HISTORICAL ACCOUNT

PREPARED FOR THE

RUAPUHA UEKAHA HAPU TRUST

Bruce Stirling

2011

Introduction

This historical account has been commissioned by the Ruapuha Uekaha Hapu Trust for the purpose of explaining to its beneficiaries the Wai 51 Settlement between the hapu of Ruapuha and Uekaha and the Crown and the subsequent vesting of Hauturu East 8 in the Ruapuha Uekaha Hapu Trust.

Recently there have been a series of proceedings in the Maori Land Court about the terms of trust for the Ruapuha Uekaha Hapu Trust including the definition of beneficiaries and the status of the Wai 51 settlement. In addition, the Maori Land Court considered distribution of income from royalties under the licence to the Glow Worm Caves.

These issues ultimately culminated in the Maori Appellate Court's reserved decision at 2010 Maori Appellate Court MB 512-556 dated 2 November 2010.

The Author

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Mr Stirling has a BA in History from Victoria University of Wellington. Mr Stirling worked for the Treaty Issues Unit at the Crown Law Office as a researcher and historian from 1989 to 1993, and then as a Historian and later Research Manager at the Crown Forestry Rental Trust ("CFRT") between 1993 and 2000. After leaving the CFRT Mr Stirling worked as an independent historian before establishing HistoryWorks in 2004.

Since leaving CFRT Mr Stirling has written further reports for Maori claimants that Mr Stirling has presented to the Waitangi Tribunal and other fora. These include: 'From Kingitanga to Te Kooti: Taupo in the 1860s' (CNI inquiry); 'Nineteenth Century Land Interests in Kaingaroa' (CNI inquiry); 'Southern Te Urewera Waterways and Fisheries'; 'Whanganui Maori and the Crown, 1840–1865'; 'Taupo–Kaingaroa 19th Century Overview' (CNI inquiry); 'Rongowhakaata and the Crown, 1840-1873' (Gisborne inquiry); 'Te Rae o Papamoa (Papamoa Hills Cultural Heritage Regional Park) Cultural Heritage Report', (EBOP); 'Ngati Whatua o Orakei and the Crown, 1840-1865'; and, 'Ngati Whatua‟s North Shore Lands, 1840-1865'.

Mr Stirling has also been engaged by the Historic Places Trust, Tauranga City Council, Matakitaki-a-Kupe Trust, Ngati Whatua o Orakei, the Tauwhao Te Ngare Trust, the Pouakani Claims Trust, and other organisations to prepare briefs of evidence on various aspects of Maori land and

heritage in the Maori Land Court, the Environment Court, and the High Court.

Crown Acquisition of the Waitomo Caves, 1884-1911

In 1884 Waitomo Maori revealed to government surveyor of Te Rohe Potae, Lawrence Cussen, and his assistant, Fred Mace, the entrance to the Waitomo Caves. Mace planned to return to explore the Caves at a later date and did so in December 1887 when, accompanied by local man, Tanetinorau, he became the first Pakeha to explore the Caves.

Tanetinorau only reluctantly agreed to take Mace into the Caves. Mace returned to the Waitomo Caves in February 1888 with his brother and several other Pakeha, again accompanied by Tanetinorau.

The exploration of the Caves led to growing public interest in visiting the Caves. In response, Waitomo Maori prepared for the arrival of tourists. They cleared the entrance and exit to the Caves, built ladders, acquired waka, and constructed paths to guide visitors through the Caves. A visitor's book was opened in mid-1889.

The Crown was soon interested in the tourism potential of the Waitomo Caves and in 1889 sent an official but secret party to report on them.

Auckland Chief Surveyor Humphries led the party and was assisted by Native Land Court Judge William Mair, who was then involved in Te Rohe Potae land title investigations involving Waitomo lands. The government party was guided through the Caves by local Maori, including Tanetinorau, on 1 to 3 June 1889 and took the first photographs of them. A dining table was set up in the first main cave where Maori hosted the party to a hot dinner. This led to the cave being dubbed the 'Banquet Chamber'.

The government party reported in June 1889 that the Caves were becoming a tourism attraction, but needed to be maintained in their "present natural condition." Some vandalism – in the form of names carved into the cave walls – was already evident and Humphries was concerned Maori might not be able to protect the Caves from further vandalism, and urged the government to take control of the Caves. This led the Native Department to look at acquiring the land above the Caves.

The first step in acquiring the Caves land was identifying the land above them, and its owners. The title determination process had already commenced when title to Hauturu East 1 was determined in September 1888 by the Native Land Court, sitting under Judge Mair. Title was awarded to the descendants of Ruapuha, described as "Ngati Ruapuha and Ngati Tanetinorau

and Ngati Kowaenga and Ngati Toarikiriki." The Waitomo Stream, which flowed into the Caves, was a boundary of Hauturu East 1 but until the land was surveyed it was not certain if it included the land above the Caves.

Title to another block, Hauturu East, was also determined in September 1888. Title was awarded to the descendants of Uekaha, named as "the people of Ngati Uekaha, Ngati Taiwa, Ngati Te Whetu, Ngati Ngapurangi, Ngati Tuwherua, Ngati [illegible], Ngati Ariki, Ngati Tuawa, and Ngati Parekohuru, hapu who have claims." This block adjoined Hauturu East 1 along the Waitomo Stream but until the land was surveyed it was not certain if it included any of the land above the Caves.

It was not until October 1889 – when Hauturu East and Hauturu East 1 were both subdivided to cut out the land around the Caves – that it was confirmed that the Caves lay beneath Hauturu East 1, not Hauturu East. Part of Hauturu East near the Caves (1 ½ acres of Hauturu East 3B1) was later taken by the Crown under the Public Works Act for scenic purposes in 1911. This taking is examined later in this report.

Judge Mair advised the Native Department in 1889 that the Caves lay beneath Hauturu East 1 and that the, "three leading owners of the portion where the Caves are located appear to be Te Aroa, Te Moerua, and Tanetinorau, but there are a great many owners of the block."

At the same time, the local government native land purchase agent, John Wilkinson, saw an opening for the government, reporting that:

> There is jealousy amongst owners of Waitomo Caves, brought about by the fact that certain of the owners are taking a more prominent part in the management of them than others, and also because the owners, or some of them so it is said, were put on the photographs of the Caves as owners thereof.

The government had published the photographs it took on its 1889 visit, and the labelling of the Maori guides as 'owners' was said by Wilkinson to have caused division. The greater role played by some owners in the growing tourism at Waitomo was claimed by Wilkinson to have caused dissatisfaction amongst the owners. Whether this was true or not is difficult to know without corroboration from an impartial source, but it is certainly the case that government land purchase agents sought to take advantage of any division they could perceive – or aggravate – amongst Maori land owners.

Wilkinson began to urge the owners to apply to the Native Land Court for a subdivision of Hauturu East, to cut out the land above the Caves and reduce the number of owners he needed to deal with. At the same time, he added, "I do not think it would be advisable to suggest any

desire on part of government to lease or purchase until we know who the owners of that portion are."

The Crown preferred to deal with a smaller partition and a smaller group of owners. Wilkinson praised the willingness of Judge Mair's Court to co-operate in keeping the number of owners of the subdivided title to the Caves land "as few as possible in order to facilitate negotiations for purchase or lease." He added that Mair's attitude "shows the great interest he takes in having this wonderful locality placed, if possible, in a position to be preserved and made available for the benefit of [the] public."

In August 1889 Judge Mair heard Tanetinorau's application for the subdivision of Hauturu East 1. The land above the Caves was dubbed Hauturu East 1A and was claimed by Ngati Tanetinorau and Ngati Ruapuha. After several objections to the claim being made for Ngati Tanetinorau, it was amended to be under Ngati Ruapuha only. Even so, Pepene Eketone, who was the kaiwhakahaere for Tanetinorau's case, maintained that Ngati Tanetinorau did have a right.

The case was adjourned until September 1889, when Judge Mair advised that, "the subdivision was only meant to represent a portion to take in the Caves, and not as representing a subdivision of interests." That is, the partitioning out of Hauturu East 1A was not meant to represent a group of customary interests – as was usually the case in a subdivision – but was simply a way to separate out the land above the Caves. This was underlined when title was awarded to Hauturu East 1A: the Court observing that "the persons in this subdivision will also retain their interests in the balance of the original block."

Tutawa Tuatara objected to the subdivision proposed by Tanetinorau for the Caves land, and to the list of names he proposed for Hauturu East 1A. Tutawa was father-in-law to Tanetinorau, his first wife, Te Nekehanga being Tutawa's daughter.

Tutawa and Tanetinorau could not reach an agreement outside the Court so each submitted his own list of owners to be assessed in Court. Three names were common to both lists. Tanetinorau admitted that some of the names on his list were included through "aroha" rather than on the basis of descent from Ruapuha, so the Court removed them from the list, namely Te Ra Houpapa and Mata Te Kanawa.

Title to Hauturu East 1A (756 acres) was then awarded on 17 September 1889 to the 14 names remaining on the two lists, being:

Ani Hokopu

Ani Kumeroa
Hiiti Henare
Haami Haereiti
Kingi Taniora
Ngamane Tukemata
Riutoto Aihe
Rangiwhakarewa Paraone
Tutawa Tuatara
Te Moerua Natanahira
Te Whata Karaka
Tanetinorau Opataia
Te Nekehanga Tanetinorau
Waitere Raharuha

Judge Mair immediately advised the government that the title had been determined so "negotiations may be commenced now." Wilkinson reported in October 1889 that he had sounded out some of the owners of Hauturu East 1A and said they were "agreeable that the Caves should be acquired in some way or other by the government." Their preference was to lease, with £1,500 per annum sought in rent (equal to $250,000 today). At the same time, a sale price of £6,000 was named to Wilkinson, who thought they "have really no idea as to what they ought to ask," so he sought some instructions as to price.

The Native Land Purchase Department did not refer to leasing the land. It instead advised Wilkinson to pay up to £1,000 to purchase the right to the Caves, plus 10 shillings per acre for the land. He responded by urging that he offer Maori even less; suggesting a payment of "about £50" per owner for the right to the Caves (or £700 in total) plus just six shillings per acre for the land, as a higher price would "have a prejudicial effect upon other land purchases in this district."

As Hauturu East 1A might be the first purchase in the district, the price would set a precedent and he wanted it to be a low one. The Native Land Purchase Department advised in November 1889 that the price it had recommended earlier was a "maximum," and he was "of course...expected to purchase the lands at as low a rate as possible." In December 1889, he was told to lower the price per acre to five shillings and pay only £500 more for the rights to the Caves.

Before any purchase negotiations commenced, J. Fraser of Otorohanga was appointed as the

government caretaker of the Waitomo Caves in October 1889. He was instructed to supplement the guiding activities of Waitomo Maori, to improve access to the Caves, protect them from vandalism and negotiate with the owners for their purchase.

Fraser was instructed to prioritise the purchase of Hauturu East 1A, as the government considered that any expenditure on improvements to the Caves "would only increase the difficulty of dealing effectively with the native owners." Indeed, one of the owners undertook improvements at his own expense "as he objects to the work being done at government expense" (lest this give the government some claim to the Caves).

The pending visit of Governor Ranfurly to the Waitomo Caves in April 1890 led the government to instruct Fraser to instead focus on improvements to the Caves, rather than their purchase.

The Caves were becoming an increasingly popular destination, despite the poor road access. The visitors' book recorded 360 visitors there by the end of 1890, with a further 140 by April 1891. At first the price of admission was a candle, but the Maori owners soon settled on a charge of two shillings six pence each (25 cents, equal to $23 today).

Government retrenchments saw Fraser's post disestablished in April 1891, and the owners once again took over full management of the Caves.

The "general booming" in business at the Waitomo Caves concerned Wilkinson, who feared in 1890 that this – combined with the building of a road from Hangatiki station to improve access – would lead Maori to realise that the Caves "are very valuable indeed," and "have an injurious effect upon the proposed purchase." When, in April 1890, Pakeha first located other Caves west of Waitomo, the government kept the discovery secret because it also wanted to purchase those Caves and did not want public interest driving up the price.

In any case, Wilkinson's purchase negotiations had been hampered by the lack of a survey of Hauturu East 1A, and by January 1890 all he had done was meet two of the owners at the Caves. As they were "only old people," he did not discuss the government's purchase plans, "preferring to wait until I can get the younger and more intelligent ones together."

Wilkinson soon learned that, rangatahi or kaumatua, the owners were, with one exception, "disinclined to sell." The sole exception was not then identified.

In July 1890 he reported that "J. Davis, half-caste of Otorohanga," had told him that his Maori wife and another owner were willing to sell their Hauturu East 1A interests for £50 each. But they wanted to sell only the right to the Caves and a small area around the Caves, not all of their

interests in the block.

Wilkinson ascribed the "sudden willingness to sell" to moves by other owners to subdivide Hauturu East 1A and to define their relative interests in the land. This would enable the land around the Caves to be partitioned out and the interests of those with the greatest rights to that land to be defined.

The government rejected the offer by two owners to sell their interests, at least until the Caves land was partitioned out and relative interests defined.

In September 1892 the Native Land Court determined the relative interests of the 14 owners of Hauturu East 1A, awarding a total of 27 shares in the following proportions:

Ani Hokopu	1
Ani Kumeroa	2
Hiiti Henare	1
Haami Haereiti	2
Kingi Taniora	2
Ngamane Tukemata	2
Riutoto Aihe	2
Rangiwhakarewa Paraone	2
Tutawa Tuatara	2
Te Moerua Natanahira	2
Te Whata Karaka	2
Tanetinorau Opataia	2 ½
Te Nekehanga Tanetinorau	2 ½
Waitere Raharuha	2

In October 1892, Wilkinson reported that the final survey of Hauturu East 1A was still not completed which prevented any purchase proceeding. Added to this, he noted, "the unfortunate advertising and booking of the Caves by government before we had acquired any interest in them has militated greatly against acquiring them now."

Finally, in March 1896, he reported that the Crown purchase deed for Hauturu East 1A had been opened with the purchase of the two shares of Ani Kumeroa for £56 12s. 8d. The deed named a total purchase price of £764 12s., being £500 for the right to the Caves and 7 shillings per acre for the land (this being the price then being paid for other Hauturu land).

The price of £28 6s. 4d. per share comprised £18 10s. 4d. for the right to the Caves and £9 16s. for the land.

The purchase of individual interests in a piecemeal fashion was usually resorted to by the government when owners presented a united opposition to sale: it was far easier to isolate individuals and acquire interests one by one. The owners were prevented by Crown pre-emption from selling their land to private purchasers at market value.

At the same time, Wilkinson feared that disgruntled owners who rejected the government's low price might, "give vent to ill-feeling should Government refuse to give them any absurd price they may demand for their interests." He asserted – without providing any evidence – that such owners might, "smash the beautiful stalactites and stalagmites inside the chambers and thus completely destroy all value attached to the Caves."

He urged the government to make anyone who injured or defaced the Caves liable to punishment. On another tack, he suggested that as the government had now acquired a single interest in the Caves, it could, "assume complete control over all matters connected with the Caves and their future management," as well as collecting all tourist fees to be "periodically" distributed amongst the owners.

The government was interested in enacting legislation to provide these powers, but failed to do so; instead concentrating on acquiring title as a way to secure control of the Caves.

Progress with the purchase of individual interests was slow. It was not until December 1896 that Wilkinson acquired more shares, being one of two shares held by Poihipi Taniora (successor to Kingi Taniora). In March 1897, Poihipi's remaining share was purchased.

After another long wait, Wilkinson bought the two shares of Waitere Raharuha before securing Te Nekehanga Tanetinorau's shares in June 1898. The last interest purchase was that of Te Moerua Natanahira, in June 1899.

Despite this targeting of individual owners, in three years the government had managed to acquire 10 ½ shares, just over one-third of the interests in Hauturu East 1A.

Another action affecting the title in this period was an exchange of shares arranged by Tanetinorau between his daughter Te Aue, an owner in Hauturu East C for whom he acted as trustee, and Ngamane Tukemata, an owner of two shares in Hauturu East 1A. The exchanged shares in Hauturu East 1A were controlled by Tanetinorau, as trustee.

In July 1899, the government moved to define the 10 ½ interests it had acquired, and applied to the Native Land Court to partition them out. According to Wilkinson, Tanetinorau and Haami Haereiti had agreed that the Crown was "entitled to part of the Caves" and could "take the river entrance" leaving the remaining Maori owners with "the upper entrance."

The Crown area was about one acre and the owners' area about three acres. The agreement also divided the Caves beyond the entrance, with the boundary between Crown and Maori interests being the centre of the Waitomo river running into the Caves and out through the "shaft" entrance at the other end. This agreement took care of the Caves, leaving the rest of Hauturu East 1A to be divided.

In an unusual move, the government sought to have its interests defined in three parcels: one being the Caves area already agreed on; the second being about six acres near the Caves where it intended to site a hotel; and, the third being a larger area comprising the bulk of the interests it had acquired since 1896.

Tanetinorau objected to the location of the six acres the government wanted for its hotel as he occupied it and had planted an orchard there. Judge Edger inspected the land and then rejected Tanetinorau's objection on the grounds that:

> The Court cannot see that the area asked for by the Crown Agent can be reduced, if the Crown is to have a proper hotel site at the Caves. And, seeing that a price has been given for the Caves, it is reasonable that such hotel site should be acquired by the Crown.

The Court recommended that Tanetinorau be compensated for the loss of his orchard, but this did not occur. As with Judge Mair ten years earlier, the Court was more than willing to co-operate with the government's agenda at Waitomo.

The result of the partitioning out of the Crown's interests by the Native Land Court in July 1899 was the following orders:

Crown awards:

Hauturu East 1A1 – 294 acres at the western end of the block (final area 291 acres).

Hauturu East 1A2 – 1 acre at south-west end of Caves.

Hauturu East 1A3 – 6 acres near the Caves (later known as the Domain, final area 2 acres).

Maori owners' awards:

Hauturu East 1A4 – 56 acres awarded to Riutoto Aihe.

Hauturu East 1A5 – 403 acres awarded to 8 remaining owners in 14 ½ shares (being Ani Hokopu, Hiiti Henare, Haami Haeriti, Ngamane Tukemata [exchanged with Te Aue Tanetinorau], Rangwhakarewa Paraone, Tutawa Tuatara, Te Whata Karaka, and Tanetinorau Opataia).

Hauturu East 1A6 – 3 acres at north-east end of the Caves awarded to 9 remaining owners in 16 ½ shares (same owners as Hauturu East 1A5 with addition of Riutoto Aihe).

In October 1901, Hauturu East 1A5 was further subdivided into 1A5A (167 acres), 1A5B (167 acres), and 1A5C (69 acres). This subdivision was applied for by Tanetinorau, who was awarded sole title to Hauturu East 1A5C, a block on the south bank of the Waitomo river which surrounded the Crown block, Hauturu East 1A3, on three sides.

In September 1903, Wilkinson, acting as President of the Maniapoto-Tuwharetoa District Maori Land Council, approved the lease by Tanetinorau of Hauturu East 1A5C to Frank McGuire for 21 years at a rental of £27 per annum, but with no compensation for improvements, no right of renewal and no right of purchase. The lease included existing improvements made by Tanetinorau, notably an accommodation house. McGuire was subsequently appointed as caretaker of the Caves.

The rent being paid each year for Hauturu East 1A5C was higher than the price paid by the government for the freehold of Hauturu East 1A. Even so, the rent seems to have been low relative to the high value of land near the Caves for tourism purposes. McGuire sold the lease to the Wrattans in 1905, who sold it to the Crown that year for £500. This price for a leasehold interest in land near the Caves was equal to the price the government had offered the owners for the freehold of the Caves themselves, indicating how low the prices offered by the government had been.

By the end of 1903, there had been several changes to the title to the Maori-owned Caves land, Hauturu East 1A6. As a result of successions and exchanges of shares, Tanetinorau had acquired additional interests so that he held 8 of 16 ½ shares in the block. The other five owners held the balance of the shares.

The government still wanted to acquire Hauturu East 1A6 and renewed its efforts in January 1904. Assistant Surveyor-General Mueller then claimed that the five owners other than Tanetinorau were willing to sell. According to Mueller, there was a "great deal of ill-feeling"

towards Tanetinorau from the other owners because he was believed to control much of the tourist business in the Maori-owned part of the Caves.

It seems more likely that it was the government, rather than the other owners, that resented Tanetinorau's success at Waitomo and his independence from the government. He was viewed as, "extremely averse to the government having any hand in the management" of the Caves. If the government could acquire the interests of the other five owners, Mueller believed it would be in a better position to "cope with" Tanetinorau.

Like Wilkinson before him, Mueller cautioned against "harsh measures being taken with the Natives" as he suspected they "might prove spiteful and the dissatisfaction might lead to the destruction of some of the chambers of these magnificent subterranean wonders."

In response to Mueller's report, the Scenery Preservation Commission resolved in April 1904 to acquire all of the remaining shares in Hauturu East 1A6 and issue a proclamation under the Scenery Preservation Act 1903 (s.4) to "protect the Caves from depredations that are reported as likely to occur." As with Wilkinson's earlier claims, there is no evidence to support these fears about the Caves, but these fears seem to have driven government action.

Mueller had stopped short of advising the compulsory acquisition of Hauturu East 1A6, instead recommending in July 1904 that "special efforts should be made to purchase," mainly because he feared "there may be trouble with the Natives if a forced sale is pushed and damage might in the meantime be spitefully done to the Caves." The Department of Tourist and Health Resorts rejected this advice, pointing to Wilkinson's earlier failure to purchase, and urged that the land be taken from its Maori owners. The taking was briefly hindered by the lack of a survey of the title, but this was prioritised for completion. Then, on 31 August 1904, the government proclaimed the taking of Hauturu East 1A6 under the Scenery Preservation Act 1903.

The 1904 taking of Hauturu East 1A6 was later found to be of doubtful validity, as the Solicitor General considered that the 1903 Act did not give power to take any lands for scenic purposes except Crown lands. The 1903 Act also delayed the Native Land Court awarding compensation to the former owners of Hauturu East 1A6. When the Court sat in March 1905, under Judge Wilkinson (the former land purchase officer), to determine compensation, the government had the case adjourned "in order to have the Scenery Preservation Act 1903 amended." The Act then required compensation to be paid to the Public Trustee, rather than to the former owners. Accordingly, a fresh proclamation was issued on 29 December 1905, taking the land under the Public Works Act 1905 and the Scenery Preservation Act 1903.

A few months later, in May 1906, the Department of Tourist and Health Resorts asked the government to take Hauturu East 1A5C (67 acres; 2 acres having been taken from the original title for road) under the Public Works Act for a Waitomo Caves accommodation house. This was the land the government was already leasing from its Maori owners. This taking was proclaimed on 19 December 1906.

The proclamation of the taking of Hauturu East 1A6 had a bad effect on the Caves, as John Davis (husband of one of the owners) later explained. Being "in doubt as to what their position was now with regard to looking after the Caves," they did not feel they were able to keep looking after land that the government had taken from them. Yet the government had failed to appoint a caretaker, "and in consequence the Caves were deteriorating."

Davis observed that since the government had taken the land, the Caves were "being destroyed by tourists breaking off and taking away the stalactites." This was the sort of vandalism the government claimed that Maori would do to the Caves, so it took them to prevent it; yet its actions had led to the Caves being damaged under government ownership. The Department of Tourist and Health Resorts subsequently appointed Mr Grover to manage the Caves.

The Native Land Court returned to the question of compensation for the former owners of Hauturu East 1A5C and 1A6 in November 1907. Grover was called to give evidence on the tourist income generated by the Caves as this was relevant to the loss the Maori owners had suffered when their land was taken.

His superiors were "afraid that Mr Grover's desire that the natives should be generously treated...renders him unsuitable as a witness." Grover was then instructed to confine his evidence to visitor numbers only. As this would leave him open to questioning by Maori or by the Court that might lead to a higher compensation award, the Public Works Department ensured Grover did not appear at all; it simply incorporated his report on visitor numbers into the evidence it presented.

The compensation for Hauturu East 1A6 was determined first. Charles Davis testified for the former owners that in the first summer after the existence of the Caves became public knowledge, Maori had received "over £70 in tolls."

In later years they made a profit of "£40 at least, clear of expenses." In the mid-1890s they had been offered £1,000 for the Caves by private parties, with others offering to lease the Caves for £100 per annum. The imposition of Crown pre-emption prevented them from accepting such offers, leaving only the government's much lower price on offer. He believed the Caves on

Hauturu East 1A6 were worth £1,000, plus improvements.

The Public Works Land Purchase Officer E. Bold responded that, "there was a difficulty in assessing the value of the Caves," but proposed a figure of just £400 which was even less than the £500 the government had offered when it was purchasing shares in 1896-1899. He asserted that visitor numbers had increased since the Department of Tourist and Health Resorts had taken them over (ascribing this, in part, to improvements to road access), so current income should not be used to assess compensation. Yet the government did not have records of earlier visitors.

Bold did not refer to the visitors' book that was introduced in 1889. He noted that "about twice as many visited the Caves in 1907 as in 1906," with an average of "500 to 600." At 2s. 6d. per visitor this equated to £75 per annum, which is in accord with the £37 the Department had paid to Maori from its Caves revenue in 1906. This is about half the revenue gathered; reflecting the Maori ownership of about half the Caves land at that time.

The Court arrived at a capital value of £800 for the Caves on Hauturu East 1A6. This was based on what seems a rather selective reading of Davis' evidence that Maori earned a profit of £40 per annum from what it believed was a gross income of £70. The difference was ascribed by the Court to payments made to cave guides, but of course these guides were drawn from amongst the Maori owners so this was also income they were losing through the taking of the land.

Based on the low figure of £40 profit per annum, the Court equated this to a capital value of £800 (based on a five percent return). Yet the government proposed a value of just £400. The Court settled on a compromise based on Bold's figures of an average of 500 visitors each year, and a net profit of £31 5s.; at a five percent return this equated to a capital value of £625, which was the compensation awarded by the Court for the Caves and the three acres of Hauturu East 1A6.

The compensation for Hauturu East 1A5C was awarded the next day, the sum of £670 having been agreed by Bold and Ormsby (for the former Maori owners). They had agreed on a capital value of £800, subject to the lease (acquired by the government in 1905 for £500 as noted earlier) which was considered to reduce the compensation to the agreed sum of £670.

Adjacent Waitomo lands were subsequently taken from Maori to strengthen the government's dominance in Waitomo tourism. In 1908 the Inspector of Scenic Reserves, E. Phillips Turner, observed that the two blocks of Caves land – Hauturu East 1A2 and 1A6 – were separated from the road by Maori land, being Hauturu East 1A5B, "so there is really no legal access to the Caves."

He also observed that "some of the best Caves are situated under Hauturu East 1A5B," while the Waitomo stream emerged from the Caves in Hauturu East 3B1. Hauturu East 3B1 (197 acres) had been subdivided from Hauturu East 3B in 1901, when it was awarded to Tanetinorau Opataia and six others.) Turner asserted that "the Natives could stop people from seeing some of the best Caves, or could themselves guide people into the Caves from where the stream emerges."

A proposal to simply lay out a road to provide access to the Caves was rejected in favour of taking a far larger area of Maori land on which it was proposed to plant "ornamental trees which would add greatly to the beauty of the surroundings." The Department of Tourist and Health Resorts insisted on total control of tourism and the benefits of tourism so it resolved to take the land referred to by Turner.

The land it wanted was the area of Hauturu East 3B1 between the road and the Caves land (Hauturu East 1A2 and 1A6), as well as that part of Hauturu East 1A5B beside the Caves land and between the Caves and the accommodation house on Hauturu East 1A5C. Accordingly, in April 1911 Hauturu East 1A5B (part) (16 acres) and Hauturu East 3B1 (part) (1 ½ acres) were taken under the Public Works Act 1908 for "the use convenience and enjoyment of the Waitomo Caves House."

The Native Land Court sat at Te Kuiti in March 1912 to determine the compensation to be paid for these takings, and it awarded £65 15s. for Hauturu East 1A5B (part) and £6 6s. for Hauturu East 3B1 (part).

By 1911, the Crown had acquired all of the land around the Caves through a mixture of purchase of individual interests followed by partition, and takings under the Public Works Act and Scenery Preservation Act, as summarised here:

Block	**Area**	**Date and Method of Alienation**	**Payment**
Hauturu East 1A1	291 acres	1896-99 (purchase)	£102
Hauturu East 1A2	1 acre	1896-99 (purchase)	£125
Hauturu East 1A3	2 acres	1896-99 (purchase)	£70[1]
Hauturu East 1A6	3 acres	1904-06 (Public Works Act 1905)	£625
Hauturu East 1A5C	67 acres	1906 (Public Works Act 1905)	£670
Hauturu East 1A5B	16 acres	1911 (Public Works Act 1908)	£66

[1] A total of £295 was paid for the right to the Caves. In 1907 the government claimed to have paid £125 for Hauturu East 1A2, which would indicate that it considered this the more valuable of the two cave blocks, leaving £70 for Hauturu East 1A3.

Hauturu East 3B1	1 ½ acres	1911 (Public Works Act 1908)	£6

The Wai 51 Treaty of Waitangi Claim, 1986-1990

Parts of the large area of land taken in 1906 for the Waitomo Caves house were not needed for that purpose and were subsequently granted for other public purposes. In 1916, 1 rood (1/4 acre) of Hauturu East 1A5C was set aside for the post office. In 1942, 1 acre 2 roods 35.9 perches of Hauturu East 1A5C were reserved for a school site. In 1952, 1 rood 9.2 perches of the school land was set aside for the Waitomo Caves Accommodation House (being the site of the Hotel Manager's house).

In 1963, 8 acres 3 roods 34 perches were set aside as a public domain. Another part of the school site (1,438 m^2) was subsequently deemed surplus to requirements and in 1983 it was set aside as a reserve for local purposes, being the site of the Waitomo Caves Museum, operated by the Waitomo Speleological Museum Society.

In the early 1980s, the Tanetinorau Whanau Society ("the Whanau") was formed and amongst its purposes was to investigate the alienation of the lands of their tupuna Tanetinorau. In February 1986, the Secretary of the Whanau wrote to the Minister of Lands about land that had originally been part of Hauturu East 1A5C, taken under the Public Works Act in 1906, and asked that all surplus Crown land from that block be returned to the Whanau.

The Public Works Act 1981 (s.40) included a requirement for lands compulsorily acquired for public works and which were no longer needed for the purpose for which they were taken to be offered back to the former owners or their immediate successors.

The action by the Whanau on surplus Crown lands at Waitomo took place within the context of the extensive government sector reforms initiated by the Fourth Labour Government after it was elected in 1984. These reforms included the corporatisation and privatisation of State-owned enterprises, and eventually affected the government-owned Tourist Hotel Corporation ("THC") which was then operating the Waitomo Caves and the Waitomo Hotel.

The focus of the Whanau and of the government was initially on the former school land set aside in 1983 for the Waitomo Caves Museum. The Ministry of Works and Development recommended that the land be offered back to the former owners (or their successors), as required by the 1981 Act. Subsequently, Lands and Survey met with the Whanau in 1986 and presented them with three options for the land:

(a) It be vested in them provided they pay the current value of $6,000 for it;

(b) The Crown retain the land for the Museum extension; or

(c) The land be vested in the tupuna, Tanetinorau Opataia, and made a Maori reservation for all New Zealanders "for environmental and cultural interpretation" (meaning the Museum extension).

By 1986, the had investigated the taking of Hauturu East 1A5C and expressed to the Crown their deep concern at the findings. The land was taken for the Waitomo Caves Accommodation House, but the Whanau observed that more land was taken than needed for this purpose.

Subsequently, the land surplus to hotel needs had been set aside for a school, post office, museum, tavern, a hall, THC staff accommodation, a scenic reserve and a recreational domain. Other surplus land was leased to a local farmer (Peter Dimond, who was also chairman of the Museum Society and a member of the National Parks and Reserves Board that administered the Waitomo land).

In light of these findings, the Whanau rejected all three government options and instead sought the return of all land not being used for the purposes for which it had been taken.

The government initially acted on the request by the Whanau. In July 1986, Hamilton Assistant Commissioner of Crown Lands, Barnaby, recommended that the Director-General of Lands action an agreement arrived at with the Whanau regarding three areas of land within what had been Hauturu East 1A5C that were to be returned to them, being:

(a) 38 acres (15 ha) leased by THC to Dimond as a farm;

(b) 1 ½ acres (6,100 m^2) beside the Waitomo Domain, between the road and Waitomo Stream (formerly Hauturu East 3B1 (part), possibly to be set aside as a Maori reservation for recreation purposes); and

(c) ¼ acre (1,410 m^2) for the Museum extension (to be leased back to the Museum).

A small amount of compensation for loss of revenue since 1906 was sought in addition to the return of the lands.

This proposal did not proceed as THC wished to assume control of the process of returning any land that might be returned, rather than have Lands and Survey arrange matters with the Whanau. THC did not wish to return all of the land leased to Dimond, and did not believe it was obliged to return any land.

It resolved in February 1987 to return only 6.6 ha (16 ½ acres) of the land leased to Dimond, provided that the Whanau paid THC's legal expenses, any survey expenses, compensation to Dimond for the loss of his lease and other costs. Associate Minister of Tourism, Peter Tapsell, rejected THC's proposal responding that the Crown, not THC, should negotiate with the Whanau for the return of the land to them in return for a lease of those parts of it required by THC. However, he advised that the final decision rested with Minister of Tourism, Mike Moore, who was then absent.

The delay in resolving the surplus lands issue prevented the Museum from proceeding with its long-planned extension. In order to assist the Museum, the Whanau agreed in March 1987 to separately resolve the claim relating to the 1,140 m2 needed for the Museum extension, without prejudice to their outstanding claims to other parts of Hauturu East 1A5C. This settlement was implemented without the need to secure THC's consent because the land was Crown land in which THC had no interest.

On 30 September 1988, the Maori Land Court vested the Museum extension land (Section 44 Block X Orahiri Survey District) in the five trustees of the Tanetinorau Opataia Whanau Trust under the Maori Affairs Act 1953 (s.438). The trust then leased the land back to the Crown for sub-lease to the Museum.

The beneficial owners were defined as "the Whanau of Tanetinorau Opataia." Josephine Huti Anderson (Whanau Secretary and a member of the Ruapuha Hapu working party for the Wai 51 Treaty of Waitangi claim to Waitomo lands; see below) considered the definition of the beneficiaries to be "too limited," going on to write:

> In light of the circumstances concerning the likely return of these [wider] interests [in Hauturu East], I have always held the view that every living descendant of Tane and those yet to be born would become beneficiaries equally. Is there anything that can be done to ensure that this can happen?
>
> I feel very strongly about this, so much so that if the answer is no, then all that has been accomplished to date may have been in vain.
>
> It could jeopardise our plans for sharing future revenue from these wider interests with the descendants of the sellers and the wider Maori community.
>
> You will appreciate that I am referring only to Tane's shares in the claim.

Defining those intended to benefit from the return of the Hauturu East 1A lands was a matter that was subsequently raised in relation to the settlement of the Wai 51 Treaty claim to those lands (see below).

Progress with the other portions of Hauturu East 1A5C sought by the Whanau was slower than for the small area related to the Museum extension. By July 1987, the Department of Survey and Land Information ("DOSLI") had begun to look into the history of Hauturu East 1A5C but was still unable to advise THC if the Crown's acquisition was on a "willing seller/willing buyer" basis.

It was able to conclude that most of the land was no longer used for the purpose for which it was taken, indicating that the outcome should be the offer back of the land. The Minister of Lands, Koro Wetere, was adamant in mid-1987 that all land not occupied by the hotel should be returned and Associate Minister of Tourism, Peter Tapsell, was of the same view.

The Minister of Tourism, Mike Moore, had the final say but his view is not evident from the record. However, THC continued to reject the return of the land, asserting that the Whanau had "no valid land claim" and that it was under no obligation to return any land. It remained willing, as before, to return only part of the leased farm land provided the Whanau paid the numerous associated costs.

Progress on the matter was further delayed until after the High Court had made its findings in the 1987 State-Owned Enterprises case brought by New Zealand Maori Council. Despite the Maori case being upheld, THC advised the Minister of Tourism in February 1988 that it had not changed its stance on the return of Hauturu East 1A5C.

In response to the failure of the Crown to return the land, Josephine Anderson filed a Treaty of Waitangi claim on behalf of Ngati Ruapuha on 29 January 1988 calling for the return of the areas of Hauturu East 1A6, 1A5B, 1A5C, and 3B1 held by the Crown (or THC). On 3 February 1988, the claim was registered by the Waitangi Tribunal as Wai 51.

The Acting Director-General of Lands reacted to the claim in April 1988 by advising the Minister of Lands, Peter Tapsell, that, "Now that the claim is with the Waitangi Tribunal no further action is required." Later in 1988, the Government announced its intention to sell various state-owned assets, including its interests in THC. Implementation of this policy commenced in July 1989 when Fay Richwhite were confirmed as agents for the Crown in the sale.

In May 1989, a new Ruapuha Hapu organisation held its inaugural meeting at Tokikapu marae on 6 May 1989, with more than 50 of the hapu attending. Josephine Anderson explained the genesis of the Wai 51 claim, commencing with land taken from Tanetinorau (Hauturu East 1A5C) before expanding to take in all of Hauturu East 1A in the name of the Ruapuha hapu, "Ruapuha was the tupuna name for the land now being claimed and from whom the successful applicants [to Hauturu East 1A in the Native Land Court] were descended." The Wai 51 hapu claim was

contrasted with claims lodged by individual whanau elsewhere in New Zealand and was described as "an opportunity to be united once more."

A working party for the claim, comprising Josephine Anderson, Walter Anderson, Te Aue Davis and Sam Green was formed and a Ruapuha Hapu Committee elected. By June 1989, Christopher (Kit) Toogood had been appointed as legal advisor for Wai 51, and the Waitangi Tribunal had proposed a mediation process to settle the claim (rather than a full Tribunal inquiry).

In the same month, Ruapuha Hapu agreed to try mediation. The mediation application was made in the name of the hapu of Uekaha and Ruapuha and from this time Wai 51 papers refer to both hapu, even though the statement of claim continued to refer only to Ruapuha.

In July 1989, the Hapu filed an amended and more detailed statement of claim for Wai 51. This listed more specific grievances and alleged breaches of the Treaty of Waitangi associated with the alienation of Hauturu East 1A6, Hauturu East 3B1 (1 ½ acres), Hauturu East 1A5B (16 ½ acres) and Hauturu East 1A5C.

Relief sought included the return of the lands taken, compensation for loss of Caves revenue since 1904, loss of other revenue from land taken in 1911 and an arrangement for a share in future revenue. With respect to Hauturu East 1A5C, the relief sought included the return of all grassed areas except the Domain, the former post office site (the post office having been closed), school grounds and buildings (in the event the school was closed) and the tavern.

The Wai 51 claim was publicised in the Sunday Star of 30 July 1989 when it was reported that the claim lodged by the hapu of Ruapuha and Uekaha to Waitomo lands might need to be resolved before the proposed sale of THC could proceed. The very next day, Treasury confirmed to the Hapu that the government intended to resolve the Treaty claims "through direct discussions… simultaneously with the sale process." They were assured that, "The interests of claimants will therefore be fully taken into account before decisions are taken on sale of any THC assets."

A week later, on 6 August 1989, it was reported that Waitangi Tribunal member, Peter Trapski (the recently retired Chief District Court Judge), was to mediate the Wai 51 claim. He was quoted as saying, "it is a relatively uncomplicated claim with not too much argument about the historical facts." This was said to make the claim "ripe for mediation."

On 8 August 1989, Judge Trapski convened the first mediation meeting in Wellington. Kit Toogood attended for the Wai 51 claimants. Staff from the Waitangi Tribunal, Crown Law Office

("CLO"), Department of Conservation ("DoC"), Treasury and the Treaty of Waitangi Policy Unit of the Justice Department ("TOWPU") were also present. DoC was involved because the conversion of THC to a state-owned enterprise (prior to privatisation) and legislative changes in 1989 meant that administration of some Waitomo land passed to DoC.

The first meeting was to set the terms of mediation, foremost amongst which were that it was to be be "informal, conducted in private, and conducted on a without prejudice basis." Notes would be taken but the only formal record would be of the final result of the mediation. The Crown representative for mediation was Alex Frame, manager of TOWPU.

The Wai 51 claimants proposed that the mediation proper commence at Tokikapu marae on 7 and 8 September 1989, which was agreed to. In keeping with the terms of mediation, no record seems to have been kept of the mediation hui of 7 and 8 September. What is recorded is that on 20 September, Kit Toogood advised that "little progress" had been made since the mediation hui.

On 16 November 1989, Kit Toogood informed Josephine Anderson of what he had learned of the Crown's settlement proposal in an "off the record" telephone call with Graham Quinn, an advisor to THC. Quinn indicated that the Crown and the Wai 51 claimants, "would share in resource rentals arising from a licence to administer the Caves which would be granted to the purchaser of the hotel." This would involve the return of the Caves land to the "local people" but with a perpetual lease back to the Crown. Quinn was said to be, "anxious to negotiate with us in good faith," and expressed, "a concern that we have not been involved in discussions over the fixing of the rental and other matters."

On the same day, 16 November 1989, the Wai 51 claimants (through Kit Toogood) expressed "grave concern" to Judge Trapski at having learned that the government was proceeding with the sale of THC as well as the sale of THC's interests in the Caves before mediation had borne fruit. Negotiations were said to be taking place with DoC over the granting of a resource licence for the Caves in exchange for rental. They sought an urgent meeting of the mediation parties to discuss progress.

A day later, on 17 November 1989, Judge Trapski advised parties to the mediation that he had scheduled a further meeting of the parties in Wellington on 24 November. The meeting was to "review progress" and also to address the issues raised in Kit Toogood's letter to him of 16 November. As before, no record was kept of the mediation meeting on 24 November, but it appears from the Hapu's response that the Crown's settlement proposals were put to them.

On 1 December 1989, Kit Toogood sent Judge Trapski a "first draft" of the claimants' response to

the Crown's proposals, although this had yet to be discussed with the Wai 51 claimants. A key point at issue was the extent of ongoing Crown control of the Caves after Hauturu East 1A6 and 3B1 were returned to the claimants. In their response, the claimants proposed a management committee comprising equal Crown and claimant representation.

Another issue was the claimants' share of the income to be derived from the licence fees to manage the Caves. The Hapu did not consider sharing the income with the Crown on a 3:1 basis to be fair as they were "conceding more than 75 percent of the land to the licence area" and had been "wrongfully deprived of a share in the revenue from the Caves since 1904."

The licence area covered about 10 acres, but the Crown was contributing just 1 acre (Hauturu East 1A2). On the basis that a distribution of the licence fees, based on the revenue for the 1988-89 year, would deliver $237,000 per annum to the claimants they proposed an additional payment of approximately six times that amount ($1,200,000).

They described this as "a very modest request," but an "acceptable settlement figure so as to provide a reasonable capital base for re-establishment of the community and future development." This sum was not to be regarded as adequate recompense for "the loss of past revenue" which was a separate settlement issue. For its part, the Crown had already stated that any lump sum compensation for loss of past revenue "would be politically unacceptable."

Another issue was employment for the Hapu and the wider local community at the Caves (as had been the case up to 1904). They "regard it as important that any licence [to manage the Caves] should contain an employment preference clause," to give "first preference in respect of employment at the Caves to suitably qualified descendants of the original owners and other suitably qualified persons (both Maori and Pakeha) living within a radius of 30 kilometres of the Caves.

On 13 December 1989, Kit Toogood distributed the final version of the Hapu's response to the Crown's settlement proposals and this was discussed at a mediation meeting on the same day. The priorities for the claimants were to secure the return of Hauturu East 1A5B, 1A6, 3B1 and those parts of 1A5C not reserved for hotel, school, museum and domain purposes. The points noted above in the draft response were also included, along with an overarching priority, namely "the restoration of the mana of the hapu of Ruapuha and Uekaha."

Compared to their overarching priority, securing a share of the Caves revenue was of secondary importance to the Hapu. In that regard, they sought no more than, "an appropriate capital sum and a reasonable income stream which will provide them with the resources to educate their

people and descendants and promote community development." Specific proposals for community development were not included in the response, although reference was made to preferential employment of the Hapu and of local Maori and Pakeha. Maintaining and improving Waitomo School was also "a priority."

No figures were proposed for the capital sum or the income stream sought by the Hapu, but they did note that THC's net return from its Caves operations "exceeds $1million per annum." Compensation for past lost income had been rejected out of hand by the Crown, to which the Hapu responded, "there is no reason why proper recognition of the loss of past revenue should not be given." They added that the capital sum could be "described as an advance [against future income] to make it more acceptable to the Crown."

As noted below, this approach was acceptable to the Crown, but whether any offer would also be acceptable to the Hapu depended on the sum, "the amortisation period," and the ongoing income stream.

In a separate development, on 29 January 1990, the Hapu working party met with DoC at Tokikapu marae to discuss "matters of common interest between the hapu and DoC regarding each other's role in the management of the glowworm cave." It was agreed that "the ecology, preservation, and Maori values were important factors" for the glowworm cave reserve. DoC's role as the lessor of the licence area was not raised with the Hapu, but was an important issue for the Hapu.

Josephine Anderson afterwards advised Kit Toogood that the Hapu did not feel they had been given access to all the relevant documents regarding the existing lease or licence of the Caves area.

The following day, 30 January 1990, Josephine and Walter Anderson met Graham Quinn and Dennis Callesen of THC at Waitomo to examine and discuss the boundaries of the Caves licence area and the areas to be returned to the Hapu.

The Hapu understood these areas to include all four acres of the Caves land (meaning Hauturu East 1A2 as well as 1A6), but the Crown did not intend to return 1A2 (which had been acquired through purchase rather than taking).

On 12 February 1990, Cabinet authorised Alex Frame of TOWPU and Graham Quinn of THC to, "seek an agreement with the hapu of Ruapuha and Uekaha of the Ngati Maniapoto who are the claimants in the Waitomo Claim." This agreement was to be based on "without prejudice"

mediation and 10 other points, including the following:

(a) The emphasis of the agreement "is on looking towards a constructive future."

(b) The vesting of Hauturu East 1A6 in the claimants, the Crown retaining 1A2, with control of the Caves shared by a management committee comprising DoC and claimant representatives.

(c) The Museum land to be vested in the claimants and leased back to the Crown "on the same terms and conditions as the present museum extension."

(d) Claimants to have first option to acquire the tavern if it closes.

(e) The hotel site, staff housing land, and "a small scenic acreage" to be transferred to the buyer of THC by a Glasgow [perpetual] lease from the Crown.

(f) The balance of the land to be returned to the claimants.

(g) The Crown to issue a 32-year licence for cave operations to THC, on behalf of DoC and the claimants, with licence fees of 15 percent of gross cave revenues, with 75 percent of the fees going to the claimants and 25 percent to the Crown.

(h) The Crown to loan $1million to the claimants, representing an advance on licence fee revenues, charging interest of 13 percent per annum (repayments to consist of 28.89 percent of the claimants' share of the licence fees).

On 28 February 1990, about 100 people attended a meeting of "Ruapuha Hapu – Uekaha Hapu," as the Wai 51 claimants then referred to themselves. Josephine Anderson informed those present about a meeting the previous day in Wellington between the Hapu working party and Kit Toogood, and advised them of the Crown's latest proposals. Walter Anderson produced a map "to show the affected areas. He defined the area for the hotel and those that would be returned to the whanaus concerned." This phrasing raised the issue of how the beneficiaries of the settlement were to be defined.

Tau Carnachan responded that, "he was confused. It was his opinion that matters concerning Tanetinorau should be pursued first. It was a matter for the descendants to decide who should benefit." Josephine Anderson responded to Tau Carnachan, stating that "she had received advice to deal with the claim as a Hapu. Until the claim was amended in 1987 [to a hapu claim] there had been very little progress. Applying to the Waitangi Tribunal for a hearing me[a]nt complying

with the rules of the Tribunal." Arthur Davis and Rua Anderson supported "the Hapu approach." There were suggestions that membership of the hapu be demonstrated by whakapapa.

Josephine Anderson then "raised the prospect of forming a Hapu trust at a later date." Tau Carnachan moved that such a trust be formed. The motion was seconded and carried without reference to opposition. After the lunch break and discussion of funding issues, Wally Tane endorsed "Tau's stance concerning Tanetinorau's interests." Josephine "reiterated what she had said to Tau. A Tanetinorau trust was already formed to receive any benefits that may come."

Following that meeting, on 5 March 1990, Josephine Anderson wrote to Kit Toogood about an "area of concern" she had previously raised with him and which had been raised at the meeting; namely the ownership of Hauturu East 1A6 and 1A5C. She wrote: "There were very strong views expressed for that of Tanetinorau's interests (balance of 67 acres [1A5C]) to be returned to his descendants," rather than to the Hapu claimant group. In response, she had:

> explained to the gathering the purpose of amending the claim to that of hapu status as complying with the [Treaty of] Waitangi Act, whereby it took the matter back to its original beginnings before the advent of the [Native Land] Court.

Following a "serious exchange of words," a resolution to "form a hapu trust was proposed & seconded and carried." She added:

> I thought it important to make you aware of the feelings some whanau members are expressing. I think its origins stem from the fact that the bulk of moral and monetary support for the kaupapa to recent times, has come from this direction and they have also learnt a great deal about their tupuna's character in his efforts to keep the Crown at bay.

Josephine Anderson anticipated that elections for the new hapu trust would be held after a meeting of the claimants with the Waitangi Tribunal scheduled for April 1990 (see below).

Prior to that, the trustees of the Tanetinorau Opataia Whanau Trust were to meet on 14 March 1990, when "questions relating to the Trust and interests already gained will be discussed there. A suggestion has already been made that the hapu lease these interests." The interests referred were the museum land vested in the Tanetinorau Opataia Whanau Trust by the Maori Land Court in 1988.

When the trustees of the Tanetinorau Opataia Whanau Trust met they discussed "at length" the ownership of Hauturu East 1A5B and 1A5C. Their research indicated that these lands "involve only three whanau," namely, "Whatakaraka, Haami Haereiti and his sister Rangiwhakarewa Paraone, [and] Tanetinorau." Hauturu 3B1 "also had specific owners." The trustees, "by majority

decision," resolved that the lands be returned to those whanau. They planned to meet the whanau at the end of March 1990.

The trustees of the Tanetinorau Opataia Whanau Trust also resolved that Hauturu East 1A6 "be vested in the two hapu involved" (meaning Ruapuha and Uekaha). While noting that, at the time of the taking, Tanetinorau had 8 shares in 1A6 and the remaining owners had 8 ½ shares, the trustees:

> have no problem with sharing these interests with the wider Maori community and with the descendants of those who sold [their shares]. They are not however willing to give up the mana over the land.

Josephine Anderson wrote to Kit Toogood on 15 March 1990 about the outcome of the Tanetinorau Opataia Whanau Trust meeting, as she had previously raised her concerns about the approach it was taking to the return of the land. Kit Toogood replied that he was "not in the least surprised by the decisions that have been made concerning future land ownership." He agreed it was "entirely appropriate" that title to specific blocks be returned to the descendants of those from whom the land was "confiscated." He continued:

> I think it is wise, however, to maintain the position which you took right at the outset of our discussions concerning ownership of the three acres at the Caves [Hauturu East 1A6], namely, that no distinction should be made between the descendants of the sellers and the descendants of the non-sellers. For those reasons I think it absolutely right that the three acre Cave block be vested in the two hapu. I will need your advice and assistance in defining just who the beneficiaries should be. …our settlement proposals were based on the proposition that the restoration of mana over the land was the most important issue and that any financial benefits would be applied for the benefit of the hapus, e.g., for educational purposes.

It was also the Crown's view that the return of the lands was the most important issue, not least because, to its way of thinking, this lessened the significance of any compensation to be paid in addition to the return of the land. The Crown advisor Graham Quinn later recalled that, "the claimants in my opinion made a considerable concession in not pursuing the question of compensation, the return of their lands being the paramount issue" (Graham Quinn, 'File note regarding Waitomo Settlement', 20 July 1990).

On 5 April 1990, members of Ruapuha and Uekaha hapu met at Tokikapu Marae with Judge Trapski and Bishop Manu Bennett of the Waitangi Tribunal along with Tribunal staff. Judge Trapski said that the Crown's "immediate response" after the mediation meeting of 7 September 1989 "had surpassed all expectations and he was delighted." It is presumed he was referring to the Crown's settlement proposals of November 1989 and February 1990.

When Kit Toogood proceeded to brief those present about progress on the claim to date, Tau Carnachan asked him to clarify if Tanetinorau's interests were to be dealt with separately. Kit Toogood, "reiterated what J. Anderson had said at a previous meeting, it was being dealt with as a hapu claim," and that beneficiaries were "to include Hapu members generally."

The hui continued after the Tribunal departed, and the "ownership question" was the first topic raised. Te Aue Davis, "appreciated the gesture to include the wider community outside of the 1A5C block but stated that she had always felt uncomfortable about it." Kit Toogood observed that there was "a list of owners" (presumably referring to lands other than Hauturu East 1A5C in which Tanetinorau had been the sole owner). Josephine Anderson responded that the ownership list "was too narrow." Tau Carnachan asked, "how wide was it to be? It would end up including the whole of Maniapoto."

Kit Toogood advised the hui that the land "could go back to the Hapu involved in general." Walter Anderson "explained boundaries of Ruapuha and Uekaha areas in relation to the cave," with Ruapuha on the eastern side of Waitomo Stream (which runs through the Caves) and Uekaha on the western side.

Sam Green then said, "the lands should be administered by the Hapu trust," but Walter Anderson disagreed. Josephine Anderson explained that the respective whanau of Hauturu East 1A5B, 1A5C, and 3B1 had held meetings, "and they had decided that the titles be returned to them." Tau Carnachan stated that "the ownership of the land should return to the Non-Sellers whanau and they decide what to do with the land and revenue." This stance was endorsed by Walter Anderson. Josephine Anderson responded, "there was supposed to be no distinction between the Non-sellers & the Sellers." Kit Toogood added that, "he had always approached the matter on that basis."

When discussion turned to the Crown's proposals, the matter of ownership re-emerged. "Googie" did not agree with a wide distribution of the "principle sum," stating that it "should go to the whanau of those who were dispossessed" (meaning the "non-sellers' whanau"). Gloria Pou-Haereiti disagreed. No resolution was arrived at on this issue at this hui. What was agreed was that the claimants broadly accepted the Crown's proposals. It was the implementation of those proposals, in terms of defining the beneficiaries of the Wai 51 settlement, that remained to be resolved.

What was also agreed at the meeting of 5 April 1990 was to "advertise the meeting to form a Hapu Trust." The structure and purpose of such a hapu trust were matters directly relevant to

the discussion at the hui, and remained to be resolved.

On 10 April 1990, Josephine Anderson sent an urgent fax to Kit Toogood regarding the "ownership question" of Hauturu East 1A6. She advised that "Sam, Walter, and myself have agreed that title be returned in the names of the original non-sellers who were Tanetinorau, Whatakaraka, Haami Haereiti, Rangiwhakarewa Paraone, and Te Riutoto Aihe." (Hare Purangi also held a ½ share interest.)

This decision had not been discussed with Tau Carnachan but it was understood that this was in accord with his stance. Josephine Anderson noted that "obviously the matter has to be addressed sooner or later," adding:

> The object all along has been to share with the wider community somehow and the idea was to include the whanau of the sellers and the Hapu of Ruapuha in general. Recently it was extended to include the Uekaha Hapu.
>
> We believe that this can still be achieved through the Hapu Trust which is in the process of being established.
>
> Nothing can change the fact that the lands were partitioned and succeeded to and that other people were not dispossessed of them as was the case in this instance.
>
> However at the end of the [Caves] lease period [32 years hence] we believe that the descendants of the non-sellers should be the decision makers when that time comes.

On 10 April 1990, Kit Toogood advised TOWPU and THC of the outcome of the meeting of 5 April. He advised that "subject to the matters of interpretation and comment," the settlement proposals "are accepted." One of the matters of interpretation was the return of Hauturu East 1A6, in relation to which he noted that, "an appropriate trust deed will be prepared by the claimants to enable the re-vesting of the 3 acres." The beneficiaries of the trust "have yet to be determined but the ultimate objective is that any financial return from the Cave should be applied for the benefit of the members of both hapu" (meaning Ruapuha and Uekaha).

With respect to the portion of Hauturu East 1A5C set aside as a recreational domain, the claimants accepted the need for the domain to remain as a community asset. However, "the land now occupied by the Domain was taken in breach of Treaty principles. It is fundamental, therefore, that the mana whenua should be returned to the descendants of the original owners." The land could then be formed into a Maori Reservation under the Maori Affairs Act 1953 (s.439) that "would continue to be available as a recreational facility for the community as a whole under section 439(12)."

On 26 April 1990, Josephine and Walter Anderson met with Maori Land Court Judge Carter in Hamilton, "to seek advice on several matters in relation to the elections, land, and status of the 'Working Party'." The next day she wrote to Kit Toogood about Judge Carter's advice, as a result of which it was proposed that Hauturu East 1A6 and 3B1 be vested in a section 438 trust to be established by the claimants. The details of the trust were to be drafted by the "core committee," comprising Josephine Anderson and the "core 'Working Party'" of the claimants. The proposed trust order would then be referred to "a general meeting for alteration and confirmation." It was noted that at any such meeting, "the proposer, seconder, and voters were to come from whanau members of the Non-Sellers only," not from the wider group of intended beneficiaries. She continued:

> Technically all descendants of the original tupuna (the Non-Sellers) can be beneficiaries. It would only change if the individual tupuna is succeeded to. Judge Carter said there was no problem with leaving the original tupuna as the owner to fulfil the object of the claim.
>
> At the A.G.M. the distribution of surplus funds could be determined by the decision of the beneficiaries for the wider community, including the Sellers, by writing it into the Order.

A meeting of the proposed Ruapuha – Uekaha Trust was held at Tokikapu marae on 28 April 1990 to elect trustees for the Ruapuha Uekaha Hapu Trust ("RUHT"). There were 12 candidates nominated for the 6 trustee positions. Josephine Anderson told the hui that Judge Carter "had informed them that only the descendants of the non-sellers were eligible to vote or nominate people." She found this "a very distressing revelation."

She identified the non-sellers as: Hiiti Henare, Hare Purangi, Ani Hokopu, Tanetinorau, Haami Haereiti, Rangiwhakarewa Paraone, Whatakaraka and Te Riutoto Aihe. She added that "the tupuna who affects us today are, Tanetinorau, Whatakaraka, Haami Haereiti, and Te Riutoto" (Rangiwhakarea Paraone, sister to Haami Haereiti, had no children). She "asked that the successful candidates consider the whanaunga who have been affected by Judge Carter's revelation."

The six trustees elected to the RUHT on 28 April 1990 were: Walter Anderson, Huia Davis, Joe Davis, Sam Green, Norman Tane and Wally Tane. In addition, Te Aue Davis and Rua Anderson were elected as kaumatua members of the trustees. At the end of the meeting, Wally Tane "mihi'd to the table and assured Josephine he would not forget our whanaunga."

Meanwhile, the Crown proceeded to conclude the settlement of the Wai 51 claim. On 8 May 1990, the Cabinet Committee on Treaty of Waitangi Issues approved the agreement in principle previously arrived at, being broadly similar to that approved by Cabinet on 12 February and

agreed to by the claimants in April.

On 29 May, TOWPU advised Kit Toogood of the Cabinet approval of the agreement. With respect to the return of land, the agreement stated only that ownership of Hauturu East 1A6 "should be vested in the claimants" while those parts of Hauturu East 1A5C not required for other purposes were to be "returned to the claimants." The other land to be returned was the site of the museum, which was to "be vested in the claimants." This wording did not clarify the issues of ownership and beneficiaries which the RUHT had been grappling with.

Despite the claimants request for the agreement to refer to the Treaty of Waitangi and to Treaty principles, it stated only that, "The emphasis of the agreement is on looking towards a constructive future and co-operation between the Crown and its agencies on the one hand, and the claimants on the other."

On 30 May 1990, Kit Toogood responded to the Agreement in Principle, noting that this day was the 85th anniversary of the death of Tanetinorau. He wrote: "I am pleased to be able to tell you that the proposal records a settlement which is acceptable to the claimants." The next step was to implement that settlement.

Implementation of the Wai 51 Settlement, 1990-1992

At the most basic level, the settlement was formalised by the issuing of Terms of Settlement under the Treaty of Waitangi Act 1975 Amendment Act 1988 (s.9C). TOWPU drafted this in June 1990 for Judge Trapski's signature and the signature of representatives of the parties (Crown and claimants). Judge Trapski indicated that an exchange of letters between Kit Toogood and Alex Frame (of TOWPU) was "sufficient to constitute agreement." The Judge was still drafting a report on the mediation and settlement in July 1990. These were necessary steps, but did little to clarify how certain aspects of the settlement were to be implemented.

Implementing Treaty claims settlements in 1990 was a very different process to the more streamlined and defined process used for today's Treaty claims. In fact, there was no 'process' as such because the Wai 51 settlement was amongst the first historical Treaty claims to be settled. Settlements were implemented in whatever way Crown officials and claimants decided was appropriate to their circumstances.

Some Crown agencies, such as DOSLI, had long-standing formal processes in place for the transfer or return of land to Maori (through the Maori Land Court), but no one had experience in Treaty claims settlements. A key issue for the claimants that still needed to be resolved was how,

and to whom, the land taken from their tupuna was to be returned.

The first visible result of the 1990 Wai 51 settlement was an Agreement to Licence Waitomo Glowworm Caves signed on 14 June 1990 by the Minister of Conservation, THC, and "The Hapu of Ruapuha and Uekaha" ("the Claimants"). The claimants were described as "the descendants of the original owners of Hauturu East No. 1A5B, No. 1A6 and No. 3B1 blocks." The same wording is used to describe the claimants in the subsequent 1990 Loan Agreement between the Minister of Justice and the claimants. This related to the $1million loan from the Crown to the claimants provided for in the settlement.

On 21 June 1990, Crown officials and the Wai 51 claimants held the "first implementation meeting" for the Waitomo agreement. The meeting was attended by officials from TOWPU, DoC and DOSLI, and – for the claimants – by Kit Toogood, Josephine Anderson, Te Aue Davis and Peter Douglas. On the agenda were a range of items, including: forming an Implementation Committee; how the land was to be re-vested; how the domain, the Caves, and the museum were to be managed; and financial arrangements around royalties (or licence fees), the loan, and its repayment.

The "core group" of members for the Implementation Committee were selected, being: Amelia Manson (TOWPU, co-ordinator), Richard Hill (TOWPU), David Crawford (DoC), Graham Quinn (Treasury), Peter Bollman (DOSLI) and Kit Toogood. (Richard Hill is now a member of the Waitangi Tribunal and Amelia Manson still works at the Office of Treaty Settlements, the successor agency to TOWPU.)

The land to be re-vested was, "to be put into appropriate trusts." It was agreed that Josephine Anderson and Peter Douglas would "write a description of the trust(s) and the names of the trustees and identify blocks of land," as well as identifying to whom land was being returned "and for what purpose."

It was noted that the trusts would be "s.439 trusts initially." The land trust details were to be passed on to DOSLI who "stressed they were agents in the process, not negotiators, so needed instructions from Treasury."

It is not evident that DOSLI were ever given specific instructions about the re-vesting of the land. The agency instead followed its standardised re-vesting procedures which were designed to return land to former owners rather than to a claimant body established to receive Treaty settlement assets. Accordingly, DOSLI put in motion a s.436 re-vesting that "puts ownership with owners." A s.438 application to the Maori Land Court could then follow to determine the

"investigatory trustees" when the "onus will be on Maori owners to establish new trusts."

Meanwhile, the claimants sought advice "on the procedures which they should adopt to ensure that the land which is being returned to them is vested in the appropriate trusts." On 19 July 1990, Kit Toogood wrote to Wellington barrister Tom Woods to ask him to accept instructions from the hapu of Ruapuha and Uekaha on "the means by which the various parcels of land can be re-vested in the descendants of the original owners."

At the same time, a Ruapuha Uekaha Hapu newsletter clarified for the claimants that under the settlement 'original owners' meant those who owned the land at the time it was taken; otherwise referred to as the non-sellers. In the case of Hauturu East 1A6, this did not affect many descendants of the sellers because Waitere Raharuha, Ani Kumeroa, Te Nekehana Tanetinorau and Kiingi Taniora left no issue. The only seller who did have issue was Te Moerua Natanahira, so only that group of descendants was affected by the exclusion of sellers.

Yet the Wai 51 claim had not been made in the names of the non-sellers or of the sellers; it had been made on behalf of Ruapuha, and then amended to include Uekaha. In the newsletter Josephine Anderson explained why the claim was made in this way:

> As briefly as possible, it was because of the historical status of the land before partitioning took place. It was also an attempt to include those who sold to the Crown and the wider Maori community. To some degree this will still happen, but in an indirect way.

That "indirect way" of including the hapu was through the trusts to be established as part of the implementation of the settlement.

On 5 August 1990, the RUHT held a Special General Meeting at Tokikapu marae, attended by 86 people. Josephine Anderson presented a report on the RUHT, including work to build a register of beneficiaries. She again referred to the intention of the Wai 51 settlement to benefit the hapu:

> I have always been mindful of the fact that the cave reserve (1A6) should be for the hapu. I have never deviated from that course. As stated in the newsletter, the whanau of the non-sellers have yet to determine how these interests are to be administered. The whanau who have associated interest in 1A5B and 1A5C have decided to have these returned in title to them.

She reminded the meeting of the advice given by Judge Carter in April 1990 that:

> technically the interests under claim had owners when they were taken by the Crown & that membership to the hapu trust could only be determined by the descendants of the non-sellers.

She added: "I don't have to tell anyone how distressing that information was for me." She

reminded the meeting that, "the success we have had with the claim was due to the fact that it was pursued on the basis of the hapu and for our mokopuna of the future." Although she respected the decision of the majority in relation to 1A5B and 1A5C, "the cave reserve is another matter. I regard it as hapu interest on the basis of which the claim was made, and has had its success."

Walter Anderson informed the meeting that the Working Party hoped to have the lands re-vested by 31 August 1990, "and the title for the land interests is to go back to the families concerned." Peter Douglas informed the meeting about the work of the Implementation Committee, noting that he and Te Aue Davis had engaged Tom Woods, "a lawyer expert in Maori land," to advise on the settlement and on the "appropriate trusts." Josephine added that they had been advised to "be careful about the [s.]439 Trust status" and that a s.438 "wider Trust" might be better "in the interim." Peter Douglas responded that s.438 trust land "could be sold" but that s.439 trust land was inalienable.

On 9 August 1990, Tom Woods wrote to Kit Toogood about implementing the claim settlement. He proposed applying to the Maori Land Court for the vesting of Crown lands under the Maori Affairs Act 1953 (s.436) as this "operates as a code regulating the disposition of land acquired from Maori for public works and related purposes."

There were, however, "two important consequences" of a s.436 vesting order. One of these was that the land was freed from "any trusts and restrictions subject to which the land may have previously been held" (such as designation as a reserve). The second point was that, "the land as a consequence of a re-vesting order, becomes Maori freehold." He went on to note that:

> The revesting process will essentially involve the return of the land in three titles. Each title will at first be vested in a tupuna nominated by the respective family groupings and then vested in trustees. The trusts are declared by the Court appropriate to the land use and arrangements in mind. The titles will be made up as follows:
>
> Tanetinorau Opataia Whanau lands – comprising block 1A5C and Lot 28.
>
> Ruapuha – Uekaha hapu lands (Cave block) – comprising blocks 1A6 and 3B1.
>
> The remaining title will be made of Pt 1A5B and Lots 31, 32, and 35.

With respect to the Ruapuha – Uekaha hapu land, this was, "like the others," to be returned as Maori freehold land vested in trustees. "It is important to note," he continued, "that it is not the claimants per se that are to be ultimately bound by those arrangements but the trustees, as the legal proprietors of the block."

The issue here was that the Caves licence and $1million loan had already been arranged with the claimants – the Ruapuha-Uekaha Hapu – before trustees were appointed: "The issue is to bind the trustees to the arrangements. As intimated, the claimants by executing documents are in no position to prospectively bind the trustees." His solution to this potential difficulty was to include the terms and conditions of the Caves licence and loan agreement included in the re-vesting application.

On 27 September 1990, the Ruapuha-Uekaha Hapu met with Tom Woods at Tokikapu marae to discuss re-vesting procedures before proceeding to the Maori Land Court. One of the issues "to be resolved" was that the land be re-vested "according to the Whanau." The blocks were to be dealt with in three "lots" with new amalgamated titles:

(a) Hauturu East 8 (an amalgamation of 1A6 and 3B1) comprising the Waitomo Caves;

(b) Hauturu East 9, 10, and 11 (formerly 1A5B), benefiting Haami Haereiti and Te Whata Karaka interests; and

(c) Hauturu East 12, 13, 14, and 15 (formerly 1A5C), comprising the domain and Waitomo museum and benefiting Tanetinorau interests.

The focus here is on Hauturu East 8, of which Tom Woods noted that it had initially been intended to "re-vest the lands to the descendants of the [owners of the] two merged blocks" with a trust to then be established to administer the land. However, "the Minister of Lands did not approve of this procedure." It was now "emphasised that when the lands are re-vested, all the descendants should benefit." It was therefore intended to re-vest Hauturu East 8 in the five original owners (i.e. the non-sellers): Haami Haereiti, Te Whata Karaka, Tanetinorau, Riutoto Aihe, and Whariki (Huti). After setting this out, Tom Woods said:

> It was agreed that the land be vested to the trust for the beneficiaries of those five persons. The status of the land would then become Maori freehold.
>
> It was proposed that the trust retain its present name – Ruapuha Uekaha Hapu. The trust would fall under the Maori Trusts s.438 of the Maori Affairs Act 1953.

Thus the court would re-vest the land to the RUHT, and establish the trust at the same time. He pointed out that s.438 of the Maori Affairs Act 1953 "was very wide in terms of its objectives, but catered for all the trust's needs."

Tom Woods emphasised that: "No individual was to have an undivided interest in the cave block." He added that, "the trustees have a broad description of how the trust would benefit everyone.

The trustees could use the benefits to assist community activities if so wished." His proposals were agreed to by those at the hui.

The next day, 28 September 1990, Tom Woods faxed re-vesting applications to Judge Carter for the blocks Hauturu East 8 to 15 together with re-vesting orders and applications and orders to appoint trustees. These were set down to be heard on 1 October 1990.

In a covering memorandum he advised he had been instructed by the claimants "to oversee the implementation of the settlement in regard to the return of the Waitomo Caves and related lands."

He considered the documents to be "generally self-explanatory," but wrote that it was "important to amplify with you the intentions surrounding the re-vesting" of Hauturu East 8. His instructions were for Hauturu East 8 to "re-vest in persons being the original non-sellers of the Caves Block," adding:

> In re-vesting the block in those persons, the intention is not to enable the restoration of title by succession so that the block once again becomes vested in common ownership.
>
> Instructions are that the benefits arising from the return of this property be to promote the interests of the Ruapuha and Uekaha hapu.
>
> In order to achieve that within the confines of the present legislation it is important to state in the application that the nominated owners in whose names a vesting order is made hold the land for the benefit of those two hapu.
>
> …In order to promote and facilitate the use and administration of the land in the interests of the hapu it will be necessary to appoint trustees pursuant to s.438 in place of the owners who are all deceased.
>
> The section 438 trustees in essence acquire the same trust for which the owners were nominated to hold the land. The trust order reflects that.

Tom Woods observed that the Maori Affairs Bill then before Parliament (later enacted as Te Ture Whenua Act 1993) included "the prospect of creating whenua topu trusts to promote specifically the interests of iwi or hapu." As currently drafted, "whilst a whenua topu trust is constituted, no person is entitled to succeed to any interests vested in the trustees." This was, he noted, what was intended for Hauturu East 8:

> In this instance, the s.438 trustees do not acquire beneficial interests capable of succession but are appointed to facilitate the use, management, and alienation of the land in accordance with the trusts and conditions [on which] the owners hold the land.

Subsequently, on 1 October 1990, Peter Bollman of DOSLI applied, on behalf of the Minister of

Lands Peter Tapsell, to the Maori Land Court sitting at Te Kuiti under Judge Carter for the vesting of Hauturu East 8 to 15 in trustees under the Maori Affairs Act 1953 (s.467). Peter Bollman set out the background to the applications, including the Wai 51 claim "by the hapu of Ruapuha and Uekaha" and its settlement by mediation.

The Wai 51 terms of settlement were attached to each of the three applications (for Hauturu East 8, Hauturu East 9, 10 and 11, and for Hauturu East 12, 13 and 14). The application did not include Hauturu East 15, the domain, as there were unresolved issues relating to that block.

The explanation by DOSLI accompanying the applications noted that they were to vest the land "in the terms of settlement in trustees for the persons beneficially entitled or for that class of persons being the descendants of the owners recorded at the date of the taking." When dealing with Hauturu East 8, Peter Bollman noted:

> To meet the requirements of the terms of settlement I will ask for a trust order (under s.436) vesting the land in named trustees to hold and administer the land for the use and benefit of the descendants of the owners recorded at the date of taking.
>
> In conclusion, I advise the court that care has been taken to ensure that the beneficial interests of all the former owners are not derogated through these applications, and in this regard I thank the claimants and their counsel for their cooperation and flexibility.

The orders sought by Tom Woods (on behalf of Ruapuha Uekaha Hapu) for Hauturu East 8 were unfamiliar to DOSLI, and Peter Bollman had found them "a complex and sometimes confusing task."

Indeed, he later wrote to TOWPU about the s.436 applications prepared by Tom Woods "to vest the land in certain individuals nominated by the claimants," as this did not accord with standard DOSLI process. Peter Bollman recalled:

> I disputed the appropriateness of this with him on several occasions, my stance being that the land should be vested in either the original owners, or in an interim trust for the original owners, with the court to determine beneficial ownership.
>
> I reached an impasse with Mr Woods and referred the matter to the Minister of Lands, who was the applicant in this matter. The Minister was adamant that the land should be vested in either the original owners, or in an interim trust for the original owners, with the court to determine beneficial ownership.
>
> After some discussion, Mr Woods proposed applying for a s.267(3)(a) Trust Order vesting the land in trustees to hold and administer the land for the use and benefit of the descendants of the owners recorded on the respective instruments of title at the date of taking. This proposal met the requirements of the Minister of Lands and it was agreed to proceed in this manner.

> On the morning of the hearing Mr Woods expressed concern with regard to the future jurisdiction of the court in respect of a s.267 trust, and requested a conference in chambers.
>
> During the conference it was suggested that the application be heard as a s.436 application. From my perspective, as long as the land was re-vested back into either the former owners or their descendants, I was prepared to oblige.
>
> Consequently, the land was re-vested pursuant to s436 in the owners recorded on the instruments of title at the date of the taking.

This outcome is reflected in the Court minutes. On 1 October 1990, Judge Carter ordered under the Maori Affairs Act 1953 (s.436) that Hauturu East 8 be:

> vested in the persons listed in the Schedule hereto being the former owners of Hauturu East 1A6 and the former owners of that part of Hauturu East 3B1 as recorded in the Maori Land Court at the date taken in 1905 and 1911 respectively.

The re-vesting order also noted that the application for it stipulated that it "be and is subject to the terms of settlement of claim Wai 51" and that "all expedient steps be taken to have the said land vested in trustees" under s.438 to enable the Wai 51 settlement to be implemented.

The Schedule attached to the 1 October 1990 order listed the 17 owners and their respective shareholding of Hauturu East 1A6 at the time it was taken in 1905 and the 14 owners and their respective shareholding of Hauturu East 3B1 at the time it was taken in 1911. The shareholdings of each owner in the combined Hauturu East 8 block was also given:

No.	Owner	Hauturu East 1A6 shares	Hauturu East 3B1 shares	Total Shares	Hauturu East 8 Shares
1.	Ani Hokopu	-	50.6000	50.6000	6.9031
2.	Te Aue Tanetinorau	72.7273	3.1625	75.8898	10.3533
3.	Charles Davis	14.5455	-	14.5455	1.9844
4.	Edward Davis	14.5455	-	14.5455	1.9844
5.	Haami Haereiti	58.1818	-	58.1818	7.9374
6.	Hare Purangi	14.5455	75.9000	90.4455	12.3391
7.	Joseph Davis	14.5455	-	14.5455	1.9844
8.	Kingi Taniora Tanetinorau	4.1571	3.1625	7.3196	0.9986
9.	Kino Tanetinorau	4.1571	3.1625	7.3196	0.9986
10.	Te Kiripango Tanetinorau	4.1571	3.1625	7.3196	0.9986
11.	Mereana Tanetinorau	4.1571	3.1625	7.3196	0.9986
12.	Okewhare Tanetinorau	4.1541	3.1625	7.3166	0.9982
13.	Parakau Tanetinorau	-	18.8675	16.8675	2.3012
14.	Purangi Tanetinorau	-	18.8675	16.8675	2.3012

No.	Owner	Hauturu East 1A6 shares	Hauturu East 3B1 shares	Total Shares	Hauturu East 8 Shares
15.	Rangipataka Tanetinorau	4.1541	3.1625	7.3166	0.9982
16.	Rangiwhakarewa Paranone	58.1818	-	58.1818	7.9374
17.	Tanetinorau Opataia	130.9091	-	130.9091	17.8594
18.	Thomas Davis	14.5455	-	14.5455	1.9844
19.	Tokorewa Tanetinorau	-	18.8650	18.8650	2.3008
20.	Waiwhakaahu Tanetinorau	4.1541	3.1625	7.3166	0.9982
21.	Whariki Tanetinorau	-	50.6000	50.6000	6.9031
22.	Te Whata Karaka	58.1818	-	58.1818	7.9374
			TOTAL	**733.0000**	**100.0000**

According to research by the Wai 51 claimants, the whanau affiliations of each of the named individuals are as follows:

No.	Owner	Kin Relationships	Whanau Affiliation
1.	Ani Hokopu	Mother to Tanetinorau Opataia (No. 17)	Tanetinorau
2.	Te Aue Tanetinorau		Tanetinorau
3.	Charles Davis	Son of Te Riutoto Te Aihe	Te Riutoto Te Aihe
4.	Edward Davis		Te Riutoto Te Aihe
5.	Haami Haereiti		Haereiti
6.	Hare Purangi	Brother of Ani Hokopu, no issue	Tanetinorau
7.	Joseph Davis	Son of Te Riutoto Te Aihe	Te Riutoto Te Aihe
8.	Kingi Taniora Tanetinorau		Tanetinorau
9.	Kino Tanetinorau		Tanetinorau
10.	Te Kiripango Tanetinorau		Tanetinorau
11.	Mereana Tanetinorau		Tanetinorau
12.	Okewhare Tanetinorau		Tanetinorau
13.	Parakau Tanetinorau		Tanetinorau
14.	Purangi Tanetinorau		Tanetinorau
15.	Rangipataka Tanetinorau		Tanetinorau
16.	Rangiwhakarewa Paraone	Sister of Haami Haereiti, no issue	Haereiti
17.	Tanetinorau Opataia		Tanetinorau
18.	Thomas Davis	Son of Te Riutoto Te Aihe	Te Riutoto Te Aihe
19.	Tokorewa Tanetinorau		Tanetinorau
20.	Waiwhakaahu Tanetinorau		Tanetinorau
21.	Whariki Tanetinorau	Wife of Tanetinorau Opataia (No. 17)	Tanetinorau
22.	Te Whata Karaka		Whatakaraka

Accordingly, the shares of each whanau in Hauturu East 8 are approximately:

(a) Tanetinorau Opataia whanau – 68 shares;

(b) Te Riutoto Te Aihe whanau – 8 shares;

(c) Haereiti whanau – 16 shares; and

(d) Whatakaraka whanau – 8 shares.

On 2 October 1990, Judge Carter heard Josephine Anderson's application to establish a section 438 trust for the Hauturu East 8 block. It was subsequently ordered that the block be vested in Walter Anderson, Haumia Sam Green, Huia Davis, Joseph Davis, Wally Tane, Norman Tane, Rua Anderson and Te Aue Davis under s.438(2) of the Maori Affairs Act 1953.

The trust was to be known as the Ruapuha-Uekaha Hapu Trust, the beneficiaries of which would be "all the descendants of the owners in whom the land was vested" under s.436 on the same day.

Amongst the objects of the RUHT was:

> to conclude and to carry on any arrangements or agreements entered into in respect of the land binding on the claimants in the settlement of claim Wai 51 with the Crown under the Treaty of Waitangi Act 1975.

Another object was to investigate the "future form and direction of the Trust," in particular, whether the Trust should be a "comprehensive Trust" with full power to administer its land and assets, or whether it should "distribute the net proceeds each year to trusts established for each of the whanau comprised within the hapu," with each then dealing with those funds in accordance with their own trusts.

The trust order also provided that, within a year of it being issued, the Trustees shall call a General Meeting of Owners where the owners would consider, "the future utilisation and administration and constitution of the Trust" and move for any variation required in the trust order. Such a variation would require the approval of the Maori Land Court. That meeting was also to consider "the utilisation and disbursement of the balance, rents, and revenues" held by the Trust.

An important aspect of the October 1990 Court orders is that, while made, they were not yet signed and sealed by the Court. There was considerable delay in getting the orders signed and sealed. In the first instance, the orders were made subject to the Minister of Lands signing fresh applications under s.436 of the Maori Affairs Act but, as set out below, DOSLI officials, notably

Peter Bollman of the Implementation Committee, continued to oppose the use of s.436 as it was not their usual practice to use this provision for the return of land.

On 15 October 1990, the Implementation Committee met for the last time. Tom Woods summarised progress with re-vesting of the land, but noted the difficulties arising from DOSLI's approach to the special circumstances of Hauturu East 8 (the Caves land):

> This problem arose only four days before the Court hearing. Thus, it was decided to vest in the trustees and define the class. Tom expressed dissatisfaction at this because it allowed an impediment to the administration of the block. In the Conference held in Chambers it was decided to return [the land under] s.436 and to define the class there. Thus in terms of the Caves block the land was vested accordingly and trustees appointed.

He subsequently wrote to Kit Toogood about the difficulties of implementing the settlement through legislative provisions intended for different purposes, particularly where those provisions required the involvement of agencies, such as DOSLI, who had their own way of doing things:

> In all the previous vestings, I purposefully tied the persons nominated in those applications to the Settlement Agreement to avoid the possibility of the Minister of Lands directing otherwise.
>
> The most effective way to avoid any further doubt, is to have the settlement formally documented whereas all these understandings and arrangements are put beyond doubt.
>
> Clearly, DOSLI officials have a fixation on the Public Works Act especially the policy underlying that Act concerning the disposition of Crown properties. That Act or its policy as I have endeavoured to point out does not apply and, in this instance, the re-vestings are governed by the terms of settlement of the claim. Section 436, is simply a mechanism to give expression to that agreement.

Kit Toogood made much the same point in a letter of October 1990 to Peter Bollman of DOSLI. That agency had long-established processes for dealing with the return of land taken under the Public Works Act, but it had not grasped the essential difference in the case of Hauturu East 8, which was that this was land being returned as the result of a Treaty claims settlement:

> In these circumstances, it is not appropriate to follow the same procedure as for the other land being re-vested and use the Public Works Act procedures to re-vest in the original owners. The use of the Public Works Act has merely been a means by which the objectives of the settlement have been achieved, and if the machinery is not apt to achieve the desired result then some other method must be found.

He was firmly of the view that normal Crown policy and practice was, "not relevant – this settlement does not have its basis in Public Works policy but in Treaty principles." He emphasised this point in a subsequent letter to Amelia Manson of TOWPU:

> I am not impressed by Peter [Bollman]'s suggestion that the arrangements between the Crown and the

> claimants, and in particular the understandings which provided the basis for them, were contained solely within the written correspondence which makes up the Terms of Settlement. As I am sure you know as well as anybody, I have been anxious to ensure that all of the underlying assumptions and nuances of the settlement are properly recorded to avoid the very arguments which Peter Bollman now advances. Neither the claimants nor I have any concern whether the Crown has a particular policy about Public Works Act re-vestings. The settlement which was reached between the Crown and the claimants was reached in accordance with the principles of the Treaty of Waitangi, not the Public Works Act, and while I am sure Peter Bollman is anxious to see that the terms of settlement are carried out, I suggest his views as to policy must be given little weight in light of the fact that he took no part in the negotiations.

Kit Toogood also wrote to Peter Bollman that it had been agreed "on all sides" that "existing mechanisms" should be used to implement the settlement where possible, "but that, in the event that existing mechanisms were inappropriate, special legislation might have to be resorted to."

Ultimately, this did not occur but special legislation for Treaty settlements soon became the norm. More pointedly, Kit Toogood wrote that it was "abundantly clear" that the settlement was:

> not to be frustrated by Government agencies whose predetermined policies take no account of the nature of the settlement under the Treaty. …What is intended is that the Crown's obligations as a Treaty partner, having achieved agreement with claimants as to the honouring of the Treaty, should be fulfilled.

On 27 November 1990, Peter Bollman for the Commissioner of Crown Lands responded to Kit Toogood's concerns. He confirmed that the Crown was now prepared to forward an application for re-vesting "in the manner required by the Implementation Team."

However, he contended that neither the Minister of Lands nor the Maori Land Court would agree to such an application, as they could only consent to such land being re-vested in the former owners or their descendants. He considered the implementation committee would need to find "an alternative mechanism" to achieve the re-vesting that was sought.

1.2. Kit Toogood replied on 5 December that if the Minister declined to sign the application, "then some other mechanism would have to be found" (such as special legislation).

Earlier, Ruapuha-Uekaha Hapu had begun the work required of them for implementation. On 4 November 1990, the Hapu held an Annual General Meeting at Tokikapu marae. The agenda included the dissolution of the Working Party and the assumption of its responsibilities by the RUHT trustees.

Josephine Anderson advised that the trustees still had no Maori Land Court orders to guide them as the October 1990 orders had not yet been signed and sealed. By her account, the orders submitted by Tom Woods were "being rewritten" and two objections to the trust orders had been

received by Judge Carter. She explained that, "the Court has to be satisfied that all the beneficiaries are being fairly represented."

In the interim, the trustees had to "report to the Court what instructions they had received from the beneficiaries regarding the respective whanau interests in the cave block described as Hauturu East 8." The whanau involved had been sent "repeated requests" to set up their own whanau trusts but "this had not been complied with." The whanau of Haami Haereiti and of Whatakaraka had held meetings and elected representatives. The Tanetinorau Trust had been "up and running for two years."

It was explained to the meeting that when the whanau trusts were formed, each trust "will decide to appoint their own member to the [Ruapuha Uekaha] Hapu Trust in 12 months time." It was noted that the Haeretiti whanau had no representative on the RUHT but they had been advised that "one could be appointed by the Court if their respective whanau so wished."

Sue King observed at the meeting that, "she did not see any of her tupuna's names on the paper. She was here because of the tupuna, Uekaha." Josephine Anderson explained why the Ruapuha-Uekaha name was used: "It was the original status of the land before it was partitioned and succeeded to." Wally Tane reminded those present of the earlier undertaking by the trustees, "that the wider Maori community would not be forgotten" by them. Walter Anderson responded that the trustees' "first responsibility is to the beneficiaries."

On 24 November 1990, RUHT held its inaugural meeting at Taware House, Waitomo. The six trustees were present, but the two kaumatua trustees were absent. It was noted that more than 500 members had registered with RUHT to date. The Maori Land Court Trust Order was "worked through" but no discussion was recorded.

With respect to Hauturu East 8 and the administration of the Caves, a "two tier trust" was proposed and agreed to by the trustees. Josephine Anderson (now in a role as part-time administrator) observed that legal advice had made it "quite clear" that the $1million advance and the return of Hauturu East 8:

> was a package deal arrived at through the mediation process for the Hapu as a whole in relation to the various interests of the owners concerned. It was her view that in spite of the two tier system proposed, the Hapu Trust would have a role to play other than that of a distributing/watchdog body.

In response, the trustees agreed that information should be made available to all the whanau concerned but that "each whanau, however, be left to action [its] own affairs in setting up trusts, etc."

On 9 February 1991, RUHT held an "executive meeting" at Taware House, Waitomo. It was noted that registrations with the Trust had risen to 1,179. There was some discussion of the "function, structure, and objectives" of the trust. It was noted that there was "agreement in principle" to the "two-tiered system," but Joe Davis stated that "if representation was to be on a share basis, then the structure would not change all that much." This would, he said, entitle the Haereiti whanau to two members, the Whatakaraka and Te Riutoto Aihe Whanau one each, and Tanetinorau, four members. He "would not agree to Tanetinorau having only two [members] as suggested. Big shareholders had as much to be concerned about as smaller ones."

Huia Davis said beneficiaries had raised different concerns with him: "People want to see action in terms of what money is available for education, etc." Josephine Anderson advised that requests for assistance "along those lines" had been received, but applicants had been informed that "the various trusts were still in the process of being set up" and it was expected to take "at least a year" to complete that process. The Tanetinorau Opataia Whanau Trust was "up and running" but it, in turn, "had to wait for the hapu trust to sort matters out."

The RUHT trust order was then "perused and discussed at length," but this discussion was not recorded. Following that, the requirements for "membership as a beneficiary" were raised. Te Aue Davis stated, "if a person could whakapapa to the tupuna named, that was all that was required." Joe Davis added: "Judge Carter had said the same." Sam Green and Joe Davis were to meet with Judge Carter in February 1991 regarding the trust orders.

On 15 June 1991, the RUHT trustees met. It was noted that 1,300 members had now registered. As regards "trust policies," three discussion papers had been received from trustees. Huia Davis' paper dealt with the trust structure, which was to consist of nine members comprising:

(a) Tanetinorau Whanau – 5 members;

(b) Te Riutoto Aihe Whanau – 1 member;

(c) Haami Haereiti Whanau – 2 members; and

(d) Whatakaraka Whanau – 1 member.

In addition, one kaumatua from each Whanau Trust would have an "ex-officio" role. This structure was accepted by the trustees.

On 13 July 1991, the RUHT trustees and "full executive" met with ANZ representatives and Kit Toogood. After discussing the management of the $1million advance, the matter of applications

for educational grants was raised. Josephine Anderson suggested that distribution of funds for education "should be handled at Whanau Trust level from cave revenue income," adding that:[2]

> the priority for the Hapu Trust is to administer the million dollars and all the benefits derived from it, so that assets whether it be monetary or by other means could be built up to the best advantage for the benefit of all beneficiaries.

The October 1990 Maori Land Court orders establishing the Trust had yet to be signed and sealed. On 16 July 1991, Josephine Anderson, RUHT Secretary, wrote to Judge Carter regarding the Wai 51 settlement and Hauturu East 8. She noted that the settlement regarding Hauturu East 8 was based on the agreement between the non-sellers and the Crown as to the 1899 subdivision of Hauturu East 1A. In regard to the non-sellers:

> To recognise these people for their resolve and original ownership of the land, it was intended that they be the titleholders of the interests that would have been returned. In doing this all of their descendants would become beneficiaries.
>
> I realise this creates a problem but the view of the Crown at the time was that no individual could benefit. From advice received from Tom Woods… leaving the tupuna concerned as the titleholders could be achieved. Accordingly, a register has been set up to reflect this and in excess of 1,100 persons have been registered.

She also noted that the ownership of Hauturu East 1A6 (now Hauturu East 8) changed somewhat between 1899 and when it was taken by the Crown in 1904/1905. She advised that these changes could be accommodated in the trust orders "as the persons affected were direct descendants of those persons concerned." She gave the example of Te Riutoto Aihe whose interests had been succeeded to by her four sons. She considered that, if the sons were named as the titleholders, "her identification as the original owner would be lost," adding: "It would also restrict the beneficiaries to persons such as myself who are the next of kin" (she noted that she is a grand-daughter of Te Riutoto Aihe). She advised Judge Carter:

> Many whanau members and those directly involved in the claim negotiations shared similar views, that persons such as myself should not be more entitled than those who are not next of kin but nonetheless directly descended from the tupuna concerned and entitled to share.
>
> I also believe that all matters concerning the return of these interests and how a settlement was arrived at, must be considered.

Judge Carter's reply has not been located, although he later recalled writing to Josephine Anderson on 2 September 1991. His subsequent letter of 4 June 1992 to RUHT has been located,

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[2] Meeting of RUHT, 13 July 1991. RUHT Minute Book.

and addressed the letter of July 1991. In relation to the desire of the RUHT to name Riutoto Te Aihe in the Hauturu East 8 title, rather than her four sons, Judge Carter observed:

> The purpose of recording the persons on the title as being those from whom the land was compulsorily taken was to recognise and record that fact. The fact that a certain person is on the title does not necessarily mean that only their descendants need benefit from the Trust. In fact, and I have not got a copy of the Trust Order before me, I believe that the Ruapuha Uekaha Trust has been set up so that all members of the hapu are beneficiaries of the Trust. This would apply to the descendants of the sellers and non-sellers alike. I might be wrong in this assumption but as I cannot locate the Court file at the moment on which the original Trust Order is situated, I am unable to check this point.

Judge Carter added that although he had made the vesting orders in October 1990, they had still not yet been sealed. This was due to the RUHT's request, in the letter of 16 July 1991, that the orders be "withheld" until its difficulties with the Crown over the implementation of the settlement had been resolved. However, as the orders had been made, "there is no real reason for the Court to hold up sealing of them." He noted that the files "are cumbersome and involved," and that "it takes me about three-quarters of an hour from the time I open the files to put myself in a position of being able to go forward because much time is taken up familiarising myself with the background."

Four days later, on 8 June 1992, Judge Carter wrote again to RUHT regarding Hauturu East 8. Since writing his previous letter he had located the RUHT file and sought to "clarify some of the comments" he had made:

> As far as the Court is aware the re-vesting of this land was to be back in the original owners from whom the land was compulsorily acquired. The claim to the Waitangi Tribunal appears to have rested in the hands of the descendants of those owners on the grounds of the compulsory acquisition.
>
> It appears that the intent of the application from the Minister of Lands and the Order by the Court was to re-vest the land in those original owners.
>
> In my letter of 4 June I referred to the fact that I did not have a copy of the Trust Order before me and I believed that the Ruapuha Uekaha Trust had been set up so that all members of the hapu are beneficiaries of the Trust. This in fact, is not the case. Under the draft Trust Order submitted by Mr Tom Woods and modified by the Court so that it would be an investigatory Order the beneficiaries are described as being the descendants of the owners in whom the land was vested by the Court Order.
>
> If my memory serves me correctly the Trustees were to come up with proposals for a final Trust Order after consultation among themselves and meetings with the beneficiaries over the formation of the final Trust. That Trust Order could provide for all the members of the hapu to be beneficiaries if the descendants of the beneficial owners so agreed.

Judge Carter concluded by again noting that "none of the orders have been sealed." As the

vesting orders had not been signed and sealed, the trust orders could not be sealed. However, "as the Orders have been made and pronounced the situation is unsatisfactory and the Court has no alternative but to sign and seal the various orders."

On 17 July 1992, Josephine Anderson of RUHT replied to Judge Carter's letters of 4 and 8 June:

> In re-vesting the [Hauturu East] No. 8 block in the Ruapuha Uekaha Hapu Trust the intention would not enable the restoration of title by succession so that the block once again becomes vested in common ownership, in this case for the benefit of all of the descendants of the (4) persons named.

By the "(4) persons named," she meant the "4 whanau remaining who are involved in the 1990 Waitomo settlement."

The difficulty RUHT had with the 1990 Court order was that it had included Ingoa Tukemata and Konehu Tukemata in a list of original owners when RUHT had not wanted them included and wanted the land vested in four key tupuna who gave rise to the whanau represented on RUHT.

The four whanau involved were those of Haami Haereiti, Te Riutoto Te Aihe, Te Whatakaraka and Tanetinorau. Other original owners had been included in the ownership of Hauturu East 1A6, but the results of succession reduced ownership to the four named whanau.

Of the other original owners, she noted that: Rangiwhakarewa Paraone (sister to Haami Haereiti) had left no issue; Ani Hokopu's interest was succeeded to by one of Tanetinorau's sons; Hiiti Henare's interest was succeeded to by Hare Purangi and Te Aue Tanetinorau; and Hare Purangi's interest was subsequently succeeded to by Tanetinorau's children.

After noting the primacy of the four whanau, she added that: "The Hapu Trust believe that it is not possible at this time to include the descendants of those tupuna who sold their interests to the Crown." The RUHT believed that such inclusion, "will only be possible if the Crown were to give up or dispose of these interests [acquired from the sellers] in the future." In any case, it was noted that there was only one seller, Natanahira Te Moerua, who left issue and whose descendants were thus presently excluded from the RUHT.

Three days later, on 20 July 1992, Josephine Anderson wrote separately to the Maori Land Court about the RUHT claim and the vesting order for Hauturu East 8:

> From the outset of the claim we were told that no individual(s) could expect to have title to the interests that there were to be returned in the Waitomo Settlement and were advised to set up a register of beneficiaries as early as October 1989. It was decided that the Ruapuha Uekaha Hapu would be the name of the Trust based on historical location of land the interests affected through occupation by those tupuna making their claim in 1889 in the Maori Land Court.

Title to the land was to be vested in the four tupuna who were "representative of all of the owners comprised in the Court's Order, and that it was desired that the tupuna be put on the title so as to recognise their resolve in not selling their interest to the Crown."

On 28 July 1992, the Court sat at Thames under Judge Carter to consider Josephine Anderson's application to amend the order of 1 October 1990 so as to vest Hauturu East 8 in four tupuna (Haami Haereiti, Te Riutoto Aihe, Te Whatakaraka and Tanetinorau Opataia). He concluded the Court could not act on this application:

> The Court does not have any jurisdiction to amend or alter the Orders that it made on the 1st of October 1990. ... What Mrs Anderson is now asking the Court is to depart from the original decision which was made and substitute the names of the four tupuna she has mentioned.
>
> The Court has considerable sympathy for Mrs Anderson. It appears that a lot of work has gone into the arrangement of a Hapu Trust and then Whanau Trust[s] by the claimants and the beneficial owners they represent. The Court has not investigated the finer details of the submissions that Mrs Anderson has made that the four tupuna in fact represent the families of all the owners from whom the lands were taken and in whom they have now been vested. It does appear however that there may be something in Mrs Anderson's claim that the claimants were led to believe that there would be no difficulty in arranging for title to be in the name of whichever owners they nominated.
>
> The situation is however that the Court made Orders on the 1st of October 1990 in accordance with the application and submissions made by the Crown. The Crown ...asked for an Order vesting the land in the persons who owned the land at the time of taking by the Crown. Mr Woods appeared on behalf of the owners and the claimants and is recorded as supporting the applications and the making of the Orders as prayed.
>
> Under Section 436 the Court has no discretion as regards the Orders it makes. It must make them in accordance with the terms of the application or it may decline them. It cannot modify them. ...
>
> The Court does recall that the application was somewhat hurried and there may not have been all the communication between the Crown, counsel for the parties and the parties as there might well have been. It could well have been therefore that there was some misconception as far as the parties were concerned in the presentation of the application to the Court. The Court would commend to the Crown that it make contact with Mrs Anderson and that she make the same representations to it as she has made to the Court as regards the persons in whose name title should be put. If agreement can be reached between the claimants and the Crown as to those persons then it appears that there would be a case for seeking amendment of the Orders that have been made under the provisions of Section 452 of the Maori Affairs Act 1953.

Judge Carter noted that a copy of the above minutes was to be sent DOSLI but no response from DOSLI or other Crown agency has been located.

As a result of this, the Court issued the three orders of October 1990 relating to Hauturu East 8

that were intended to implement that part of the Wai 51 settlement relating to the Caves land. These orders:

(a) Re-vested land taken for public purposes (under s436);

(b) Vested Maori land (under s 438); and

(c) Declared the terms of a trust (under s 438).

The trust order was a modified version of a standard s.438 trust, being an investigatory trust with relatively restricted powers.

One of the trust's objects was to investigate the future use and management of Hauturu East 8, and to discuss the nature of the trust with the beneficiaries (who were defined as the descendants of the owners in whom the land was now vested).

The October 1990 order had allowed RUHT one year to carry out the investigations and consultation with its beneficiaries, but this had not occurred. In the first instance, as the orders were not completed until July 1992, it is not clear when this year was up. Secondly, RUHT had actually met with its beneficiaries and discussed the nature of the trust in 1991, but did not formally report back to the Maori Land Court which could then have proceeded to vary the trust order as a result of the investigations carried out under the order.

On 3 December 1990, Carrie Wainwright3 for the Treasury, faxed Kit Toogood a draft letter from Doug Kidd (then Minister of State-Owned Enterprises and Associate Minister of Finance) to the Hapu of Ruapuha and Uekaha. The letter advised that Southern Pacific Hotel Corporation, the purchaser of THC Waitomo, had refused to agree to a right of first refusal being offered to the Wai 51 claimants in the event that Southern Pacific Hotel Corporation sought to dispose of the lease of the Waitomo hotel site.

The inclusion of a right of first refusal for the claimants was a condition of the Wai 51 settlement. The Crown acknowledged that this right was "a proper recognition of the mana of your hapu as tangata whenua," and regretted that it could not now honour this aspect of the settlement. It undertook to "provide your hapu with a benefit of equal value to the right of first refusal, and equally befitting your mana as tangata whenua." Such benefit had yet to be decided upon but was then "receiving urgent attention."

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[3] Formerly Judge Wainwright of the Maori Land Court. She retains her capacity as presiding officer in the Whanganui Inquiry before the Waitangi Tribunal and continues also as a judge of the District Court.

On 5 December 1990, Minister for State-Owned Enterprises, the Hon. Doug Kidd, wrote to the Hapu of Ruapuha and Uekaha in regard to the lease of the Waitomo hotel site. The letter was broadly similar to the draft letter of 3 December 1990, except that it included a proposal to compensate the hapu for the loss of the right of first refusal in the lease. In the first instance, the Crown was to ask Southern Pacific Hotel Corporation "to reconsider its position." If it continued to decline to have the right of first refusal included in the lease, the Crown "undertakes to offer your hapu the freehold of the Waitomo hotel site." Doug Kidd considered this "a very fair offer" and "consistent with the Crown's desire always to recognise appropriately the mana of the tangata whenua of Waitomo.

On 12 December 1990, the Chairman (Haumia Green) and three Trustees of the RUHT (Wally Taane, Joseph Davis, and Walter Anderson) signed a resolution agreeing to the loss to the Wai 51 claimants of the right of first refusal to acquire the lease of the Waitomo hotel site, and indicating their "willingness to accept any offer by the Crown for the transfer of the freehold of the Waitomo Hotel site."

Post-Settlement Issues

After the 1990 orders were issued in July 1992, the only significant variation to the trust was one made in 1998 to provide for the distribution of funds to whanau trusts approved by a general meeting of owners.

From the inception of Wai 51, if not earlier, a critical issue for Ruapuha-Uekaha Hapu has been the hapu focus of the Wai 51 claim and the settlement. It was not intended that Hauturu East 8 be returned to Maori ownership as individually-owned land held in defined and alienable shares. RUHT and the whanau trusts linked to Hauturu East 8 seem to have functioned effectively despite RUHT not having gone back to the Maori Land Court to vary the 1990 trust order, as the Court had ordered.

The situation changed in 1999 when Judge Carter made succession orders for the estate of Purangi Tanetinorau, one of the original 22 owners in the land now known as Hauturu East 8 (he having died in 1972). Two of his grandchildren, Lani Dawn Tane-Stockler and Norman Tane

On 10 May 2002, the Maori Land Court declined to make succession orders for the interests of Purangi Tanetinorau in Hauturu East 8. These succession orders had been applied for by Lani Dawn Tane-Stockler and Norman Tane as beneficiaries under the will of Purangi Tanetinorau. The Maori Land Court declined the applications on the grounds that although the land was vested in the original owners, "it was never intended that they be regarded as absolute owners and

subject to rights of succession."

The Maori Land Court observed that the RUHT was not like a normal s.438 or ahu whenua trust (under Te Ture Whenua Act 1993), where interests are capable of transfer and succession. Rather, the trust was established "to meet the terms of the agreed settlement" so the original owners were recognised on the title, before legal title was vested in the trustees. The Maori Land Court considered that at this point, "the descendants of the original owners as a class became the beneficial owners." This process "supplanted" the title of the original owners who then held no title or interest in the land. As they held no interest, there was no interest for the applicants to which the applicants could succeed.

Lani Tane-Stockler and Norman Tane appealed against the decision of the Maori Land Court on 5 July 2002 on the grounds that:

(a) The decision was wrong in fact and law;

(b) The Court had wrongly determined that Purangi Tanetinorau had no interest in or rights to the land and that it could not be considered as part of his estate or be subject to succession;

(c) The Court wrongly held that the owners listed on the title held no interest in the land on revesting and could not be succeeded to; and

(d) The Court failed to consider their interests as successors to Purangi Tanetinorau under the Public Works Act 1981.

Their appeal was heard by the Maori Appellate Court (comprising Deputy Chief Judge Isaac and Judges Wickliffe and Milroy) at Hamilton on 12 February 2003, whereupon the Appellate Court allowed the appeal. The Appellate Court subsequently issued its judgment on 30 May 2003.

The Appellate Court identified the main issue in the appeal as "whether or not there can be succession to the Maori land known as Hauturu East 8 Block." The background to the issue was discussed to the extent that the Appellate Court acknowledged how the Crown acquired the former Hauturu East 1A3 and 3B1 blocks, and that the lands were vested in the RUHT as Hauturu East 8 on 1 October 1990 as a result of the settlement of a claim lodged by the descendants of the original owners of the land. The vesting was ordered under the 1953 Maori Affairs Act 1953 (s.438(2)).

The Appellate Court observed that the 1990 trust order provided for a general meeting of owners

within one year of the date of the trust order. This meeting was to consider the future use of the land, and the administration and constitution of the trust. The trustees could then apply to the Maori Land Court for any variation to the trust order arising from the decisions of the meeting. No such application had been received, meaning that the order of 1 October 1990 remained in force.

The Appellate Court continued: "It is clear that the lower Court was influenced in its decision by the context in which the settlement was made." It noted that where lands returned as part of a broad Treaty settlement "were vested in tupuna, and if there were no specific indication that they were to take as full owners, it is reasonable to assume that the land is vested in trust for the hapu or iwi as a whole."

The Appellate Court considered that the Wai 51 settlement involved a "particular grievance which personally affected the original owners of the land." It referred to Tom Woods' memorandum of 23 September 1990 to the Maori Land Court, which emphasised that the "nominated owners in whose names a vesting order is made hold the land for the benefit of those two hapu [Ruapuha and Uekaha]."

The Appellate Court compared this with the Terms of Settlement which stated only that ownership of the Caves land (Hauturu East 8) was to be vested in "the claimants in the full sense." It further noted that the application to the Maori Land Court made by the Minister of Lands states only that the land "is to be returned to the ownership of the claimants" with reference to the Terms of Settlement. The result was that the land was vested in 22 owners, "being the owners of the land at the time the land was taken."

The Appellate Court then cited the Maori Land Court's rejection of Josephine Anderson's 1992 application to amend the 1990 vesting order so as to show only four of the non-selling owners of 1896-1899. The Maori Land Court responded that it had made the orders asked for in October 1990, "in accordance with the applications and submissions made by the Crown." Tom Woods has appeared for the claimants and had supported the applications and the making of the orders.

The Appellate Court found the Maori Land Court's upholding of the 1990 order to be pertinent to the question of succession. The beneficiaries of the trust were expressed to be "the descendants of the owners in whom the land was vested," rather than the hapu of Ruapuha and Uekaha. Nor did the applications and submissions of 1990 "ask for a limitation on succession" although the Appellate Court noted, "in any case, it is debateable whether the Court could have made such a limitation."

The Appellate Court observed that, had the 1990 application instead come before the Maori Land Court under Te Ture Whenua Act 1993, the trust "would have been made under s 216/93 to create a whenua topu trust." Such a trust would have been explicitly "in the interests of the iwi or hapu." The intentions of the claimants, as expressed in Tom Woods' memorandum of 23 September 1990, "might well have been more appropriately carried out through the terms of such a trust." Instead, the trust order was made under the legislation "available at the time, that is, pursuant to s 438/53. The legal consequences are therefore quite clear."

By "legal consequences" the Appellate Court meant that, pursuant to Te Ture Whenua Maori Act 1993 (s 354), all s.438 trusts "continue as ahu whenua trusts pursuant to section 215/93." Hauturu East 8 "is therefore subject to an ahu whenua trust." Moreover, an ahu whenua trust:

> does not affect a person's entitlement to succeed. Accordingly, we are of the clear view that succession can take place in respect to Hauturu East 8 and as a consequence the appeal on this point must be granted.

The Appellate Court went on to observe that it was apparent that the beneficiaries of the trust "are already receiving entitlements related to the value of the share their tupuna would have had in the land, although there are disagreements as to the amount and the method by which that value is to be established." Given this situation:

> allowing succession to the original owners in whom the land was vested will not invalidate the settlement as carried through by the orders of the Court in 1990. However, it will allow the ultimate beneficiaries under the trust to be formally recognised on the title.

After the Appellate Court allowed successions in Hauturu East 8, numerous successions have been applied for and granted since 2002. As a result, the current ownership of Hauturu East 8 has increased from the 22 tupuna named in the title order of 1 October 1990 to 218 shareholders. There are a further 57 owners listed under the names of shareholders who hold only a life interest, or a life interest until remarriage.

Of the 22 tupuna in whom title was vested in 1990, the interests of six have yet to be succeeded to:

(a) **Edward Davis – 1**.9844 shares;

(b) Joseph Davis – 1.9844 shares;

(c) Kingi Taniora Tanetinorau – 0.9986 shares;

(d) Mereana Tanetinorau – 0.9986 shares;

(e) Te Kiripango Tanetinorau – 0.9986 shares;4 and

(f) Whata Karaka – 7.93**74 shares.**

In addition, the shares of Te Aue Tanetinorau (10.3533 shares in 1990) and others appear to have been vested in the Te Aue Tanetinorau Whanau Trust (holding 10.9265 shares today).5

On 20 January 2006, Norman Tane field applications under ss.351, 215, 17 and 242 of Te Ture Whenua Maori Act 1993 seeking orders "that living owners/shareholders are properly recognised by the [trust], and that their interests in HE8 block be distributed directly to living owners/shareholders."

On 4 October 2006, the RUHT filed an application for review of the trust pursuant to s 231 of the Act.

The two applications were heard together with Mr Catran representing Norman Tane at the hearing on 16 October 2007. The focus of the hearing was on:

(a) The nature of ownership and beneficiary interests in Hauturu East 8;

(b) The past performance of the RUHT trustees; and

(c) Proposals from the RUHT and Norman Tane for new trust orders.

In her decision dated 29 September 2009 at 134 Waikato MB 3, Judge Milroy concluded that:

(a) At law Tanetinorau originally held the land with all the rights and powers of an owner;

(b) The 1990 settlement was between the Crown and the hapu of Ruapuha and Uekaha;

(c) The vesting orders were in favour of the original 22 owners;

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[4] The 2007 ownership list also shows Kingi Taniora Tanetinorau and Te Kiripango Tanetinorau as each having a separate shareholding of 5.256 shares, and Mereana Tanetinorau as having a separate shareholding of 5.2559 shares. These separate shareholdings may be the result of succession to the shares of Tanetinorau Opataia (in whom 17.8594 shares were vested in 1990). It is not yet been ascertained to whom the remaining 2.0915 shares were awarded.

[5] Hauturu East 8 list of owners, Maori Land Court, September 2007.

(d) As the trust order provided for the beneficiaries to be the descendants of those owners, the Court must ensure that the descendants remained the beneficiaries of the trust unless it is clear that they have consented to a change to the beneficiaries; and

(e) The descendants of the original 22 owners were entitled to succeed to interests in accordance with the Maori Appellate Court's decision in 2003.

In terms of the RUHT's application to review the trust order, Judge Milroy found that "a significant change to the beneficiaries would constitute a fundamental change to the nature of the trust." The Court was not satisfied that there was sufficient support for the proposal put forward by either party and identified various difficulties with both draft trust orders.

The Court highlighted that the RUHT paying "dividends to four whanau trusts who do not hold interests in HE8 but represent descendants of some of the original 22 owners was problematic." Judge Milroy directed that the definition of beneficiaries within the trust order must remain as the descendants of the original 22 owners.

She further directed that the RUHT and Norman Tane amend their respective draft trust orders and that a further meeting be held to consider the proposals and that only those listed in the Court's list of owners would be entitled to vote.

The application to enforce the obligations of the trust was dealt with by a direction that, if the unsecured loan to the Tanetinorau Opataia Whanau Trust was addressed by the trustees satisfactorily, the application would be dismissed.

There were no final orders made by the Court and both parties appealed the decision as preliminary determinations. The Maori Appellate Court released its on 2 November 2010 at 2010 Maori Appellate Court MB 512-556.

The decision commences with the Appellate Court traversing the background to the Wai 51 settlement, the various negotiations with the Crown and the re-vesting orders made by the Maori Land Court.

The Appellate Court also discusses previous applications filed with the Maori Land Court and the decision of Judge Milroy at first instance.

The Appellate Court identified three issues:

(a) What did the 1990 settlement intend in relation to the re-vesting of Hauturu East 8, or more specifically, who was to benefit from the land and did the settlement contemplate successions;

(b) What was the effect of the 1990 orders in relation to HE8; and

(c) What are the consequential issues arising in relation to the proposed variations to the trust order?

The first issue concerned whether, following the Wai 51 settlement, HE8 was re-vested in the Ruapuha and Uekaha hapu or the successors of the original 22 owners.

After discussing the settlement negotiations and the intentions of the parties, the Appellate Court found that at no stage was the Wai 51 settlement in relation to Hauturu East 8 expressed to be for the sole benefit of those who could succeed to the original 22 owners. The Wai 51 settlement was with the hapu of Ruapuha and Uekaha and Hauturu East 8 was returned to the original 22 owners and their descendants, in the broadest sense of that word.

In terms of successions, the Appellate Court found that the Wai 51 settlement did not expressly address this issue.

The question of the effect of the 1990 orders in relation to Hauturu East 8 was seen by the Appellate Court as the central issue in the appeal. This issue concerned vesting and trust orders made under the Maori Affairs Act 1953 and the subsequent effect of Te Ture Whenua Maori Act 1993.

The issue was whether the original 22 owners of Hauturu East 8 held the land on trust and therefore all rights of succession were excluded.

As a result of the particular provision under which the 1990 orders were made, s.426 of the 1953 Act, the Appellate Court found that there was no express trust imposed upon the original 22 owners and that there was no restriction on the rights of succession. The trust was deemed to be an ahu whenua trust for the purposes of the 1993 Act.

However, whilst the Appellate Court found that the rights of succession were preserved, it also held that the ownership rights obtained through succession are superseded by the beneficiaries of the RUHT, as they are defined in the trust order. The class of beneficiaries under the trust order was not dependant on ownership but on descent.

Ownership rights were therefore found to be merely a reversionary interest, meaning that Hauturu East 8 would be returned absolutely to those persons holding such rights only in the event that the RUHT was ever terminated. The reference to "owners" in the trust order was found to be a mistake.

As a side point, the Appellate Court also found that successions to the original 22 owners' interests must be on the basis of intestacy.

There were a number of consequential issues arising in relation to the proposed variations to the trust order.

The Maori Land Court could not vary a trust order unless it was satisfied that the beneficiaries of the trust had sufficient notice of the application and sufficient opportunity to discuss and consider it. There also needed to be a sufficient degree of support for the proposed variations amongst the beneficiaries. It follows then that the beneficiaries must be identifiable.

The Appellate Court found that those persons coming within the definition of the descendants of the original 22 owners, as defined in the trust order, were the class of persons that needed to be consulted for the purposes of variations to the trust order.

This seemingly straightforward finding was complicated when the Appellate Court also found that the underlying owners had no such right to be consulted. Whilst the underlying owners were probably also all descendants of the original 22 owners, under the 1993 Act it was possible that interests in Hauturu East 8 may be succeeded to by persons who were not a descendant of the original 22 owners.

The Appellate Court noted that the definition of beneficiaries in the trust order was therefore critical to maintaining the intentions of the settlement in the future.

In order to facilitate an effective meeting of beneficiaries to consider variations to the trust order, the Court suggested that this be done in two stages:

(a) Require the beneficiaries to pass resolutions in relation to key changes e.g. should the definition of beneficiaries change? Should the trustees be permanent or should they rotate?

(b) Once the position of the beneficiaries was determined, the Court would direct a draft trust order to be prepared by the trust in accordance with views of the beneficiaries.

In accordance with its earlier finding, the Court also found that any voting must be based on the list of beneficiaries maintained by the trust. However, it voiced some concerns as to the efficacy of the roll of beneficiaries. The Court suggested that the roll be reviewed and submitted to the Court for scrutiny.

The Appellate Court also commented in terms of distributions. Whilst the Appellate Court found that whanau trusts are entitled to distributions, it also commented that the present situation was untidy. This was an issue to be addressed when conducting the review of the trust. The Appellate Court posed some relevant questions in this regard at paragraph 128 of the decision.

When carefully considering the potential impact on any unborn beneficiaries, in relation to the variation of the definition of beneficiaries, the Appellate Court found that a variation to the definition of beneficiaries could only occur if three criteria were satisfied:

(a) The change could not offend the purpose of the Wai 51 settlement which was to benefit the hapu of Ruapuha and Uekaha;

(b) The Court would need to be satisfied that there was a good reason for the change; and

(c) There would need to be significant support from the beneficiaries.

When giving its decision and concluding remarks, the Appellate Court directed that:

(a) The trust was not to distribute revenue without the express approval of the Court pending the outcome of the applications; and

(b) The applications are to be referred back to Judge Milroy to conduct a rehearing to consider directions in relation to the proposed meeting of beneficiaries and the future conduct of the applications.