Ngati Paki. Ngati Hinemanu me Ngati Paki are one and the same people. …
>
> What is different is that the lands within the Taihape district were claimed in the Native Land Courts by Ngati Hinemanu me Ngati Paki through different tipuna than lands claimed by Ngati Hinemanu within the Heretaunga district.
>
> The Ngati Hinemanu me Ngati Paki claims in the Taihape area were mostly through the lines of the mother of Hinemanu, Punakiao, whereby the claims [of] Ngati Hinemanu in the Heretaunga area were mostly through the lines of the father of Hinemanu, Taraia 2nd.[116]

5. On 24 November 2010, OTS wrote to counsel for the Heritage Trust confirming that Wai 1835 and 1868 would be excluded from the He Hoa Takitini deed of mandate, as the Crown had become satisfied that Ngāti Hinemanu in Heretaunga were distinguishable from Ngāti Hinemanu in Pātea due to their descent from different children of Hinemanu (in the case of Ngāti Hinemanu ki Heretaunga, this descent was through Hinemanu's son Tarahe). The Crown supported plans for the two groups to establish an MOU.[117]

The He Toa Takitini terms of negotiation

6. Because of the Crown's concern to provide clarity about whose claims were to be settled in negotiations with He Toa Takitini, the following clause was included in the draft terms of negotiation:

> The parties acknowledge that the definition of Heretaunga Tamatea includes any whanau, hapu or group of persons who are members of Ngati Hinemanu only to the extent that those whanau, hapu or groups descend from the eponymous [sic] ancestor Tarahe who exercised customary rights within the Heretaunga Tamatea Area of Interest.[118]

7. As with the deed of mandate, the Heretaunga Tamatea area of interest was described as matching 'directly with the Waitangi Tribunal District Inquiry areas', although it again included the same parts of the Taihape inquiry district that the deed of mandate had.[119]

8. Proceeding with the proposed clause concerning Tarahe became impossible, however, as members of Ngāti Hinemanu were offended that they were to be defined by reference to one of Hinemanu's children rather than through their descent from Hinemanu herself. He Toa Takitini told OTS on 8 August 2011 that they agreed with the Hinemanu

[115] Wai 2542, #A10(a), pp 78-79, 85
[116] Wai 2542, #A10(a), p 58
[117] Wai 2542, #A10(a), pp 95-96
[118] Wai 2542, #A10(a), p 110
[119] Wai 2542, #A10(a), p 111

position.[120] In consultation also with the Heritage Trust (and, it would appear, the Claims Trust[121]), the relevant clause of the draft terms of negotiation was reworded as follows:

> The parties acknowledge that the definition of Heretaunga-Tamatea … includes any whanau, hapu or group of persons who are members of Ngati Hinemanu only to the extent that those whanau, hapu or groups descend from the eponymous [sic] ancestor Taraia II (also known as Taraia Ruawhare) who exercised customary rights within the Heretaunga Tamatea area of interest.[122]

9. This wording was potentially ambiguous, it seems to us, because all members of Ngāti Hinemanu descend from Taraia II, regardless of where he exercised customary rights. However, a further clause was inserted in the historical claims section of the terms of negotiation that referred instead to the derivation of interests:

> For the avoidance of doubt, the definition of Heretaunga Tamatea Historical Claims does not include those historical claims of Ngati Hinemanu to the extent that those historical claims relate to the interests of Ngati Hinemanu that are derived through the eponymous [sic] ancestor Punakiao.[123]

10. He Toa Takitini and the Crown signed the terms of negotiation on 19 December 2011.[124]

Memorandum of understanding between He Toa Takitini and the Heritage Trust

11. By 2014 the negotiations had advanced considerably and yet no MOU was in place between the Heritage Trust and He Toa Takitini. Counsel for the Heritage Trust wrote to the Minister on 14 April 2014 expressing a desire to finalise the MOU shortly. Counsel noted that several blocks were included in the He Toa Takitini deed of mandate – Te Kōau, Tīmāhanga, Awarua o Hinemanu, and 'the foot of the Kaweka block' – that were shared interests of Ngāti Hinemanu me Ngāti Paki. The Heritage Trust sought a clause in the MOU in which the Crown and He Toa Takitini agreed to recognise the trust's interests in these blocks and not use them in settlement without the trust's agreement.[125] (We note that none of the blocks named included any of the Kāweka or Gwavas CFL lands).

12. Before the Minister responded, the chairs of the Heritage Trust and He Toa Takitini (Jordan Winiata-Haines and David Tipene-Leach respectively) signed the MOU on 15 May 2014. Its purpose was threefold. First, to 'clarify the Ngāti Hinemanu interests that are being progressed by NHNPHT through the Waitangi Tribunal district inquiry process and will not be affected by the Heretaunga-Tamatea Deed of Settlement or the associated Treaty settlement negotiations'. Secondly to 'clarify the Ngāti Hinemanu interests that are represented by HTT within the Treaty settlement negotiation process and will be settled through the Heretaunga-Tamatea Deed of Settlement'. Thirdly, to 'record undertakings between the Parties to support each other's efforts to progress the interests of Ngāti Hinemanu'.[126]

13. The respective areas of interests were then described and depicted on two appended maps. He Toa Takitini's area was the same as that set out in its deed of mandate (thus

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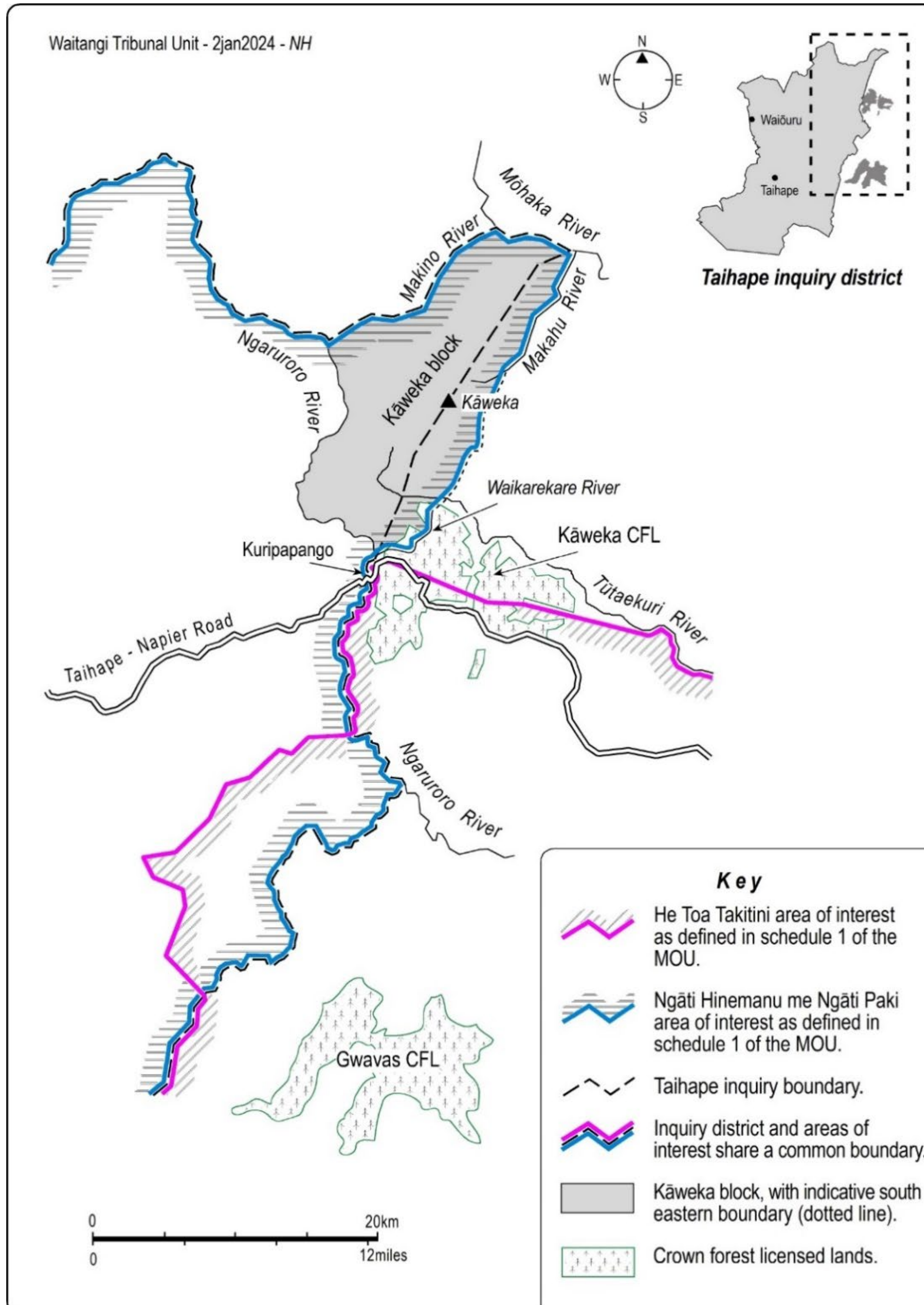
[120] Wai 2542, #A10(a), p 99
[121] He Toa Takitini advised OTS on 24 November 2011 that the new wording had been 'agreed in principle by the Mokai Patea and Ngati Hinemanu Ngati Paki Heritage Trust': Wai 2542, #A10(a), p 102.
[122] Wai 2542, #A10(a), p 110
[123] Wai 2542, #A10(a), p 112
[124] https://www.govt.nz/assets/Documents/OTS/Heretaunga-Tamatea/Heretaunga-Tamatea-Terms-of-Negotiation-19-Dec-2011.pdf
[125] Wai 2542, #A10(a), pp 134-135
[126] Wai 2542, #1.1.1, p [12]

including some Taihape blocks), while the Heritage Trust's area of interest was the Taihape inquiry district (albeit including, on the map, the area of the Kāweka Block overlapping the inland Ahuriri block boundary, thus putting it at odds with the Tribunal's confirmation of the Taihape inquiry district in July 2010 and including a very small area of Kāweka CFL land).[127] The Heritage Trust was described as authorised by the Wai 1835 and 1868 claimants to represent those of Ngāti Hinemanu me Ngāti Paki whose customary rights lay within this boundary.[128]

He Toa Takitini and Ngāti Hinemanu me Ngāti Paki areas of interest as defined in the MOU



[127] See Wai 2180, #2.5.13, pp [10]-[11] and Wai 2542, #A10(a), pp 362, 376, for a map showing that part of the Kāweka CFL land in this south-west corner of the Ahuriri block bordering the Kāweka and Kohurau blocks.
[128] Wai 2542, #1.1.1, p [13]

14. Regarding He Toa Takitini's settlement negotiations, the MOU recorded that it was mandated to settle Ngāti Hinemanu claims within the Heretaunga-Tamatea area of interest only. The parties committed themselves 'to a process of on-going engagement where issues arise during the settlement negotiations between HTT and the Crown which concern areas in which the Parties' interests converge'. For its part, He Toa Takitini recognised that the Heritage Trust had 'a legitimate interest' in the Taihape inquiry district (which was described as 'the NHNPHT Common Areas of Interest').[129]

15. Importantly, the MOU then stated that 'Where any settlement regarding the NHNPHT Common Areas of Interest requires an agreement by both NHNPHT and HTT and where an agreement is not possible, the NHNPHT Common Areas of Interest are to be ring fenced and to be addressed to the satisfaction of both parties before the HTT Deed of Settlement is signed.'[130] In other words, the MOU only stipulated that lands within the Taihape district required the agreement of the Heritage Trust before they could be included in the Heretaunga-Tamatea settlement.

The He Toa Takitini agreement in principle

16. Two days after signing the MOU, on 17 May 2014, He Toa Takitini accepted the Crown's settlement offer.[131] On 5 June 2014, OTS wrote to the Heritage Trust, the Claims Trust, and other groups with overlapping interests[132] alerting them to this development and noting that the Crown and He Toa Takitini would sign an agreement in principle (AIP) on 11 June. OTS stressed that the final settlement would be contingent on the resolution of overlapping claims.[133] OTS appended a list of site-specific proposed redress, which included options to purchase both the Kāweka and Gwavas CFL lands.[134] On 16 June 2014, OTS contacted the Heritage Trust again (along with the other groups with overlapping interests) to advise them that He Toa Takitini and the Crown had now signed the AIP. OTS appended the same list of site-specific proposed redress. OTS encouraged the Heritage Trust to raise any issues with He Toa Takitini and advise OTS of any concerns by 1 August 2014.[135]

17. Since OTS had heard nothing from the Heritage Trust it wrote to them again, on 16 September 2014,[136] but there was no response to this letter either. On 25 September 2014, OTS wrote to Wai 1835 claimant Christine Te Ariki and informed her that the Wai 1835 claim was included in a schedule to the AIP as an historical claim concerning Heretaunga Tamatea. To the extent it related to Heretaunga Tamatea, the letter explained, it would be settled through the negotiated settlement with He Toa Takitini.[137] Other Ngāti Hinemanu me Ngāti Paki claims that concerned Pātea exclusively – Wai 662 and 1868 – were not included in the schedule.

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[129] Wai 2542, #1.1.1, p [14]
[130] Wai 2542, #1.1.1, p [14]
[131] Lewis Winiata claimed in his evidence that the agreement in principle had in fact been signed in April 2014, a month before the signing of the MOU. However, we have seen no evidence of this, and from his description it appears that he had merely seen a draft that was shared online. See Wai 2542, #A2 at [51]-[55].
[132] These included the Rangitāne Settlement Negotiation Trust, Mana Ahuriri Incorporated, Ngāti Kahungunu ki Wairarapa-Tāmaki Nui a Rua Trust, and the Tūwharetoa Hapū Forum. See Wai 2180, #A29 at [19].
[133] Wai 2542, #3.1.5(a), p 1
[134] Wai 2542, #3.1.5(a), p 5
[135] Wai 2542, #A10(a), pp 138-139, 144
[136] Wai 2542, #A10(a), p 137
[137] Wai 2542, #3.1.5(a), pp 15-16

Independent historical research on the Kāweka and Gwavas CFL lands

18. In the lead-up to signing the AIP, in May 2014, the Crown had commissioned independent historian Anthony Pātete to, as he put it in the introduction to his June 2014 report, 'assist the He Toa Takitini, Mana Ahuriri Incorporated, and the Office of Treaty Settlements to identify historical customary interests in the Gwavas and Kāweka Crown forest licensed (CFL) lands'.[138] Pātete was given three weeks to complete the task.[139] He did so by examining the creation or purchase of the eight original land blocks that contain parts of the Kāweka and Gwavas CFL lands today. The report noted evidence of Ngāti Hinemanu interests in the blocks, but none for Ngāti Paki. Pātete identified the names of other hapū not named in either the Mana Ahuriri or Heretaunga-Tamatea claimant definitions who might have interests in these lands.[140]

19. In September 2014, OTS commissioned Pātete, over four weeks, to write a second report about the interests of these other hapū, as well as further examination of the customary rights of Ngāti Hinemanu and Ngāi Te Upokoiri in the eight blocks.[141] He included consideration of blocks contiguous to the key eight blocks in both the Taihape inquiry district and in Heretaunga. This longer report reaffirmed a lack of evidence connecting Ngāti Paki to the CFL lands. It further confirmed, however, that Ngāti Hinemanu had interests on both sides of the Ruahine Range.[142]

The Crown and the Heritage Trust's discussions concerning the meaning of the MOU

20. It seems that, during the evolving settlement of the Heretaunga-Tamatea claims, the Heritage Trust had been reliant on the November 2010 OTS assurance that neither Wai 1835 nor Wai 1868 would be settled by He Toa Takitini.[143] On 21 October 2014, the Heritage Trust wrote to OTS requesting a meeting as a matter of urgency.[144] OTS was willing to meet, but its reply of 3 December principally advised the Heritage Trust to set out the Ngāti Hinemanu me Ngāti Paki interests in the CFL lands in writing by 19 December.[145] That day it also sent the Heritage Trust the Mana Ahuriri AIP that had been signed a year to the day earlier, on 19 December 2013, and asked for comment on any overlapping interests and efforts to resolve them by 30 January 2015.[146] On 21 January 2015, Jordan Winiata-Haines spoke with OTS over the phone and pointed to the MOU with He Toa Takitini. He said he had sent this to OTS once before but would now re-send it. His counsel, Ms Sykes, added that the MOU had a process for resolving issues of overlap that would prevent the Minister of Treaty Negotiations from making his own determination.[147]

21. In other words, the Heritage Trust had placed reliance on a previous OTS undertaking about Wai 1835 and felt that the MOU meant that He Toa Takitini would need to resolve

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[138] Wai 2542, #A10(a), p 149 and #A10, p 12
[139] Wai 2542, #A10(a), p 211
[140] Wai 2542, #A10 at [49]-[59]. We have relied here on OTS official Rewi Henderson's summary of the main points of Pātete's report.
[141] Wai 2542, #A10(a), pp 333, 337
[142] Wai 2542, #A10 at [57]-[59]. Here again we have relied on Mr Henderson's summary of the main points of Pātete's second report.
[143] Wai 2542, #A1 at [4] and #A2 at [51]-[55]
[144] Wai 2542, #A2(a), p 82
[145] Wai 2542, #A2(a), pp 83-84
[146] Wai 2542, #A2(a), pp 87-89
[147] Wai 2542, #A10(a), pp 345-346

any matters of overlap with it before it could proceed to settlement. It now found, however, that these assumptions had been wrong. The Minister of Treaty Negotiations wrote to the Heritage Trust on 5 March 2015 and pointed to the wording of the MOU:

> [Y]ou notified officials of a Memorandum of Understanding (MOU) that you signed with He Toa Takitini (HTT) in May 2014 which identifies how Ngati Hinemanu's interests will be addressed by HTT within their Treaty settlement negotiation based on area of interest. Specifically, I reference the following clause:
>
> > 6.1 For the purposes of the Heretaunga-Tamatea settlement negotiations, the parties acknowledge and agree that:
> >
> > a. HTT is mandated to negotiate and settle the Treaty claims of Ngāti Hinemanu that fall within the Heretaunga-Tamatea Area of Interest;
> >
> > b. HTT has no mandate to settle Treaty claims that relate to grievances outside the Heretaunga-Tamatea Area of Interest.
> >
> > …
>
> The information received from you, including the MOU, demonstrates that the Gwavas and Kāweka CFL lands sit wholly inside the Heretaunga-Tamatea area of interest (as attached to the MOU). I understand this to mean Ngāti Hinemanu's interests in the Gwavas and Kāweka CFL lands will be represented by HTT in Treaty settlement negotiations.
>
> I consider the HTT claimant definition, as recorded in their agreement in principle, correctly reflects this understanding. It reflects that the HTT Treaty settlement will settle the claims of Ngāti Hinemanu's interests in HTT through any ancestor(s) that exercised customary rights predominantly in HTT's area of interest after 6 February 1840. I anticipate that the remainder of Ngāti Hinemanu's interests will be addressed through Mokai Patea's Treaty settlement negotiations.[148]

22. On 20 March 2015, Jordan Winiata-Haines and OTS official Rewi Henderson discussed the Minister's response over the phone. Mr Henderson's record of that conversation, which he emailed to Mr Winiata-Haines directly afterwards, included the following:

> I gave you an update on the redress proposal for Kaweka/Gwavas – that the whole forest is to be offered as commercial redress to htt and Mana Ahuriri.
>
> I explained that the Minister's preliminary decision was made on the basis of our reading of the MoU and discussions that Hinemanu's interests in Kaweka/Gwavas would be represented and addressed through the settlement with htt.
>
> And Hinemanu's interests on the western side of the ranges would be represented by the mandated entity for negotiations of those claims once agreed/mandated following the conclusion of the Taihape inquiry.
>
> You advised that that is your understanding and position.
>
> You were clear that any interests of Hinemanu in Kaweka/Gwavas was to be represented by htt as the representatives of Hinemanu's fathers line. The interests on the western side of the ranges were from the mother's line and are represented by the Heritage Trust.
>
> You advised that the crown position that htt will settle and receive redress for Hinemanu's interests in Kaweka/Gwavas was 'absolutely correct'. You advised you do not claim redress from Kaweka/Gwavas for this reason. And you expect HTT not to seek redress on your side for the same reasons.[149]

[148] Wai 2542, #A10(a), pp 356-357
[149] Wai 2542, #A10(a), p 360

23. Mr Winiata-Haines replied stating that 'NHNP have agreed that those lands pertaining to Ngati Hinemanu through the whakapapa o[f] Taraia II would be claimed and settled by HTT in line with the MOU between us. Without looking at the maps this does include Kaweka and Gwavas however there is still a % of the Kaweka block which sits within the Tribunal boundary which we claim within the Taihape Area. This will need to be clarified.'[150]

24. On 25 March 2015, Mr Winiata-Haines spoke again with Mr Henderson. The latter's record of that conversation was that Mr Winiata-Haines confirmed the position he had taken on 20 March but added that the Heritage Trust was 'concerned at the loss of possible redress options in [our] future settlement'.[151] Ms Sykes then entered the email exchange and provided additional comments for 'completeness'. She remarked that there was still uncertainty as to whether areas of the Kāweka block were being offered to He Toa Takitini in settlement that were yet to be inquired into by the Tribunal in the Taihape inquiry, and a hardcopy map was required. She added that Ngāti Paki had a 'distinct claim' to the CFL lands 'which arises from a separate and distinct whakapapa relationship to the lands'. Ngāti Paki's claims, she said, 'do not arise from the claimed whakapapa connections which form the basis of much of the requirement in the MOU' for cooperation between He Toa Takitini and the Heritage Trust. And even if the CFL lands were entirely outside the Taihape inquiry district, she asked, 'what commercial redress is available in the Kaweka and Guava [sic] blocks to meet the extant and yet to be heard claims by NHNP[?]'[152]

25. On its face, this statement about Ngāti Paki appeared to represent a departure from the Heritage Trust's position of September 2010 quoted above that 'There is no difference in whakapapa for Ngati Hinemanu me Ngati Paki. Ngati Hinemanu me Ngati Paki are one and the same people.'

26. In reply to Ms Sykes's email, Mr Henderson stated categorically that the Taihape boundary did not include any CFL land and the Crown would continue to rely on the agreements made between the Heritage Trust and He Toa Takitini in their MOU. The Crown saw no reason to delay the progress of the settlements with He Toa Takitini or Mana Ahuriri in the circumstances. He added that in a recent memorandum-direction, we ourselves had confirmed that the CFL lands lay outside the Taihape district.[153] The following day, on 26 March 2015, the Minister wrote to Mr Winiata-Haines to 'confirm my allocation decision that Ngāti Hinemanu's interests in the Kāweka and Gwavas CFL lands will be represented by HTT in Treaty settlement negotiations'.[154]

27. Mr Winiata-Haines responded on 27 March 2015. He continued to insist that the maps provided had been of insufficient quality to clarify whether Ngāti Hinemanu me Ngāti Paki interests overlapped the boundaries of the CFL lands. He asserted that:

- Ngāti Hinemanu me Ngāti Paki did have claims to the CFL lands 'arising from whakapapa relationship of both Ngati Hinemanu and Ngati Paki';

[150] Wai 2542, #A10(a), p 359
[151] Wai 2542, #A10(a), pp 366-367
[152] Wai 2542, #A10(a), pp 364-366
[153] Wai 2542, #A10(a), pp 363-364, referring to Wai 2180, #2.5.36 at [64] and #2.5.36(a)
[154] Wai 2542, #A10(a), p 373

- the Ngāti Paki interests were distinct 'by virtue of relations from Te Aopakiaka down through Nukuteaio and Ohuake to their child Rangiwhakamatuku and his two children Te Matauahiwawe and Unakea';
- He Toa Takitini could not represent all of Ngāti Hinemanu in the settlement of the CFL lands; and
- OTS had misunderstood the MOU, which made clear that where there were overlapping claims the Heritage Trust and He Toa Takitini would 'meet prior to any discussion with the Crown as to the extent and nature of their claims'.[155]

The finalisation of the Heretaunga-Tamatea deed of settlement

28. The Crown decided that Mr Winiata-Haines's submission of 27 March did not give any reason to change course and informed him as such.[156] The Crown and He Toa Takitini then moved forward with the settlement, with He Toa Takitini initialing the deed on 30 June 2015, Cabinet approving it on 6 July 2015, and the Minister initialing it on 9 July 2015.[157] At the same time the Heritage Trust had been trying to gain some agreement for provision for it to be made in the settlement, which it understood would provide for a one-third share in a company holding the CFL lands to be given to Mana Ahuriri and a two-thirds share to be given to He Toa Takitini. A meeting was held at OTS between He Toa Takitini and the Heritage Trust on 24 June. Mr Winiata-Haines said in an affidavit to us on 30 June 2015 that 'During this negotiation, the possibility of Ngati Hinemanu me Ngati Paki receiving 10% of the commercial interests of the crown forest licenced lands in the Kaweka and Gwava[s] forests was raised and discussed', although no agreement was reached. He considered that the approach being taken by the Crown and He Toa Takitini was 'a breach of the Treaty and a way to circumvent the remedies provided by the Crown Forest Assets Act'.[158]

29. The chair of He Toa Takitini, David Tipene-Leach, responded to Mr Winiata-Haines with an affidavit a week later. He took exception to Mr Winiata-Haines appearing to suggest that He Toa Takitini had abandoned its previous commitments, arguing that He Toa Takitini had always acted in accordance with the MOU's 'letter and spirit'. The MOU was clear, he said, that the CFL lands were located within He Toa Takitini's area of interest, and members of Ngāti Hinemanu with interests in the Heretaunga Tamatea district were included in the benefits of the settlement. Regarding the meeting of 24 June, he denied that He Toa Takitini's position was intransigent, stressing that its desire to reach settlement was 'entirely consistent' with the provisions of the MOU. He also denied the implication that He Toa Takitini had raised the possibility of Ngāti Hinemanu me Ngāti Paki receiving 10 per cent of the CFL lands. Rather, 'we felt it was likely a PSGE would support, in the post settlement phase, the aspirations of a united Ngāti Hinemanu body (rather than the Heritage Trust per se) to access interests in the Heretaunga Tamatea portion of the CFL redress that is being jointly offered to us and Mana Ahuriri'.[159]

30. On 13 August 2015, Ms Sykes met with Crown officials to (as recorded by Mr Henderson) raise concerns both that Ngāti Paki's specific interests in the CFL lands were not being

[155] Wai 2542, #A10(a), pp 368-372
[156] Wai 2542, #A10 at [92]; Wai 2542, #A10(a), p 377. It is not clear how exactly this was communicated to Mr Winiata-Haines.
[157] Wai 2542, #A10 at [92]. Reference to He Toa Takitini initialling the deed on 30 June 2015 was made by Mr Winiata-Haines in his affidavit of the same date (Wai 2180, #A33 at [14]-[15]).
[158] Wai 2180, #A33 at [12]-[18]
[159] Wai 2180, #A34 at [4]-[32]

provided for in the settlement and that Wai 1835 was included in it. Mr Henderson informed Mr Winiata-Haines on 8 September 2015 that the Pātete research had 'not identified any evidence of individuals claiming interests in Kaweka and Gwavas CFL land on the basis of affiliation to Ngāti Paki or descent from Ngāti Paki ancestors'. Ngāti Paki's historical claims, he said, would be settled 'through a future settlement with the Mōkai Pātea large natural group'. Regarding Wai 1835 he set out that, while Ms Sykes had advised that it related to the Pātea district only, it did refer to several blocks of land in the Heretaunga Tamatea district. He reiterated that

> Under the Crown's policy of comprehensive historical Treaty of Waitangi settlements, the Crown must ensure that all claims that have been identified as relating to the Heretaunga Tamatea claimant definition are included in the deed (either to be settled in full or only insofar as they relate to the claimant definition).[160]

31. Further meetings took place between He Toa Takitini and the Heritage Trust in early September 2015. In a 15 September 2015 letter to Mr Winiata-Haines, Mr Tipene-Leach summed up his understanding of the Heritage Trust's position as including the following: 'a portion of the CFLs to be reserved or removed from our settlement so that it can remain as redress for you'; 'a governance role on any entity that might hold CFL redress'; 'reference to WAI 1835 be removed from the Heretaunga Tamatea Deed of Settlement'; and either the abandonment of the MOU or the implementation of a dispute resolution or mediation process under it. In response, Mr Tipene-Leach contended that the MOU had been the culmination of discussions between the Heritage Trust and He Toa Takitini, and He Toa Takitini had been 'entitled to rely on the MOU' in reaching its settlement with the Crown. He thought it would be 'unreasonable' to expect He Toa Takitini to now decline the redress it had negotiated or delay the settlement. He maintained that there 'may be post settlement opportunities for us to work together'.[161]

32. Mr Winiata-Haines replied the following day.[162] He criticised He Toa Takitini for what he saw as its record of poor communication with the Heritage Trust. In fact, he said, 'HTT had completely ignored us until we noticed that they had swallowed up our claims in their AIP with no discussion'. He considered that Mr Tipene-Leach had 'quite properly … summarised' the Heritage Trust's position in his letter, and then went on to explain why it was 'little wonder' that the Heritage Trust sought some reservation of the CFL lands for its own, future settlement. He accused He Toa Takitini of being complicit in the Crown's agenda of 'sweeping up … our claims' and of 'now trying to swallow up our constituency of Ngāti Hinemanu ki Mōkai Pātea as part of Heretaunga Tamatea to prop up the suggestion they are mandated by Ngāti Hinemanu whānui to pursue forest claims'. He concluded by warning that 'unless there is movement by yourselves and the Crown' the Heritage Trust would resort to litigation.[163]

The filing of Wai 2542 and the application for urgency

33. On 18 September 2015, with the deed of settlement signing set down for 26 September, Mr Winiata-Haines lodged a claim with the Tribunal, which was registered as Wai 2542. The claim asserted that the Heretaunga Tamatea settlement would 'remove the ability for the Crown to deal with Ngati Hinemanu ki Mōkai Pātea who trace their descent lines via Punakiao and Ngati Paki in relation to the Kaweka and Gwava[s] Crown Forest

[160] Wai 2542, #A10(a), pp 378-379
[161] Wai 2542, #A2(a), pp 209-212
[162] The letter is undated, but the index to Lewis Winiata's supporting documents to his brief of evidence in the Wai 2542 inquiry record its date as 16 September 2015: Wai 2542, #A2(a), p [2]
[163] Wai 2542, #A2(a), pp 213-216

License Lands, as they form part of the redress being offered to HTT under the DoS'. The processes for resolution of overlapping interests set out in the MOU, the claim argued, were 'being thwarted by the unwillingness of the Crown, and HTT to come to an agreement over these lands since the initialing of the DoS'. The claim alleged also that Wai 1835 would be settled without the claimants' consent and noted that the Crown had put in writing in November 2010 that Wai 1835 would be excluded from a settlement with He Toa Takitini. The claim sought findings that the Crown had breached the treaty through these actions. Mr Winiata-Haines sought an urgent inquiry and a recommendation that the CFL lands remain unsettled until Ngāti Hinemanu and Ngāti Paki were ready to settle or 'some appropriate mechanism has been put in place to protect [their] rights'.[164]

34. On 28 September 2015, the Tribunal chairperson appointed three members of the inquiry panel – Judge (as he was then) Layne Harvey, Professor (now Professor Sir) Pou Temara, and Dr Angela Ballara – to determine the application for urgency.[165] The Tribunal received evidence from the claimants and Crown and set down a judicial conference to consider the matter on 10 December 2015. At the outset, the Tribunal noted that the boundary depicted on the map attached to the MOU marked as the Ngāti Hinemanu me Ngāti Paki area of interest was not the same as the Taihape inquiry boundary: 'The boundary depicted in Schedule 2 of the MOU and marked as Ngāti Hinemanu me Ngāti Paki's area of interest *appears* to include a small portion of the Kaweka Forest Park' (emphasis in original).[166] In hindsight, this should have read 'a small portion of the Kāweka Crown forest licensed land'.

35. The judicial conference concluded by adjourning the urgency application in order 'to allow parties to discuss the possible discrepancy in the boundary areas' in the MOU.[167] Mr Henderson stated that he met the Heritage Trust, He Toa Takitini, and their counsel to discuss these matters at Winiata Marae on 15 December 2015. According to his evidence, the Heritage Trust said that the map depicting their area of interest in the MOU had been taken from a 2010 Tribunal staff scoping report, adding that 'the area in map 2 was the entire area shown on the map rather than restricted to the outline of the Taihape inquiry boundary'. Mr Henderson noted that this 'included the Tongariro maunga'. In any event, He Toa Takitini and the Heritage Trust could not reach agreement on the meaning of the MOU at this meeting, with the latter continuing to insist on a share of the CFL lands and the removal of Wai 1835 from the He Toa Takitini settlement.[168]

36. On 12 February 2016, we asked the parties for an update on their progress.[169] The submissions received showed that they remained at an impasse. Counsel for the Heritage Trust had filed a memorandum on 18 December 2015 and advised the Tribunal that the matters in it remained unresolved.[170] In the December memorandum she had submitted that, in defining the Taihape inquiry district in 2010, the Tribunal chairperson had included parts of the Kāweka block that encompassed Kāweka CFL land, both by description and through the appended map; and that clause 5.1 of the MOU was 'clear

[164] Wai 2542, #1.1.1 at [4]-[22]
[165] Wai 2542, #2.5.2
[166] Wai 2542, #2.5.3
[167] Wai 2542, #2.5.4 at [1]
[168] Wai 2542, #A10 at [97]-[98]
[169] Wai 2542, #2.5.4
[170] Wai 2542, #3.1.19 at [3]-[6]

and unambiguous' that Wai 1835 should be removed from the He Toa Takitini claimant definition.[171]

37. Crown counsel responded on 19 February 2016 that the chairperson's direction in 2010 had clearly not extended the inquiry boundary to include any part of the Kāweka CFL lands. Regardless, he added, the claimants' historical claims arising from descent from Punakiao were expressly excluded from the settlement. There was no cause, he added, for further delay.[172] Counsel for He Toa Takitini made similar points. He noted that Wai 1835 was only included in the settlement to the extent that it touched on Heretaunga Tamatea. Its aspects concerning Pātea, derived from Punakiao, were unaffected. With regard to the boundaries set out in the MOU, counsel submitted that even if the map in schedule 2 inadvertently appeared to include a small section of Kāweka CFL land, a closer examination of the boundary lines showed that it did not, because the Waikarekare Stream is the eastern boundary of the Kāweka Block and the western boundary of the Crown forest. More to the point, this area was in the Ahuriri hapū's area of interest, and not He Toa Takitini's. He concluded by submitting that the Tribunal was 'now in a position to decline the current application for urgency'.[173]

38. At a chambers conference in Taihape on 1 April 2016, the Tribunal proposed to refer the matter to mediation under clause 9A of the second schedule to the Treaty of Waitangi Act 1975. The parties agreed and on 8 April the Tribunal appointed Ron Crosby and Sir Hirini Mead as mediators.[174] Despite two extensions of time, however, the mediators reported back to the Tribunal on 16 June 2016 that the mediation had not settled the issues.[175] One matter that was agreed upon, however, was the removal of Wai 1835 from the list of historical claims to be settled by the He Toa Takitini deed of settlement. The Crown recognised that this had 'caused anger and upset'. It noted, however, that the effect of the settlement would be that the claim would be 'partially settled' nonetheless.[176]

39. In reporting back on the outcome of the mediation, the Crown and He Toa Takitini both considered that the Heritage Trust's aspirations remained achievable in due course. Counsel for He Toa Takitini, for example, raised the possibility that the Heritage Trust could 'negotiate interests in the CFLs either during, or following, their own settlement negotiations' – something it said it had been repeatedly open to.[177] The Crown submitted that it was 'satisfied it retains capacity to provide sufficient redress when Ngāti Hinemanu and Ngāti Paki come to settle the remainder of their historical claims with the Crown'. For example, there would be 'the opportunity to purchase a range of Crown properties' in their 'area of interest'.[178] However, the Heritage Trust preferred to push ahead with its urgency application.[179] The Claims Trust – an interested party in the urgency application proceedings – submitted that the descendants of Ngāti Hinemanu and Ngāti Paki did not in fact support the Wai 2542 claim or the application for urgency.[180] In that regard Claims

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[171] Wai 2542, #3.1.16 at [10]-[19]
[172] Wai 2542, #3.1.18 at [8]-[12]
[173] Wai 2542, #3.1.17 at [5]-[26]
[174] Wai 2542, #2.5.6
[175] Wai 2542, #2.8.1
[176] Wai 2542, #3.1.21 at [17]-[18]
[177] Wai 2542, #3.1.22 at [3.4.3]
[178] Wai 2542, #3.1.21 at [23]
[179] Wai 2542, #3.1.23 at [8]
[180] Wai 2542, #3.1.24 at [8]

Trust claimant Utiku Potaka had argued that the eponymous ancestor of Ngāti Paki was Te Rangi te Pakia, not Te Aopakiaka as asserted by the Heritage Trust.[181]

'Threshold' interests

40. Before turning to the Tribunal's decision on the urgency application, we pause here to consider the meaning of the 'threshold' level of interest that claimants like the Heritage Trust must demonstrate, in the eyes of the Crown, during OTS's overlapping claims process. The policy is described in the OTS negotiations guide *Ka tika ā muri, ka tika ā mua — Healing the past, building a future*, otherwise known as the 'Red Book'. For our purposes, the relevant edition of the Red Book is the one published in 2015. It explained:

> Where there are valid overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances. For example, when several groups claim an area of licensed Crown forest land, the Crown considers the following questions:
>
> • has a threshold level of customary interest been demonstrated by each claimant group?
>
> • if a threshold interest has been demonstrated:
> - what is the potential availability of other forest land for each group?
> - what is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
> - what is the relative strength of the customary interests in the land?, and
>
> • what are the range of uncertainties involved? The Crown is likely to take a cautious approach where uncertainties exist, particularly where overlapping claimants may be able to show breaches of the Treaty relating to the land, and would lose the opportunity to seek resumptive orders from the Tribunal.[182]

41. The Red Book did not define a threshold interest, but it added the following: 'Broadly, a claimant group would not have to show the dominant interest in the forest land to be eligible to receive that land in redress, only a threshold level of interest.'[183] We note that this text has now been amended in the Red Book to refer not to 'a threshold interest' but to 'a customary interest or association'.[184]

42. In his second affidavit provided to the Wai 2542 Tribunal in September 2016, Mr Henderson explained 'threshold' interests:

> 'Threshold interests' are triggers or reasons that might cause OTS to investigate further. The point of the threshold interest is to ensure that OTS investigates potential customary interests and is made aware of those interests. Accepting that a group has a threshold interest does not mean that the group has a substantiated customary interest or an interest that requires the allocation of some land.
>
> It is difficult to set a general standard for determining whether a threshold level of interest exists because of variable historical records available and the specific circumstance of each case. Native Land Court minutes can give an indication. If a claimant group was awarded the land by the Native Land Court, it is very likely that a threshold interest has been demonstrated. Another likely indicator is also that a claim was made to the Native Land Court for the land, whether or not an award was made to that group. This recognises

[181] Wai 2542, #A5 at [15]

[182] Office of Treaty Settlements, *Ka tika ā muri, ka tika ā mua — Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, Wellington, March 2015, p 54

[183] *Ka tika ā muri* (March 2015), p 54

[184] 'How do overlapping interests influence the redress offered by the Crown?', https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/the-red-book/overlapping-interests/how-do-overlapping-interests-influence-the-redress-offered-by-the-crown/ accessed 30 October 2023

> that Native Land Court awards often represent an attempt to rationalise customary interests, rather than delineate them.[185]

43. Mr Henderson went on to say that, from the research undertaken (a reference, we assume, to the Pātete reports), Ngāti Paki did not have a threshold interest in the Kāweka and Gwavas CFL lands. Ngāti Hinemanu, by contrast, did have a threshold interest. That is, they had settlements in both Pātea and Heretaunga and there was evidence that Ngāti Hinemanu based in Pātea 'sometimes crossed the Ruahine ranges into areas now covered by the two Forest Parks to gather resources, often on a seasonal basis'. Mr Henderson noted, however, that the Heritage Trust had itself asserted in January 2015 that 'The Mana of Ngāti Hinemanu at Inland Pātea derives from the descent lines of Punakiao while their rights at Heretaunga derive from Taraia II.'[186]

44. The Crown policy of assessing threshold interests appears to have arisen in its settlement of the Ngāti Awa claim through the planned return to the iwi of the Matahina Crown forest. While other iwi were regarded by the Crown as having threshold interests in both Matahina as well as other CFL lands, the Crown had concluded that Matahina was (apart from Rotoehu) the only Crown forest where Ngāti Awa could establish such a link. The customary interests of the other iwi were not regarded by the Crown as strong enough to warrant the withdrawal of the offer of Matahina to Ngāti Awa. The Tribunal considered these matters in its *Ngāti Awa Settlement Cross-Claims Report* of 2002, concluding that

> the Crown has said, and we accept, that the Government has arrived at a policy with regard to the allocation of interests in Crown forest licensed land that does not in all cases involve assessing the relative strength of customary interests in that land. Indeed, the relative strengths are likely only to be a dominant concern where those potentially entitled to be granted interests in certain Crown forest licensed land are predicted to have difficulty in demonstrating a threshold interest in any other areas of licensed land. The clear policy underpinning this is the desire of the Crown to achieve equity between claimants at the macro as well as the micro level.[187]

45. The focus with Matahina, then, concerned options for the return of CFL lands to settlement groups each holding threshold interests. With Kāweka and Gwavas, by contrast, the primary question was more whether Ngāti Hinemanu (ki Pātea) and Ngāti Paki had threshold interests at all.

The Tribunal's decision on the urgency application

46. As per the Tribunal's Guide to Practice and Procedure, before granting urgency the Wai 2542 Tribunal needed to establish that there would be 'significant and irreversible prejudice' to the applicants and that 'no alternative remedy' was available to them. At that stage the Tribunal preferred not to 'delve too deeply into the merits of the applicant's claim', but rather to assess whether the applicant had prima facie made out a case for urgency.[188]

47. The Tribunal noted that the Crown had not met the Heritage Trust claimants face to face, despite the treaty standard for the Crown's dealings with overlapping claimants set out in the Tribunal's *Tāmaki Makaurau Settlement Process Report*. The Tribunal did not

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[185] Wai 2542, #A10 at [61]-[62]
[186] Wai 2542, #A10 at [63]-[69], and quoting Wai 2542, #A2(a), p 267
[187] Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp 50-51, 75, 77-78
[188] Wai 2542, #2.5.10 at [75]

necessarily fault the Crown for relying on the MOU but noted the 'potential difficulties' with it. That is, the Tribunal explained, the Taihape inquiry boundary was not the same as the boundary in the map in schedule 2 showing the Ngāti Hinemanu me Ngāti Paki area of interest, and the schedule 2 map '*appears* to include a small portion of the Kaweka CFL' (emphasis in original).[189] The Tribunal considered that 'the boundary issues identified in the MOU are at least significant enough to call into question the validity of that agreement and whether there was a meeting of minds between the parties who signed it'.[190]

48. While the Tribunal was unsure of the nature of Ngāti Hinemanu me Ngāti Paki's interests in the CFL lands, it considered that there was

> sufficient connection between the potential prejudice we have outlined and the actions taken by the Crown during settlement negotiations for the purposes of this application. In other words, the applicant's assertions of interests, coupled with our concerns with the Crown's process, suggests that there is a real prospect of the applicant suffering significant and irreversible prejudice should the settlement proceed in its current form.[191]

49. With respect to the Crown's submission that alternative remedies existed, the Tribunal had doubts. As it put it,

> if Ngāti Hinemanu me Ngāti Paki have legitimate customary entitlements to the CFLs by virtue of their descent from Punakiao or other ancestors which are not recognised in the Heretaunga Tamatea settlement, we would be cautious about concluding now that the alternative land redress proposed by the Crown remedies any prejudice arising from a related historical Treaty breach, if one is established.[192]

50. The Tribunal was conscious of the prejudice to He Toa Takitini and Mana Ahuriri that would be caused by the delay of their settlements. However, it was 'not satisfied that any prejudice to them is outweighed by that which is likely to be suffered by the applicant should this settlement proceed as currently framed in respect to the Kaweka CFLs'. It therefore considered, 'after careful reflection' and 'by a narrow margin', that 'the application for an urgent hearing should be granted. In making this decision the Tribunal was careful to stress the narrow scope of the hearing. The question was not about Ngāti Hinemanu me Ngāti Paki's claims to the Kāweka block but rather 'whether the *process* by which the Crown has established interests in the CFLs informing its decision to offer that land as redress to Heretaunga Tamatea in the Deed constitutes a breach of the principles of the Treaty of Waitangi' (emphasis in original). While urgency was granted, the Tribunal added its encouragement to the parties to engage and 'explore the possibilities of resolution'.[193]

The mediated resolution

51. The urgent hearing was set down for 19-20 September 2016, and then adjourned until 11-12 October 2016 to allow the parties to discuss the possibility of entering another mediation process.[194] They elected to do this and on 3 October 2016 the Tribunal chairperson appointed Bill Wilson and Sir Hirini Mead as mediators.[195] The mediation

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[189] Wai 2542, #2.5.10 at [94]-[96]
[190] Wai 2542, #2.5.10 at [97]
[191] Wai 2542, #2.5.10 at [99]
[192] Wai 2542, #2.5.10 at [104]
[193] Wai 2542, #2.5.10 at [111]-[119]
[194] Wai 2542 #2.5.11 and #2.5.13
[195] Wai 2542, #2.5.15

took place over 6-7 October 2016. The mediators reported the following month that, on 6 October 2016, the Crown and the Heritage Trust had reached the following agreement:

> The Crown is prepared to accept that the claimants have established threshold interests in the lands at issue with the following qualifications:
>
> 1) On the basis of further evidence produced today that has not been seen before;
>
> 2) The Crown would not be acknowledging in any way the extent of the interest.[196]

52. It is not clear exactly what this new evidence was, although we assume it must have been presented to us at some point. The Crown explained on 11 November 2016 that it had 'accepted the claimants have customary associations with the land' but this was only 'a trigger or reason to cause the Crown to investigate further'. As Crown counsel put it, 'The acceptance that a group has a threshold interest does not necessarily mean that a group has a substantiated customary interest or an interest that requires the allocation of some land.'[197]

53. The following day He Toa Takitini joined the mediation but final resolution of how to implement the new agreement could not be reached. The Crown and He Toa Takitini had agreed that the Crown would retain a 10 per cent share in the company that would hold the Kāweka and Gwavas CFL lands, along with the accumulating rentals for that share, in order to have shares 'available as potential redress for the settlement of any claims to the CFLs yet to be inquired into or negotiated', including the claims of Pātea claimants.[198] The Heritage Trust sought further mediation on the detail of this arrangement but the Crown and He Toa Takitini were both opposed to that suggestion.[199] Regardless, the parties' discussions continued, and amendments were made to both the Heretaunga Tamatea and Mana Ahuriri deeds of settlement. The Crown provided the Tribunal with updates in both January and February 2017 on the likely timing of the introduction to Parliament of the Heretaunga Tamatea Claims Settlement Bill.[200]

54. The Bill was eventually introduced to the House on 28 June 2017. As such, the Tribunal's jurisdiction to consider the deed of settlement was removed by section 6(6) of the Treaty of Waitangi Act 1975. The Tribunal therefore asked for an update from the Crown and claimants.[201] Counsel for the Heritage Trust and Crown counsel issued a joint memorandum on 8 August 2017 setting out the following:

> 1. Counsel for the applicants and the Crown advise that the issues that are the subject of this application have been resolved.
>
> 2. As set out in the letter appended to this memorandum, the Crown has accepted Ngāti Hinemanu me Ngāti Paki has a threshold interest in the Kaweka and Gwavas Crown Forest licensed (CFL) land. This will be taken into account when negotiating future Treaty settlements that may include the CFL lands or rights regarding the CFL lands as settlement redress.
>
> 3. The Crown will retain a 10% share of the forestry company which includes accumulated rentals for pro rata distribution, for up to eight years, as reflected in the

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196 Wai 2542, #2.8.2
197 Wai 2542, #3.1.48 at [2]-[3]
198 Wai 2542, #3.1.48 at [6]
199 Wai 2542, #3.1.46 at [2.5]-[3.8]; #3.1.48 at [4]; #3.1.49 at [7]
200 Wai 2542, #3.1.51 and #3.1.55
201 Wai 2542, #2.5.21

Heretaunga Tamatea Claims Settlement Bill, introduced to the House of Representatives on 28 June 2017. The 10% share will preserve the Crown's ability to settle the historical claims of any other Kaweka/ Gwavas claimant to the CFL land.

4. On the basis of the comfort letter they have received from the Minister, the claimants formally withdraw their application for urgency. It follows, and in response to para 4(b) of the memorandum-directions of 4 August 2017 (#2.5.21), there is no need for Tribunal involvement in the Wai 2542 claim.

5. The applicants would like the ability to revive the claim if there is a material and significant change in the subject-matter of the comfort letter. Counsel agree the Wai 2542 claim should now be adjourned sine die, with leave being reserved to the claimants to apply on 10 working days' notice to re-enliven the claim in the event that any need arose for them to do that in the future.[202]

55. The attached 'comfort letter' from the Minister to counsel for the Heritage Trust reassured the claimants 'that their ability to seek an interest in the CFL lands is being protected pending the future settlement of all Ngāti Hinemanu me Ngāti Paki Wai claims'.[203]

56. The settlement legislation was passed on 26 June 2018. Section 90 preserved the Tribunal's jurisdiction to hear historical claims concerning CFL land (other than claims settled by the Act) for eight years after the settlement date of 22 August 2018. Claims not settled by the Act included, under section 14(4)(c), 'a claim of Ngāti Hinemanu to the extent that the claim relates to the interests of Ngāti Hinemanu that are derived through the ancestor Punakiao'. Further, under section 90, the Tribunal could not recommend the return to claimants of a greater proportion of shares in the licensed land than had been left available for this purpose.

Our decision on the way forward

57. While the Bill remained before the House, we (the Wai 2180 Tribunal) began planning how we would inquire into claims to customary interests in the Kāweka and Gwavas CFL lands. At the outset, in February 2018, we confirmed that no part of either the Kāweka or Gwavas CFL lands was located within the Taihape inquiry district boundary.[204] This clarification was necessary because both Mr Winiata-Haines and counsel for the Heritage Trust had asserted that a small part of Kāweka CFL land was in our inquiry district.[205]

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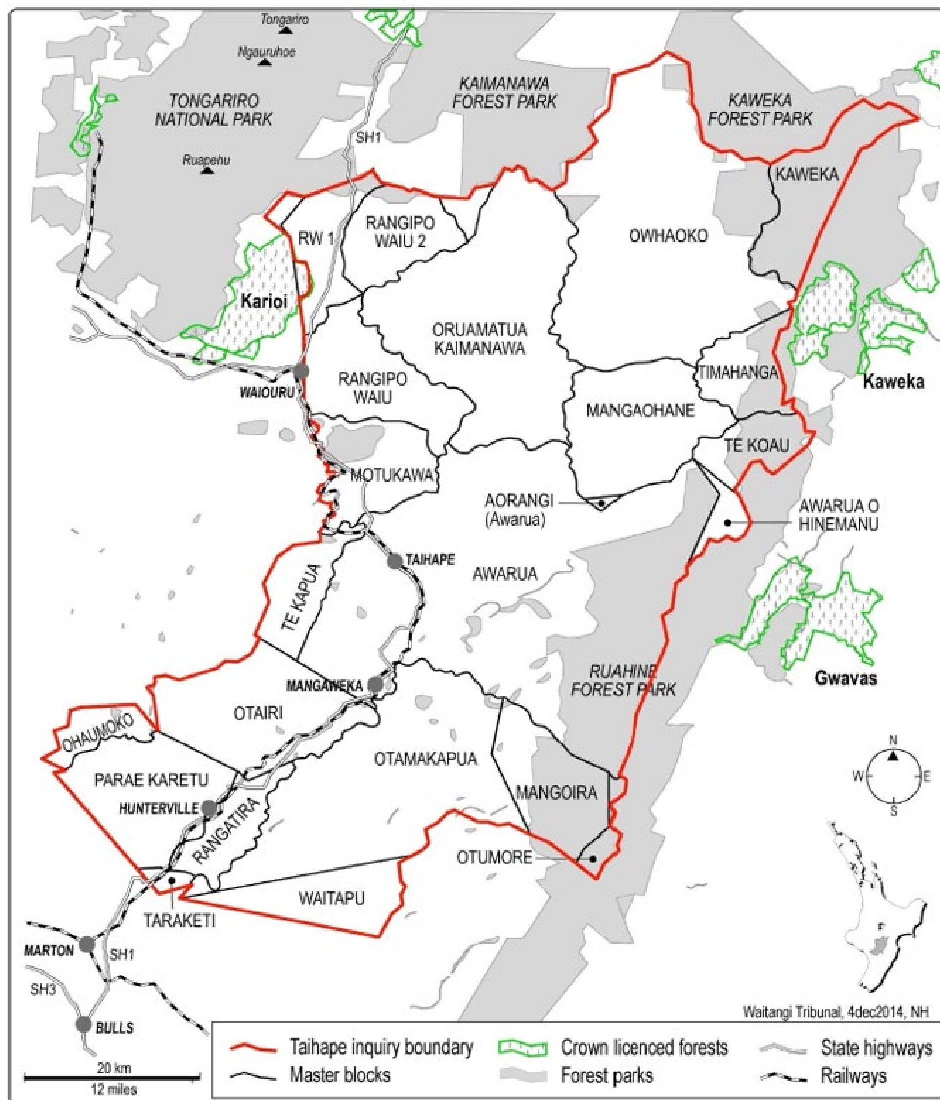
[202] Wai 2542, #3.1.56
[203] Wai 2542, #3.1.56(a)
[204] Wai 2180, #2.6.37 at [4]
[205] Wai 2180, #3.3.9 at [9]; Wai 2542, #A12 at [15]-[16], [49]

Location of the Kāweka and Gwavas CFL lands

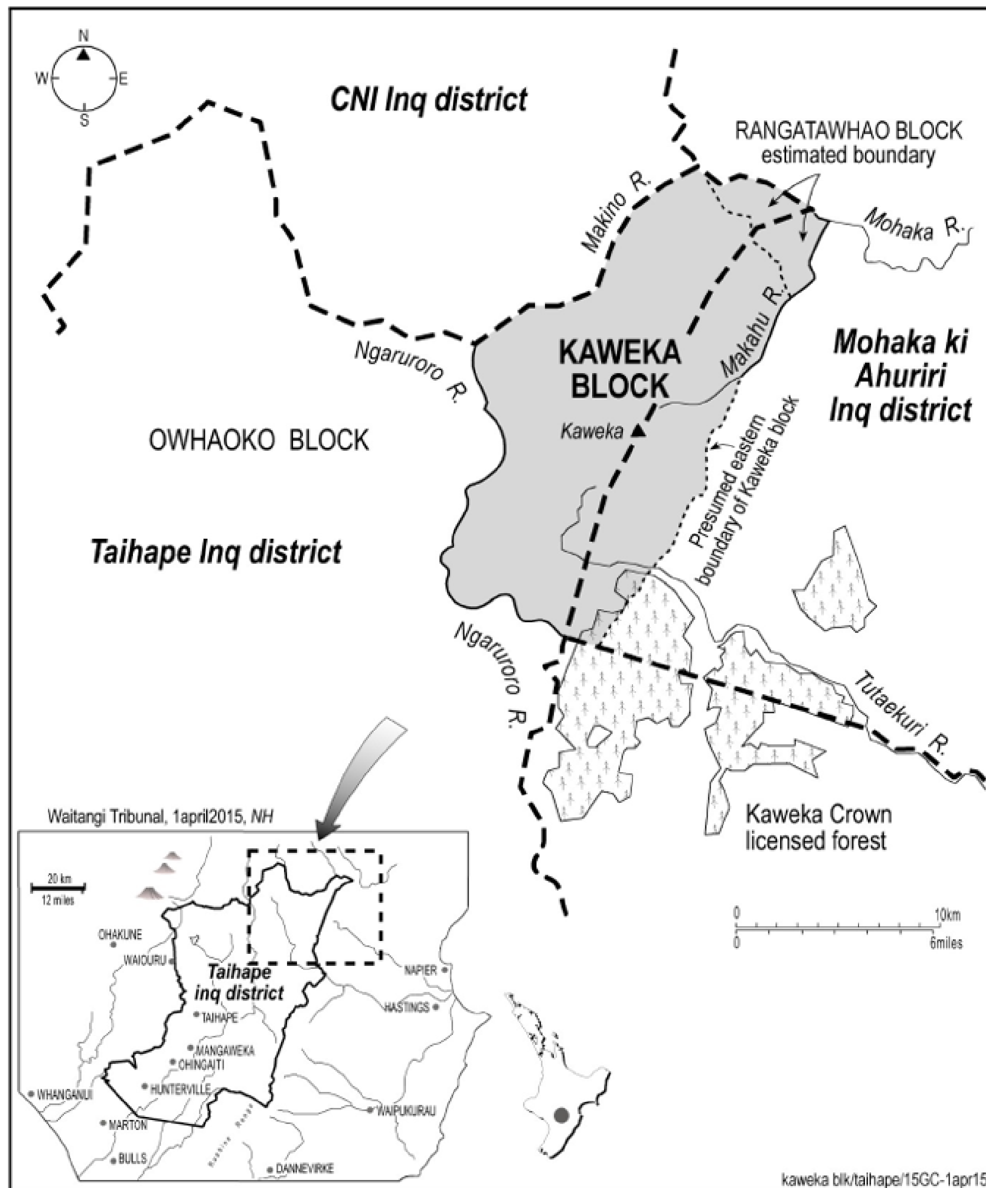


Taken from Tribunal direction Wai 2180, #2.6.37, February 2018, p 12

58. We also reiterated that, in his direction setting the boundaries of the Taihape inquiry district, the chairperson had directed that '[c]laimants may present evidence of customary interests or associations in the Kaweka and Ruahine Ranges, whether or not any particular interests or associations extend beyond the boundaries of any particular Crown purchase or original Māori land block in that area'.[206] By definition, this allowed evidence to be introduced about customary interests in the Kāweka and Gwavas CFL lands. The question remained, however, whether we had any jurisdiction to make findings and recommendations over Crown actions concerning those lands. We therefore asked counsel whether they wished to have an inquiry into claimant interests in the CFL lands as part of the Tribunal's standing panel process or as part of our inquiry and, if the latter, whether we needed a formal boundary extension.[207]

[206] Wai 2180, #2.5.13 at [9]
[207] Wai 2180, #2.6.37 at [32]-[44]

Kāweka block and Kāweka CFL lands



Taken from Tribunal direction Wai 2180, #2.6.37, February 2018, p 13

59. A judicial conference was held to discuss these matters on 8 March 2018. Counsel were divided on the way ahead. The Heritage Trust favoured a discrete hearing within the Taihape inquiry, with a boundary extension to cover the CFL lands. He Toa Takitini preferred the standing panel option, noting that any extension of the Taihape boundary would be prejudicial to it since it had not participated in the Taihape inquiry. The Crown favoured a separate and discrete inquiry. Counsel for the Claims Trust submitted that what was first needed was a determination of how the stated customary rights of the Heritage Trust claimants were derived. He considered that our panel was best placed to make that assessment. The Crown supported some kind of 'staged' approach like this, reasoning that the Tribunal's consideration of that matter would determine whether further inquiry was warranted. There was also much debate about the timing of any inquiry, and the kind of evidence that would be required.[208]

[208] Wai 2180, #2.6.53 at [8]-[52]

60. We released our decision on 22 May 2018. We confirmed that the Taihape inquiry was the correct forum for claims to customary interests in the CFL lands to be heard. We noted that the chairperson had anticipated as much in 2010 with his provision for claims to customary rights beyond the inquiry boundary in the Kāweka and Ruahine ranges to be heard by our panel. We also agreed with counsel for the Heritage Trust that further targeted research was needed on customary interests in the CFL lands.[209]

61. We also concurred with Crown counsel and counsel for the Claims Trust, however, that we should first address which groups had customary interests in the forest lands and from which tūpuna those rights derived. After that, we would be in a position to decide whether there was any merit in considering Crown actions. This would also ease the advancement of our inquiry through the restrictions on our jurisdiction as settlement Bills were considered by Parliament.[210]

62. We therefore decided upon a series of procedural steps, with the parties advising at the end of each step whether it was necessary to move to the next step or whether matters could be resolved through some other means (such as direct negotiations with the Crown). As foreshadowed, we followed a four-step process.

Step One: Historical research

63. We considered it essential that we were provided with a research report prepared by an independent expert on customary interests in the land blocks where the Kāweka and Gwavas CFL lands are located. We understood these blocks to be Aorangi, Ahuriri, Koharau, Manga-a-Rangipeke, Omahaki, Otamauri, Ōtaranga, and Ruataniwha North. The report needed to cover all customary interests in these land blocks, including those of groups that were located outside of or who were not then participating in the Taihape inquiry.

Step Two: Hearing

64. Upon completion of the historical report on customary interests, we would seek parties' opinions on whether this evidence needed to be heard and cross-examined. We also invited parties to nominate any further evidence that they wanted entered on the record, and whether it needed to be heard (including tangata whenua briefs filed for the Wai 2542 claim and historical research prepared for other inquiries or settlement negotiations). The requests were to be assessed by the Tribunal on a case-by-case basis after seeking the advice of the Waitangi Tribunal Unit Chief Historian.

65. If leave was granted for any of this evidence to be heard, we were to schedule hearing time to do so. We envisaged that all such evidence could be heard in one of the hearing weeks that had already been scheduled. Depending on when the historical report was completed, we thought this could be the additional hearing we had pencilled in for 10-14 December 2018, or one of the closing weeks in the first quarter of 2019. Given the discrete nature of the issue, parties could seek leave to file targeted closing submissions.

[209] Wai 2180, #2.6.53 at [59]-[61]
[210] Wai 2180, #2.6.53 at [59]-[61]

Step Three: Issue a preliminary Tribunal opinion

66. Once hearings had been completed, we were to seek parties' opinions as to whether a preliminary Tribunal opinion was required on customary interests in the CFL lands and the derivation of those interests. We reiterated that such an opinion would not include any findings or recommendations as it would not relate to Crown actions or omissions.

Step Four: Inquiry into Crown actions and omissions

67. If, upon release of a Tribunal preliminary opinion, parties still wished to proceed with an inquiry into claim allegations concerning Crown actions and omissions in respect of the CFL lands, the Tribunal would then consider which inquiry pathway was best suited for this purpose. In doing so, we would also consider any jurisdictional issues that still applied at the time, including the effects of settlement legislation and the extent to which claimants in this inquiry could seek to rely on the findings of the Mohaka ki Ahuriri Tribunal in respect of the Kāweka block.[211]

[211] Wai 2180, #2.6.53 at [70]-[75]