

The Treasury

Release of Submissions: Consultation on the Waitangi Tribunal's “Shares Plus” Proposal

Release Document

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05 October 2012

Shares Plus Consultation
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RE: Submission in relation to "Shares Plus" Consultation with Directly Affected Iwi

1. These submissions are filed on behalf on the following:
2. My name is Arapeta Wikito Pomare Hamilton, and I am an interested party in the Wai 2358 National Freshwater and Geothermal Claim.
3. I filed this claim on behalf of the descendants of Pōmare II and members of the Ngāti Manu, Te Uri Karaka, Te Uri o Raewera and Ngāpuhi ki Taumarere tribes in relation to the waterways within our rohe including Kawakawa River (Taumarere) and its tributaries, Tirohanga River and its tributaries, Waitangi River and its tributaries, Te Haumi Stream, Punakitere River, Kaipatiki Stream, Orauta Stream, Karetu River, Puhoi River, Te Muri Stream, Mahurangi River, Waiwera River, and all waters associated with the following whenua, Kawau Island, Hauturu Island, Opanui Okiato, Tiritirimatangi Island, Orewa, Tawharanui and Whangaparaoa.
4. I attach as Appendix "A" my Brief of Evidence dated 18 May 2012 (Wai 2358 #A47).
5. We have had an opportunity to review the Crown's consultation documents, and now make submissions on the Shares Plus Consultation.

Background

6. The Waitangi Tribunal released its interim report on the National Freshwater and Geothermal Resources claim (Wai 2358) on 24 August 2012. Although the report is interim, the Tribunal has stated that the substance of its findings and recommendations will not change.
7. The Tribunal agreed with what Maori have always maintained, that we have rights and interests in our water bodies for which the closest English equivalent in 1840 was ownership rights, and that such rights were confirmed, guaranteed, and protected by the Treaty of Waitangi.¹

¹ Waitangi Tribunal *Interim Report on the National Freshwater and Geothermal Resources Claim* Wai 2358 at 110.

8. The release of the Tribunal's interim findings has formed the basis of the Crown's consultation process that commenced on 5 September 2012.
9. It is extremely alarming that the Crown has been mischievous in its interpretation of the Tribunal's findings when presenting to Maori. In the consultation presentation document dated 09 September 2012, the Crown states that "*the Tribunal largely agreed with us that there was no link between ownership of ordinary shares and ownership of water.*" This is blatantly incorrect, as the Tribunal found that there is a sufficient nexus between shares in the power-generating SOEs and Maori rights in water.²
10. We hold serious concerns about the manner in which the Crown has conducted their consultation process. The timeframe of four weeks to properly consult is simply inadequate for such a significant issue. Furthermore, the Crown have set the parameters of the discussion and invited submissions, as opposed to entering into a meaningful dialogue with Maori.
11. We support the resolutions that were passed at Turangawaewae Marae which have expressed a way forward. These proposed that a framework of proprietary rights be settled:
 - a) Before the sale of shares; and
 - b) Before the Government enters into negotiations with hapu and iwi.

Shares Plus

12. The Tribunal found that the Crown cannot ignore the option of using shares in the power-generating MOM companies in partial recognition of these rights, where that is what Maori want.³ Shares on their own are not an adequate remedy to recognise our interests in our fresh water, however the option must be made available for those who want it.
13. The Crown has expressed its view during the consultation process that it does not believe that the 'shares plus' concept should be progressed. The Crown's view is formed on five main reasons:
 - a) Not in the national interest for any given group among the 49% minority shareholders in these companies to be given special rights.
 - b) Almost every form of rights recognition and redress for Maori that could be delivered by "shares plus" can be achieved in other ways.
 - c) The remaining elements of "shares plus" in relation to decision rights over management or strategic decisions would not work in practice as an effective for of rights recognition or redress.
 - d) If the "shares plus" concept was put in place, it would be likely to make the company less attractive to investors, which in turn could be reflected in a lower sale price and therefore be to the detriment of all taxpayers.

² Ibid at 161.

³ Ibid at 166

e) Following consultation with iwi, a careful and deliberate decision was made to ensure that the Crown's obligations under the Treaty continue to rest with the Crown, not with companies. They are not themselves appropriate vehicles for achieving redress.

14. Our submissions in relation to the obstacles cited by the Crown are outlined below.
15. **National interest:** It is fundamental to the Tribunal's findings that Maori rights and interests in water be recognised. To dismiss these rights in favour of the "national interest" is essentially a refusal by the Crown to recognise Maori proprietary rights, and suggests that Maori human rights are less important than the rights that will be asserted by potential shareholders.
16. It is common practice for companies to have different classes of shares, and a special class of shares should not be denied to Maori.
17. **Interests recognised in other ways:** While the Tribunal acknowledges that rights recognition and redress could be effected through other means, it recognises that the Crown's ability to provide redress with shares will be greatly reduced:⁴

We have found that company law will in practical terms prevent the Crown from providing or recovering the asset sought – 'shares plus' – after partial privatisation of the companies. The Crown will therefore be unable to carry out its Treaty duty to actively protect Maori property rights and to remedy well-founded claims if it proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Maori rights and remedy their breach.

18. **Decisions rights would not work in practice:** the essence of the Tribunal's analysis of "shares plus" is that a shareholders agreement would give Maori a meaningful connection to their water. As recognised by the Tribunal, the intent of the legislature to ensure that a company's constitution, or the terms upon which shares are issued, can allow for and permit a wide range of shareholder arrangements.⁵ There is no reason for the Crown not to require the provision of a shareholders agreement from the MOM companies that reserve special positions for the Maori, being the owners of the resource fundamental to the operation of the company. As found by the Tribunal:⁶

In a practical sense, the Crown could negotiate with Maori now and ensure that any requisite changes were made to the companies' constitutions. These might include, for example, provisions in respect of a possible future settlement of this Treaty claim or for the companies to enter into joint ventures with Maori in respect of water. Then, after partial privatisation, and having regard to its section 45Q obligations, the Crown could use its 51 per cent shareholding to prevent such provisions being altered or removed. The Crown could also make the policy decision now to reserve a proportion of shares for Maori, rather than to sell the full 49 per cent or to retain what is not sold. For entering into a shareholders' agreement, however, it would need to change the status of the companies from SOEs to MOMs by issuing an order in council to bring the relevant legislative provisions into effect. Then, before selling shares in Mighty

⁴ Ibid at 198

⁵ Ibid at 160.

⁶ Ibid at 169

River Power to private shareholders, the Crown could potentially transfer shares to Maori and negotiate a shareholders' agreement with them.

19. **Less attractive to investors:** It appears that the Crown places greater importance on generating finance, than providing redress to its Treaty partner who has long suffered at the hands of the Crown for continually denying Maori our ability to exercise mana over our taonga, our waterways. That being said, surely certainty is the best means of providing an attractive investment option to investors. A settlement achieved between the Crown and hapu will stabilise these MOM companies and make them more attractive for raising capital.
20. **Consultation with iwi:** consultation with the Iwi Leaders Forum and a 10 day road show undertaken in March are less than sufficient to meet the Crown's obligations under the Treaty, which cements the relationship between the Crown, Rangatira, and hapu. Furthermore, the consultation that did take place did not deal with proprietary interests. It is agreed that the Crown carries the Treaty obligation and not the companies. Therefore the obligation rests with the Crown to ensure that a solution is achieved before the companies are privatised.

Recognition of our interests: a way forward

21. It is fundamental that the exercise of kaitiakitanga and rangatiratanga carries with it the ability to create, develop and enforce regulatory frameworks. It is also widely accepted that there are nuanced differences in the way that varying hapu exercise kaitiakitanga and rangatiratanga.
22. Any system would therefore need to provide for the requirements of relevant hapu while protecting against their being subsumed under super iwi bodies that deny participation by dint of their representation. It is my submission that the framework for recognising our rights and interests:
 - a) meaningfully empower them to create regulations over water allocation in their region;
 - b) enable them to enforce these regulations;
 - c) enable them to work together while protecting the integrity of the respective hapu.
23. This suggestion we believe parallels the 'share plus' option raised by the Tribunal. Instead of providing for it within the creation of a privatized company, we believe there is also room for the protection to sit alongside as a regulatory framework that the company must sit within and with which its constitution must be consistent.
24. A regulatory framework such as this was proposed by the Crown to regulate therapeutic products in this country. In an effort to bring consistency to the regulation of therapeutic products throughout Australasia, the government decided to pursue a joint regulating agency with Australia. This is not the only example of joint regulating agencies, as The Food Standards Australia New Zealand is another bi-national government agency in which the authority to jointly develop and administer a 'code' has been vested.
25. These examples suggest that there is no reason why a similar authority cannot be established with the ability to develop systems of regulation for water. Within such a system, the longer conversation that was recommended by the Waitangi Tribunal

could take place within a discussion that is meaningful and respectful and forward focussed. A regulatory framework will result as a direct result of these discussions which is developed and enforced from the ground up.

Concluding remarks

26. Part of the Tribunal's rationale in suggesting the "shares plus" concept, was the ability to develop a shareholders agreement that reserve special positions for the Maori, in recognising the unique relationships and the proprietary interest that we have with our waterway.
27. Our suggestion outlined above, supports the sentiments of the Tribunal though an external regulatory framework that would set the standards for all relevant MOMs and their shareholders agreements.
28. While we are not opposed to the "shares plus" approach, our preference is for external regulation whereby a national framework will be developed to protect all our interests. Our proposal, like the "shares plus, must be undertaken now rather than after privatisation.
29. From a wider perspective, contemporary arguments over water illustrates the discrimination that prevails which suggests that Maori human rights are less important than the property rights that will be asserted potential shareholders. The fact that this position received the support required to amend the law is damning of the constitutional arrangements that exist in this country.
30. It is apparent that constitutional change is essential if we are to avoid these kinds of incident in the future.

Dated this 05 Day of October 2012

Arapeta Hamilton on behalf of Pōmare II and members
of the Ngāti Manu, Te Uri Karaka, Te Uri o Raewera and Ngāpuhi ki Taumarere tribes
(Wai 354)

OFFICIAL

Wai 2357, #A47
Wai 2358, #A47

BEFORE THE WAITANGI TRIBUNAL

WAI 2357
WAI 2358
WAI 354

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

**The Sale of Power Generating
State-Owned Enterprises (Wai 2357)**

AND

IN THE MATTER OF

**The National Freshwater and
Geothermal Resources Claim (Wai
2358)**

BRIEF OF EVIDENCE OF ARAPETA WIKITO PŌMARE HAMILTON

Dated this 18th day of May 2012

RECEIVED

Waitangi Tribunal

18 May 2012

Ministry of Justice
WELLINGTON

AURERE LAW

Barristers and Solicitors
PO Box 1693
DX JP30025
ROTORUA

Ph: 07 348 0034
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Counsel: Annette Sykes and Terena Wara

1. I heke mai a Ngati Manu i a Ngamanu. Ko te tupuna tera o Tohe. I nohongia nga kainga tawhito o Muriwhenua. Ko tona iwi nga kaitiaki o te Rerenga Wairua. I tetahi ra ka haere a Tohe i tetahi haerenga nui kia kite ia tona mokopuna a Te Raninikura i roto o te Te Wairoa. I tapatapangia e ia nga tini ingoa wahi o te Tai Hauauru i te wa ia e haere ana. I ai ki nga korero o oku matua tupuna, ka tae ia ki te tatahi o Ripiro. Ka takoto ka mate ia i reira. I kainga nga kanohi o Tohe i te manu watai. Ko te Putoto te ingoa. Na reira he ingoa tawhito a Ngati Manu i roto i te Tai Tokerau.
2. I nekehia a Ngati Manu mai te Wairoa ki Tautoro noho ai. I te wa o Te Rawheao ka poua ratou ki roto Tautoro. He Tupuna rongonui a Te Rawheao. Ka moe ia te kotiro o Te Ra. Ko Te Ra te tino tupuna o Ngati Rahiri. Na tenei moenga, ka hono a Ngati Manu ki a Ngati Rahiri. Na tenei ka uru a Ngati Manu ki roto i nga whenua o Tokerau ara ko Te Pewhairangi.
3. I whakataukia "Ko te Tokowhito o Te Rawheao". Ko wana nei tamariki katoa nga taikohine nga taitamara. He toa ratau ki te mau patu, mau taiaha, mau tao i nga pakanga o Ngati Manu. Ko enei tamariki ko Te Au, ko Taake, ko Kohinetau, ko Ngaro, ko Taumata, ko Korora me ko Ngaromata. He maha nga kainga o Ngati Manu mai Tautoro i Waimatenui, i Taiamai, i Taumarere, i Te Ruapekapeka, i Paihia.
4. I mua o te taenga o Taiwi ki Aotearoa ka tungia a Ngati Manu i nga wahanga e toru. Ko tetahi wahanga i raro i a Tara i Tautoro, ko tetahi wahanga i raro i a Pomare i Taiamai, ko tetahi wahanga i raro i a Hautai raua ko Te Huru i Taumarere. Mai wenei wahi ka nekehia a Ngati Manu ki te whakanohongia nga taiwhenua o te Kororareka. Ko wenei whenua he whenua tuku ki a Tara e te Ngare Raumati mo te kohurutanga o Te Aohau (he tuahine ia ki a Tara). I kohurungia ia ki Kororareka e te Ngare Raumati
5. I roto tenei wa ano ka riro te whanau o Pomare te ingoa nei a Te Uri Karaka i muri o te matenga o Hurepo tamaiti o Pomare 1. I iringia tona tupapaku i roto i te rakau karaka i Opanui ki Okiato. Mai tera wa ka karangatia ko Te Uri Karaka te hapu o Pomare.

6. I muri o te Pakanga o nga Kotiro i Kororareka me te tuku whenua ki a Te Ururoa, ka mauria e Pomare i tona iwi ki Otuihu. I whakahoungia te Pa ki reira ma nga pu me nga repo. Ko Otuihu i runga tetahi akau hirahira o te takutai moana o te Tonga o Tokerau i nga paringa o Taumarere patata nei ki Opuia.

Ko te mana tuturu ki te whakahaere wai maori

7. Ko te wai maori he taonga nui ki o tatou matua tupuna. Ko te mana whakahaere o te wai me te tohaitanga he mahi na te Rangatiri kahore ma te ware. I Tokerau/Pewhairangi i tera wa ko te kaupapa wai maori he mea nui kia ora te tangata me tona whanau/hapu. I runga ano i tera whakaaro, ma te wai maori ano e whakaatu ai ko tehea pihi whenua i nohongia tuturutia e te iwi te kahore ranei.
8. Ko te taenga o Taiwi i te mutunga o nga tau o te rau tau 1700 ma runga o nga Kaipuke, ka taea tetahi ahuaranga hoko i ki ra ko te pioioi rawa ara ko te hoko kai me nga wai maori me nga rakau ki nga Kaipuke. Ma tena ka kitea e nga Rangatira pena i a Pomare ma he tino taonga te wai Maori mo te hoko. I moata tonu tenei i te wa o te tutakitakitanga o te iwi Maori ki te iwi Pakeha. He iwi mohio o tatou matua tupuna ehara ratou i te iwi kuware.
9. I te timatatanga o te rautau 19th.C i piki haere te mahi hokohoko a te iwi Maori ki te iwi Pakeha. Ko Kororareka te wahi nui mo tenei mahi hokohoko. I te tau 1810 ko te hawhetanga o nga mahi hokohoko i riro ki a Kororareka. I te tau 1827 ko Kororareka te wahi nui mo te hokohoko. I te tau 1830 ko Kororareka nahe te wahi hokohoko.
10. I te timatanga o te tau 1800s e rua e toru ranei noa iho nga Kaipuke i hokonga rawa e te Maori ia tau. I te tau 1820 ka piki te nama ki a 25 Kaipuke ia tau. Ko te 1830s ka ekengia ki te kotahi rau Kaipuke ia tau.
11. Mai Kororareka i hokongia a Ngati Manu i wana kai, wana wai maori me nga wahine ki nga heremana i u mai nei i runga i nga Kaipuke.
12. I muri o te nekehanga o tona iwi e Pomare ki Otuihu ka timata ia te mahi akiaki. Kia poua a Opuia hei taunga Kaipuke mo te Tokerau/Pewhairangi. Ka

tino taea e ia na te mea ka kitea ko te heke haere o nga nama Kaipuke i u mai ki Kororareka. Ka rere mai nga Kaipuke ki Opuia tau ai. Ko tetahi take ka wikitoria a Pomare ko tona ngakaunui me tona nei whakahoahoatanga ki ona hoa Pakeha a James Clendon, Himi Kerenara, Gilbert Mair, Kerepeti Mea ratou ko Waetford, Te Wetiwha.

13. He maha nga whakaaturanga o te hokonga wai maori o Pomare ki nga Pakeha engari ko te OLC te rekota tuatahi o te hokonga puna wai maori e Pomare ki a Ben Wright.
14. Ko nga Rangatira pena i a Pomare te mana whakahaere i nga awaawa ara ko wai nga tangata i haere ki runga ki nga matawai me ko wai nga tangata i heke ki te ngutu awa. Ko te awa o Taumarere nga arawai o o tatau matua tupuna, na reira ki a ratou ehara i te wai noa iho.
15. I te tau 1830 ka rahuitia te awa o Taumarere e Pomare raua ko Kiwikiwi. Ko raua nga Rangatira o Ngati Manu. Ka tau tenei rahui ki runga o nga Pakeha. Kia kore ratou e watea te haere ki runga i te awa ki te mahi hokohoko me te kahi wai maori.
16. I ai ki to tatou Rangatira i mate a Ta Himi Henare. Nana i ki - Ko te awaawa o Taumarere ko te toto ora o te Iwi, he mauri, he tapu i raranga haere ake i tona tuwhaiahuaranga ko taua ahua ano i roto i a tatou. He mea nui i whakatinanatia i roto i to tatau ahua nga uri whakatupu o wenei ra.
17. I te tau 1996 i whakatungia tetahi rahui e ahau te uri o Pomare i runga i te awa o Taumarere mo te kahi kai mo nga marama tekau ma rua. Ko te take o tenei rahui ko nga mahi kino a te Kaunihera ki te wai maori.
18. Ko te hokonga o te wai maori hei taonga hoko e Pomare me tona ringa kaha ki te rahui i nga pakihi hokohoko i runga i nga awaawa i roto i te rohe o Ngati Manu me Te Uri Karaka. He tino tohu era o tona nei Rangatiratanga. I roto i tona hainatanga o te Tiriti o Waitangi i tino whakapono ia. Ka mau tonu e ia i te mana whakahaere i nga wai maori me nga awaawa katoa i roto i tona ake rohe mo ona whanau me ona hapu katoa, no te mea ko te taonga wai maori no tatou ke.

19. I mua o te hainatanga o te Tiriti ko te mana whakahaeretanga o nga wai maori me nga awaawa i raro i te mana o nga Rangatira. Na te Karauna ano i apo tenei taonga te mana o te wai me nga awaawa. Kahore i te mea tuku ki te Karauna e o tatou Matua Tupuna. He mea i tahaengia ke!!

Ko Taumarere te awa
Ko Otuihu te Pa
Ko Te Uri Karaka te Hapu
Ko Ngati Manu te Iwi
Ko Pomare te tupuna

Te ra 18th o te marama o Haratua 2012

ARAPETA WIKITO PŌMARE HAMILTON

