

IN THE HIGH COURT OF NIUE (LAND DIVISION)

IN THE MATTER of Part Lamea/Tiatele, Alofi District

BETWEEN Tukala Makamau Hekau and Lagakiniu Lavini

Applicants

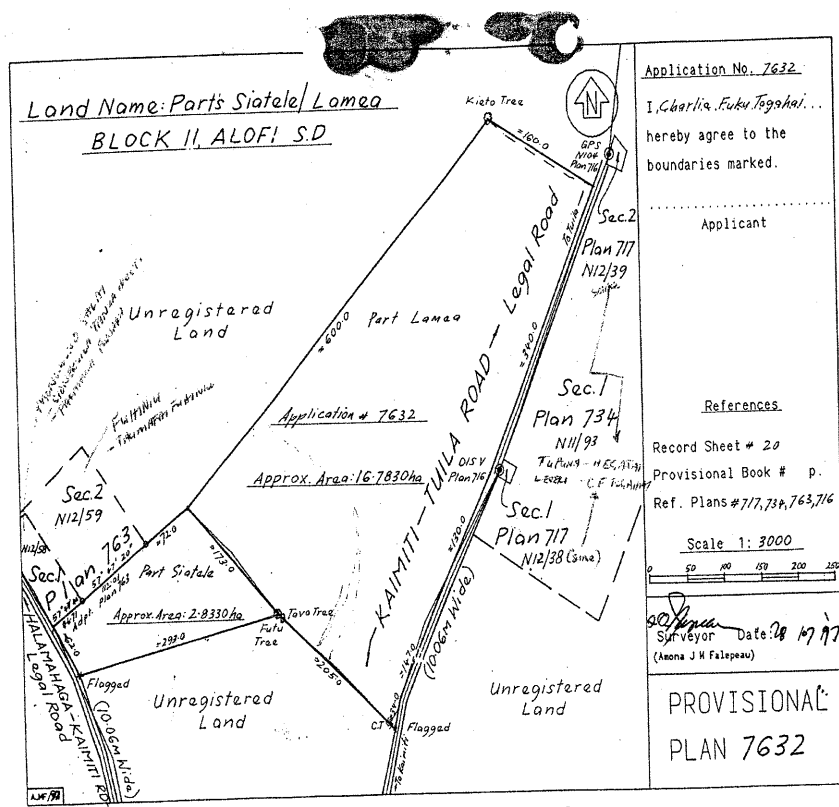
AND Charlie Fuku Tongahai

Respondent

DECISION

Introduction

[1] The applications before the Court concern the determination of title to Part Lamea/Tiatele, Alofi Survey District, containing 16.7830 hectares as set out below in Provisional Plan 7632.



[2] In 1997 Charlie Tongahai and Lagakiniu Lavini both filed applications for determination of title to this land and the appointment of a Leveki Magafaoa (Leveki).

[3] On 2 August 2001 five Land Commissioners of the Niue High Court determined Hakemotu to be the common ancestor for this land and appointed Mr Tongahai as the Leveki.

[4] On 17 August 2001 Mr Lavini and Tukala Hekau filed applications for a rehearing because they disagreed with the determination of the common ancestor and the appointment of Mr Tongahai as Leveki. Mr Tongahai opposed the applications for a rehearing.

[5] On 10 June 2008 I granted the rehearing for the reasons set out in my direction at 14 Folio 235-239.

[6] After several adjournments, I heard the applications by way of rehearing on 16 and 17 November 2009. All three families also held a meeting on 16 November 2009 to try and resolve the issues around the common ancestor and title to the land. No agreement was reached.

[7] The submissions of the parties to support their claims are set out below.

Submissions for Hekau and Lavini

[8] Submissions and evidence were presented for the Hekau and Lavini case by Lousiana Kakauhemoana, Tukala Makamau Hekau, Anamata Lavini, Ngatu Tukutama, and Maihetoe Hekau which covered these matters.

[9] They stated that the common ancestors for this land should be Iapeta and Inisi Uela and the Leveki should be Tukala Makau and Laga Lavini.

[10] The land is a large block and it is unlikely that it belongs to one family. The appointment of Hakemotu as common ancestor would cut off the Hekau and Lavini families.

[11] The ancestors of Lavini and Hekau have worked this land but do not descend from Hakemotu.

[12] The fact that Lavini and Hekau have not worked this land because they occupy other family land does not remove their interests in Lamea because their ancestors worked the land.

[13] Both Lavini and Hekau have family knowledge of special land marks and characteristics of Lamea such as bush tracks, the cave known as Tokaata and the poisonous creeper plant Niukini which the families obtain for their use. This knowledge would only be obtained by usage and occupation of these lands.

[14] The Hekau family submit that Hakemotu should not be the common ancestor because Fomalo occupied and worked the land through her tupuna lapeta.

[15] They say that Fomalo worked this land in her own right and not through Tauhogofulu. Also that Tuiolo, who is Charlie Tongahai's mother, worked the land through Fomalo.

[16] Tuiolo was adopted from outside the blood and has not been accepted by the family to the land and is considered an outsider to the land.

[17] Fomalo had no other children apart from Tuiolo and has registered family land and has cut off lapeta and blood descendants from this land.

[18] As Charlie Tongahai's mother Tuiolo was adopted by Fomalo, Mr Tongahai's interest in Lamea should be for the duration of his mother's life and then the land the land should revert back to the family.

[19] In Niuean custom an adopted person does not have greater rights than the blood family.

[20] Both Tukala Makamau Hekau and Laga Lavini wish to be appointed as Leveki.

Charlie Fuku Tongahai case

[21] The case for Charlie Fuku Tongahai was presented by his counsel Toailoa with evidence in support from Nokupega Fuhiniu, Fakahula Funaki, Mitianeini Viliko, Stanley Tafatu and Allan Yabaki.

[22] Mr Tongahai's claim to Lamea and Tiatele derives from his grandfather Tauhogofulu (born in 1894). Tauhogofulu adopted Mr Tongahai's mother Tuiolo and is named as common ancestor for Lamea.

[23] The control and utilisation of Lamea and Tiatele began with Tauhogofulu, who was an only child. There is no evidence that any of Tauhogofulu's ancestors cultivated these lands before Tauhogofulu.

[24] Tauhogofulu was a hard working man and owned huge tracts of land in the Alofi area including lands bought by the New Zealand Government where the golf course and prison are now located.

[25] Tuiolo began working these lands with her adoptive parents Tauhogofulu and Fomalo when she was a child and she was told that these lands were virgin bush and were first cultivated by Tauhogofulu.

[26] In 1942 when Tuiolo was only 16, Tauhogofulu passed away and because Tuiolo was an only child, she and her mother Fomalo continued working on these lands from time to time. When Tuiolo got married and had children, they all continued working on the land with Tuiolo and her husband Lipaea Tongahai.

[27] Mr Tongahai's earliest recollection of working this land was when he accompanied Fomalo and parents. Also recalls in 1968 Fomalo and Charlie Tongahai's parents planted a huge taro plantation for Charlie's haircutting. When Mr Tongahai (junior) married, he and his late wife and their children also worked the lands. The Tongahai family have continued to work at Lamea/Tiatele until 2005 and are now leaving the land to fallow. Mr Tongahai's brother-in-law Kifoto Vakatau also worked at Lamea until 2007. The Tongahai family have therefore worked the land from Tauhogofulu in 1894 to 2005.

[28] At the 2001 Court hearing of Mr Tongahai's claim, the Land Commissioners determined the common ancestor for the lands as Hakemotu. Hakemotu was Tauhogofulu's great-great maternal grandfather. It appears that the Commissioners have mistakenly interpreted Tuiolo's evidence - when she relayed her genealogy to the Court commencing at Hakemotu - to mean that Hakemotu should be the common ancestor. However Mr Tongahai states that his application and his family's testimonies were quite clear that Tauhogofulu was the tupuna they wished to appoint as their common ancestor.

[29] The boundaries to this land were drawn up following Mr Tongahai's application. At the time there was no objection.

[30] The Tongahai family only claim the Lamea land that they work. The rest is not titled. The Tiatele land was originally cultivated by Tauhogofulu and has been planted by Charlie Tongahai.

[31] Other families work land adjoining is at Tiatele with no dispute. The Hekau/Lavini families do not work this land.

[32] It is noted that in the 2001 hearing Hekau initially agreed with Hakemotu as the common ancestor and only in the rehearing referred to lapeta as the common ancestor.

[33] The Hekau family only rely on genealogy as the basis of their claim to lapeta and not occupation or working on the land. They accept that Foumalo occupied Lamea and Tiatele.

[34] Lavini seems to claim Inisi Uela Paotoga, his maternal grandmother, as his common ancestor. Inisi is the same generation as Tuiolo and there is no reference to Inisi occupying or working the disputed lands.

[35] Lavini claims that the ancestors Fakahula, Inoke and Matahemoka worked the land prior to his father. These ancestors passed away well before Mr Lavini and this evidence is conjecture. Also Mr Lavini's father from Hikutavake has no claim to this land.

[36] Mr Lavini also says that he was authorised by my neighbour Nokupega Fuhiniu to work part of his land. Nokupega Fuhiniu has supported my claim and states that Lavini has never worked Tiatele or Lamea.

[37] Lavini also confirms that Tauhogofulu and Foumalo worked this land in dispute.

[38] In relation to the issue of adoption raised by Hekau and Lavini, counsel submits that this issue is settled by case law involving the same parties. Firstly, on 19 May 2000 Application 8370/4/36 Norman Smith J held that *"It will be seen therefore that the question of blood relationship does not in any way affect the relationship between the adopted child and the adoptive parent or any other person. For this reason, the submission by the bloodline must fail."* Secondly, Carter J on 3 September 2009 after canvassing the statutory provisions found that *"...legally adopted persons are by law members of the Magafaoa of their adoptive*

parents. Tuiolo, by virtue of her adoption by Foumalo, is therefore a member of the Magafaoa for Part Tapeu. So also, by virtue of section 16(2) (c) of the Adoption Act 1955 is her son Charlie Tongahai."

[39] Charlie Fuku Tongahai wishes to be appointed as Leveki for his land. He lives in Niue and has carried out responsibilities as Leveki for family lands. He also has the consent from the majority of the magafaoa.

The Law

[40] The Niuean High Court (Land Division) has exclusive jurisdiction to hear and determine applications relating to the ownership and occupation of Niuean land, and to the appointment of a Leveki.¹

[41] The relevant provisions of the Land Act 1969 concerning title to Niuean land state:

"10 Determination of title

- (1) *The Court shall determine every title to and every interest in Niuean land according to the customs and usages of the Niuean people, as far as the same can be ascertained....*

11 Court may require written statement

The Court may require any person having an interest in any application under this Part to lodge with the Court a statement in writing setting out any one or more particulars of the following matters –

- (a) *The boundaries of the portion of the land which he claims;*
- (b) *The grounds of the claim;*
- (c) *The genealogical tables showing descent from the ancestor or ancestors through whom title is claimed down to and including all persons admitted by the claimant as entitled with him under his claim;*
- (d) *The names and the approximate location of cultivations, villages, burial places, with the names of relatives of the claimant and persons included in his claim who have been buried there, and any other places or marks of historical interest;*
- (e) *Any other proof or signs of occupation of or connection with the land by the claimant and other persons included in his claim.*

¹ Section 47, Niue Amendment Act (No.2) 1968.

12 Ownership determined by ascertaining and declaring Magafaoa

The Court shall determine the ownership of any land by ascertaining and declaring the Magafaoa of that land by reference to the common ancestor of it or by any other means which clearly identifies the Magafaoa.

14 Appointment of Leveki Magafaoa

- (1) *When the ownership of any land has been determined any member of that Magafaoa who was reached the age of 21 years may apply in writing to the Court for an order appointing a Leveki Magafaoa of that land.*
- (2) *If the application is signed by members who in the Court's opinion constitute a majority of the members of the Magafaoa whether resident in Niue or elsewhere the Court shall issue an order appointing the person named in the application as the Leveki Magafaoa of that land.*
- (3) *If no such application is received within a reasonable time, or applications are each signed by members who, though having attained the age of 21 years, constitute less than a majority of the Magafaoa who have attained such age the Court may appoint a suitable person to be Leveki Magafaoa of that land.*
- (4) *The appointment of a Leveki Magafaoa shall not be questioned on the grounds that any member of the Magafaoa was absent from Niue, but the Court may consider any representation made in writing by any member so absent.*
- (5) *Any person who is domiciled in Niue, and whom the Court is satisfied is reasonably familiar with the genealogy of the family and the history and locations of Magafaoa land, may be appointed as a Leveki Magafaoa of any land, but if he is not a member of the Magafaoa he shall not by virtue of such appointment acquire any beneficial rights in the land.*
- (6) *In appointing any Leveki Magafaoa the Court may expressly limit his powers in such manner as it sees fit."*

[42] Also important in this decision is the law relating to adoption and I set out the relevant sections.

92 Adoption by Niuean custom invalid

No adoption by Niuean custom, whether made before or after 1 November 1969 shall be of any force or effect, whether in respect of intestate succession or otherwise.

93 Adoption by Niuean custom before 1 April 1916 by parent dying before 5 December 1921

Notwithstanding anything in section 92, in any case where before 1 April 1916 any child was adopted by Niuean custom and since that date and before 5 December 1921 the adopting parent has died, the adoption shall for all purposes have the same operation and effect as that which is attributed by Niuean custom to adoption by Niuean custom.

99 Effect of adoption order

Every adoption order shall have both in Niue and New Zealand the same operations and effect as an adoption order made under the Adoption Act 1955 has virtue of section 16(1) and (2) of that Act.

[43] Finally, as set out in s 52 of the Niue Amendment Act 1968, when the Court makes an order affecting title, that order:

“...shall bind all persons having any interest in that land, whether or not they are parties to or have notice of the proceedings in which the order is made, and whether or not they are subject to any disability.”

[44] Therefore, the Court's jurisdiction is very onerous and it is required to make careful decisions as to determination of title which stand the test of time and are equal to most challenges.

Discussion

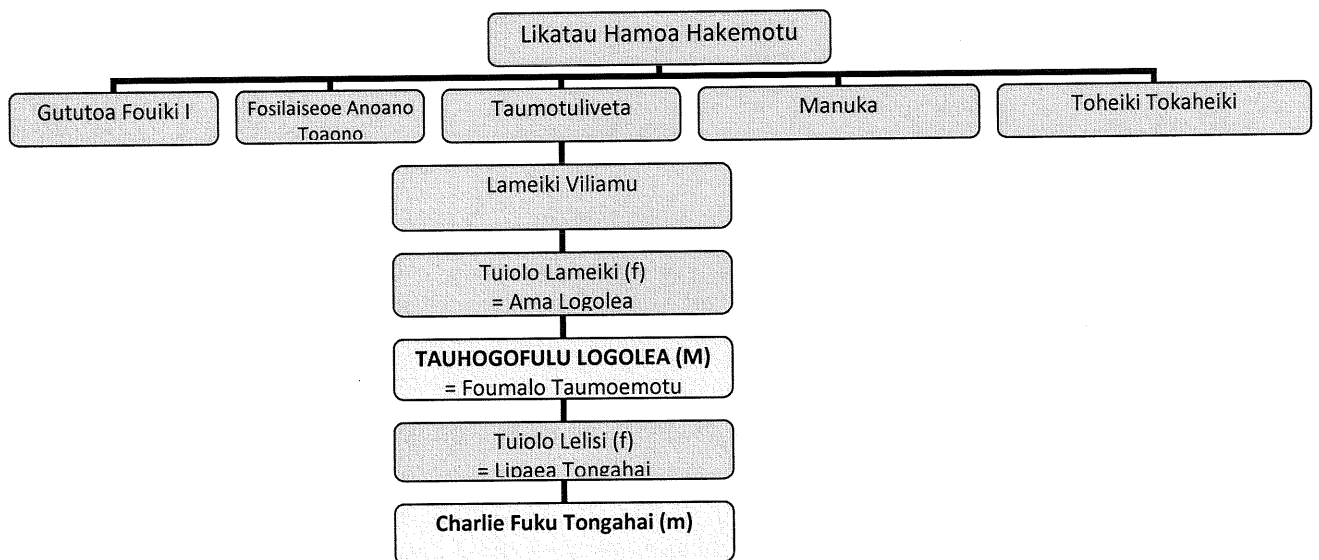
[45] The issues to be considered in this case include:

- (1) The determination of title.
- (2) The adoption of Tuiolo.
- (3) The most appropriate Leveki for this land.

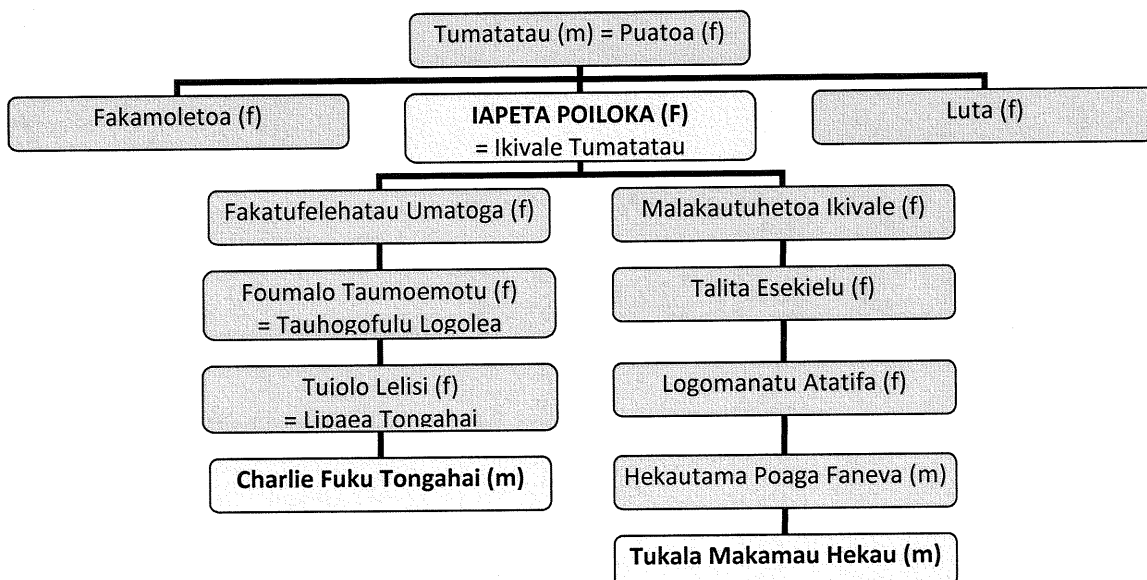
[46] When determining title the legislation requires the Court to consider the genealogy of the parties and the use and occupation of the land.

[47] Mr Tongahai is claiming Tauhogofulu Logolea as the common ancestor; Mr Hekau is claiming Iapeta Poiloka and Mr Lavini is claiming Inisi Uela. The genealogies from Justice Department records are set out below.

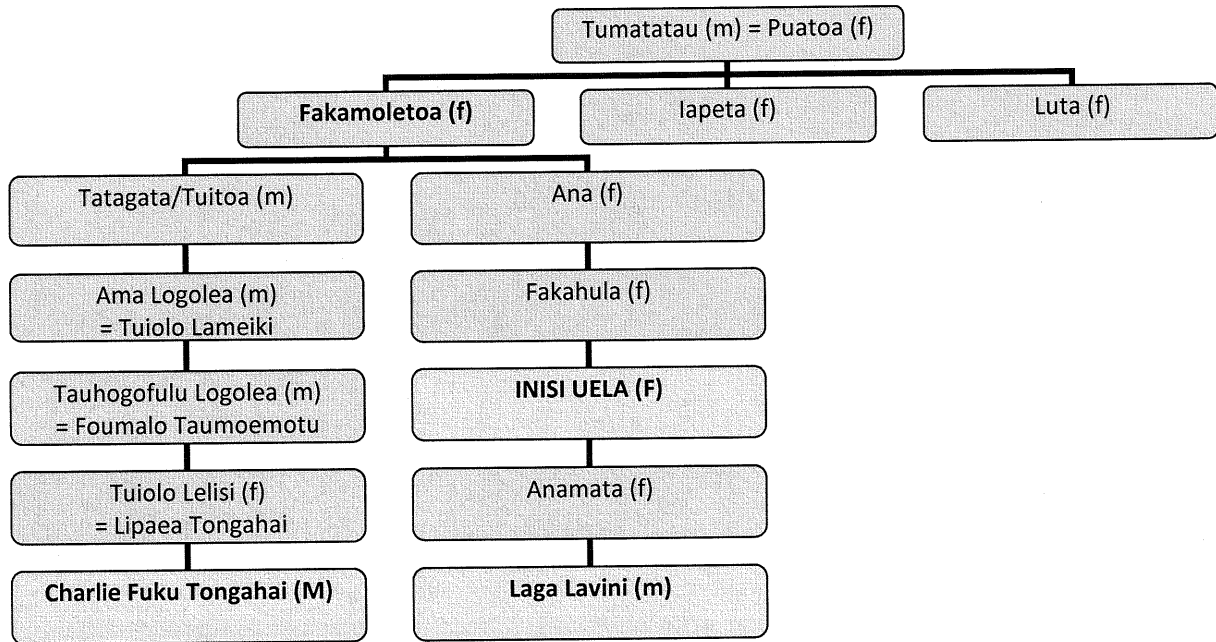
TAUHOGOFULU LOGOLEA



IAPETA POILOKA



INISI UELA



[48] From the above genealogies it is clear that the Tongahai, Hekau and Lavini genealogies are linked.

[49] Whilst the evidence of genealogy is linked, this is where the connection to the land for the Hekau and Lavini claimants ends.

[50] The evidence given to Court is clear and not in dispute. This land was used and occupied by Tauhogofulu and Foumalo and from them to Tuiolo and then to Mr Tongahai.

[51] This is not disputed by the Hekau and Lavini side, although they maintain that prior to Tauhogofulu that their ancestors used the land. However, there was no clear evidence given to support this contention.

[52] As set out in section 11 of the Land Act 1969, the court is required to consider not only genealogy but also use and occupation of the land.

[53] When these two aspects are brought together the Tongahai case is compelling. By contrast the Hekau and Lavini cases are totally lacking in respect to evidence of use and occupation going back through the generations.

Adoption of Tuiolo

[54] The question that should now be considered is does the legal adoption of Tuiolo by Tauhogofulu and Foumalo create rights of entitlement to this land by the applicant Tongahai.

[55] Tuiolo in her affidavit of 17 November 2009 sets out her position she states:

"I was born at Vailoa in 1926 to my birth parents Tifaulu Lelisi and Melelaunisi. I was then adopted out by my mother's cousin Foumalo and her husband Tauhogofulu at birth and my father named me after his mother Tuiolo Lameiki Logolea. I was legally adopted on 31 October 1938 before William Moody Bell Resident Commissioner and Judge. I was 12 years of age. My parents separated soon after. I was legally adopted by my father Tauhogofulu continued to care for my mother and me as he was living across the road from us in Kalaone and we lived at Halamahaga. I was 16 years of age when my father died. I am now 83 years of age... My father was an only child to his parents Tuiolo and Logolea and I was only child to my adopted parents."

[56] The Hekau claim is that Tuiolo claim as she is not from the family bloodline is not as strong as their claim and her rights should only exist for her lifetime and then revert back to the blood.

[57] As set out early sections 99 of the Niue Amendment Act (No2 1968) an adoption order shall have the same force and effect as if made under the New Zealand Adoption Act 1955. In that Act Sections 16 (1) and (2) state:

"Every adoption order shall have both in Niue and in New Zealand same operations and effect as an adoption made under the Adoption Act 1985..."

[58] In the recent decisions of this court involving the same parties referred to by Counsel for Mr Tongahai the legal effect of adoption is set out. The position is summarised by Judge Carter in Hekau v Tongahai Part Tapeu, High Court Niue, 23 April 2009 as follows:

"Legal adoption is a relatively new concept and replaces Niuean customary adoption which is now of no legal effect... Legal adoption is a creature of law not custom. Legal adoption is not recognised by custom. It is an entirely different concept established by law. The qualification in section 2 of the Land Act 1969 recognised as

entitled by Niuean custom, does not fit with legal adoption... Legally adopted persons are by law members of the Magafaoa of their adoptive parents.”

[59] As a consequence and as affirmed by Smith J on 19 May 2000 Application 8370/4/36 again involving the same parties with effectively the same argument.

“... the submission by the appellant that the natural children have priority over adopted children by outside the bloodline must fail.”

[60] I agree with the findings of Carter J and Smith J. As a consequence the fact that Tuiolo may not be a direct descendant of Tauhogofulu and Fomalo does not lessen her rights as a member of the magafaoa associated with this land. As a result her son Charlie has the same rights.

[61] Therefore, I find that the applicant Charlie Fuku Tongahai's claim based on genealogy and use and occupation satisfies the criteria of the Niue Land Act 1969.

[62] The claim by Mr Hekau and Mr Lavini does not and must fail. I therefore determine title of this land in Provisional Plan 7632 containing 16.7830 hectares and declare the common ancestor to be Tauhogofulu.

Leveki

[63] The Tongahai's application to be appointed as leveki is also granted. This claim satisfies the provisions of the Act in that Mr Tongahai in terms of Section 14(2) has filed consent of the majority of the magafaoa of this land. If this had not been done Mr Tongahai's evidence has satisfied me that he is a suitable person to be appointed because of his knowledge of this land and the genealogy associated to this land. Mr Tongahai is also resident in Niue.

[64] The applications by Mr Hekau and Mr Lavini are dismissed as by their own admission they have not worked this land and would not have the same intimate knowledge of this land as that of Mr Tongahai.

[65] Whilst I have made this order appointing Mr Tongahai as sole Leveki I note that this is a large area of land. Mr Tongahai should now, in his position of Leveki, look closely at his

powers and functions under Section 15 of the Niue Land Act 1969 and ensure that consultation takes place with the magafaoa of this land regarding its use and occupation.

[66] A copy of this decision is to go to all parties.

Dated at Wellington in New Zealand this 12th day of October 2010.

A handwritten signature in black ink, appearing to read 'W W Isaac', written in a cursive style.

W W Isaac
JUDGE