IN THE WAITANGI TRIBUNAL

Wai 2180

CONCERNING the Treaty of Waitangi Act 1975

AND the Taihape: Rangitīkei ki Rangipō District Inquiry

DECISION ON CUSTOMARY RIGHTS IN THE KĀWEKA AND GWAVAS CROWN FOREST LICENSED LANDS

8 October 2024

Claimant counsel
L Watson *Ngā Iwi o Mōkai Pātea amalgamated claim* (Wai 1705, 647, 588, 385, 581, 1888)
A Sykes (Annette Sykes & Co.) *Ngāti Hinemanu me Ngāti Paki amalgamated claim* (Wai 662, 1835, 1868)
K Feint (Thorndon Chambers) *Ngāti Tūwharetoa amalgamated claim* (Wai 61, 575)
C Hockly (Hockly Legal) *Ngāti Hikairo amalgamated claim* (Wai 37, 933)
P Walker (Kahui Legal) *Waiouru to Ohakune Lands claim* (Wai 151)
D Naden (Tamaki Legal) *Horowhenua Block claim* (Wai 237) and *Tongariro Power Development Scheme Lands claim* (Wai 1196)
B Gilling (Mahony Horner) *Ōwhāoko C3B claim* (Wai 378), *Kaweka Forest Park and Ngaruroro River claim* (Wai 382), *Ahuriri Block claim* (Wai 400), and *Ngāti Kauwhata ki te Tonga surplus lands claim* (Wai 972)
T Afeaki (Afeaki Chambers) *Renata Kawepo Estate claim* (Wai 401)
R Siciliano & J Burgess (McCaw Lewis) *Te Reu Reu Land claim* (Wai 651) and *Ngāti Pikiahu claim* (Wai 1872)
P Johnston (Rainey Collins) *Kauwhata Lands and Resources claim* (Wai 784) and *Te Kotahitanga o Te Iwi o Ngāti Wehiwehi claim* (Wai 1482)
Y Singh (Legal Hub) *Awakino and Other Lands claim* (Wai 868), *Ngāti Hekeawai Land Block claim* (Wai 1299), *Lands and Resources of Ngāti Ngutu/Ngāti Hua claim* (Wai 1409), *Ngāti Ngutu Hapū claim* (Wai 1497), *Hauturu Waipuna C Block (Herbert) claim* (Wai 1978), *Ngāti Kinohaku and Others Lands (Nerai-Tuaupiki) claim* (Wai 2131)
M Tuwhare *Ngā Poutamanui-a-Awa Lands and Resources claim* (Wai 1254)
C Panoho-Navaja (Wackrow Panoho & Associates) *Ngāti Waewae Lands claim* (Wai 1260) and *Ngāti Parewahawaha (Reweti) claim* (Wai 1619)
T Bennion (Bennion Law) *Waimarino No. 1 Block and Railway Lands claim* (Wai 221), *Ngāti Tara Lands claim* (Wai 1261), and *Tahana Whānau claim* (Wai 1394)
D Hall (Woodward Law) *Ngāti Kauwhata ki te Tonga and Rangitīkei-Manawatū, Reureu blocks and Awahuri reserve lands claim* (Wai 1461)
M Sinclair (Te Haa Legal) *Raketapauma (Descendants of Ropoama Pohe) claim* (Wai 1632)
M McGhie for the *Te Wai Nui a Rua (Ranginui and Ranginui - Tamakehu) claim* (Wai 2157)
Representatives for the *Ngāti Hikairo ki Tongariro Lands claim* (Wai 1262)

Unrepresented claims
Te Kōau Block and Ruahine Ranges claim (Wai 263)
Gwavas Forest Park claim (Wai 397)
Parakiri and Associated Land Blocks claim (Wai 1195)
Descendants of Mōkai-Pātea (Cribb) claim (Wai 1639)

Counsel for the Crown
R Ennor

Interested parties
P Majurey (Atkins Holm Joseph Majurey) *Genesis Power*
Big Hill Station
Mangaohane Station
Ngamatea Station
Rangitīkei District Council
B Pitman of Ngāi Tapuwae
Heretaunga Tamatea Settlement Trust

Moana Sinclair

13 May 1956 – 30 May 2024

Moana e,

Tirotiro kau ana, tirotiro kau noa

kei hea rā koe ka ngaro nei?

Aua! Tērā ka riro kei Paerau,

kei te huinga o te Kahurangi

ka oti atu koutou

te kāhui rōia wāhine Māori toa.

Moana, e kanohi kitea ana koe i ngā kōti, i ngā nōhanga o Te Rōpū Whakamana i te Titiri o Waitangi, i ngā huihuinga Māori o te motu, i a koe e ora ana. I tēnei rā kua kore koe e kitea, kua ngū te waha o te manu ka hunaia e Tāne. Kua kore te kārearea turaki i ngā tūwatawata o ngā pā o te hunga ringa-taumaha e pēhi ana i tō iwi. Ka ngaro koe, ko tō rongo me te wainene o tō reo, ka mau tonu, ka kōrerohia e ngā mōrehu o tōu tātai, ka whakaheketia o mahi ki ngā taitama wāhine e piki ake ana hei whakakīkī i ngā tūranga me ngā mahi maha ka wātea. Ko tō āhua kua whakairotia ki ngā ngākau o ō hoa i a koutou e noho tahi ana ki te whiriwhiri i ngā huarahi whakamua i ngā whare wānanga i whakangungua ai koutou. E taea te aha e hine i te mea ko te ara kua takahia e koe, he ara ka takahia e te katoa. Hoatu Moana ki te huaki mai i te huarahi hei whāinga atu mā o hoa maha. Haere ki tō hoa pūmau, nā mate kōrua i wehe, nā mate kōrua i hono. E noho i te hāneanea o Hawaiki, e kore a muri e hokia.

Introduction

Background

1. On 16 February 2024 we issued a preliminary opinion that constituted step three in a process that commenced in May 2018 to inquire into customary interests in the Kāweka and Gwavas Crown forest licensed (CFL) lands. Our opinion was essentially a preliminary assessment of part of the Taihape inquiry claims that overlap with the settlements achieved between the Crown and, respectively, the Heretaunga Tamatea and Ahuriri claimants. The claims in question were brought by members of Ngāti Hinemanu me Ngāti Paki, represented by the Ngāti Hinemanu me Ngāti Paki Heritage Trust ('the Heritage Trust'). The claimants assert customary interests in the CFL lands through their ancestor, Punakiao.

2. In our process set out in 2018 we undertook to release a preliminary opinion, if the parties sought one, upon the completion of a hearing into these claims to customary interests. That hearing took place in February 2020. In our preliminary opinion we concluded that there was 'insufficient evidence to sustain the Ngāti Hinemanu me Ngāti Paki claim to a customary right in these CFL lands that is derived from Punakiao'.[1] We invited the parties to make submissions both on the opinion's contents and on the next steps in our process by 30 April 2024.[2]

3. The Crown filed submissions on that date. Crown counsel submitted that our preliminary opinion had been careful, the process undertaken thorough, and we could regard step three as being complete. Step four (an inquiry into Crown actions in the CFL lands) was unnecessary.[3] On 13 May 2024 counsel for the Heritage Trust sought leave to file submissions late, which was granted.[4] Submissions were filed on 24 May 2024, asking for the preliminary opinion to be 'reviewed and reassessed'.[5] Given their detail, counsel for the Mōkai Pātea Waitangi Claims Trust ('the Claims Trust') sought leave to file reply submissions by 4 June 2024.[6] Crown counsel also filed submissions in response on the same date.[7]

4. In short, based on the available evidence put before us, this decision represents our last word on customary rights in the CFL lands. We have largely adopted the text of the preliminary opinion and adjusted it in response to the parties' submissions, making clear reference where we have done this. This includes expanding the text of our conclusion to address several points made by counsel for the Heritage Trust.

5. We reiterate that we do not consider claims here against the Crown. Our first requirement is to clarify whether the claimant group has customary interests in the CFL lands that would prompt an examination of Crown actions. Our task is arguably similar to that faced by the Tribunal in its Te Tau Ihu o Te Waka a Maui inquiry concerning claims by Te Tau

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1 Wai 2180, #6.2.58 at [79]
2 Wai 2180, #6.2.58 at [80]
3 Wai 2180, #3.4.3 at [3.1]-[3.6]
4 Wai 2180, #3.4.4 at [4]
5 Wai 2180, #3.4.6 at [5]
6 Wai 2180, #3.4.7 at [3]. Leave was granted and the submission filed – see Wai 2180, #2.7.5 at [4] and #3.4.10.
7 Wai 2180, #3.4.9. Crown counsel sought leave to do so in her submission itself.

Ihu iwi to customary rights in the statutorily defined Ngāi Tahu takiwā. Te Tau Ihu claimants alleged that Crown actions both in the nineteenth century and in its more recent settlement with Ngāi Tahu had overlooked their rights and breached the treaty. As the Tribunal put it, 'To assess these claims, it was necessary for us first to establish whether Te Tau Ihu iwi did, in fact, have customary interests in the takiwa.'[8] We remain confident that we have jurisdiction to proceed in this manner under section 6 of the Treaty of Waitangi Act 1975, as the Ngāti Hinemanu me Ngāti Paki claims in relation to the Kāweka and Gwavas CFL lands are made against the Crown.

6. The procedural background that has led us to this point is traversed in Appendix A. That background begins with the negotiations between He Toa Takitini, a body representing Heretaunga Tamatea claimants, and the Crown in 2010 and 2011. At that stage, our inquiry boundary had only just been defined and we remained years away from commencing hearings. The background also includes the decision to grant urgency to the Heritage Trust claim arising from the proposed Heretaunga Tamatea Deed of Settlement (Wai 2542) from which an eventual agreement was reached between the parties following mediation. That agreement set out a process that ultimately involved the commissioning of further evidence from Dr Te Maire Tau and Dr Martin Fisher and a testing of that report and further claimant evidence at the aforementioned hearing at Ōmāhu Marae in February 2020. This was then followed by a second review of Tau and Fisher's report by Paul Meredith.

7. Our concluding decision on customary interests in the Kāweka and Gwavas CFL lands is set out in paragraphs 75 to 96.

Ngāti Hinemanu and Ngāti Paki

8. Submissions were received from both the Heritage Trust and the Claims Trust on the preliminary opinion's explanation of Hinemanu's whakapapa, and the text of our decision now reflects this.[9] Ngāti Hinemanu are the descendants of Hinemanu, the daughter of Punakiao and Taraia II (or Taraia Ruawhare). Through her father Hinemanu had lines of descent from Tamatea-pōkai-whenua, Kahungunu, and Rakaihikuroa.[10] Through her mother she descended from Tamatea-pōkai-whenua, Kahungunu, Rongomaitara, and Te Ōhuake, as well as from Whatumāmoa and back to Te Tini o Te Hā and Ngāti Orotu, the early people of Ahuriri. Although born in Heretaunga, she returned to live on her ancestral lands at Pātea and married Tautahi, the grandson of Haumoetahanga and Whitikaupeka. The wharekai at Winiata Marae is named Hinemanu and the wharepuni is named Tautahi. They had four children, one of whom – Tarahe – was sent back to live at Heretaunga to keep his mother's claims alive. From Tarahe's descendants Ngāti Hinemanu are also tangata whenua in the Heretaunga district, based at Ōmāhu Marae.[11]

9. We received submissions on the preliminary opinion's description of Ngāti Paki's identity from the Heritage Trust and the Claims Trust.[12] Like Ngāti Hinemanu, Ngāti Paki are

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8 Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: Preliminary Report on Te Tau Ihu Customary Rights in the Statutory Ngai Tahu Takiwa* (Wellington: Legislation Direct, 2007), p 183

9 Wai 2180, #3.4.10 at [4]-[5] and #3.4.6(a), p 1

10 Both sets of claimants used the spelling 'Rakeihikuroa', although the Heritage Trust also used 'Rakaihikuroa'. We have opted to use the latter, as it is the more common spelling.

11 The Heritage Trust noted that Hinemanu and Tautahi's eldest son, Ngahoa, also returned to Heretaunga to live, albeit later in his adult life: Wai 2180, #3.4.6(a), p 1. According to Tony Walzl, all of Ngahoa's own children remained in Pātea: Wai 2180, #A12, p 132.

12 Wai 2180, #3.4.10 at [4]-[5] and #3.4.6(a), pp [1]-[2]

based at Winiata Marae, on land inherited by Winiata Te Whaaro by descent from Ngāti Hauiti and settled by them after their expulsion from Pokopoko on the Mangaohāne block in 1897. Ngāti Paki are descended from Te Rangiwhakamātuku, the second son of Te Ōhuake and Nukuteaio. The Heritage Trust reiterated that Ngāti Paki is a hapū of Ngāti Hinemanu.[13] As is set out in our procedural appendix, in 2010 the Heritage Trust told the Office of Treaty Settlements that 'There is no difference in whakapapa for Ngati Hinemanu me Ngati Paki. Ngati Hinemanu me Ngati Paki are one and the same people.'[14] The Claims Trust disputed that Ngāti Paki is a hapū of Ngāti Hinemanu.

10. Differences also exist about the identity of Ngāti Paki's eponymous ancestor. The Claims Trust said it is Te Rangi Te Pakia from Heretaunga and who married Taungapunga of Ngāi Te Ōhuake. The Claims Trust point to the Pātea whakapapa recorded by Native Land Court officer A T Blake in the late nineteenth century. Blake wrote 'Origin of name Ngati Paki' alongside the name of Te Rangi Te Pakia in his chart of Ngāti Paki whakapapa.[15]

11. The Heritage Trust's position is more complex. In 2013, researcher Tony Walzl noted in his tribal landscape report that – according to Ngāti Hinemanu and Ngāti Paki informants – Ngāti Paki's principal ancestral links came through Te Aopakiaka.[16] In 2015, in his oral and traditional history report for Ngāti Hinemanu and Ngāti Paki (that was produced in consultation with them), historian Peter McBurney also wrote that Ngāti Paki's eponymous ancestor was Te Ao Pakiaka.[17] During our inquiry, however, Heritage Trust witnesses and counsel have also contended that the name 'Ngāti Paki' originated with Winiata Te Whaaro's grandfather, Moretapaki. This stems from Winiata Te Whaaro having produced a list of 25 members of his hapū who were all the descendants of his grandfather.[18] In her submissions in response to our preliminary opinion, Ms Sykes stated categorically that 'The eponymous ancestor of Ngāti Paki of Winiata Marae is Moretapaki the grandfather of Winiata Te Whaaro', and that the Ngāti Paki hapū consist only of his children and their descendants.[19]

12. We acknowledge the right of Ngāti Paki uri to define themselves. The identity of Ngāti Paki's eponymous ancestor is, therefore, ultimately a matter for Ngāti Paki to determine.

Procedural overview

Four-step process

13. Our directions of May 2018 set out the four-step process for determination of the issues surrounding the Kāweka and Gwavas forest claims of Ngāti Hinemanu me Ngāti Paki:[20]

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13 Wai 2180, #3.3.71(b), at [75]
14 Wai 2542, #A10(a), p 58
15 Wai 2180, #O2(a) p 30. See also Wai 2180 #A12, p 33.
16 Wai 2180, #A12, pp 700-701. Walzl noted that Te Aopakiaka came from Heretaunga, and that Winiata Te Whaaro told the Native Land Court in 1891 that 'Paki was an ancestor of mine but he belonged to Heretaunga'.
17 Wai 2180, #A52, pp 81, 84, 87. There are variations in the spelling of this tupuna's name.
18 Wai 2180, #E6(b) at [4.18]-[4.19], #P9(c) at [55]-[56], and #3.3.71(b) at [74]
19 Wai 2180, #3.4.6 at [34]. In the tabular appendix to this submission the Heritage Trust have added that the hapū Ngāti Paki of Winiata Marae began with Moretapaki but '[t]he origin of the name is not the origin of Ngāti Paki hapū': Wai 2180, #3.4.6(a), p [3].
20 Wai 2180, #2.6.53 at [70]-[75]

(a) **Step one:** the commissioning of historical research into the customary interests in the Kāweka and Gwavas CFL lands;

(b) **Step two:** the hearing and cross-examination of the historical research and the hearing of any further evidence regarding customary interests in the Kāweka and Gwavas CFL lands;

(c) **Step three**: a preliminary Tribunal decision on customary interests in the Kāweka and Gwavas CFL lands; and

(d) **Step four**: an inquiry into Crown actions and omissions in relation to the Kāweka and Gwavas CFL lands.

14. At the end of each step, parties were to advise the Tribunal whether they considered it necessary to proceed to the next step, or whether they had sufficient material to proceed with a process other than a Tribunal inquiry including direct negotiations.[21]

15. Step one was completed on 28 November 2019 when the Crown Forestry Rental Trust filed the report *Customary Interests in Kāweka and Gwavas CFL Lands* by Dr Tau and Dr Fisher (the Tau and Fisher report). It was placed on the Record of Inquiry as #O2(a). In directions dated 23 December 2019, in response to parties' submissions, the Tribunal confirmed that it would progress to step two.[22] Step two took place in the form of hearing 10, which was held from 17 to 19 February 2020 at Ōmāhu Marae. The Tau and Fisher report, as well as a range of further evidence concerning customary interests in the Kāweka and Gwavas CFL lands, was presented and cross-examined.[23]

16. The impact of the COVID-19 lockdowns during 2020 affected progress. In directions dated 4 September 2020, we addressed outstanding evidential matters arising from hearing 10. Submissions were sought on whether a preliminary opinion on customary interests in the Kāweka and Gwavas CFL lands was required, considering the evidence heard.[24] Ms Ennor for the Crown supported a preliminary opinion,[25] as did Mr Afeaki for the Renata Kawepo Estate (Wai 401).[26] Mr Watson for the Claims Trust submitted that a preliminary opinion would be beneficial and advised that the Claims Trust's parallel mandating process has included provision for this preliminary opinion on customary interests.[27] Ms Sykes for the Heritage Trust submitted that a preliminary opinion was required and included detailed submissions as to why the Tribunal could find that Ngāti Hinemanu and Ngāti Paki have customary interests in the Kāweka and Gwavas CFL lands.[28] Other parties expressed no view and would abide by the Tribunal's decision.[29] Plainly, the parties supported the issuing of a preliminary opinion on customary interests in the Kāweka and Gwavas CFL lands.

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21 Wai 2180, #2.6.53 at [68]
22 Wai 2180, #2.6.90
23 See Wai 2180, #4.1.21 for the transcript of hearing 10 and its appendices for parties' corrections.
24 Wai 2180, #2.6.104
25 Wai 2180, #3.2.797 at [3]
26 Wai 2180, #3.2.798 at [7]
27 Wai 2180, #3.2.802 at [2]-[4]
28 Wai 2180, #3.2.801(a)
29 Danyon Chong for Ngāti Wehi Wehi (Wai 1482); Emily Martinez for Ngāti Kauwhata ki Te Tonga (Wai 784); Dr Gilling for the Ōwhāoko C3B (Wai 378) claim, the Kaweka Forest Park and Ngaruroro River (Wai 382) claim, the Ahuriri Block (Wai 400) claim, and the Ngāti Kauwhata ki te Tonga surplus lands (Wai 972) claim.

Review of Tau and Fisher report and next steps

17. While assessing the evidence, we decided that the Tau and Fisher report needed to be reviewed to ensure that there were no gaps in the possible evidence and that the authors had explored and made best use of all available material. As part of this review, advice was sought from Paul Meredith. His review is titled 'Review of the "Customary Interests in Kāweka and Gwavas CFL Lands" Research Report by Te Maire Tau and Martin Fisher' and has been placed on the Record of Inquiry as document Wai 2180, #O2(k).

18. Submissions were invited from any of the parties affected by the review. They were to concentrate on both the content of the review and any other relevant matters along with what future steps if any might be appropriate in the circumstances. Parties were directed to file submissions by 7 August 2023.[30]

The report by Te Maire Tau and Martin Fisher

19. Step one commenced in October 2018 when the Crown Forestry Rental Trust commissioned Tau and Fisher to undertake the research project.[31] As noted above (paragraph 15), their report 'Customary Interests in the Kāweka and Gwavas CFL Lands' was completed in November 2019 and filed with the Tribunal.

20. In their introduction, Tau and Fisher summarised their task:

> The key question facing us and the Tribunal is whether Ngāti Hinemanu me Ngāti Paki derive their interests from a different tupuna, Punakiao, than Ngāti Hinemanu ki Heretaunga, who derive their interest from Punakiao's husband Taraia II, who are part of the Heretaunga-Tamatea Settlement Trust mandate. The shared whakapapa is undeniable, but the derivation of the interests from a specific tupuna is one that is certainly open to debate. Ngāti Hinemanu me Ngāti Paki stress that a key difference is their focus on descent flowing from a female tupuna on a different ancestral line than that of Ngāti Hinemanu ki Heretaunga.[32]

21. Tau and Fisher explained the limitations of the documentary record concerning customary rights in the eight land blocks that contain parts of the Kāweka and Gwavas CFL lands today. This stems from five of the blocks being pre-1865 Crown purchases, for which few if any details about customary right-holders were recorded, while two of the other three blocks passed the Native Land Court at an early point in the court's history, when investigations of customary rights were relatively cursory. Because of this, Tau and Fisher looked also at the later title investigations for six blocks in the north-eastern part of the Taihape inquiry district. They found little to support the position of the Heritage Trust, though, and provided the following overview of their research findings: 'From the material that is available, it was difficult to find direct evidence of a specifically Punakiao-derived Ngāti Hinemanu right or a separate Ngāti Paki occupation of the area that is now known as the Kāweka and Gwavas CFL lands.'[33]

22. Much of the discussion in Tau and Fisher's report centered around Winiata Te Whaaro, who they said 'epitomised' the Ngāti Hinemanu me Ngāti Paki claim 'as the most ardent exponent of Ngāti Paki in the NLC process in the late nineteenth and early twentieth

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30 Wai 2180, #2.6.137 at [16]
31 Wai 2180, #6.2.53
32 Wai 2180, #O2(a), p 4
33 Wai 2180, #O2(a), pp 4, 5-6

century'.[34] Te Whaaro was born in Pātea as the son of a Ngāti Hinemanu and Ngāti Paki mother, Kinokino, and a Ngāti Pouwharekura father, Wi Turitakoto. His father had migrated to Pātea because of the battles in the 'turbulent decades prior to 1840'. These migrations, said Tau and Fisher, had produced 'a range of new interests that were fought out in the NLC' later that century. Tau and Fisher considered that, by 1840, 'the descendants of Punakiao and Taraia II had established themselves over a very large area through not only conquest but also significant intermarriage'.[35]

23. In 1890, Te Whaaro was a witness before the Otaranga and Ruataniwha North Commission, known as the Awarua Commission. This was set up to establish the western boundaries of the secretive Hawke's Bay Crown purchases conducted in the late 1850s. It concluded that the Ōtaranga boundary had extended as far as the top of the Ruahine Range. Its findings led to title investigations for three new blocks: Tīmāhanga, Te Kōau, and in 1991, Awarua o Hinemanu. Te Whaaro's knowledge of the area seems to have been unparalleled. He had been the main guide for surveyors of the Awarua block and could describe all the peaks and food-gathering places on the range. Te Whaaro remarked that all lands to the west of the range 'belong to us', 'the Patea people', whom he listed as 'N' Whiti, N'Ohuake and N' Hauiti'. He also said that 'Ruahine was ancestral boundary of Whiti and Ohuake and not for convenience of sale. N' Kahungunu had to east of it. N' Whiti and descendants of Ohuake occupied west of it.'[36]

24. Te Whaaro had an opportunity before the commission to stake his own claims to Ōtaranga but did not do so. Tau and Fisher thought he had 'strong interests' on the eastern side of the Ruahine Range but held back from asserting these to bolster his claims to blocks he was contesting in Pātea, such as Mangaohāne. However, he asserted much later, in 1909, that Ruataniwha North was 'the land of our ancestors' and had been sold without permission. Te Whaaro did not name the tūpuna he made this claim through, and Tau and Fisher considered that it would 'most likely' have been his father's Ngāti Pouwharekura whakapapa. Te Whaaro did tell the 1890 commission that Ngāti Hinemanu had rights on both sides of the range, although again he did not give any information about the ancestors they would have asserted these rights through.[37]

25. Tau and Fisher observed that, while '[e]vidence of specific discussions of the name Punakiao were not present in the Kāweka and Gwavas CFL lands in terms of claims to the land', Punakiao's uri 'were a key part of most blocks involving Ngāti Hinemanu, Ngāi Te Upokoiri, Ngāti Honomōkai and Ngāti Mahuika particularly'.[38] They concluded:

> Overall there was limited evidence to show a specifically Punakiao-derived claim to the blocks that make up the Kāweka and Gwavas CFL lands. Nonetheless Ngāti Hinemanu me Ngāti Paki maintain that a lack of early Crown purchasing or NLC evidence does not equate to a lack of interests. They highlight especially the Ngāti Pouwharekura line with Ngāti Hinemanu me Ngāti Paki which has undeniable interests in the Ruataniwha North block. In 1890 Winiata Te Whaaro denied any occupation rights in Heretaunga, but in 1909 he made a claim to the Ruataniwha North block. These kinds of contradictions feature throughout the evidence gathered for this report and reflect our uncertain conclusion.[39]

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34 Wai 2180, #O2(a), p 192
35 Wai 2180, #O2(a), p 55
36 Wai 2180, #O2(a), pp 83, 86-87
37 Wai 2180, #O2(a), pp 87, 97, 134, 192
38 Wai 2180, #O2(a), p 189
39 Wai 2180, #O2(a), p 192

Testing Tau and Fisher's report at hearing

26. Step two involved inviting submissions on whether the Tribunal should hear evidence on customary rights in the Kāweka and Gwavas CFL lands.[40] The Claims Trust submitted that they would abide by our decision but considered that we were able to decide whether the Heritage Trust claim was 'well-founded' or not.[41] By contrast, the Heritage Trust wanted the evidence heard and signaled that it intended to file further evidence. The Crown did not express a view. Counsel reiterated that the question of Ngāti Hinemanu me Ngāti Paki customary rights in the CFL lands based on an ancestor not covered by the Heretaunga Tamatea settlement was a matter for them and the affected parties.[42]

27. We decided that the Tau and Fisher report should be presented so that parties could question the authors on their research. Had there been a Tribunal inquiry in Heretaunga Tamatea, the need for us to do this may not have arisen. The absence of such an inquiry, however, had left uncertainties about the extent of overlapping customary interests along our administrative boundary. We then scheduled a hearing on customary rights in the Kāweka and Gwavas CFL lands for 17-19 February 2020 at Ōmāhu Marae.[43]

28. After Tau and Fisher had presented their summary on 17 February 2020, we opened the questioning.[44] We asked them whether – if Punakiao did have rights to the areas in question – it was likely that there would be 'some footprint on the historical record'? Tau and Fisher agreed.[45] We expressed surprise that there was such a difference of opinion about the identity of the eponymous ancestor of Ngāti Paki. Was it common, we asked, for this sort of disagreement between such closely connected groups? Dr Tau replied that 'it's becoming common'.[46] We asked them about their lack of a firm conclusion. Was this because of time constraints to conduct their research and they had not located evidence for anything more definite? They agreed, so we asked if they were effectively saying that 'the mountain of evidence that we have assessed is silent on that issue, at a time when people were litigious, land rights were highly contested, and you would expect that if there was that interest they would say so'? Dr Tau qualified this characterisation:

> I think we would say there was an absence of evidence of take whenua and I want to make that separate from the Native Land Court evidence. So I would say, we did not find a mountain of evidence on take whenua which we see as different from Native Land Court evidence.[47]

29. Ms Sykes raised the point that the settlement process had created an 'imaginary boundary' that did not recognise 'the fluidity of relationships'. The position in the recent title investigation of Awarua o Hinemanu had been, she suggested, that 'There is no Ngāti Hinemanu ki Taihape, there is no Ngāti Hinemanu ki Heretaunga, we are one people, one iwi and that is our land.' Dr Tau responded that 'I think what you are trying to examine is the difference between the regions and if there is in fact a difference. The

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40 Wai 2180, #2.6.85 at [20]-[21], [24]
41 Wai 2180, #3.2.631 at [9]. As per section 6(3) of the Treaty of Waitangi Act, only where we find a claim to be 'well-founded' are we able to recommend that action be taken to compensate for or remove the prejudice.
42 Wai 2180, #2.6.90 at [10]-[17]
43 Wai 2180, #2.6.90 at [22]-[26]
44 We note that there are some minor wording differences between our account of Tau and Fisher's comments and what appears in the transcript. That is because we took the additional step of listening to the audio recording of the hearing to make sure their words had been transcribed correctly.
45 Wai 2180, #4.1.21, p 38
46 Wai 2180, #4.1.21, p 45
47 Wai 2180, #4.1.21, p 53

best answer we can give is, there is an absence of explanation for that in the evidence that satisfies the threshold for the needs of both parties.'[48]

30. Ms Sykes then turned to 'this more vexing question of the status of women and colonialism'. She put it that 'women of status' had inherited the mana over lands from their husbands. However, because of 'colonial attitudes' women were often 'invisibilised'. She was referring here to Punakiao, but also raised Pouwharekura, a woman of mana who had married Kahungunu but who had been demeaned in historical accounts as having been a slave, owing to her capture at Kaiwhakareireia pā.[49] Ms Sykes noted that Winiata Te Whaaro relied on descent from Pouwharekura for his rights over the range, and thus Pouwharekura was 'significant for our claimants to assert customary rights' in the CFL lands. Dr Fisher agreed 'with your overall proposition in terms of the silencing of female tūpuna within that [Native Land Court] process.' But Dr Tau added that 'I saw an absence of take whenua and take tupuna, which I tend to see as the same'.[50]

31. Ms Sykes accepted that Tau and Fisher had a very difficult assignment, to come in fresh to the material and pronounce on highly contested customary rights. She asked them to reflect more broadly on the issue:

> I'm asking you to look through a different lens of just this hearing, to look through the lens that I'm trying to paint, which is whakapapa. Whakapapa unites, not divides, and if you take that proposition, then that take tūpuna should be the key to unlocking the entitlement of both sides of the ranges, whether it's Upokoiri or Ngāti Hinemanu and Ngāti Paki.[51]

32. This was a different approach to that taken when the Heritage Trust was objecting to the inclusion of Ngāti Hinemanu ki Pātea in the He Toa Takitini mandate. As Jordan Winiata-Haines had put it in June 2015, the 'very basis' of the Heritage Trust's 'objections to the mandate of HTT which we set out in the first place' was that 'Ngati Hinemanu ki Heretaunga and Ngati Hinemanu and Ngati Paki ki Mokai Patea are separate and distinct entities'.[52]

33. Dr Fisher accepted that Ngāti Hinemanu rights existed on both sides of the range while noting that this was not the question they were required to answer:

> We are no way denying that Ngāti Hinemanu rides on both sides into these Crown Forest licensed lands. There is a very specific topic that was set up to us which was the descent through Punakiao, now this is because of the Treaty settlement process which took Taraia II within the Heretaunga-Tamatea Settlement Mandate for the tūpuna that will be settled for a lack of better term, and so that's the answer that we had to – that's a question we had to provide an answer for, and that is still inconclusive we would say, which is the point that we made in the report. Hinemanu rights across the ranges, undeniable. It's throughout this report. It's throughout so many others. It's throughout hundreds of pages of evidence, but it was that specific descent – those descent issues. The take tupuna which is what was put to us.[53]

34. Ms Sykes appeared to appreciate the confirmation of Ngāti Hinemanu rights in the CFL lands. We sought clarification from the witnesses that they were not suggesting that rights to the forests derived through Punakiao. Dr Fisher replied, pointing to both their introduction and conclusion, 'We couldn't find any evidence for that'. Ms Sykes's final

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48 Wai 2180, #4.1.21, p 60
49 Wai 2180 #4.1.21, pp 62-65; Wai 2180 #P15 at [47]
50 Wai 2180, #4.1.21, pp 65-66
51 Wai 2180, #4.1.21, p 71
52 Wai 2180, #A33 at [16]
53 Wai 2180, #4.1.21, p 72

word was to suggest then that 'that would be a quite difficult proposition in light of the Māori Land Court view on those matters in the Awarua-Hinemanu case, wouldn't it?'. Dr Fisher replied 'yes'.[54]

35. Tau and Fisher were then questioned by Mr Watson. He put it firmly that the question was not whether Ngāti Hinemanu had customary rights in the CFL lands, but whether any of their rights there derived from Punakiao. Dr Fisher agreed.[55] Mr Watson then turned to the Māori Land Court's 1991 Awarua o Hinemanu title investigation and award to Ngāti Hinemanu. Given Dr Fisher's reply to Ms Sykes on this, Mr Watson put it that the court's award had been on the basis of descent from Punakiao, and not from Taraia II. His implication here was that award of title was consistent with Ngāti Hinemanu's rights deriving on one side of the range from Punakiao and on the other from Taraia II. Dr Fisher confirmed that the Awarua o Hinemanu decision had been based on the rights of Punakiao, adding that he could not recall Taraia II being mentioned.[56]

36. Mr Watson asked Tau and Fisher if their 'inconclusive' outcome was because they preferred the Tribunal's decision making or because 'there was simply a paucity of evidence'. Dr Tau replied, 'in absence of evidence we found it difficult to reach the conclusion of Punakiao's take whenua'.[57] Counsel suggested that the demeaning of women's status in the land court 'doesn't really stack up' here as there was evidence in the Tīmāhanga case of witnesses 'relying extensively and consistently on the mana wahine of their ancestors'. Dr Fisher replied, 'We'd accept that.'[58]

37. Mr Watson put it to Tau and Fisher that, according to Claims Trust witness Richard Steedman, when blocks like Ōmahaki and Tīmāhanga were being claimed by Ngāti Hinemanu, it was based on 'on the particular tupuna from which that take derived'. One could not simply 'assert Ngāti Hinemanu as the derivation of interests in these lands', said Mr Watson. Dr Fisher replied 'Yes, we'd agree.'[59]

38. Counsel for He Toa Takitini, Jacki Cole, raised the omission of Ngāti Pouwharekura from the claimant definition in the Heretaunga Tamatea settlement. She suggested 'it would be superfluous to have mentioned Ngāti Pouwharekura … given the reference specifically to [Taraia II's] tipuna Rākaihikuroa'. Dr Fisher did not agree, noting that the Crown tended to be thorough by including tupuna and hapū names in treaty settlements. He did accept, however, that the lack of reference to Ngāti Pouwharekura did not mean the hapū was excluded from the settlement. Beyond that he would not be drawn.[60]

39. Ms Cole noted Tau and Fisher's observation that Ngāti Hinemanu me Ngāti Paki 'currently' emphasised that Punakiao's marriage to Taraia II represented a 'merging of interests'. She observed that they had contrasted this with the more longstanding view 'embedded' in evidence to and decisions of the Native Land Court that Ngāti Hinemanu's rights in Heretaunga derived from Taraia II and in Pātea from Punakiao. She asked what

54 Wai 2180, #4.1.21, pp 72-73
55 Wai 2180, #4.1.21, p 83
56 Wai 2180, #4.1.21, pp 87-88
57 Wai 2180, #4.1.21, p 88
58 Wai 2180, #4.1.21, pp 88-89
59 Wai 2180, #4.1.21, pp 93-94
60 Wai 2180, #4.1.21, pp 101-102

their use of the word 'currently' signified. Dr Fisher did not want to put a timeline around when this change had taken place.[61]

40. Ms Ennor said that Mr Winiata-Haines had effectively suggested that 'Taraia's interests became Punakiao's and Punakiao's interests became Taraia's'. She asked, 'is that how you understand a marriage of this nature to be able to work under custom?' Dr Tau thought she had correctly interpreted Mr Winiata-Haines' meaning, but in his view it 'would not be custom'. Later, when pressed again by Ms Ennor, Dr Tau went slightly further and said he did not believe customary interests were shared via the marriage.[62]

41. Ms Ennor sought to contrast the idea of a merging of interests with what she proposed had been 'repeatedly' put forward in Ngāti Hinemanu me Ngāti Paki evidence, that rights derived from Punakiao were different to rights derived from Taraia II. Dr Fisher agreed with her summation.[63] On the question of Ngāti Pouwharekura's omission from the claimant definition, Dr Fisher told Ms Ennor that, first, Ngāti Pouwharekura's interests did not derive from Punakiao and, secondly, Ngāti Pouwharekura was generally accepted as being a Heretaunga hapū.[64]

42. In response to our preliminary opinion, the Heritage Trust pointed to a range of matters that they considered had been omitted either from (or were incorrect in) Tau and Fisher's report or from the questioning of Tau and Fisher's report at the hearing.[65] These included the mana that the descendants of Whatumāmoa had over the area from Heretaunga and into Pātea; the fact that Punakiao lived in Heretaunga and all of her children were born there; the story of Taraia Ruawhare's punishment of Ngāti Ruapirau at Okawa after its members had failed to look after Punakiao adequately despite him entrusting them with her care while he was away (including Okawa being so named in reference to Punakiao); and about the pou that was erected and still stands in commemoration of this.

43. We consider that these matters were traversed at the hearings and are addressed in this decision. They are particularly reflected in our questioning of Mr Winiata-Haines set out at paragraph 52 below.[66] We did not receive evidence about a pou at Rūnanga Marae, but Richard Steedman, in evidence set out below, noted the existence of a stone memorialising Punakiao's treatment by Ngāti Ruapirau in a paddock at the marae that he said had been there since the 1990s.[67] The hearing focused more on the possibility that a wharekai at the marae had been named after Punakiao.

44. The Heritage Trust took issue with paragraph 27 of the preliminary opinion (paragraph 33 of this decision), in which we quoted Dr Fisher accepting that Ngāti Hinemanu had rights on both sides of the ranges but adding that he and Dr Tau had found no evidence that Ngāti Hinemanu rights to the CFL lands stemmed from descent from Punakiao. The Heritage Trust submission referred to 'overwhelming' evidence that Punakiao's

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61 Wai 2180, #4.1.21, p 107
62 Wai 2180, #4.1.21, pp 109-111, 115-116
63 Wai 2180, #4.1.21, pp 111
64 Wai 2180, #4.1.21, pp 115-116
65 It is not clear which was intended. The submission focused on paragraph 22 of the preliminary opinion (now paragraph 28 of the decision) and set out various matters under the heading 'Evidence omitted / Corrections': Wai 2180, #3.4.6(a), pp [4]-[7].
66 Furthermore, Tau and Fisher did discuss Taraia Ruawhare's punishment of Ngāti Ruapirau, as the Heritage Trust response acknowledges. See Wai 2180, #O2(a), pp 103-104 and #3.4.6(a), p [6].
67 Wai 2180, #4.1.21, p 360

descendants had rights on both sides of the ranges and that the ranges did not act as any boundary between them. They pointed to the evidence of Lewis Winiata.[68] The submission also addressed paragraphs 42-46 of the preliminary opinion (paragraphs 52 to 56 of this decision, which include our discussion of Lewis Winiata's evidence). Counsel contended that we needed to consider Punakiao's Heretaunga occupation rights and the fact that the Māori Land Court awarded the title to Awarua o Hinemanu to all members of Ngāti Hinemanu.[69]

45. We believe we considered all these issues carefully in both setting out the evidence of the Heritage Trust witnesses and in reaching our conclusions in the preliminary opinion. We reiterate that our task was to establish whether there is sufficient evidence that Ngāti Hinemanu and Ngāti Paki interests in the CFL lands were derived from Punakiao.

Evidence from other witnesses

46. Arapata Hakiwai was called by Dr Gilling, counsel for several claimants based in Heretaunga, albeit with whakapapa interests reaching into the Taihape inquiry district. Dr Hakiwai spoke about the history of Ōmāhu Marae. We asked him if there had ever been a building at Ōmāhu called Punakiao, and he said he thought there had been a wharekai named for her.[70] Ms Sykes followed up with a question about the exact location of this whare, and Dr Hakiwai said it was at nearby Rūnanga Marae.[71] She was intrigued by what this naming may have symbolised, but Dr Hakiwai knew no more details.

47. Several other witnesses were called by Dr Gilling: Bayden Barber, Jerry Hapuku, Greg Toatoa, and Wero Karena. They gave evidence about the strong connections of Ngāti Hinemanu ki Heretaunga and Ngāi Te Upokoiri – who are both based at Ōmāhu – to the Kāweka and Gwavas CFL lands.[72] Mr Karena spoke of the closeness of Ngāti Hinemanu at Ōmāhu to Ngāti Hinemanu at Winiata. As he put it, the relationship was so close that 'I don't see a mountain between us'. Ms Sykes asked him if Punakiao had interests on the Heretaunga side of the range but Mr Karena replied that he did not know.[73]

48. Dr Joe Te Rito, a member of Ngāti Hinemanu ki Heretaunga and a trustee of Ōmāhu Marae, appeared as a witness for Ms Sykes's clients. We asked him about the wharekai called Punakiao. He said he had not been aware of that himself but had been 'enthralled' to hear Dr Hakiwai's kōrero on it. He explained that:

> I'm not surprised because in the whakapapa – in the history I see that Punakiao was taken up there to Rūnanga by Taraia Ruawhare, she was left there, but the people there didn't look after her, didn't feed her. She complained about not being fed properly apparently and so he came back, and he banished those people you might say, they then moved further away because they hadn't cared properly for Punakiao. But I was pleasantly surprised to hear that there was [a] wharekai, that was an excellent question that Dr Soutar [asked] because had that not been asked, we would not know, and I actually think it's really quite critical really to this whole case and to the stance and mana of Punakiao in Heretaunga because they would have not named a wharekai or any whare after someone if they had no status and she was not valued.[74]

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68 Wai 2180, #3.4.6(a), pp [7]-[8]
69 Wai 2180, #3.4.6(a), p [8]
70 Wai 2180, #4.1.21, pp 122-123
71 Wai 2180, #4.1.21, p 128
72 Wai 2180, #4.1.21, pp 133-141, 302-309, 310-315, 315-338
73 Wai 2180, #4.1.21, pp 328, 335
74 Wai 2180, #4.1.21, pp 183-184

We found it unusual that news of a wharekai called Punakiao was of such surprise to members of Ngāti Hinemanu on both sides of the Ruahine Range.

49. In reply to Ms Sykes' questions, Dr Te Rito said Punakiao had 'a Kahungunu whakapapa in her own right', as a descendant of Rākaihikuroa's sister Rongomaitara.[75] We asked if that meant that every descendant of Kahungunu 'would have some Kahungunu rights there too'? Dr Te Rito was 'not sure about the technicalities', but guessed so. We asked him whether Hinemanu's rights on the Heretaunga side of the Ruahine Range came from Taraia II or Punakiao, but like Mr Karena, he said he did not know.[76] Ms Ennor asked if Punakiao's rights in Heretaunga came through her whakapapa or her marriage to Taraia II. He was unsure, but he felt that 'the mere fact that there was a wharekai built in her honour at … Rūnanga', and that Taraia had punished the haukāinga for not treating her well, 'must surely mean that she has some mana'.[77]

50. Mr Winiata-Haines, a key claimant witness, said that it was only when the Crown began purchasing land that 'we start drawing lines around the whenua' and 'lines around boundaries between our people'. Regarding the wharekai at Rūnanga named Punakiao, he said a witness for Ngāti Hinemanu me Ngāti Paki would be able to 'give a full brief on that wharekai' at the hearing.[78] He explained why the memorandum of understanding (MOU) signed by the Heritage Trust and He Toa Takitini in May 2014 (see paras 11-15 of Appendix A) had stated that Ngāti Hinemanu's interests in Heretaunga – based on the rights of Taraia II – would be settled by He Toa Takitini. Ngāti Hinemanu had been in 'a very sticky situation', as unless Ngāti Hinemanu could differentiate between Pātea and Heretaunga, their claims would be settled in Heretaunga-Tamatea or they would be blamed for holding that settlement up. But they had no doubt that Punakiao had rights in Heretaunga. He Toa Takitini had then failed to uphold the MOU and mediation had been required to resolve matters. He appeared to regard the Crown's recognition of a threshold interest in the CFL lands as vindication. He concluded that 'the narrative that has been developed by the Crown has tried to limit the territorial homelands of our peoples to one side of a mountain range where in fact, we are one and the same. There was no Ngāti Hinemanu ki Heretaunga or Ngāti Hinemanu ki Inland Pātea.'[79]

51. Ms Sykes then asked Charmaine Pene, a kuia of Rūnanga Marae, about the marae and the wharekai called Punakiao. Ms Pene said the wharekai at Rūnanga was a replacement of the original wharekai but it 'still holds the name Punakiao'. However, we noted that the Māori Maps website records that the wharekai's name is Puanani. Ms Pene then confirmed that it was indeed called Puanani, and not Punakiao. As far as she knew it had never been called Punakiao. Taraia II and Punakiao had stayed there though, she added.[80] We were then addressed by Natasha Hanara, from Te Āwhina Marae, who said that Puanani was in fact the name of the wharekai at that marae,[81] although we note that the Māori Maps website does not record a wharekai at Te Āwhina.[82]

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75 Wai 2180, #4.1.21, p 182
76 Wai 2180, #4.1.21, pp 184-185
77 Wai 2180, #4.1.21, pp 203-204
78 Wai 2180, #4.1.21, pp 223, 231
79 Wai 2180, #4.1.21, pp 235-237
80 Wai 2180, #4.1.21, pp 238, 240, 242-243
81 Wai 2180, #4.1.21, p 244
82 Wai 2180, #4.1.21, p 245. Ms Sykes undertook to provide us with clarification after the hearing. We followed this up in post-hearing directions on 4 September 2020, but we have no record of any response. See Wai 2180, #2.6.104 at [23]-[24].

52. Leaving aside the wharekai issue, we asked Mr Winiata-Haines what evidence he had 'that will give us a definite lead as to Punakiao's rights over here?' He referred to her whakapapa; her marriage to Taraia II; having her children in Heretaunga; her residence at Heretaunga and how she could stay on the land when Taraia was away; and the instructions Taraia left that she be well looked after in his absence. Mr Winiata-Haines accepted that evidence did not exist in Native Land Court minutes and other documentary records. He considered that Ngāti Hinemanu had never thought in terms of the rights of Taraia or Punakiao 'no matter which side of the range you were on or what lands you were on'.[83]

53. We then asked what he understood was meant by the term "threshold interest". He replied that it meant 'a whakapapa right'. We suggested that there was some speculation about Punakiao, and limited oral evidence, which was contested, supporting the claim of her customary rights in Heretaunga. We asked why the MOU had been concluded stating that the Heretaunga claims of Ngāti Hinemanu would be settled based on descent from Taraia. Mr Winiata-Haines said that, at the time, they had been unaware of the exact location of the CFL lands in terms of the Taihape inquiry boundary. He also said the MOU had been agreed to bring 'some comfort' to their kin in Heretaunga Tamatea 'that they could progress with their aspirations to settle'. We asked if he thought the debate about Punakiao would ever have taken place if the Kāweka and Gwavas CFL lands did not exist. He said '[p]ossibly not', noting that the forests were 'one of the biggest Crown assets that sits within our whenua for both of us on both sides'.[84]

54. Lewis Winiata also gave evidence for the Heritage Trust. He laid stress on the 1992 award of title to Awarua o Hinemanu to Ngāti Hinemanu, which sat just across the range from the CFL lands.[85] Regarding Heretaunga, he said it was understandable that claims were made to land via Taraia II rather than Punakiao. However, this was no reason to ignore 'her rangatira lines'. He was adamant that 'Punakiao has rights in her own name, under her own mana', and these were 'distinct from Taraia'.[86] We asked him where those rights were, and he indicated around Whanawhana.[87] We asked why Winiata Te Whaaro had never pursued claims in Heretaunga citing Punakiao. Lewis Winiata felt the matter was 'complex' but suggested that sometimes people with whakapapa links did not make claims. He also agreed with us that a customary right required more than just a whakapapa interest, and that it involved holding the land by occupation, for example.[88]

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83 Wai 2180, #4.1.21, pp 247-248

84 Wai 2180, #4.1.21, pp 249-251. In their response to the preliminary opinion, the Heritage Trust submitted that the MOU also provided comfort to the Claims Trust in 'ensuring that lands their claimants had interests in would remain within the Inland Patea district and not within the Heretaunga district': Wai 2180, #3.4.6(a), p [9]. We do not know what the Claims Trust's view of this is, although – as we note in Appendix A [paragraph 39 of the preliminary opinion appendix] – in 2016 the Claims Trust did not support the Heritage Trust's Wai 2542 claim or application for urgency.

85 Wai 2180, #4.1.21, pp 272-273

86 Wai 2180, #4.1.21, p 274

87 Wai 2180, #4.1.21, pp 280-281

88 Wai 2180, #4.1.21, pp 284, 287. We also received a summary (Wai 2180, #P15) from Peter McBurney of his earlier Ngāti Hinemanu me Ngāti Paki oral and traditional history report (Wai 2180, #A52), along with several pages of commentary on the Tau and Fisher report. In his earlier report McBurney noted that his Ngāti Hinemanu informants had told him that their mana at Pātea 'derives from the descent lines of Punakiao from Whatumāmoa, while their rights at Heretaunga derive from Taraia II' (p 89). To that extent, it was not helpful to the Heritage Trust's arguments. McBurney's main point about Tau and Fisher's report was that it did not set out the extent to which a concerted effort was made to undermine Winiata Te Whaaro's rights in Pātea (let alone Heretaunga) both because they were so strong and because Renata Kawepo needed to be awarded title so he could clear his debts to John Studholme. McBurney even suggested that 'the debate about Punakiao's rights versus those of Taraia II seems to me to be a red herring': #P15 at [139].

55. Several other witnesses appeared for the Heritage Trust. Patricia Cross spoke about Winiata Te Whaaro's familiarity with the Ruahine Range and his relationship with the Beamish family, who began farming at Whanawhana from 1878 (and who still farm there today).[89] Florence Karaitiana spoke about her great-grandfather Keepa Winiata's travels over the range with his father Winiata Te Whaaro.[90] Terence Steedman described the tracks and old pā sites through the range,[91] as did Kathleen Parkinson, who also described mahinga kai and the history and status of the Awarua o Hinemanu block.[92]

56. Richard Steedman gave evidence for the Claims Trust. He appeared on behalf of Maraea Bellamy and Te Rangianganoa Hawira, with whom he had jointly filed a brief of evidence. Mr Steedman is also a descendant of Winiata Te Whaaro and a member of Ngāti Paki, but his allegiances lie with the Claims Trust. This placed him in the opposite camp to several members of his whānau, which is not uncommon.

57. Mr Steedman emphasised that 'the assessment of customary interests must include an understanding of the derivation of those interests through whakapapa'. He stressed 'the importance of distinguishing between the mana whenua rights of Punakiao in the Mōkai Pātea rohe, and the mana whenua rights of her husband Taraia in the Heretaunga rohe'. He explained that, when he stood on different pieces of whenua around the region, his rights came from different ancestors. On Awarua o Hinemanu, for example, his rights were through Hinemanu from Te Ōhuake, but when he stood at Ōmāhu, his rights were through Hinemanu from Taraia II and from Kahungunu. 'That is not a separation or a split of myself, my whānau or hapū', he said, 'that is me being precise about my whakapapa and holding each of my tūpuna, our tūpuna, and the mana whenua each represents'.[93]

58. Mr Steedman further stated that the Ngaruroro River was the boundary between the whakapapa of Kahungunu and the whakapapa of Whitikaupeka and Te Ōhuake. Furthermore, Winiata Te Whaaro's rights to the area containing the Gwavas Crown forest were through his Ngāti Pouwharekura father, and 'Ngāti Pouwharekura is not a Mōkai Pātea hapū but sits firmly within Heretaunga and within Ngāti Kahungunu whakapapa.' He had never heard of a wharekai called Punakiao, but since the original name of the whare at Ōmāhu was Taraia Ruawhare he said he would 'not at all be surprised if there was a whare manaaki tangata that was called after his wife'.[94]

59. We asked Mr Steedman why, as an uri of Punakiao and member of Ngāti Hinemanu, he was not seeking to take advantage of the Crown's recognition of a threshold interest. This was an opportunity for Ngāti Hinemanu. He explained that 'the point … is I don't see Punakiao as having rights over here'. He considered that, because of their descent from Taraia II, Ngāti Hinemanu were already covered by the settlement. He described the claim being advanced as 'a separate mana whenua right for us in Mōkai Pātea to these two CFL blocks', which he did not accept.[95]

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89 Wai 2180, #4.1.21, pp 207-215
90 Wai 2180, #4.1.21, pp 264-270
91 Wai 2180, #4.1.21, pp 289-298
92 Wai 2180, #4.1.21, pp 386-393; Wai 2180, #P10
93 Wai 2180, #4.1.21, p 343
94 Wai 2180, #4.1.21, pp 352, 358, 360-361. Mr Steedman looked into the existence of a whare named Punakiao at Ōmāhu after the hearing but could find no evidence of one: Wai 2180, #3.2.802 at [4].
95 Wai 2180, #4.1.21, pp 365-367

60. Ms Sykes intimated that, as she was acting for Mr Steedman's father, uncle, and aunts, and they had an opposite position to the one he was taking, this was problematic. Mr Steedman replied that their position was incorrect. Ms Sykes noted that he had given testimony in the investigation of title to Awarua o Hinemanu and had claimed the land for Hinemanu rather than for Ōhuake. She asked why he promoted Ōhuake now. Mr Steedman replied that the Hinemanu whakapapa he provided began with Ōhuake, but he considered this was a separate issue to the one at hand. Ms Sykes highlighted that those who went into the Awarua o Hinemanu title were all Ngāti Hinemanu but without 'the artificial distinction' the Crown was making in the Heretaunga-Tamatea settlement. Instead, they were there through a 'merging' of the respective interests of Punakiao and Taraia Ruawhare, or a 'fusion'. Mr Steedman agreed there had been a 'fusion' in the generations after their union, but said it remained important to know 'where … those rights come from'. He said it had 'to be done on the correct basis'.[96]

61. Ms Sykes suggested Mr Steedman was 'a lone voice in the wilderness where everyone here wants to unify Ngāti Hinemanu not separate them'. He replied that he had always maintained that Ngāti Hinemanu was unified, but '[w]e just don't need to get hooked into changing our whakapapas.' He asked Ms Sykes whether if 'my whānau says something regardless of whether I think it's right or wrong that I have to agree to it?' She replied that he needed to 'analyse' himself as to why the position he was taking was different from the rest of his whānau, which drew an objection from Mr Watson. Mr Steedman said the goal had to be 'for us all to have a proper understanding of who we are, hopefully so that we don't argue so much and are not so divided so that we can actually move forward in this world that we find ourselves in'.[97]

Deliberations prior to proceeding to step three

62. Following delays caused by the onset of the COVID-19 pandemic, we issued directions on 4 September 2020 concerning evidential matters that remained outstanding. At this point we directed parties – as per step three of our process – to file, by 17 November 2020, submissions on whether a preliminary Tribunal opinion on customary interests in the CFL lands was needed.[98] Ms Ennor replied that the Crown supported the production of such an opinion.[99] For the Claims Trust, Mr Watson said it would be 'beneficial'.[100]

63. In a lengthier submission that revisited much of the evidence presented at the February hearing, Ms Sykes contended that a preliminary opinion was 'required'. She maintained that the evidence presented had demonstrated not only that Ngāti Hinemanu me Ngāti Paki had a threshold interest in the CFL lands, but that they also had 'substantive customary rights and interests'. Counsel argued that we should confirm that these interests exist, and thus embark upon the fourth step in our process: an inquiry into Crown actions and omissions.[101]

64. As foreshadowed, it was apparent from this that the parties supported the production of a preliminary opinion. In preparation for that we decided that a review of Tau and Fisher's

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96 Wai 2180, #4.1.21, pp 370-374, 377
97 Wai 2180, #4.1.21, pp 378-380
98 Wai 2180, #2.6.104 at [27]
99 Wai 2180, #3.2.797 at [3]
100 Wai 2180, #3.2.802 at [2]
101 Wai 2180, #3.2.801(a) at [132]-[133]

report was appropriate to ensure that there were no gaps in their coverage and that they had made the best use of the available evidence. We therefore sought advice from Paul Meredith, an expert in the areas of Māori customary law, Māori identity, and iwi history. In April 2023 Mr Meredith provided us with a 16-page review.[102]

The review by Paul Meredith

65. Meredith noted that the key question was, as Tau and Fisher had remarked, whether Ngāti Hinemanu me Ngāti Paki derived rights in the CFL lands from a different ancestor (namely Punakiao) than Ngāti Hinemanu ki Heretaunga, who derive their rights from Taraia II.[103] He considered that, in section 2 of their report, Tau and Fisher had provided 'a robust study of the complex web of whakapapa and the changing relationships across a fluid tribal landscape with shifting rights', outlining 'both agreed and contested whakapapa'. Meredith thought this context helped an understanding of why certain whakapapa lines had been used in particular circumstances. He noted that specific lines of descent on their own, 'even where they are from the original or earlier ancestors in the region, do not necessarily equate to customary interests'.[104]

66. Meredith observed that there was 'general agreement among all concerned' that Ngāti Hinemanu held customary rights in the CFL lands, which had previously been claimed through descent from Taraia II. He noted, however, that Lewis Winiata and others had claimed that Punakiao had rights under her own mana in Heretaunga, which would create an independent claim to the CFL lands. In assessing these claims Meredith considered that Tau and Fisher had taken the correct approach of testing and scrutinising the evidence, both oral and documentary. He acknowledged that Ngāti Hinemanu witnesses provided evidence about the eastern side of the Ruahine Range. However, he noted that Tau and Fisher had still been 'unable to say whether those rights were derived from Punakiao or Taraia II'. Meredith noted that the claimants had placed much store on the knowledge and rights of Winiata Te Whaaro, but 'again there is no specific evidence to say whether any rights he claimed derived from Punakiao or Taraia II'.[105]

67. Meredith considered Tau and Fisher's examination of Native Land Court minutes, including from blocks surrounding the CFL lands. He noted, with approval, their recognition of the unreliability of much of the evidence, with many claimants distorting oral traditions to gain awards of title. He concluded that Tau and Fisher had exercised appropriate caution, looking 'across the evidence rather than cherry pick[ing] isolated examples of customary interests'. Meredith undertook a light review of the relevant minutes to satisfy himself that Tau and Fisher had covered the material thoroughly, and 'came to a similar conclusion in terms of Taraia II being the dominant tupuna promoted in the Heretaunga region to secure Ngāti Hinemanu interests'.[106]

68. Meredith addressed Lewis Winiata's claim that the colonial degrading of women's status meant that Punakiao's rights had been inevitably 'obscured'. Meredith accepted that 'mistreatment' of women occurred in the court but offered examples of where Pātea claimants had cited descent from Punakiao in pursuing their cases. Regarding whether

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102 Wai 2180, #O2(k)
103 Wai 2180, #O2(k) at [9]
104 Wai 2180, #O2(k) at [11]
105 Wai 2180, #O2(k) at [12]-[14]
106 Wai 2180, #O2(k) at [15]-[20], [25]-[26]

the Ruahine Range formed a boundary, Meredith noted that Tau and Fisher had said that the evidence pointed to it being such a dividing line, although they had added (in Meredith's paraphrase) that 'some evidence might challenge that'. Meredith suspected Tau and Fisher were being diplomatic. That is, while they had cited Winiata Te Whaaro's late claim to Ruataniwha North, they had also suggested that this was likely to have been on the basis of his Ngāti Pouwharekura whakapapa. In other words, the evidence that might 'challenge' the prevailing understanding was itself weak. Meredith had seen no evidence to suggest that Pouwharekura interests were derived from Punakiao.[107]

69. Meredith listed a range of online sources he had consulted to cross-check the land court evidence, including newspaper databases and other digitised archival material. The keywords he used for searching in these databases were the names of relevant ancestors, hapū, iwi, blocks, and physical features in the environs of the CFL lands. He found two items that had not been mentioned by Tau and Fisher. One was an 1894 letter to the editor in the newspaper *Huia Tangata Kotahi* from a Ngāti Hinemanu and Ngāti Paki 'Komiti' that referred to two tribal 'takiwa' of 'Whakarauika, Haki pei' and 'Poko Poko, Haku pei'.[108] Meredith could not establish where Whakarauika was.[109] In response, Mr Watson noted that 'Haki pei' was not necessarily indicative of Whakarauika being east of the Ruahine Range given that Pokopoko's location was also referred to as being in Hawke's Bay.[110] Ms Sykes submitted that 'the actual meaning of that section is that there was a panui written from an "Assembly" or "Whakarauika" of the NHNP people. It is not a location, but an event.'[111] This seems unlikely. 'Whakarauika' also appears at the head of the letter,[112] and a study of the format of letters to the editor of *Huia Tangata Kotahi* at the time indicates that this is the address of the correspondent.

70. The other item Meredith found was in the January 1993 edition of the Kahungunu newspaper. It outlined a submission from Ngāti Hinemanu and Ngāti Paki to be part of the Heretaunga Taiwhenua of the Rūnanganui of Ngāti Kahungunu. However, he did not appear to regard this as significant. His overall conclusion was as follows:

> Tau and Fisher maintain that from the 'material that is available, it was difficult to find direct evidence of a specifically Punakiao-derived Ngāti Hinemanu right or a separate Ngāti Paki occupation of the area that is now known as the Kāweka and Gwavas CFL lands.' The Native Land Court evidence, as the major source of information, points largely to Taraia II as the basis of Ngāti Hinemanu's customary interests.
>
> My own search across archival sources did not produce any new information of substance to suggest a different finding. Tau and Fisher have made the best use of the limited information that was available to them.[113]

71. We released the Meredith review to the parties on 3 July 2023 and asked for submissions by 7 August 2023 both on the review itself and on 'what future steps if any might be appropriate in the circumstances'.[114] Mr Watson submitted that the review was 'comprehensive': Meredith had reached the same conclusion as Tau and Fisher. It was

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107 Wai 2180, #O2(k) at [20], [22]
108 'Haki' and 'Haku' are both used as transliterations of 'Hawke's'.
109 Wai 2180, #O2(k) at [29]-[36]
110 Wai 2180, #3.2.939 at [7]
111 Wai 2180, #3.2.941 at [42]
112 'Reka tuku mai ki te etita', *Huia Tangata Kotahi*, 7 July 1894, vol 2 issue 21, p 4 (Papers Past | Newspapers | Huia Tangata Kotahi | 7 July 1894 | RETA TUKU MAI KI TE ETITA. (natlib.govt.nz))
113 Wai 2180, #O2(k) at [37]-[39]
114 Wai 2180, #2.6.137 at [16]

also congruent with the evidence of the Mōkai Pātea claimants. Mr Watson added that his clients still supported the release of a preliminary opinion, but if the Tribunal's resources were limited then the landlocked land report and main historical report were more important. Regarding whether any other process could address the matter besides a Tribunal inquiry, Mr Watson confirmed that his clients were making 'significant progress' in their negotiations with the Crown. On the matter of Ngāti Pouwharekura's omission from the Heretaunga-Tamatea settlement claimant definition, Mr Watson submitted that Ngāti Pouwharekura (who include Winiata Te Whaaro's uri) may yet need to challenge this non-recognition to secure their interests in the CFL lands.[115]

72. For the Crown, Ms Ennor submitted that Meredith's review was 'comprehensive' and 'premised on sound methodology' and that his conclusions should alleviate any concerns we may have had about the thoroughness of Tau and Fisher's report. On next steps, Ms Ennor reiterated the Crown's support for us to produce a preliminary opinion. She added that 'The Crown's view is that sufficient evidence is available to the Tribunal to bring this aspect of the inquiry to a close. Step four is not required.'[116]

73. Ms Sykes submitted that she understood the reason for the review but was critical that Meredith had not contacted Ngāti Hinemanu me Ngāti Paki's witnesses. If any weight was to be given his review, she added, clarity was first needed as to whether Meredith would be made available for cross-examination or required to provide further information about the Native Land Court minute books he consulted. She submitted that the matter was 'not a simplistic debate about Punakiao's rights versus those of Taraia II'. Rather, the marriage of Punakiao to Taraia II 'signified a merging of interests and that their union is best characterised as one of strengthening existing relationships between those descendants that live on either side of the Ruahine Range. The marriage did not separate those rights, it unified them.'[117]

74. Ms Sykes agreed with Meredith that he had found no 'new information of substance'. She stressed that this was a reason why 'the tangata whenua evidence that has been provided on this issue should be preferably considered by the Tribunal'. She submitted that Ngāti Hinemanu me Ngāti Paki's lack of participation in early Crown purchasing (and thus absence from that limited historical record) did not mean they did not have customary interests in those lands. She rejected any suggestion that they were 'not able to take advantage of descent to customary lands and interests from a wahine rangatira [such] as Punakiao' as 'simply a misapplication of Tikanga Māori and a demeaning of the status of Māori women'. Regarding Pouwharekura, Ms Sykes submitted that 'Punakiao is a descendant from this whakapapa', and Pouwharekura interests remain unsettled in the Heretaunga Tamatea settlement. In conclusion, Ms Sykes urged us to proceed to step three of our process.[118]

Our decision

75. As foreshadowed, as determined by section 14(4)(c) of the Heretaunga Tamatea Claims Settlement Act 2018, our task is narrow: do Ngāti Hinemanu have customary interests in the Kāweka and Gwavas CFL lands derived specifically from Punakiao?

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115 Wai 2180, #3.2.939 at [3]-[10]
116 Wai 2180, #3.2.940 at [5]-[9]
117 Wai 2180, #3.2.941 at [11]-[13]
118 Wai 2180, #3.2.941 at [18]-[35], [46]

76. We recognise at the outset that the forests are relatively near Ngāti Hinemanu areas of interest in Pātea. They are very close to our inquiry boundary and several blocks on or towards the eastern edge of our district – like Awarua o Hinemanu, Te Kōau, Aorangi Awarua, and Awarua 1A – were variously awarded to Ngāti Hinemanu.[119] Whereas there is a lack of evidence about Ngāti Hinemanu customary interests in some of the blocks that contain the CFL lands, therefore, we know that Ngāti Hinemanu interests based on descent from Punakiao lay nearby.

77. In addition, we also acknowledge that the point highlighted by Dr Gilling to Tau and Fisher – 'the absence of evidence is not evidence of absence'[120] – is an argument well made. We accept that the historical record is imperfect, and that Native Land Court testimony – to the extent it was written down – is often an unreliable guide to customary rights and interests. Much will depend on the context, and the circumstances. Who was giving evidence? What was their motive, if any? Was that evidence internally consistent? Was it corroborated by the evidence of both friendly and hostile witnesses? Was the evidence consistent across several title investigations and partition hearings?

78. Even so, we are unable to accept the submission that, in the absence of this documentary evidence, we are required to adopt the line of evidence set out by the Heritage Trust witnesses. Both Tau and Fisher, on the one hand, and Meredith, on the other, warned against taking oral tradition at face value. Tau and Fisher explained that they had attempted to cross-reference oral traditions with other forms of evidence to apply adequate scrutiny. They quoted Tā Tipene O'Regan's remark that such critique is 'the only weapon we have to defend the integrity of the Māori memory'.[121] In a similar vein, Meredith remarked that the idea that kōrero tuku iho was somehow more authentic than documentary records was 'misguided'.[122]

79. We note in this regard the late Professor Alan Ward's 1989 explanation of how Tribunal researchers approached their assessment of the historical evidence produced for the Ngāi Tahu inquiry:

> All evidence is of worth, including the very rich accumulation of recorded oral evidence adduced in this claim. All of it discloses something of the understandings of the people who created the record at the time they created it. But no evidence is privileged in the sense that it is simply taken at face value. All is under scrutiny and tested against other evidence, as far as possible, for corroboration or substantiation. It is hazardous to build an edifice of doctrine or interpretation upon a single text.[123]

80. We acknowledge the importance of oral traditions and their critical relevance to tribal narratives, which has long been recognised from the earliest days of colonisation. As Professor Richard Boast KC set out in his 2017 article 'The Native Land Court and the Writing of New Zealand History', even Crown officials writing in the 1840s, like Edward Shortland, acknowledged the centrality of whakapapa and oral narratives to customary

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119 Tau and Fisher related how Awarua o Hinemanu was awarded to Ngāti Hinemanu in 1992 in part because of the prior award of these neighbouring or nearby titles to Ngāti Hinemanu: Wai 2180, #O2(a), pp 187-188.
120 Wai 2180, #4.1.21, p 94
121 Wai 2180, #O2(a), p 12, quoting Tipene O'Regan, 'Old Myths and New Politics: Some Contemporary Uses of Traditional History', in *New Zealand Journal of History*, vol 26, no 1 (1992), p 24.
122 Wai 2180, #O2(k) at [13]
123 Wai 27, #T1, p 4.

rights and interests. Shortland even queried whether oral narratives might be considered more reliable in certain context and circumstances:

> Like Fenton, he regarded whakapapa-based narratives as reliable, a position he came to by comparing genealogies given in different parts of the country. He was struck by 'the remarkable manner in which they coincided with each other, often when least expected', so felt satisfied he could depend on 'their general accuracy'. Shortland understood that whakapapa was only a framework on which much else was draped. He observed that 'my informants did not content themselves with a bare recollection of names; but related the most remarkable actions connected with the lives of their distant ancestors'. Elaborate histories 'seemed to be preserved in their retentive memories, handed down from father to son nearly in the same words as originally delivered'. He added that '[w]e, who have so long trusted to the authority of books, are, I am persuaded, too suspicious of the credibility of the traditionary history of a people who have not yet weakened their memories by trusting to a written language'.[124]

That said, we are still obliged to test claimant arguments carefully. Richard Steedman's evidence also demonstrated that the oral tradition in this case is, in any event, contested.

81. The circumstances remind us of a claim considered by the Mohaka ki Ahuriri Tribunal in its 2004 report. A claimant group called Ngāi Taane in northern Hawke's Bay disputed they were part of Ngāti Pāhauwera and asserted their own independent rights to redress, including the return of CFL land. Ngāti Pāhauwera witnesses denied any knowledge of Ngāi Taane and an independent historian could find no documentary references to them. Counsel for the Ngāi Taane claimants submitted that this absence of evidence was 'inconclusive in and of itself' and invited the Tribunal to decide matters based on oral evidence alone. The Tribunal declined to do this, concluding that 'the evidence for Ngai Tane having existed as a cultural and political entity distinct from Ngati Pahauwera in our inquiry district is slight'.[125]

82. There is no dispute as to Ngāti Hinemanu or Ngāti Paki's existence, to valid claims to land derived from descent from Punakiao, or to Ngāti Hinemanu's customary interests in the Kāweka or Gwavas CFL lands. But the evidence that Ngāti Hinemanu's rights in these CFL lands derive *specifically* from Punakiao is similarly slight. In short, this claim is based solely on contested oral testimony.

83. In its stage one report, the Te Paparahi o Te Raki Tribunal also confronted a claimant contention that was not supported by documentary evidence. Rima Edwards said that Henry Williams had put a first draft of te Tiriti to rangatira at Waitangi in early February 1840 that had them ceding their 'mana' rather than 'kawanatanga'. The chiefs had rejected this and, when Hobson died in 1842, asked for this draft to be buried with him. Archival experts could find no written evidence to support the claim, but Mr Edwards' counsel submitted that the oral evidence was 'potentially more informative and reliable' than William Colenso's written account. Another claimant counsel referred to it as 'the

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124 Richard Boast KC, 'The Native Land Court and the Writing of New Zealand History', in *Law & History*, vol 4, no 1 (2017), p 156, footnotes omitted.

125 Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), pp 531-532

best evidence … we have heard' (emphasis in original). The Tribunal, however, did not agree with these submissions.[126]

84. Tau and Fisher were commissioned to carry out their research because of their expertise. Likewise, we asked Meredith to review their work because he too is similarly qualified. Collectively, these experts could not find evidence that corroborated the claimants' assertions. They did not dismiss the possibility of rights to the CFL lands derived from Punakiao existing, and we do not do so either. We remain open to the possibility that such rights exist. But concluding that they do exist based on the available evidence was not a step they were prepared to take, and nor is it an option available to us.

85. These were the conclusions in our preliminary opinion and remain so. Ms Sykes noted that the recent Law Commission study paper on the influence of tikanga Māori on state law, *He Poutama*, noted the Environment Court's remark that Māori is an oral culture and at times oral evidence from tangata whenua must be given some (and perhaps even determinative) weight. The Law Commission added that a separate High Court case had made clear that 'oral tradition is not to be discounted simply because of its oral nature'.[127] But we have not done this. The Environment Court case cited by the Law Commission notes that tangata whenua evidence should potentially be given considerable or even determinative weight '[i]n the absence of other evidence from experts on tikanga Maori'. That does not apply in the matter before us. As we have pointed out, the oral evidence from tangata whenua is contested.

86. With specific respect to the Mohaka ki Ahuriri example, Ms Sykes submitted that – unlike Ngāi Taane – there was ample evidence that Ngāti Hinemanu and Ngāti Paki exercised customary rights, and indeed continue to do so.[128] We do not doubt this and accept that Ngāti Hinemanu rights exist on both sides of the range, including within the CFL lands. It is the evidence of their derivation from Punakiao east of the range that is elusive. Ms Sykes suggested that we should reflect 'why there is a lack of documentary evidence' rather than place weight on the Tau and Fisher report and the review by Meredith.[129] Yet this invites us to speculate rather than build our decision on the evidence available. In this regard Ms Sykes considered that her clients were disadvantaged by their tūpuna not having participated in the early Crown purchases on the Heretaunga side of the range that were investigated by Tau and Fisher.[130] That assumes that there would be evidence of rights derived from Punakiao in those blocks had they done so, which is not something we can conclude with any confidence.

87. Ms Sykes also contended that her clients had 'started from a position of disadvantage' in making their case because the CFL lands had been earmarked for return to another group through direct negotiations with the Crown. That group, she said, was a '[C]rown created construct to facilitate expeditious settlements within a Crown proscribed fiscal cap'. Moreover, she added, many of the 'knowledge keepers' among her clients had 'passed and sadly the knowledge passed with them'.[131]

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126 Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wellington: Legislation Direct, 2014), pp 506-508
127 Wai 2180, #3.4.6 at [7]-[8] citing Law Commission, *He Poutama* (NZLC SP24, 2023) at [7.15]
128 Wai 2180, #3.4.6 at [26]-[27]
129 Wai 2180, #3.4.6 at [31]
130 Wai 2180, #3.4.6 at [31(e)]
131 Wai 2180, #3.4.6 at [10]

88. Needless to say, the loss of kaumātua expert in tribal tradition is experienced by all iwi and hapū. On the matter of the Crown's negotiations with He Toa Takitini, we accept the general principle that groups who are not progressing to settlement at the same time as their neighbours can face challenges. However, we consider that any disadvantage the claimants may once have faced has been removed by the Tribunal's granting of urgency to the Wai 2542 claim in 2016, the mediation that resulted in a 10 per cent share of the company holding the CFL lands and accumulated rentals being reserved for potential settlement with other claimants, and our commencement of the four-step process in 2018 – that included the commissioning of the Tau and Fisher report and the Ōmāhu Marae hearing in February 2020 (all of which are traversed in Appendix A).

89. Ms Sykes submitted that despite the obstacles facing her clients they had demonstrated their ongoing customary rights on the Heretaunga side of the range. She added that we should have more closely examined 'the whakapapa and whanaungatanga ties explored in the evidence of Dr Joseph Te Rito and other experts' and submitted that our analysis required an understanding of these concepts.[132] We have set out aspects of Mr Te Rito's evidence above, and do not consider that it strengthened the Heritage Trust's case.

90. The claimants contend that if we had 'grapple[d] with the nature of the whakapapa relationships and dynamics of whanaungatanga' we would have concluded that their customary interests in the CFL lands derive from Punakiao's marriage to Taraia II.[133] Ms Sykes stressed that the Native Land Court 'prioritised single patrilineal lines of descent' and proposed that this was also our approach. She asserted that 'any suggestion that NHNP are not able to take advantage of descent to customary lands and interests from a wahine rangatira [such] as Punakiao is simply a misapplication of Tikanga Māori'.[134] We do not accept that submission. The derivation of rights from female tūpuna is commonplace. The Pātea interests of Ngāti Hinemanu are well understood as being based on descent from Punakiao. The challenge is that we have not seen clear evidence that Ngāti Hinemanu's rights in the CFL lands derive specifically from Punakiao.

91. We also note that, while the naming of a wharekai after Punakiao appeared to suggest recognition of her mana in Heretaunga (which Mr Te Rito described as 'quite critical really to this whole case'), it turned out that there was no wharekai named after Punakiao.

92. Moreover, logically, Winiata Te Whaaro was best placed to have pursued a Heretaunga-based claim because of descent from Punakiao. Yet he did not do so. There may well have been political reasons why he did not make any claims in Heretaunga – to protect and enhance his claims to land in Pātea – but the fact remains that he did not make them. Furthermore, when he did make a claim to Ruataniwha North it is not clear on what basis he did so. Tau and Fisher surmised that it would have been because of his Ngāti Pouwharekura whakapapa from his father. Meredith agreed in this assessment. If they are correct, the difficulty for the claimants is that Ngāti Pouwharekura is a Heretaunga hapū. Either way, however, the matter is speculative.

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132 Wai 2180, #3.4.6 at [11]-[12]
133 Wai 2180, #3.4.6 at [19]-[20]
134 Wai 2180, #3.4.6 at [22]-[24]

93. Ms Sykes submitted that the Supreme Court's 2011 *Haronga* decision was relevant as it required the Tribunal to inquire into whether every claim before it is well-founded or not. The Tribunal could not defer inquiry as a means of avoiding such a decision. If we found that Ngāti Hinemanu me Ngāti Paki had customary rights in the CFL lands, she submitted, then this would provide a 'powerful basis from which to make inquiry into the well-founded claims aspect of the CFAA [Crown Forest Assets Act] text'. Since He Toa Takitini had already 'settled claims on the basis of Te Tiriti breach in those lands, then that same finding is highly likely to be one of equal application to the present claimants from NHNP'.[135]

94. We disagree that *Haronga* is relevant to our current deliberations and note that in her response to our preliminary opinion Ms Sykes now agrees that *Haronga* would only apply at a later stage.[136] We have not been establishing whether the Ngāti Hinemanu me Ngāti Paki claims against the Crown are well-founded but undertaking the prior step of considering whether the claimed customary interests derived from Punakiao exist. This caselaw would therefore become engaged following the next step.

95. The omission of Ngāti Pouwharekura under the Heretaunga Tamatea settlement is not a matter we are able to consider. We note that Crown evidence was that the hapū were likely to be covered by the claimant definition.[137] Whether that is a correct position is a matter for Ngāti Pouwharekura to pursue. Mr Watson, for example, did not consider the matter necessarily closed, commenting that his clients who descend from Winiata Te Whaaro 'continue to reach out to their whanaunga, including those who associate with the Ngāti Hinemanu me Ngāti Paki Heritage Trust, to progress the recognition of Ngāti Pouwharekura interests'.[138] That recognition would involve the Heretaunga Tamatea settlement only, however, and have no implications for Pātea.

96. Our conclusion, based on the material before us, is that there is insufficient evidence to sustain the Ngāti Hinemanu me Ngāti Paki claim to a customary right in these CFL lands that is derived from Punakiao. There is therefore little prospect of us making a binding recommendation for the return of the ringfenced share of the company holding the CFL lands and accumulating rentals to them. We acknowledge that we have not been able to undertake an exhaustive investigation, but we have done as much as our resources have permitted. We note in any event that the Crown reserved the 10 per cent share pending the future settlement of Ngāti Hinemanu me Ngāti Paki claims, so the possibility remains that the Crown and Pātea claimants may yet negotiate a settlement involving that whenua.[139] Accordingly, we consider that there is no basis for us to move to step four of the process we commenced in 2018.

The Registrar is to distribute this decision to all parties on the notification list for Wai 2180, the record of inquiry for claims in the Taihape: Rangitīkei ki Rangipō District Inquiry.

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135 Wai 2180, #3.2.801(a) at [14]-[28]
136 Wai 2180, #3.4.6 at [38]
137 Wai 2180, #A29 at [35]
138 Wai 2180, #3.2.939 at [5]
139 Both Ms Ennor for the Crown and Ms Sykes referred in their responses to the preliminary opinion to discussions between the Crown and the Heritage Trust over Pokopoko, which we assume are taking place in parallel to the Crown's negotiations with the Claims Trust: Wai 2180, #3.4.6 at [37] and #3.4.9 at [16].

DATED on this 8th day of October 2024

Justice L R Harvey
Presiding Officer

Professor Tā Pou Temara
Member

Dr Monty Soutar
Member

Dr Paul Hamer
Member

WAITANGI TRIBUNAL

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.[140] 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.[141]

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,[142] which had been included as part of the Taihape inquiry district in July 2010.[143] 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.[144]

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.[145] 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.[146] 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.[147]

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

[140] Wai 2542, #A10(a), pp 2, 62
[141] Wai 2542, #A10(a), pp 3-5
[142] Wai 2542, #A10(a), pp 21, 365
[143] Wai 2180, #2.5.13, pp [10]-[11]
[144] Wai 2180, #2.5.13 at [3.1.110]
[145] Wai 2542, #A10(a), p 22
[146] Wai 2542, #A10(a), pp 64, 66-77
[147] Wai 2542, #A10(a), pp 88-89

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'.[148] 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.[149]

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.[150]

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.[151]

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.[152]

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

[148] Wai 2542, #A10(a), pp 78-79, 85
[149] Wai 2542, #A10(a), p 58
[150] Wai 2542, #A10(a), pp 95-96
[151] Wai 2542, #A10(a), p 110
[152] Wai 2542, #A10(a), p 111

position.[153] In consultation also with the Heritage Trust (and, it would appear, the Claims Trust[154]), 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.[155]

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.[156]

10. He Toa Takitini and the Crown signed the terms of negotiation on 19 December 2011.[157]

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.[158] (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'.[159]

13. The respective areas of interest 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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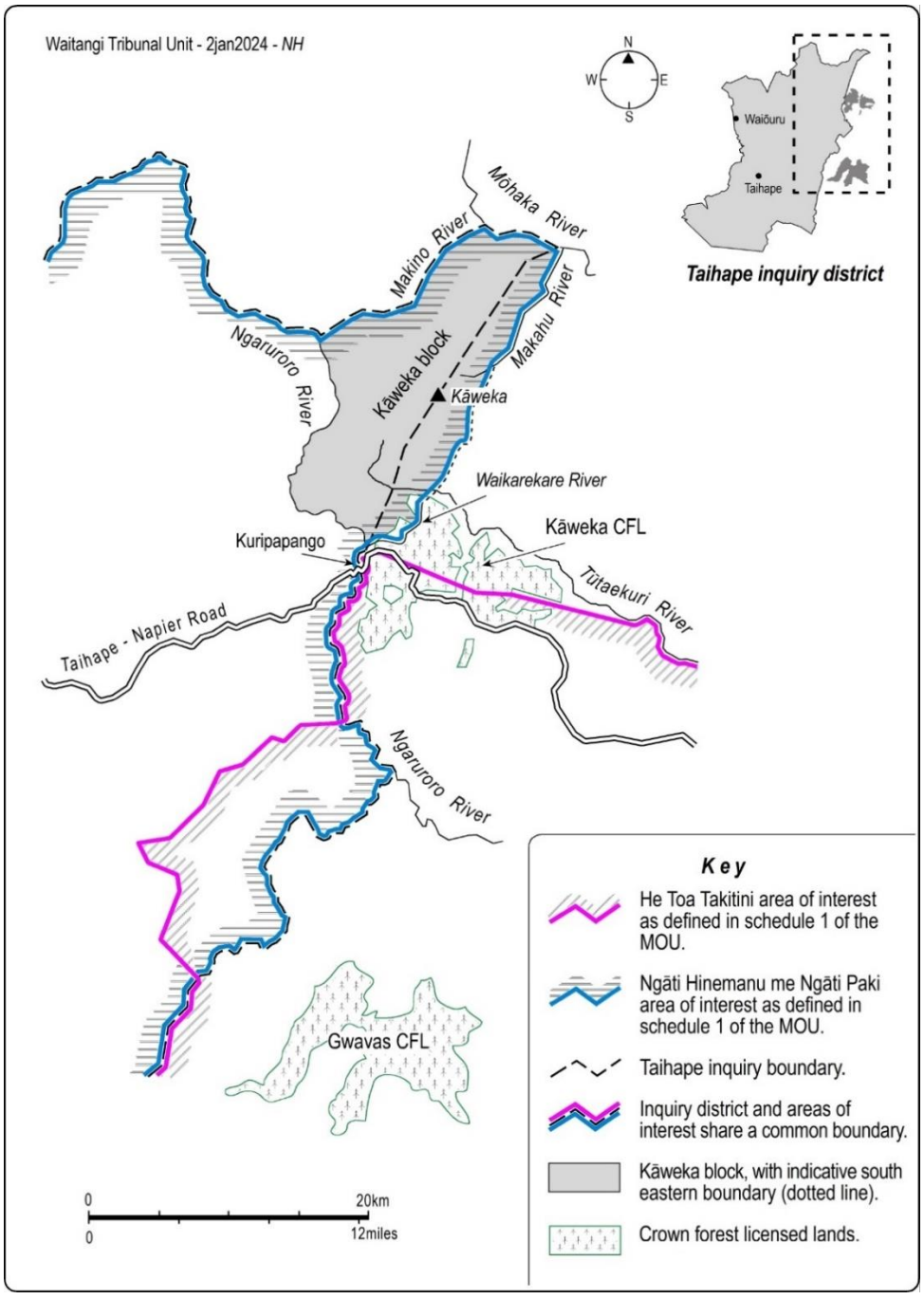
[153] Wai 2542, #A10(a), p 99
[154] He Toa Takitini advised OTS on 24 November 2011 that the new wording had been 'agreed in principle by the Mokai Patea and Ngati Hinemanu Ngati Paki Heritage Trust': Wai 2542, #A10(a), p 102.
[155] Wai 2542, #A10(a), p 110
[156] Wai 2542, #A10(a), p 112
[157] https://www.govt.nz/assets/Documents/OTS/Heretaunga-Tamatea/Heretaunga-Tamatea-Terms-of-Negotiation-19-Dec-2011.pdf
[158] Wai 2542, #A10(a), pp 134-135
[159] 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).[160] 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.[161]

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



[160] 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.
[161] 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').[162]

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.'[163] 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.[164] On 5 June 2014, OTS wrote to the Heritage Trust, the Claims Trust, and other groups with overlapping interests[165] 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.[166] OTS appended a list of site-specific proposed redress, which included options to purchase both the Kāweka and Gwavas CFL lands.[167] 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.[168]

17. Since OTS had heard nothing from the Heritage Trust it wrote to them again, on 16 September 2014,[169] 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.[170] 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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[162] Wai 2542, #1.1.1, p [14]
[163] Wai 2542, #1.1.1, p [14]
[164] 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].
[165] 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].
[166] Wai 2542, #3.1.5(a), p 1
[167] Wai 2542, #3.1.5(a), p 5
[168] Wai 2542, #A10(a), pp 138-139, 144
[169] Wai 2542, #A10(a), p 137
[170] 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'.[171] Pātete was given three weeks to complete the task.[172] 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.[173]

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.[174] 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.[175]

The Crown and the Heritage Trust's discussions on 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.[176] On 21 October 2014, the Heritage Trust wrote to OTS requesting a meeting as a matter of urgency.[177] 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.[178] 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.[179] 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.[180]

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 any matters of overlap with it before it could proceed to settlement. It now found,

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[171] Wai 2542, #A10(a), p 149 and #A10, p 12
[172] Wai 2542, #A10(a), p 211
[173] 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.
[174] Wai 2542, #A10(a), pp 333, 337
[175] 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.
[176] Wai 2542, #A1 at [4] and #A2 at [51]-[55]
[177] Wai 2542, #A2(a), p 82
[178] Wai 2542, #A2(a), pp 83-84
[179] Wai 2542, #A2(a), pp 87-89
[180] Wai 2542, #A10(a), pp 345-346

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.[181]

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.[182]

23. Mr Winiata-Haines replied stating that

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

> 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.[183]

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'.[184] 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[?]'[185]

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.[186] 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'.[187]

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';

[183] Wai 2542, #A10(a), p 359
[184] Wai 2542, #A10(a), pp 366-367
[185] Wai 2542, #A10(a), pp 364-366
[186] Wai 2542, #A10(a), pp 363-364, referring to Wai 2180, #2.5.36 at [64] and #2.5.36(a)
[187] 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'.[188]

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.[189] 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.[190] 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'.[191]

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'.[192]

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

[188] Wai 2542, #A10(a), pp 368-372
[189] Wai 2542, #A10 at [92]; Wai 2542, #A10(a), p 377. It is not clear how exactly this was communicated to Mr Winiata-Haines.
[190] 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]).
[191] Wai 2180, #A33 at [12]-[18]
[192] 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).[193]

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'.[194]

32. Mr Winiata-Haines replied the following day.[195] 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.[196]

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

[193] Wai 2542, #A10(a), pp 378-379
[194] Wai 2542, #A2(a), pp 209-212
[195] 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]
[196] 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'.[197]

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.[198] 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).[199] 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.[200] 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.[201]

36. On 12 February 2016, we asked the parties for an update on their progress.[202] 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.[203] 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

[197] Wai 2542, #1.1.1 at [4]-[22]
[198] Wai 2542, #2.5.2
[199] Wai 2542, #2.5.3
[200] Wai 2542, #2.5.4 at [1]
[201] Wai 2542, #A10 at [97]-[98]
[202] Wai 2542, #2.5.4
[203] Wai 2542, #3.1.19 at [3]-[6]

and unambiguous' that Wai 1835 should be removed from the He Toa Takitini claimant definition.[204]

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.[205] 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'.[206]

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.[207] 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.[208] 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.[209]

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.[210] 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'.[211] However, the Heritage Trust preferred to push ahead with its urgency application.[212] 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.[213] In that regard Claims

[204] Wai 2542, #3.1.16 at [10]-[19]
[205] Wai 2542, #3.1.18 at [8]-[12]
[206] Wai 2542, #3.1.17 at [5]-[26]
[207] Wai 2542, #2.5.6
[208] Wai 2542, #2.8.1
[209] Wai 2542, #3.1.21 at [17]-[18]
[210] Wai 2542, #3.1.22 at [3.4.3]
[211] Wai 2542, #3.1.21 at [23]
[212] Wai 2542, #3.1.23 at [8]
[213] 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.[214]

'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.[215]

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.'[216] 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'.[217]

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

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[214] Wai 2542, #A5 at [15]
[215] 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
[216] *Ka tika ā muri* (March 2015), p 54
[217] '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.[218]

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.'[219]

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.[220]

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.[221]

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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[218] Wai 2542, #A10 at [61]-[62]
[219] Wai 2542, #A10 at [63]-[69], and quoting Wai 2542, #A2(a), p 267
[220] Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), pp 50-51, 75, 77-78
[221] 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).[222] 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'.[223]

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.[224]

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.[225]

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'.[226]

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.[227] They elected to do this and on 3 October 2016 the Tribunal chairperson appointed Bill Wilson and Sir Hirini Mead as mediators.[228] The mediation

[222] Wai 2542, #2.5.10 at [94]-[96]
[223] Wai 2542, #2.5.10 at [97]
[224] Wai 2542, #2.5.10 at [99]
[225] Wai 2542, #2.5.10 at [104]
[226] Wai 2542, #2.5.10 at [111]-[119]
[227] Wai 2542 #2.5.11 and #2.5.13
[228] 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.[229]

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.'[230]

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.[231] 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.[232] 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.[233]

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.[234] 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

[229] Wai 2542, #2.8.2
[230] Wai 2542, #3.1.48 at [2]-[3]
[231] Wai 2542, #3.1.48 at [6]
[232] Wai 2542, #3.1.46 at [2.5]-[3.8]; #3.1.48 at [4]; #3.1.49 at [7]
[233] Wai 2542, #3.1.51 and #3.1.55
[234] 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.[235]

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'.[236]

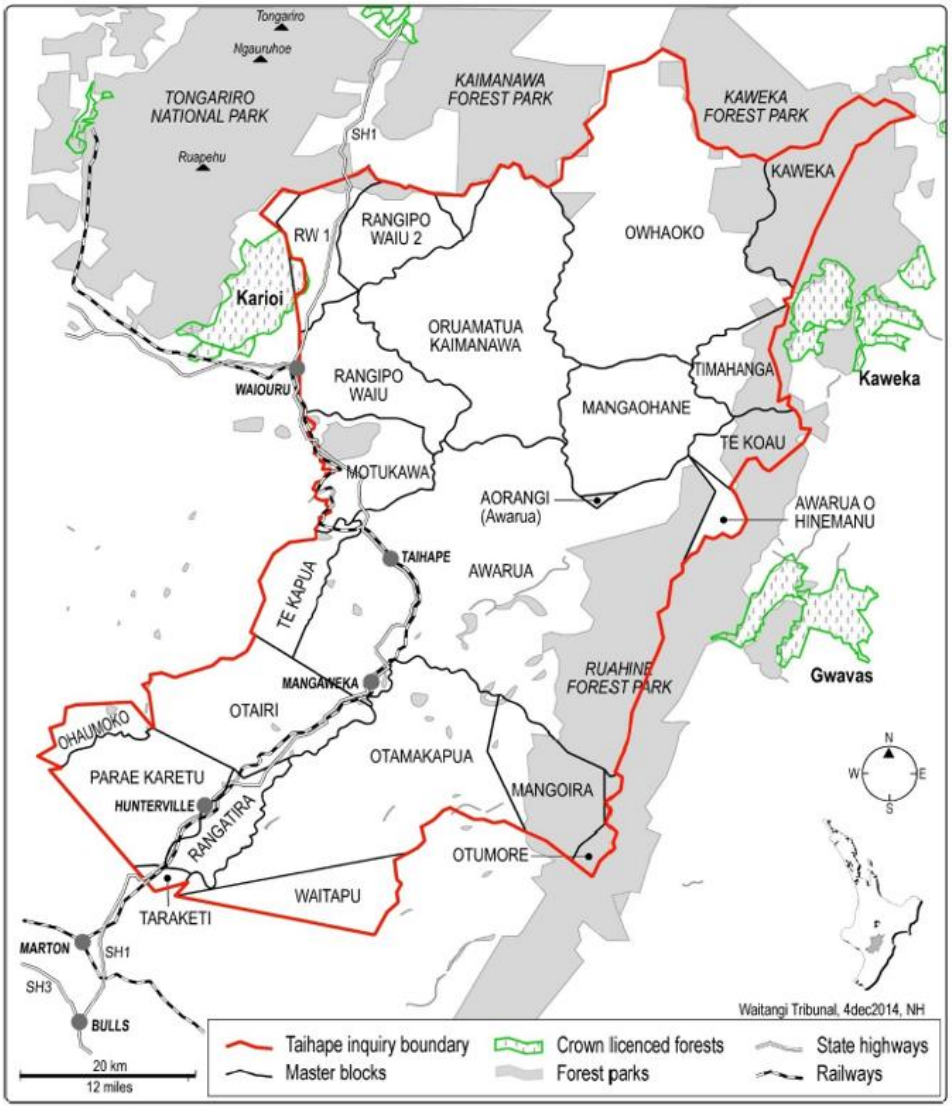
56. The settlement legislation was passed on 26 June 2018. Section 90 preserved the Tribunal's jurisdiction to hear historical claims concerning CFL land (other than claims settled by the Act) for eight years after the settlement date of 22 August 2018. Claims not settled by the Act included, under section 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.[237] 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.[238]

[235] Wai 2542, #3.1.56
[236] Wai 2542, #3.1.56(a)
[237] Wai 2180, #2.6.37 at [4]
[238] Wai 2180, #3.3.9 at [9]; Wai 2542, #A12 at [15]-[16], [49]

Location of the Kāweka and Gwavas CFL lands

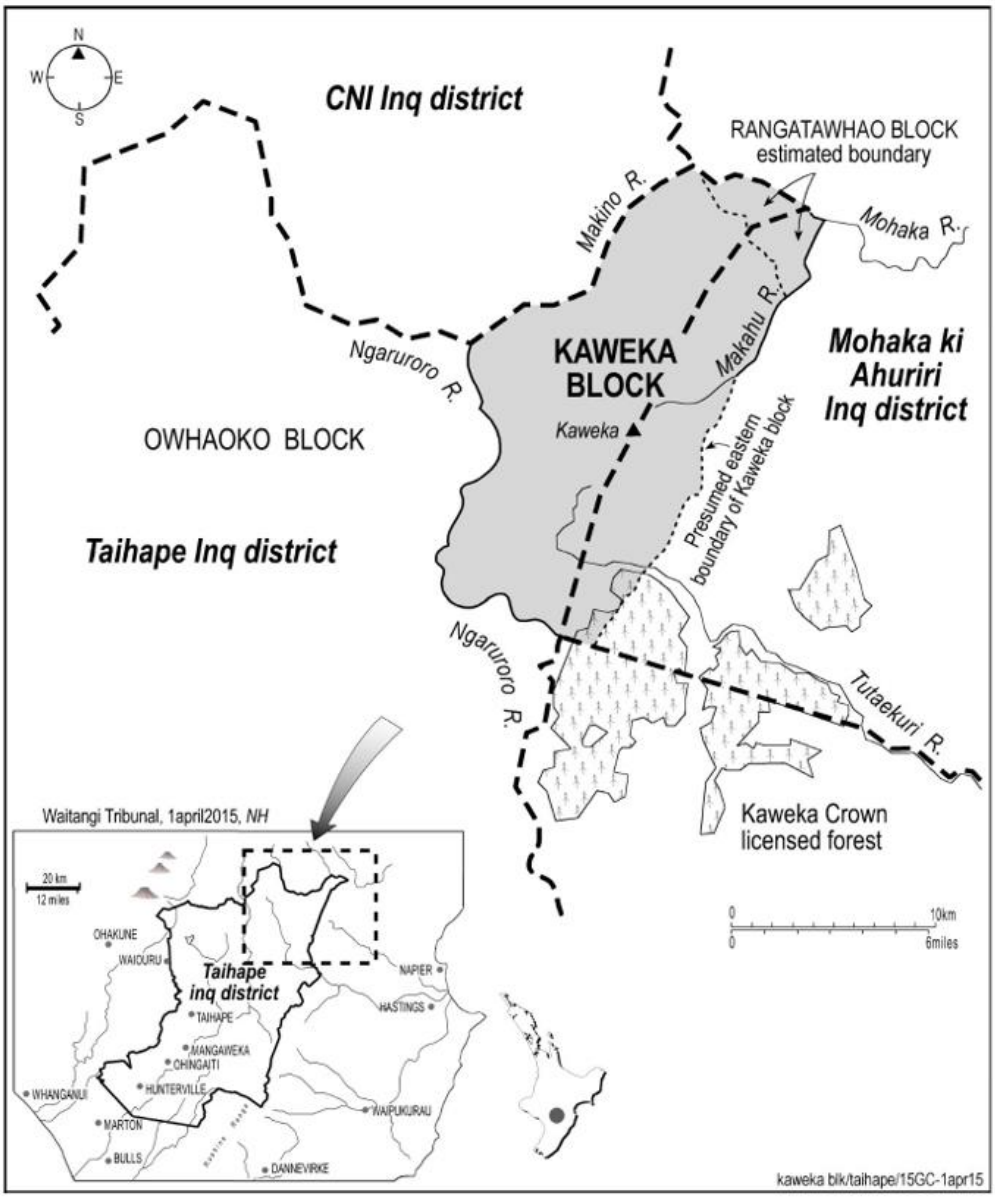


Taken from Tribunal direction Wai 2180, #2.6.37, February 2018, p 12

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'.[239] 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.[240]

[239] Wai 2180, #2.5.13 at [9]
[240] 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.[241]

[241] 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.[242]

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.[243]

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.

[242] Wai 2180, #2.6.53 at [59]-[61]
[243] 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.[244]

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