KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**THE TAIHAPE: RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY**

CROWN CLOSING SUBMISSIONS IN RELATION TO ISSUE 9: GIFTING OF LAND FOR SOLDIER SETTLEMENT

7 May 2021

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INTRODUCTION

1. In 1917-18, members of Ngāti Tamakōpiri and Ngāti Whitikaupeka gifted land within the Ōwhāoko block in the northern area of the inquiry district. It was intended that the land be used for resettlement of World War I (**WWI**) Māori soldiers on their return to New Zealand. Ngāti Tūwharetoa leadership gave impetus to the initial decision to make land available for returned Māori soldiers and also gave lands. The final gifts combined included five blocks totalling more than 35,000 acres and together this land was known as "the gift blocks". The blocks were Ōwhāoko A, A1B, B, D1 and D7B. The gift blocks were not suitable for the intended purpose, and the extent to which their use benefitted returned Māori soldiers was thus limited. They were eventually returned in the 1970s after an intensive period of intra-Crown and Crown-Māori consultation over the future use of the land.

BACKGROUND AND MAPPING

2. The Crown's Statement of Position and Concessions (**CSPC**) summarised the core narrative of the gifting.[1] It noted contemporary evidence suggesting that the parties discussed leasing the land and establishing a fund to benefit soldiers generally, rather than settling a small number of Māori returned soldiers on the land. It further noted the Crown's efforts to have the land utilised by the enactment of legislation in 1930 which enabled leasing. It stated that the Crown demonstrated good faith throughout, and expended funds annually on pest control. However, the nature of the land made it difficult to develop.

3. The CSPC stated that "while the land was returned nearly 60 years after it was gifted, material prejudice is difficult to identify".[2] However, it also recognised that closer assessment was required of "any income generation and distribution from the lands and the decision making undertaken between 1930 and 1970".[3] It further indicated that the circumstances of the return of the lands, "including the relative recognition of Ngāti Tama and Ngāti

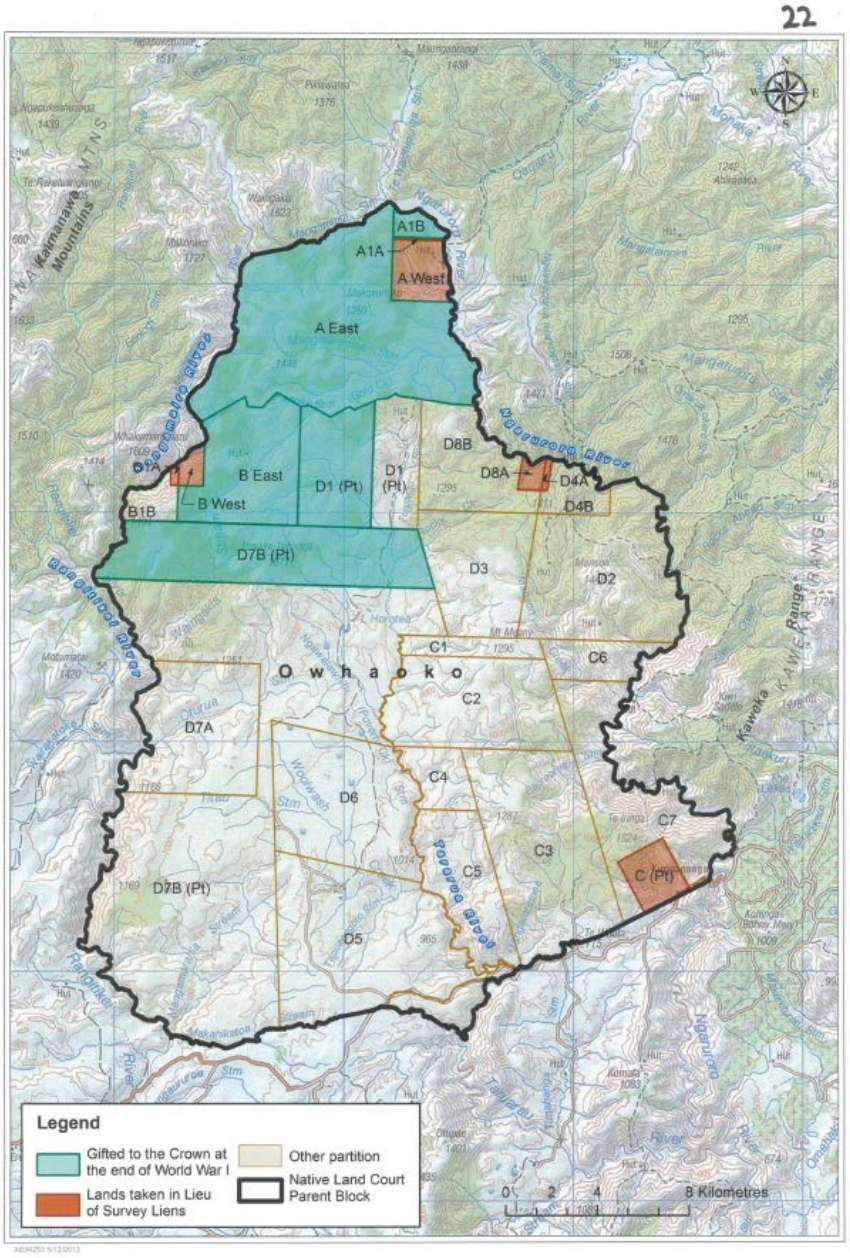
1 Wai 2180, #3.3.1, at [174]–[180].

2 Wai 2180, #3.3.1, at [181].

3 Wai 2180, #3.3.1, at [179].

Whitikaupeka and Tūwharetoa", would be the subject of future submissions after testing of the evidence.[4]

4. For clear mapping of the Ōwhāoko gift blocks, see the D Armstrong report, document bank Wai 2180, #A49(a), at 22 (extracted here for ease of reference):



4 Wai 2180, #3.3.1, at [181].

CROWN ACKNOWLEDGEMENTS

5. For the reasons set out in the "Analysis and Conclusions" section below, the Crown does not consider it breached te Tiriti o Waitangi/the Treaty of Waitangi in relation to the gifting of lands by Ngāti Tamakōpiri and Ngāti Whitikaupeka. The Crown's view of these matters is summarised, and acknowledgements made, as follows:

   5.1 In 1917, Ngāti Tamakōpiri and Ngāti Whitikaupeka (along with Ngāti Tūwharetoa) gifted lands to the nation as a patriotic gesture intended for the resettlement and benefit of Māori soldiers who had served during WWI. The gift was accepted with due appreciation by the Crown as a significant contribution to the war effort.

   5.2 Whilst the primary intention of the gift was for soldier resettlement, the kaituku (donors) also contemplated the land might be used for other purposes.

   5.3 The lands were not suitable for small holdings and had previously been offered for sale to the Crown.

   5.4 The Crown, having concluded the land was not suitable for the settlement of returned Māori soldiers, promoted legislation (in 1930) that sought to ensure the lands could still provide some benefit for returned Māori soldiers. The legislation changed the status of the land to Crown land; broadened the purposes for which the land could be utilised; and (for the avoidance of doubt) discharged any trusts that might have been formed through the gifting.

   5.5 In 1939, the Crown set aside 6,833 acres in two Ōwhāoko A subdivisions as Permanent State Forest for soil and water conservation purposes. This land (which had been gifted by Ngāti Tūwharetoa) generated no income towards the soldiers' fund. The relatively little income that was generated from the other lands went either to the former owners or to the soldiers' fund.

   5.6 On at least three occasions, representatives of some of the kaituku proposed that the land be returned to them, given that it was not

being utilised for the purposes intended at the gifting (being for the benefit of returned Māori soldiers), but the Crown continued to explore alternative uses for the land.

5.7 The government decided to return all the gifted land to the kaituku in 1973, including the land set aside for soil and water conservation purposes.

5.8 From the 1930s until the gifted land's eventual return in the 1970s, the Crown prioritised the uses it considered best for the land and carried out limited consultation with the kaituku whilst doing so.

5.9 The delay in returning the land during that time meant the kaituku were disconnected from their lands for an extended period.

ISSUES

Issue 1: What understandings and expectations did Taihape Māori have when they agreed to gift their land to the Crown?

6. The contemporary record indicates the gift was intended for Māori soldier resettlement and to demonstrate patriotic support for the war effort.[5]

7. On 3 October 1916, representatives of Tūwharetoa, including Te Heuheu Tukino and Kingi Topia, determined to set aside approximately 25,000 acres of Ōwhāoko land for settlement by returned Māori soldiers, "irrespective of the tribe or tribes to which they may belong". In conveying this decision to the Native Minister, Maui Pōmare MP stated that the land was to be an "absolute gift" for Māori soldier resettlement.[6] The Native Minister immediately acknowledged this "splendid action" in making such an unconditional gift.[7] The Tūwharetoa gift was later acknowledged by King George V.[8]

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5 For the patriotic sentiment or expressions of loyalty to "the Empire" in the crisis of war, see, for example, Maui Pōmare, Tokaanu, to Herries, 4 Oct 1916, MA-MLP 1/1916/97, ANZ, in Northern Taihape Blocks Document Bank, Wai 2180, #A06(b), at 655–656; see also Wai 2180, #A06, at 116.

6 Maui Pōmare, Tokaanu, to Herries, 3 Oct 1916, MA-MLP 1/1916/97, ANZ in Northern Taihape Blocks Document Bank, Wai 2180, #A06(b), at 659; see, also, Wai 2180, #A06, at 116; Wai 2180, #A49, at 313.

7 Herries to Pōmare, Tokaanu, 3 Oct 1916, MA-MLP 1/1916/97, ANZ in Northern Taihape Blocks Document Bank, Wai 2180, #A06(b), at 658.

8 Wai 2180, #A06, at 117.

8. On 7 October 1916, Ngāti Tamakōpiri and Ngāti Whitikaupeka offered, according to a press report, a further 20,000 acres "to the Government" for settling returned Māori soldiers, alongside the Tūwharetoa gift.[9]

9. In November 1916, a deputation that included Ngāti Tūwharetoa, Ngāti Tamakōpiri and Ngāti Whitikaupeka met in Wellington to formalise the combined gift[10] to the Crown.[11] On this occasion, Te Heuheu Tukino said that the combined gift was a "free gift" which they made "unreservedly and without any conditions". Te Hiraka Pine and Ngahuia (of Ngāti Tamakōpiri and Ngāti Whitikaupeka), speaking for "their respective families", said they would make up the total gift of 30,000 acres from their land in Ōwhāoko D7B. The Native Minister accepted the combined gift on behalf of the Government. The Minister's comments suggested that he anticipated a division of the gifted blocks among returned soldiers.[12]

10. Section 4 of the Native Land Amendment and Native Claims Adjustment Act 1917 was enacted to allow a resolution of assembled owners to be passed to dispose of the land by gift to the Crown for the purpose of settling discharged Māori soldiers. It states:

> (1.) The assembled owners of any Native land may pass, and shall be deemed as from the coming into operation of the Native Land Amendment and Native Land Claims Adjustment Act, 1916, to have had power to pass, in the manner prescribed by Part XVIII of the Native Land Act, 1909, **a resolution that such land, or any part thereof, be disposed of to the Crown by way of gift for the purpose of settling thereon discharged Maori soldiers,** and thereafter the provisions of section three hundred and sixty-eight of the Native Land Act, 1909, shall apply in the same manner as if the land were being purchased and proclaimed under Part XIX of the Native Land Act, 1909.
>
> (2.) Upon the land the subject of any such resolution being duly proclaimed Crown land as aforesaid, the Governor-General shall, by Proclamation under section three or section four of the Discharged Soldiers Settlement Act, 1915, set apart that land for the purpose of settling thereon discharged Maori soldiers.

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9 *Evening Post*, 9 Oct 1916 (https://paperspast.natlib.govt.nz/newspapers/EP19161009.2.7).

10 The term "the gift" or "the combined gift" is used throughout these submissions to refer jointly and collectively to the gifts made by all of the tribal groupings. Where it is intended to distinguish between the lands given by the different groups, or the different groups, that is stated explicitly.

11 Wai 2180, #A49, at 314–315.

12 Notes of meeting, 10 Nov 1916, MA-MLP 1/1916/97, ANZ, in Northern Taihape Blocks Document Bank, Wai 2180, #A06(b), at 645–647; Wai 2180, #A06(b), at 145; a file note records that the blocks named for gifting at the meeting in fact totalled 40,000 acres.

11. Under s 368 of the Native Land Act 1909, vested land:

> (4) shall become Crown land subject to the Land Act, 1908, **free from all right, title, estate, or interests of the said owners**, or of their successors in title, or of any trustee for them, […] **but subject nevertheless to all rights or interests, whether legal or equitabl**e, vested at the date of the Proclamation in any person other than those owners, successors, or trustees.

12. Upon such resolution, the land would be set apart under the Discharged Soldiers Settlement Act 1915. Section 3 of that Act provided for proclamations to be revoked where the land was not required or was "not suitable for the purpose for which it was set apart."

13. In 1917 and 1918, meetings of assembled owners resolved to make the relevant gifts of the Ōwhāoko subdivisions to the Crown.[13] The owners expressed a range of views and objectives in their intentions for the gift lands – some anticipated returned Māori soldiers receiving the land; some envisaged broader forms of benefit (eg distribution of rents, land and infrastructure development, or sale of the lands and distribution of profits).

13.1 In May 1917, during probably the largest of these hui of "the Ngāti Tūwharetoa and the Ngāti Tama peoples" at Tokaanu, Kingi Topia stated that rents paid by returnee farmers would be divided among the wounded contingent of Māori soldiers.

13.2 Minister Pōmare, attending for the Government, affirmed Topia's statements; he explained that rents or profits from sales would be held in trust for the benefit of "all Māori soldiers". The intention was to ballot the land to Māori soldiers in preference to Pākehā soldiers.[14]

13.3 There is evidence that the kaituku understood that the Crown would develop infrastructure on the blocks.[15] At the May 1917 meeting of owners, Minister Pōmare referred to a plan to construct roads and

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13 Wai 2180, #A06, at 121.

14 *Wanganui Chronicle*, 2 June 1917, at 5 (https://paperspast.natlib.govt.nz/newspapers/WC19170602.2.40); see, also, Wai 2180, #A06, at 122; Wai 2180, #A46, at 342.

15 *Wanganui Chronicle*, 2 June 1917, at 5 (https://paperspast.natlib.govt.nz/newspapers/WC19170602.2.40).

bridges, and to provide fencing material, agricultural implements, stock and houses for the gifted lands.[16]

14. As the CSPC noted, these comments are salient as they indicate that the gift contemplated benefits accruing to Māori veterans not only by direct settlement of a small number of farmers (who were preferably Māori returned soldiers) but through rental income, land development, and even sale of the gift blocks. The 1917-18 discussions of combined owners were consistent with the broad possibilities for the land that the rangatira had expressed in 1916. The comments are consistent with an "absolute gift" being intended insofar as the kaituku did not anticipate ongoing control or benefit accruing to themselves, nor the return of the land to them. Notwithstanding that, the Crown's later decisions continued to consider the kaituku as having some standing in relation to the lands (particularly as it became increasingly apparent over time that the land could not deliver the benefits anticipated for Māori military veterans). The resolutions made by the combined owners in 1917 and 1918 to dispose of the lands, and the terms of the 1917 legislation, were expressed broadly.

15. The legal effect of the resolution of the combined owners was to vest the land in the Crown absolutely (which was consistent with the tenor of the 1916-18 discussions). Notwithstanding that, the Crown continued to consider the kaituku to have standing, at least in Tiriti/Treaty terms.

16. Of the gift blocks, around 12,500 acres were gifted in Ōwhāoko D1 and D7B (Ōwhāoko D had been granted in 1888 to Ngāti Whiti and Ngāti Whititama), while 5,851 acres were gifted in Ōwhāoko B (granted in 1888 to Ngāti Tama, or Tamatuturu).[17] Together, these areas amounted to 18,359 acres or 51.6% of the gifted lands. The balance, in blocks A East and A1B, was awarded in 1888 to Ngāti Kurapoto and Ngāti Maruwahine[18] (Tūwharetoa).[19]

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16 Wai 2180, #A49, at 319.

17 Wai 2180, #A06, at 64; making the same calculation but re-identifying the hapū (or conflating the names or groups), David Armstrong says that Ngāti Tama and Ngāti Whiti contributed approximately 52% of the land by area: see Wai 2180, #A49, at 321.

18 Wai 2180, #A06, at 64.

19 Wai 2180, #A49, at 309.

17. The Ōwhāoko B gift block was proclaimed Crown land in November 1917.[20] The Ōwhāoko D1 gift block was proclaimed Crown land in January 1918.[21] The Ōwhāoko D7B gift block was proclaimed Crown land in March 1918.[22] It does not appear that the blocks were then set aside under the Discharged Soldiers Settlement Act 1915 as an assessment soon after the disposal and vesting took place determined that the land was unsuitable for settlement.[23]

Motivations for the gifting?

18. The SOI asks about the intentions of Taihape Māori in gifting the land, or rather their understandings/expectations of what would happen with the gifted lands. A variety of motivations are evident in the range of statements recorded above about the uses to which the land could be put. Various interpretations of the kaituku motivations in making this gift have also been proffered in the evidence. This is addressed above to some extent.

19. The owners had made a number of unsuccessful efforts to lease or sell the lands between 1908 and 1918. Hiraka te Rango and his people (Ngāti Tamakōpiri) were said to "have vainly been endeavouring to get someone to take the land from [sic] on lease".[24] Various offers and negotiations were conducted in 1908, 1910, 1913, 1914, 1915 and 1917 over different sections and by different owners (some as individuals, some more representative).[25] None of these negotiations resulted in the Crown purchasing the land. The negotiations fell over primarily as the owners and the Crown had very different views as to the value of the land. There is reference to the Ōwhāoko land being of very limited economic utility, the best of the land being either under lease or subject to private purchase, with the only viable use of the remaining land being extensive grazing in conjunction with the better quality neighbouring land (which was unavailable as it was already leased). The costs

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20 *NZ Gazette*, no. 170, 1917, p 4270; in the same Gazette notice, the gift blocks Ōwhāoko A East and Ōwhāoko A1B were also proclaimed Crown land; see, also, Proclamation 1109, Wellington District Land Register, 27 Nov 1917, vol 81, fol 80, 82, 84.

21 *NZ Gazette*, no. 3, 1918, at 10 (Ōwhāoko D1); see, also, Proclamation 1112, Wellington District Land Register, 17 Jan. 1918, vol 103.

22 *NZ Gazette*, no. 37, 1918, at 804 (Ōwhāoko D7B); see, also, Proclamation 1123, Wellington District Land Register, 16 April 1918, vol 103.

23 Report from H Lundius, Crown Land Ranger, to Commissioner of Crown Lands, 15 May 1918 (see Appendix **attached**, at 1), encl. in Commissioner of Crown Lands to Under Secretary for Lands, 1 July 1918, in AAMX 6095/W3430, Box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 2). See, also, Northern Taihape Blocks Document Bank, Wai 2180, #A06(a), at 475–476. See below for further on this appraisal.

24 Wai 2180, #A06, at 89.

25 Wai 2180, #A06, at 91–96.

associated with the land were likely to be more than the income it could generate.[26] Mr Walzl raised the possibility that these factors were part of the rationale for the gifting.

20. In the context of those earlier attempts to sell the land to the Crown, a 1910 report by the Aotea Māori Land Board President had stated that the owners "…will ere long be asking that the land be taken from them", suggesting that the costs associated with rates and rabbit control were significant.[27] Mr Walzl considered that the donors were aware that if they did nothing they were at risk of losing the land, or at least if they did not lose it, they would attract fines arising from failing to undertake pest management.[28]

21. The Crown considers that the above matters form relevant context, but were not the primary rationale for the gifting.

22. Dr Fisher, Mr Stirling, and Mr Armstrong have suggested that many Māori were under pressure to actively demonstrate their commitment to the Crown and to distance themselves from Waikato and the Kīngitanga, and sections of Tūhoe, who declined to support the war effort.[29] The Crown's view is there is little evidence to support this suggestion.

23. Other evidence tends to suggest that the gifts were motivated by patriotism and/or by a perceived need to provide for the Māori contingent of returned soldiers. The gifting followed soon after New Zealand's involvement in the Battle of the Somme, and Gallipoli, in which men from the region had been killed. In questioning Mr Walzl, Dr Soutar noted that Tureiti Te Heuheu had encouraged men of the region to go to war and that the passion of patriotism was strongly felt and was most likely to be the primary motivation behind the gifting. Dr Soutar also suggested it was possible Te Heuheu promoted the gift, in part, out of guilt given the recent deaths at Gallipoli and the Battle of the Somme. Mr Walzl accepted these views' possibility and also agreed with Dr Soutar that the intention behind the gift was sincere and well meant.[30]

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26 Wai 2180, #A06, at 125.

27 Wai 2180, #A46, at 274.

28 Wai 2180, #4.1.15, at 195.

29 Wai 2180, #A06, at 123; Wai 2180, #A49, at 322.

30 Wai 2180, #4.1.15, at 194–195.

24. The Crown submits that the motivations behind the gifting might have been varied, however the primary motivation appears to have been that the gift reflected the strong patriotism felt at the time. The Crown has no doubt, and strongly concurs with Mr Walzl and Dr Soutar, that the gift was sincere and well meant. That spirit is evident in the spirit of the dialogue between Minister Pōmare and the kaituku, and in it being imbued with the mana of the rangatira to rangatira acknowledgements between Te Arikinui Te Heuheu and the King directly acknowledging the gift.

Issue 2: Was the land gifted by Taihape Māori to the Crown for soldier settlement used for their intended purpose?

25. It seems clear from the above narrative, including from the terms of s 4 of the Native Land Amendment and Native Claims Adjustment Act 1917, that the kaituku and Government had intended the actual settlement of discharged Māori soldiers as the primary purpose of the gift – notwithstanding that the possibility of a trust fund for general veteran benefit was also discussed.

26. However in July 1918, soon after the gifts had been confirmed, the Commissioner of Crown Lands reported that it would be difficult to use the land to settle returned soldiers due to its high altitude and general unsuitability for settlement or commercial agriculture of any kind (including forestry). This reflected the assessment of the lands contained in the valuations undertaken over the previous decade in the context of sale and purchase negotiations (as above).

27. It was thought that the cost of subdividing the land and providing road access would probably exceed the land's productive worth. The Commissioner recommended that two options be considered: the first, that the Crown acquire the land (from the kaituku) at valuation as a "climatic reserve" and for possible future afforestation, with the intent to lease to local runholders for "summer grazing"; the second, to sell the land to such runholders. In both cases, funds realized would be applied to purchase "more suitable country" to settle Māori soldiers.[31] It is apparent that, notwithstanding lands at law being an "absolute gift", the Commissioner's recommendations involved

31 Commissioner of Crown Lands to Under Secretary for Lands, 1 July 1918, in AAMX 6095/W3430, Box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 2). See also Northern Taihape Blocks Doc Bank, Wai 2180, #A06(a), at 475–476.

consideration of the kaituku – this indicates that he had some understanding that if the gift was not used for the purpose intended, it needed to be returned (and potentially reacquired for consideration rather than gift if it was intended to be used for a different purpose).

28. The Minister of Lands decided, however, that the land should be retained to await sufficient demand from returned Māori soldiers to warrant survey and roading costs.[32]

29. It would seem that the Crown did not do specific due diligence on the land's usability before accepting the gift, although parts of the Crown had some awareness of the land's limitations (having earlier declined offers made by the owners of the lands to purchase the lands).[33] In the context of wartime patriotism and given Māori sensibilities, it would perhaps have been difficult to refuse such a gift.

30. The land was not used for soldier resettlement, but was used for the benefit of Māori soldiers to the extent that income derived from it was vested in the Māori Soldiers' Fund (addressed below). The reasons for this, and the uses that were made of the land, are set out below.

Issue 2a: If it was not used for soldier settlement, what was it used for? Had the Crown derived any income from the use of the land, and if so, how much?

31. The enabling legislation of 1917 had stipulated the purpose of the gift as soldier resettlement (as above) and the land was to be set aside under the Discharged Soldiers Settlement Act of 1915. Since that purpose had been frustrated by the nature of the land, Crown officials eventually promoted legislation enabling the land to be owned and/or disposed of on a different basis.

32. There is limited evidence of consultation or communications with original kaituku on this change (which is addressed further below),[34] however it is arguable that the new legislative arrangement still fulfilled the wider purposes

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32 Under Secretary for Lands to Commissioner of Crown Lands, 23 July 1918, in AAMX 6095/W3430, Box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 3). See, also, Wai 2180, #A06, at 125; and Northern Taihape Blocks Document Bank, Wai 2180, #A06(a), at 475–476; note, also, Stirling's statement to Dr M Soutar that "most of" Ōwhāoko "is pretty inaccessible" without access to a helicopter: Wai 2180, #4.1.10, at 312; see, also, Wai 2180, #A49, at 323–324.

33 Wai 2180, #A06, at 91–96.

34 According to Stirling and Fisher, Wai 2180, #A06, at 125; though see reference below to correspondence with Toia Ngorangia; as noted, the Native Department led the legislative amendment process.

or intentions of the kaituku. It is also worth noting that the main department of state facilitating this change was Native Affairs, under Sir Apirana Ngata (who had been closely involved with the initial gifting and the Māori wartime efforts). Given the nature of the land and its limited commercial or productive value, it seems that the Crown (led by Native Affairs) aimed to derive at least some value from the land for the benefit of returned Māori soldiers (the results of which are addressed further below). The most immediate solution in 1930-31 appeared to officials to be leasing to a neighbouring runholder, with the profits going towards assisting returned Māori soldiers.[35]

33. Prior to the passing of amending legislation in 1930 (the Native Land Amendment and Native Land Claims Adjustment Act 1930), the Crown had been approached by Toia Ngorangia, representing a number of former owners of Ōwhāoko D7B. Mr Ngorangia had suggested the land be returned as nothing had been done in the way of soldier resettlement. At the time, officials were considering how best to utilise the land. Based on two reports, one from the Native Department and the other from the Lands Department, it was decided that the land would be disposed of, with profits realised to be used to benefit Māori soldiers. Accordingly, the solicitors for Toia Ngorangia were advised that the land (including Ōwhāoko D7B) would not be returned but that it was planned to "apply the funds for the assistance of Māori soldiers as originally intended".[36]

34. There is no direct evidence that any other former owners were consulted or advised of the change in status prior to enactment.[37] It may be assumed that Minister Ngata maintained his longstanding relationship with Te Heuheu in this period but there is no evidence of them directly discussing this matter, nor of Ngāti Tamakōpiri or Ngāti Whitikaupeka being involved.

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35 In fact, it seems it was a request from Ngamatea station to lease Crown and native land in the area, including the gift blocks, that spurred officials to consider uses of the block again: see W C Barry (District Superintendent) to Director, Live-Stock Division, Dept of Agriculture, 6 Nov 1928, in AAMX 6095/W3430, Box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 4). This chain of correspondence led to the Native Minister (A Ngata) directing an inspection of the land and report by the Native Department or the East Coast Commissioner: see R M Jones (Under-Sec Native Dept) to Under-Sec for Lands, 26 Mar 1929, in AAMX 6095/W3430, Box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 5).

36 Wai 2180, #A49, at 327.

37 Wai 2180, #A06, at 126.

35. The change in legal status of the land was effected by s 25 of the Native Land Amendment and Native Land Claims Adjustment Act 1930. This alluded to most of the land being of "poor quality" such that it could not be "profitably occupied" and that settling discharged Māori soldiers on the land had proven "impracticable". It also referred (somewhat opaquely) to some of the land being already under lease at the time of the gifting. Furthermore, although the 1917 legislation did not stipulate that the gifted land was held on trust, the 1930 legislation alluded to the possibility that a form of trust had been created. The 1930 legislation provided *inter alia* that:

35.1 the Crown would now hold the land "freed and discharged from any trust to settle thereon discharged Māori soldiers", any Proclamation under the 1915 Act setting aside the land was revoked, and the land would now be held as Crown Land (s 25(1));

35.2 all profits from leasing or disposal of the land would be paid into a fund under the control of the Native Minister for the benefit of discharged Māori soldiers, their dependants or successors (s 25(2)); and

35.3 the Native Minister, in the event of doubt over application of the fund or the frustration of its intent to benefit discharged soldiers, could seek the determination or direction of the Native Land Court (which accordingly was granted the necessary jurisdiction) (s 25(3)).

36. At the time the 1930 legislation was enacted, the Native Minister, the Hon Sir Apirana Ngata, noted in Parliament that "The Lands Department reports that [the land] is absolutely unsuitable for the purpose, and provision is made now for a realization of what assets there may be in that land, and the benefits will accrue to the Maori soldiers."[38]

37. The 1930 legislation changed the land's status to Crown land and freed and discharged the land from any trust. It enabled leasing or disposal of the land, the profits from which would be paid to a fund for the benefit of Māori soldiers. Although the Act unilaterally (and, in particular, without consultation with the kaituku) expanded the purposes for which the land

38 (1 October 1930) 23 NZPD 618.

could be used, those purposes were still within the spirit of the original gift (as addressed above).

38. The Tribunal's role is, of course, to consider whether the Crown's actions in promoting the 1930 legislation were consistent with the principles of te Tiriti/the Treaty. The Crown's position is that the land was an absolute gift made without conditions and thus obligations to continue the terms of the gifting would not be binding at law. However, in practice, the Crown in seeking to broaden the purposes for which the land could be used, continued to honour the essence of the gift by ensuring the beneficiaries were Māori soldiers (albeit generally through a fund rather than to individual returned soldiers through occupation and farming).

39. The Crown considers that, although there are arguments both for and against the proposition that, at law, the land was or was not subject to a trust, s 25(1) of the Act was simply an avoidance of doubt clause.

40. The Crown considers it may have been more appropriate in Tiriti/Treaty terms for the Crown to have consulted with the kaituku prior to enacting that legislation but that, as the purposes of the legislation were within the scope of what had been contemplated within that gifting, the failure to consult does not constitute a breach of te Tiriti/the Treaty.

Minimal income generated by the land despite 1930 Act

41. Available evidence suggests the land never generated profits of any substance.[39]

42. The leasing history of the land indicates there was income of a sort but that it was minimal and was not always paid to the Crown's account. The record here is somewhat complex.

    42.1 In the first instance, as alluded to by the 1930 Act (as above), a portion of the gift blocks seems to have been already leased to a neighbouring station at the time of the original gift(s) in 1917-18. (Initially this seems to have been a Mrs Shaw, who had leased

[39] Wai 2180, #A06, at 126.

Ōwhāoko D7B since 1906; in 1929, Ngamatea station acquired this lease, and other leases of non-gift blocks in the vicinity.)[40]

42.2 Second, following the gifting, the lessee continued to pay rent to a group of original owners rather than the Crown. There is a file reference to these owners having disagreed with the gifting decision,[41] but it seems they also remained as owners of the wider Ōwhāoko D7 block (that is, a non-gifted portion).

42.3 Third, when the Crown became aware of this situation in 1930-31, it did not pursue either lessee (Ngamatea station) or the original owners for these lease payments.

42.4 Fourth, legislation was passed in 1931 allowing this group of owners to retain these rents for the period up to 1930, and beyond this date until the expiry of the leases, despite the Crown owning a portion of the leased land since 1918.[42] (The files indicate the Crown requested lease payments from Ngamatea station from the date that the 1930 legislation changed the land's status to Crown land and enabled 'disposal' or leasing (as above), the effective date being stated as 1 November 1930.[43] However, the eventual legislation of 1931 forfeited even this prospective right to receive lease monies.)

43. What is clear is that the rents paid were only ever small, in part because of the necessity to expend money on the blocks annually to control pests.[44] The clearest statement of the amounts due to the Crown on the portion of the gift blocks leased to Ngamatea station was a figure of £101.2.10 per annum since 1918. However, as explained above, the Crown forfeited the right to

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40 Wai 2180, #A49, at 328.

41 Wai 2180, #A06, at 126–127.

42 Native Purposes Act 1931, s 71; it seems Ōwhāoko D7 was leased since prior to the 1917-18 gifting, and part of this wider block included the gift block portion of Ōwhāoko D7B.

43 Commissioner of Crown Lands to Messrs Lee, Grave and Grave, Solicitors, Oamaru, 11 April 1931, Northern Blocks Doc Bank, Wai 2180, #A6(a), at 483; note the Native Land Amendment and Native Land Claims Adjustment Act 1930 was passed on 26 October 1930; see, also, Wai 2180, #A49, at 328–329.

44 See AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ; see Commissioner of Crown Lands to Under-Secretary for Lands, 18 Feb 1931, Northern Blocks Doc Bank, Wai 2180, #A06(a), at 477–481 (see Appendix **attached**, at 6) Reference is made to a lease figure of £230; but also to the Dept spending £400 annually on pest control; on 18 Feb 1931, reference is made by Commissioner of Crown Lands to total rentals of £1686/15 being due from the land since March 1918 (spread over about 12 years, this would work out to annual rental of £140). Another piece of correspondence from Native Dept to Under-Sec of Lands, 19 March 1931 refers to the Crown's share of rents on D7 as £101.2.10 per annum due to the Crown since 1918 (see Appendix **attached**, at 7).

this rental until the expiry of the leases in 1936. This was due, partly it seems, to the legal complications of not actually being able to lease or dispose of the land until the 1930 legislation was passed, but also to the difficulties of apportioning the correct amounts to the Ōwhāoko D7B portion of the wider leased area. Furthermore, the 1931 legislation provided that any rents the Crown did happen to have received from Ngamatea station pertaining to these leases were to be paid out to "the Natives interested";[45] this may or may not have meant the group of original owners who were also lessors of the wider block. Ngamatea station does appear to have eventually paid to Aotea District Māori Land Board a sum due on the Ōwhāoko D7 leases for apportionment as between the Crown and Māori owners. It is not clear what happened to these lease monies.[46]

44. After the expiry of these Ngamatea leases on Ōwhāoko D7 (including the gift block D7B) in 1936, it is not obvious from the files that the leases were renewed or that the Crown received any monies beyond that date.[47]

Issue 2b: Were those lands returned by the Crown and how long did it take for this to occur?

45. In 1939, the Crown set aside 6,833 acres in two Ōwhāoko A subdivisions as Permanent State Forest for soil and water conservation purposes. This land generated no income towards the soldiers' fund. No payment was offered for this taking. It appears that no consultation was undertaken with the kaituku despite the use not being in line with the purpose of the original gift (in contrast to the other actions of the Crown which consistently – even if generally or ultimately unsuccessfully – did seek to ensure any benefits accruing from the land went either to the former owners or to Māori soldiers).[48]

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45 Native Purposes Act 1931, s 71(3).

46 See Lee, Grave & Grave, Solicitors [representing native owners] to Comm of Crown Lands, 30 Oct 1831, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 9). This refers to the sum of £1387.7.7 being paid to the Board as arranged, under the power granted to Board under s 103 of the Native Land Amendment Act 1913. This sum represented lease monies due on the Ngamatea leases of the Ōwhāoko D7 block up until 1 November 1931.

47 Wai 2180, #A49, at 329–330; Armstrong suggests here, citing a later Native Dept opinion, that Ngamatea continued to use the land without a formal lease after 1936, and even over-grazed it, causing erosion. A letter appearing in the Dominion, 20 July 1939, from a "part owner", complained the local farmer had stopped leasing the land due to Crown interference in the relationship: see AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ.

48 Wai 2180, #A06, at 127–128.

46. A Land Use Committee inspected the Ōwhāoko lands in 1952-53 and recommended that an area of 37,150 acres be "locked up" for the purposes of soil and water conservation. There is no record of the Crown engaging with the kaituku at this time to consider the options for the land's use. This area included 10,490 acres of the gift blocks (Ōwhāoko A East part). In 1956, the Committee obtained a report and valuations with a view to purchase of the Māori owned areas, but this did not eventuate.[49]

47. About this time, in October 1956, Paani Otene of Ngāti Tūwharetoa requested that the Minister of Māori Affairs return the gift blocks Ōwhāoko A East, A1B and B East as the land was not being used for the intended purpose. This correspondence seems to have prompted officials from Māori Affairs and the Lands Department (Lands & Survey) to investigate afresh the gift blocks' history and potential uses.[50]

48. In December 1956, the Minister of Lands adopted recommendations from his department proposing paying donors for the gift blocks, excepting D7B proposed for sale to Ngamatea, but that the Tūwharetoa Māori Trust Board (**TMTB**) should first be consulted with.[51] It was arranged for Māori Affairs to consult with the TMTB.

49. In January 1957, the Secretary of Māori Affairs wrote to the TMTB proposing that another 20,175 acres from the gift blocks be set aside for conservancy purposes, to add to the 6,833 acres set aside in 1939. Alternatively, it was also suggested that the gift blocks might be re-vested in the former owners (excepting the 6,833 acres, but including the Ōwhāoko D7B block that it was also indicated Ngamatea station wished to purchase). If the blocks were acquired by the Crown (and/or Ngamatea) rather than revested, proceeds would be paid to former owners. The letter expressed a hope that since the original gift had been "a tribal matter", the TMTB might be able to make a decision as representatives of the original donors.[52]

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49 As summarised in Director-General of Lands to the Minister of Lands, 14 Aug 1967, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 18).

50 See Memorandum: Minister of Maori Affairs to Secretary of Maori Affairs, 26 Oct 1956, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 10).

51 Lands & Survey, briefing for Minister of Lands, 3 December 1956, countersigned by Minister 13 Dec 1956, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 11).

52 Secretary of Māori Affairs to the Secretary, TWTB, 16 Jan 1957, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ; *cf.* Wai 2180, #A06, at 126–127 (see Appendix **attached**, at 15).

50. The TMTB responded, initially expressing doubt about its representative capacity in such matters. It subsequently communicated its view that it thought the Government should return the land to the original owners since it was not being used for the purpose intended.[53] The Crown took no immediate further actions or decisions on the gift blocks (and took no direct action at the time to investigate further who might represent the kaituku).

51. In the 1960s, the Crown considered options for the use of the lands. There is no evidence of consultation with the kaituku on these options during this period:

    51.1 In early 1962, the Lands Department conducted an aerial inspection to demarcate areas for conservation/catchment protection and for grazing. No ground inspection was undertaken and there was no further decision.[54]

    51.2 In 1967-68, Māori Affairs considered a development scheme on the Ōwhāoko blocks, but this stalled after initial reports showed a base farm was not available (at least immediately) from which to use the higher-altitude country.[55]

52. At various times in the 1950s-70s period, the Forest Service expressed interest in acquiring land in the Ōwhāoko catchment for conservation purposes. These efforts were renewed in 1969-70, and a cross-department Land Use Survey was carried out, with the concurrence of Māori Affairs.[56] Based on this survey, the Commissioner of Crown Lands recommended that areas of the gift blocks should be acquired "by lease, purchase or exchange" and that a feasibility study for production forestry should be carried out.[57] The Forest Service, however, discounted the idea of production forestry (with or without the involvement of the original donors) and supported acquisition of the gift

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53 Secretary of Māori Affairs to the Dir-Gen of Lands, 2 May 1958, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 17). Initially, it responded stating it did not consider that it was its duty to make a decision on the land: see Wai 2180, #A49, at 334.

54 Wai 2180, #A49, at 335–336.

55 J R Hanan, Māori Affairs, to Minister of Lands, 18 Mar 1968, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 20).

56 B J Smith (for Sec Māori and Island Affairs) to Dir-Gen of Lands, 2 May 1969, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 22).

57 V P McGlone (Comm of Crown Lands) to the Dir-Gen of Lands, 29 June 1970, encl Land Use Committee report (see Appendix **attached**, at 23); and V P McGlone (Comm of Crown Lands) to the Dir-Gen of Lands, 11 Aug 1970, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 24).

blocks for conservation purposes.[58] It appears there were some discussions between Crown departments (Māori Affairs, Lands, and the Forest Service), a Tūwharetoa committee and a Mr Tomoana of Hastings on these proposals.[59]

53. The Lands Department obtained an in-house legal opinion on whether the gift blocks could be disposed of for conservation purposes and, if so, what should happen with the funds received. The opinion suggested that the 1930 legislation imposed a form of trust in favour of Māori returned soldiers.[60] The Lands Department sought the opinion of Māori Affairs, which opposed the idea of disposal; it also considered obligations existed under the 1930 Act to the kaituku and supported return of the land.[61]

54. Various hui were held from 1972 to 1974 (Winiata marae, Waipatu and Omahu) to discuss possible representative structures for managing the Ōwhāoko blocks.[62]

55. In 1973, the new Minister of Māori Affairs (Matiu Rata) instructed his Department to arrange amending legislation to enable the return of the lands. In June 1973, it was reported that the Government had decided to return all the gifted land, including the 6,833 acres set aside in 1939 for conservation purposes.[63]

56. The Māori Purposes Act 1973 empowered the Minister of Lands to apply to the Māori Land Court, which had jurisdiction to determine the appropriate class of beneficiaries or representative body (or trust) in whom to vest the land.[64] The Forest Service opposed the return before the legislative

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58 W J Wendleken, Dir-Gen Forest Service to Dir-Gen of Lands, 20 Nov 1970, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 25). See also Northern Blocks Document Bank, Wai 2180, #A06(a), at 498.

59 Application by Minister of Lands for Vesting Order under Sec 436 Maori Affairs Act 1953 (Edmond Andrew Astwood appearing), Maori Land Court [31 Oct 1974], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 32).

60 Lands & Survey: Instruction to Office Solicitor, 9 Dec 1970 (see Appendix **attached**, at 26); opinion from R D P Heenan (see Appendix **attached**, at 27); and minute on file instructing that Māori Affairs views be sought, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ.

61 Duncan MacIntyre (Min of Lands) to Dir-Gen of Lands, 25 Feb 1971, instructing Department not to proceed with sale idea until donors' views obtained (see Appendix **attached**, at 28); Dir-Gen of Lands to Sec for Māori and Islands Affairs, 4 Mar 1971 (see Appendix **attached**, at 29); and J M McEwen, Sec of Māori and Islands Affairs to Dir-Gen of Lands, 9 Mar 1971, in AAMX 6095/W3430, box 6, 26/1/12, part 1, ANZ (see Appendix **attached**, at 30); see, also, Wai 2180, #A06, at 129.

62 Wai 2180, #A06, at 131–132.

63 Wai 2180, #A49, at 349–350; Wai 2180, #A06, at 130.

64 Maori Purposes Act (No. 2) 1973, s 23; exercising jurisdiction under the Maori Affairs Act 1953, s 436.

committee, continuing to advocate acquisition of the land for conservation purposes. Behind the scenes, there were departmental investigations of possible exchange land. These did not produce any immediate outcome and the legislation was ultimately enacted in November 1973.[65]

57. In October 1974, the Minister of Lands applied to the Māori Land Court to revest the gift blocks in the original donors. The application (or opening submissions) set out the history of the gift blocks, including the legislative changes, leasing history and the various assessments of potential uses for the block over time. The Minister informed the Court that meetings between Crown departments (Māori Affairs, Lands, and the Forest Service), a Tūwharetoa committee and a Mr Tomoana of Hastings had discussed Crown acquisition of the gift blocks but that before any negotiations with the Forest Service were entered into the land should be returned to the original donors or responsible trustees. Accordingly, the 1973 legislation was enacted. The Minister also informed the Court that the TMTB had been advised of the hearing to enable it to appear in support of a request to have the land re-vested in it. The Minister was "in sympathy" with this request, however he considered that "in the interests of the many successors to the original donors that the ownership of these lands be left to the Court to decide". The Minister therefore "respectfully ask[ed]" the Court "to determine owners or appoint Trustees to carry out the future administration of these lands".[66]

58. The Minister's application was bundled up for hearing with other applications concerning administration of the surrounding Ōwhāoko lands (in particular, Ōwhāoko D and C blocks). These applications also sought the Māori Land Court's consideration of appropriate trustees in whom to vest the lands. Under questioning from Mr T M R Tomoana, Mr Astwood (for the Minister of Lands) confirmed it was the Crown's intention to negotiate to acquire "the major part" of the gift blocks for "forestry protection" and that land exchanges might be considered. Mr Astwood also confirmed for the Court that the Crown did not seek any conditions on the revesting, neither did it wish to make submissions as to the appropriate individuals or representative

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65 See, also, Armstrong's narrative, Wai 2180, #A49, at 350–355.

66 Application by Minister of Lands for Vesting Order under Sec 436 Maori Affairs Act 1953 (Edmond Andrew Astwood appearing), Maori Land Court [31 Oct 1974], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 32). See also version of this in Northern Blocks Document Bank, Wai 2180, #A06(a), 410–415.

body in whom the land should be vested. Formal negotiations would follow once the gift blocks were revested.[67]

59. The tribal identity or affiliation of the original donors of the gift blocks was discussed by key witnesses and the Court itself. Mr Tomoana's submission to the Court in October 1974 included a reference to a hui at Winiata marae on 10 September 1972 with 30 owners of Ōwhāoko blocks present. Mr Tomoana sought the inclusion of all Ōwhāoko blocks, including the gift blocks, under one management structure. With respect to the gift blocks, he thought that the Government should pay some "monetary compensation" for its "dereliction of duties" in delaying the return of the blocks and failing to exercise the terms of the gifts.[68] Mr Tomoana stated in Court that his trustees appointed to the trusteeship of the Ōwhāoko C7 block were representative of (or could "relate" to) all the tribal interests in the gift blocks, which he said were evenly distributed across the "tribes", "Ngatihinemanu, Ngatiteupokoiri, Ngatiwhiti, Ngatitama" (sic) and a section of Tūwharetoa ("Rangiita"). He also referred to a Mr Steedman being one of these trustees.[69] It seems clear from the names of personnel, groups and hui locations (including another hui at Winiata marae in September 1973, and a hui at Omahu mentioning Ngāti Whiti and Ngāti Tama, in September 1974) that Taihape Māori interests took part in the initial discussions over trustees or representative vehicles to manage the Ōwhāoko blocks, including the gift blocks.[70]

60. The Court (Judge Durie) was apparently quite aware, including from its own records of the initial grants of title in the 1880s, that the Ōwhāoko B block was awarded to "Ngatitamatuturu" and the D blocks to "Ngatiwhiti and Ngatitama" – all of which were people of the Taihape district. (Mr Tomoana

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67 Minutes of Hearing, Tokaanu MB 53, at 328-76, in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 38).

68 T M R Tomoana (Chairman, Ōwhāoko C7 Trustees), Submissions to the Aotea Maori Land Court, Tokaanu 31 Oct 1974, in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 63).

69 Minutes of Hearing, Tokaanu MB 53, at 328-76 [pp 8-9 of typescript minutes], in AAMA W3150/619, box 22, 20/194, part 5, ANZ [note this is the spelling of the hapū/iwi as it appeared in the Court minutes] (see Appendix **attached**, at 38).

70 Minutes of Hearing, Tokaanu MB 53, at 328–376 [p 13 of typescript minutes, mentioning hui at Winiata Pa on 9 Sep 1973 to discuss trustees] (see Appendix **attached**, at 38); and advert in *Daily Telegraph* on 30 Aug 1974, advertising hui for 1 Sep 1974 at Omahu with representatives of Ngati Hinemanu, Ngati White [sic] and Ngati Tamo [sic], "Business – To discuss exchange for part State Forestry or to accept Tuwharetoa Trust Control"; in AAMA W3150/619, box 22, 20/194, part 5, ANZ.

confirmed this, but he also affirmed his earlier submission that all these tribes were "one people through marriage".)[71] The Court indicated that if there was one management entity for the Ōwhāoko blocks then its intention would be that "all kinsmen are properly represented", while it would also have regard to the capability or ability of the trustees.[72] The discussion in Court (and Judge Durie's own statements) suggests that the focus of the parties was as much on the best utilisation of the Ōwhāoko blocks as a whole as the return of the gift blocks. At one point, Judge Durie indicated that he thought a single management entity made the most sense, but he was prepared to consider the whole picture afresh (in part because the various earlier s 438 trust orders were contradictory or appointed different groups for the same blocks).[73]

61. The Court's decision at the October 1974 hearing underlined that the Ōwhāoko blocks were granted to various tribal groups in the 1880s. With respect to the gift blocks, or Ōwhāoko B and D blocks, the Court considered that these "Ngatiwhiti and Ngatitama" peoples had "close affiliations to Tuwharetoa".[74] The Court made orders vesting the gift blocks in the original owners as at the time of the gift (excepting Part Ōwhāoko D1, which was closely held and was vested in the specific successors of the original owners of D1). With respect to trust orders, the Court gave notice of its intention to vest the gift blocks and other Ōwhāoko blocks in the TMTB, with six advisory trustees also appointed representing the range of original interests (a group that included Mr Paani Otene and Mr T M R Tomoana). The Court considered time was necessary to ensure that other interested parties or successors of original donors were heard on the proposed trust orders.[75]

62. The Māori Land Court reconvened to hear any objections to the proposed trust orders in March 1975. Objections were heard from a group of northern (Tūwharetoa-affiliated) interests and from a "Ngāti Whititama" group. Both groups were represented by counsel. The Ngāti Whititama group objected

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71 Minutes of Hearing, Tokaanu MB 53, at 328–376 [pp 9–10 of typescript minutes], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 38).

72 Minutes of Hearing, Tokaanu MB 53, at 328–376 [p 10 of typescript minutes], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 38).

73 Minutes of Hearing, Tokaanu MB 53, at 328–376 [p 15 of typescript minutes], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 38).

74 Minutes of Hearing, Tokaanu MB 53, at 328–376 [p 18 of typescript minutes], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 38).

75 Minutes of Hearing, Tokaanu MB 53, at 328–376 [pp 20–21 of typescript minutes], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 38).

that their interests in Ōwhāoko B and D blocks were inadequately represented by the proposed trustees – either by the TMTB as responsible trustees or by the six advisory trustees. Although it was stated at the time that "Whititama is a subtribe of Ngatituwhare[toa]", the Ōwhāoko B and D blocks fell squarely within the tribal area of Whititama. A meeting in September 1974 at Whitikaupeka marae at Moawhango was referred to, at which a sub-committee was appointed to conduct a feasibility study for utilisation of the blocks. A list of proposed trustees (13 in number) was also agreed as trustees for the blocks. Of these, four were included in the Court's six (proposed) advisory trustees at the October 1974 hearing.[76] The Ngāti Whititama group considered that only one of the advisory trustees represented them (although one other advisory trustee, Ira Karaitiana, stated that she also represented Ngāti Whititama). After some discussion in court, an additional name was put forward as an advisory trustee (Rawiri David Hepi) representing Whititama and the Court adopted this recommendation in its final orders.[77]

63. Some two decades later, in 1996, the Ōwhāoko B & D Trust was formed to represent the Ngāti Whiti and Ngāti Tama interests, which were separated out from the blocks controlled by the TMTB.[78]

64. The Crown considers that referring the question (of who to re-vest the gift blocks in) to the Māori Land Court to determine through its usual processes was consistent with the Crown's Tiriti/Treaty obligations. This was a fair and reasonable approach given the amount of time that had elapsed, the overlapping tribal affiliations, the complexities of identifying all descendants of original donors, and the jurisdiction and expertise of the Māori Land Court.

Issue 2c: Were Taihape Māori prejudiced in any way by the length of time it took for the Crown to return gifted lands? If so, how?

65. It is difficult to identify substantive economic prejudice from the delay in returning the land. As the land was intended as an absolute gift, it was not anticipated at that time that the land would be returned. During this time,

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76 Another two of the 13 were trustees of the TMTB, being Hepi Te Heuheu and Pateriki Hura.

77 Minutes of Hearing, Tokaanu MB 54, at 108-47 [see typescript minutes, especially pp 1–7, 18–26], in AAMA W3150/619, box 22, 20/194, part 5, ANZ (see Appendix **attached**, at 38).

78 Wai 2180, #A06, at 134.

the owners were relieved of the costs of rates and of pest control.[79] Various feasibility studies over the decades showed the gift blocks had limited potential for settlement or commercial agriculture. Considerable capital investment would have been necessary to construct access roads to much of the land (and the topography would have positively prohibited this in many places). It was not until the post-Depression and post-WWII years that serious studies of feasibility were undertaken. At that point, Crown agencies began to consider acquiring the land for conservation and/or acquisition or exchange with the original kaituku (or their successors). The TMTB was consulted in the later 1950s to this end.

66. However, the Crown accepts from the narrative above that it is clear that from the 1930s until the gifted land's eventual return in the 1970s, the Crown prioritised consideration of the uses it considered best for the land and carried out limited consultation with the kaituku on these proposals. The Crown recognises that the time that elapsed prior to the return of the land was substantial and meant the kaituku were disconnected from their lands for an extended period (with the consequent effect on cultural relationships and the exercise of kaitiakitanga over those lands during that period). This is compounded by little benefit having accrued to returning Māori soldiers throughout that period – ie the intentions of the kaituku in gifting the lands in the first place were frustrated.

Issue 2d: Was there any compensation for the long period of alienation?

67. There was no compensation paid to the original kaituku of the land for the period it was out of their possession or ownership. As noted above, the Crown did offer to compensate the kaituku for, or have third parties pay for, large portions of the block. However, it was ultimately decided that the land should be returned.

68. In terms of compensation for loss of opportunity to develop or derive an income from the land, it is noted that while in the Crown's possession, the land only ever derived a small amount of income, and no profits of any extent (and a significant portion of the limited revenue that was realised through

79 Wai 2180, #A46, at 344.

leasing went straight to the former owners). Many of the reasons for this had to do with the physical characteristics of the block.

Issue 3: Where the Crown did not use gifted land for its intended purpose, what kind of consultation, if any, did it engage in with donors about other potential uses for the land?

69. As detailed in the above narrative, there was limited, if any, direct consultation with the kaituku about potential uses for the gift blocks until the latter part of the 1950s, when the Crown discussed the land with the TMTB. Despite an approach from an individual claiming to represent owners of Ōwhāoko D7B, there was no direct consultation with Ngāti Tamakōpiri and Ngāti Whitikaupeka until they were involved in the discussions over trustees or representative vehicles to manage the Ōwhāoko blocks, including the gift blocks, from the early 1970s.

70. Various assessments of potential uses were made over time, which usually involved inter-departmental engagement. The Māori Affairs Department was critical to much of this engagement, including in the period of the late 1920s and early 1930s under Apirana Ngata.

71. The Crown submits that, in the context of the 1950s-early 1970s, it was reasonable for it to have consulted with the TMTB. In the relevant era, Ngāti Tamakōpiri and Ngāti Whitikaupeka were themselves identifying through their Ngāti Tūwharetoa linkages – with their distinct identities being subsequently revitalised, however. Relevant to the status as in the 1970s:

    71.1 Ngāti Tūwharetoa and Ngāti Kahungunu kawa was variously practised on the marae at Winiata.[80] Terence Hawira gave evidence that growing up he had understood that Tūwharetoa was his iwi and that it was not until the late 1980s that the marae reconnected with Ngāti Hinemanu and Heretaunga, and there was a revival of the Ngāti Paki hapū at that time.[81]

    71.2 Peter Steedman gave evidence that "as youth going to school in Taihape all us Māori were known as Whitikaupeka, Ngāti Tūwharetoa. We were all the same because we were all related. No-

80 Wai 2180, #4.1.11, at 628.

81 Wai 2180, #H11, at [18]–[19].

body told us any different".[82] He has stated that in 1973 he identified as Tūwharetoa.[83]

72. Te Tiriti/the Treaty aspects of the identity loss and recovery experienced by Taihape Māori are addressed further in submissions on Issue 2.

Issue 4: How did the Crown determine that the land gifted for soldier settlement should be returned? Was it the result of pressure from Taihape Māori?

73. As detailed in the above narrative, the decision to return the land resulted from several factors, including various assessments over time that the land had limited prospects for benefitting returned soldiers through settlement or agricultural/commercial uses. Crown agencies or departments undertook some consultation at various times with relevant interests, with the TMTB being the most visible entity with which the Crown engaged. The record reveals other interests from time to time, including the request around 1930 from Ōwhāoko D7 interested parties to return the land, and the negotiations or meetings involving Hawke's Bay interests in the early 1970s (led by T M R Tomoana).

Issue 5: What process did the Crown follow to determine who the land should be returned to? Was the land returned to the correct owners or their descendants? If not, what measures were taken to rectify the situation and compensate the correct owners?

74. As detailed above, s 23 of the Māori Purposes (No 2) Act 1973 was enacted to allow the Minister of Lands to apply to the Māori Land Court to vest the gifted land in accordance with the provisions of s 436 of the Maori Affairs Act 1953. These provisions empowered the Court to make orders vesting the land in the individual successors of the original donors or in any trustee or trustees. The Crown submits that given the overlapping tribal affiliations, the complexities of identifying all descendants of original kaituku, the jurisdiction and expertise of the Māori Land Court and the lapse of time since the gift was made, a Court process was appropriate for determining the parties in whom the lands should be vested.

75. The land came before the Māori Land Court for re-vesting at Tokaanu in August 1974. As detailed above, the Crown specifically declined to make

82 Wai 2180, #E05(c), at [12].

83 Wai 2180, #E05(c), at [8].

submissions on the appropriate parties (whether a trustee or descendants of original donors) in whom the Court might vest the land. The Court heard submissions from several parties and, with apparent awareness of the tribal complexities, ultimately considered it appropriate to vest the land in the TMTB, with an advisory committee to determine the use and disposal of the land. In 1975, the Court adjusted the representation of the advisory committee to allow for an additional Ngāti Whititama representative. Ngāti Whitikaupeka and Ngāti Tamakōpiri were, however, dissatisfied with their level of representation, and this eventually resulted in the formation of the Ōwhāoko B and D Trust in 1996, which now manages those particular gift blocks.

76. A hui was convened at Winiata marae in Taihape on 10 September 1972 to discuss administration of the Ōwhāoko blocks (including, probably, the gift blocks). This followed a hui in Waipatu, Hawke's Bay, in August 1972. There is some suggestion the Winiata hui was convened by D Steedman.[84] Evidence heard in this inquiry suggests the Winiata hui included representatives from Moawhango Marae, Winiata Marae and the Pōtaka whānau from Ūtiku. There were also leading members of Kahungunu, including T M R ("Boy") Tomoana, and Ngāti Tūwharetoa representatives who were members of the TMTB.[85] Peter Steedman stated in evidence that this hui "resulted in Ngāti Tūwharetoa making presentation to the Māori Land Court to become the administrators of the Ōwhāoko A, B and C Blocks".[86]

77. As narrated above, however, at the 1975 Court hearing to confirm the vesting proposal, a Ngāti Whititama grouping was not happy with their level of representation. An additional representative of Ngāti Whititama was added. As far as the Crown's role in this process, the Crown did not advocate for any of the applicant parties before the Court. It is submitted that it was not the Crown's responsibility to ensure any particular form of re-vesting.

84 Wai 2180, #A49, at 344.

85 Wai 2180, #E05(c), at [5].

86 Wai 2180, #E05(c), at [6].

Issue 6: What was the state of the gifted land when it was returned to Taihape Māori?

78. There is limited detail on the condition of the land on revesting in 1975. A Māori Affairs official suggested privately in 1973 that the Crown had done nothing to prevent unauthorised use of land by Ngamatea or other neighbouring station owners, and that this had led to over-grazing and land erosion in places.[87] There is also general evidence that many of the Māori-owned subdivisions of Ōwhāoko are today landlocked, plagued by rabbits, damaged by invasive introduced plants, and economically unproductive.[88]

79. There is plenty of evidence, however, that the Crown was concerned about erosion, which is why the Forestry Service seems to have been intent on acquiring the land for land and soil conservation (or catchment protection).[89] Earlier evidence from the 1920s-30s shows that the Crown was expending considerable sums annually on pest control.[90]

ANALYSIS AND CONCLUSIONS

80. The Crown position is articulated throughout these submissions, however in summary, the Crown's view is that:

80.1 The gifting was honourably made, and honourably received in the particular circumstances that existed at that time. The motivations behind the gifting may have been varied, however the primary motivation appears to have been that as stated by Dr Soutar – that the gift reflected the strong patriotism felt at the time.

80.2 The 1930 legislation was both lawful (by definition) and reasonable in the circumstances (and thus consistent with the Crown's Tiriti/Treaty obligations). Although it may have been better if the kaituku had been consulted at the time, the legislation is very much in line with the intentions and terms of the gift (which is not surprising given Sir Apirana Ngata's key role in both the gifting and the legislation). Not having consulted constitutes perhaps an imperfect process but does not, in these circumstances as set out in

87 Wai 2180, #A49, at 329–330.

88 Wai 2180, #A06, at 6.

89 Wai 2180, #A49, at 330–336.

90 See footnote 44 above.

the prior sentence, involve the level of wrongdoing that would constitute a breach of te Tiriti o Waitangi/the Treaty of Waitangi.

80.3 While the Crown was not under any legal duty to return the land to the kaituku, the land was eventually returned in acknowledgement that the purpose of the original gifting had not been achieved and the kaituku, in Tiriti/Treaty terms, and more broadly, were the correct people for the land to be returned to. The Secretary of Māori Affairs informed the Director-General of Lands in 1971 that "I consider the purpose of the gift has failed and the land, in fairness, should be returned to the donors or their successors…"[91]

80.4 On determining that return was warranted, the Crown took correct action by seeking determination of individual successors of the original donors (or vesting in any trustee or trustees) through the Māori Land Court. Although the Crown's early discussions regarding return of the lands occurred with the TMTB, subsequent discussions occurred with Ngāti Tamakōpiri and Ngāti Whitikaupeka directly – and the lands were returned to a Board that ensured it had representatives from the hapū.

81. The promise of the gifting, though made with honourable and generous intent, was not ultimately achieved. The quality of the land was not sufficient to meet the aspirations behind the gift. The return of the lands was right and proper – albeit, a long time coming.

7 May 2021

R E Ennor / MGA Madden
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel

91 Wai 2180, #A49, at 339.