

# **The Treasury**

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

### **Release Document**

**November 2012**

**[www.treasury.govt.nz/publications/reviews-consultation/sharesplus/submissions](http://www.treasury.govt.nz/publications/reviews-consultation/sharesplus/submissions)**

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Where personal contact information has been withheld, a light grey box masks the content.



5 October 2012

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Sent by Email

Tēnā koe Chris

**Mixed Ownership Model – Submission on 'Shares Plus' proposal**

Please find attached a submission made on behalf of the Raukawa Settlement Trust in reply to your letter of 5 September 2012.

A hard copy of this letter will follow by post.

We look forward to meeting with you in relation to these matters.

Nāku noa, nā



Vanessa Eparaima  
Chair & Chief Negotiator

2,461,452



## Mixed ownership model companies: Submission on "Shares Plus" proposal

### 1 Part 1: The context of this submission

- 1.1 This submission is made on behalf of the Raukawa Settlement Trust as the post settlement governance entity representing the interest of Raukawa.
- 1.2 The traditional rohe of Raukawa centres on the Waikato basin and Waikato River, and also encompasses the catchments of the Upper Waipa and Te Waihou rivers. It runs from Taupo Moana in the south, to Maungatautari in the north, extends westward into the Rangitoto ranges and Waipa Valley, and eastwards into the Kaimai and Mamaku Ranges. We are an iwi that practices mana whakahaere, kaitiakitanga and ahi kaa roa within this rohe, which includes the Waikato River and its tributaries. The Waikato River is an extraordinary taonga to us as historically it was a pivotal part of our commercial, social, cultural, and spiritual life.
- 1.3 We have recently settled our historical claims with the Crown in a Deed of Settlement of Historical Claims ('**Deed of Settlement**') dated 2 June 2012.
- 1.4 However the proposed partial sale of State Owned Enterprises (**SOEs**), and the water rights issues which have arisen as a result of those proposals, are not matters which are subject to our Deed of Settlement.
- 1.5 Instead the definition of historical claims contained in the Deed of Settlement makes it clear in the Deed of Settlement that the claims being settled are only those which relate to acts or omissions of the Crown before 21 September 1992. The Crown's current proposals clearly arise post-1992 and are therefore outside of the claims dealt with by the Deed of Settlement.
- 1.6 In addition, the Deed of Settlement does not remove any existing customary rights that Raukawa may have in respect of water. In particular clause 4.6 of the Deed of Settlement expressly provides that:

...nothing in this deed or the settlement legislation will:

  - 4.6.1 extinguish or limit any aboriginal title or customary right that Raukawa may have; or
- 1.7 We also note that Raukawa and the RST are party to the Deed in Relation to a Co-management Framework for the Waikato River ('**Co-Management Deed**') 2009 along with the Crown.
- 1.8 This Co-Management Deed also does not remove any existing customary interests Raukawa may have in water (see clause 13.3), and expressly provides in clause 13.2 that the Crown has an obligation to consult with Raukawa on proposals which have the effect of creating property right like interests in the Waikato River.
- 1.9 Raukawa are therefore of the view that our rights to water have not been affected by these previous agreements. Instead we are of the view that these agreements in fact create a much stronger obligation on the Crown to engage with us over these issues and we have been disappointed to date that the Crown has not recognised this elevated obligations and instead



appears to have been under the misunderstanding that 'settled groups' have a lesser role in this process.

## **2 Part 2: Summary of the Raukawa interests in water and geothermal resources**

- 2.1 As noted above, the Raukawa rohe is extensive and includes significant surface and ground water and geothermal resources. The extent of these are set out in the images contained in Appendix A.
- 2.2 Our interests in many of these assets have been expressly recognised by the Crown as part of various cultural redress mechanisms contained in our Deed of Settlement as well as the Co-Management Deed. These include:
- a The Waikato River;
  - b The lakes along the Waikato River created by hydro-electric development;
  - c The Waihou River;
  - d The Puniu River (Upper Waipa); and
  - e A range of geothermal fields.
- 2.3 We also note that our rohe includes one of New Zealand's largest underground aquifers and numerous springs arise from this. It was not possible to include Crown recognition of the importance of all of these sites as cultural redress within our Deed of Settlement given the limits of redress and the fact many sites are now on private land. However, it is important to note that Crown recognition as cultural redress does not determine the importance of these sites to us, or limit out interests in them.
- 2.4 Instead we continue to hold mana whenua and express mana whakahaere, kaitiakitanga and ahi kaa roa throughout our rohe and over our taonga and resources. We also continue to be concerned for the future health and wellbeing of the waterways throughout our rohe, and are guided by the aspiration that if we look after the wellbeing of the water the wellbeing of the people will follow. Raukawa is not concerned with the issue of rights alone, but with the intrinsically interconnected rights, relationships and responsibilities that iwi have in respect of fresh water.
- 2.5 As part of this, we acknowledge that others (both Maori and non-Maori) also have a range of rights to the water and geothermal resources within our rohe. Because these rights are interconnected, come with responsibilities, and drive the relationships between parties, we have continued to work constructively with others towards establishing a sustainable framework for the management of these resources.
- 2.6 It is also important to note however that the nature of the Raukawa customary right to water and geothermal assets has never properly been investigated or identified. Instead it is only as a result of issues arising from the proposed sale of shares in SOEs that this issue has recently become a significant one and the subject of much debate.



- 2.7 We find it concerning that while our right to these resources has never been properly considered, instead it is simply assumed 'no-one owns water', this approach has enabled others to derive a significant economic benefit from the same resource. For example all of the hydroelectric development along the Waikato River resides within our rohe, and despite 'no-one owning water' the vast majority of bottled water sold in New Zealand today is drawn from springs within our rohe (effectively the commercialisation of water).
- 2.8 It is also important to note that, as the Waitangi Tribunal did, that customary rights to water and geothermal resources are likely to extend beyond simply the right to be consulted, or a recognition of cultural associations, but also include proprietary rights that may have a commercial aspect to them. As a result it is important that these issues are explored and clarified to provide certainty for all users, as well as Maori.
- 2.9 It is disappointing that, now that these issues have arisen, the Crown's current consultation process effectively side-steps these issues and focuses on the very limited question of iwi rights in shares.
- 2.10 We suggest now that these issues are before us the genie can simply not be put back in the bottle, that instead we need to have the courage to face these particularly hard and challenging issues. We therefore strongly urge the Crown to widen the discussion to include these wider issues of iwi rights to water and geothermal assets, and in fact suggest that clause 13.2.3 of our Co-Management Deed in fact creates an obligation to do so.

### **3 Part 3: Responses to the Crown's current questions**

- 3.1 Unfortunately, as noted above, our view is that the Crown's topics for submissions are extremely limited and do not speak to underlying issues which the sale of SOE shares has uncovered, and that as a result a wider conversation would be much more useful.
- 3.2 However, as the Crown has sought submission on specific questions, this Part 3 addresses these questions directly, while remaining hopeful that the Crown has the courage and interest to undertake a planned, considered and resourced discussion with us in the immediate future. for a wider discussion shortly.

#### *How will Raukawa interests be affected by the Initial Public Offering (IPO)?*

- 3.3 Raukawa currently has a strong relationship with Mighty River Power ('MRP'). Currently Raukawa and MRP work closely through a sound relationship, at a strategic level, and on a number of projects. This relationship is founded in a 11 year old Memorandum of Understanding which is currently the focus of a mutual review and refresh. Examples of the activities undertaken through our partnership include the documentation and protection of sites of significance along the Waikato River, the capacity to engage in the environmental sector, the development of the Waikato River Trails and a range of ecological enhancement projects within the catchment. MRP also assist with a range of sponsorship of Raukawa initiatives including the annual Raukawa Reo Awards and the internship programme of the environment group. As a partnership we also undertake strategic initiatives such as executive management strategic workshops, hosting of international delegations and co-operation on key policy matters. Raukawa has also worked closely with MRP over the years to build the company's cultural understanding of the River and its importance to us as tangata whenua.



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- 3.4 We view this as a strong and reciprocal relationship. It is also a relationship that has taken a significant amount of time, energy and resource to develop and one which we have hopes of further growing in the future.
- 3.5 As a result our most significant concern is that a change in ownership of MRP will lead to changes in our current relationships or a risk that we will not be able to continue to develop, and expand the relationships we currently have. We are concerned that this could occur as the change of ownership eventually creates changes to the internal strategic directions, pressures and incentives of MRP.
- 3.6 While the Crown has suggested that issues of Maori relationships to water and geothermal resources, or access to economic benefits, could be addressed outside of the IPO we suggest that these are different issues from the relationship with MRP itself.
- 3.7 Given that our current relationship with MRP has developed within the context of MRP's existing structure, it appears to us that any changes to that structure logically creates the potential for that existing relationship to change. It also appears that, unlike relationships with the natural resource, these relationships are not issues that can necessarily be provided for by the Crown after the IPO given the nature of that step itself.
- 3.8 It is therefore fundamentally important that our existing relationship with MRP, and the ability to continue to grow and enhance that relationship, is protected as part of this process.

### *Will "shares plus" mitigate this impact?*

- 3.9 However, we do not believe that the "shares plus" concept is the appropriate vehicle for this protection.
- 3.10 In particular, the relationship that would be created by Raukawa being issued with some form of "shares plus" is not the equivalent of our current relationship with MRP, and therefore not a replacement for this. Our rights and relationships as a shareholder (via shares plus or otherwise) would be very different from the current working relationship we have with MRP. Effectively via 'shares plus' we would become part owners of MRP whereas the relationship we are seeking to protect is a reciprocal one as strategic partners with MRP working towards achieving common goals.
- 3.11 In addition we see that seeking to preserve our current relationship with MRP via a "shares plus" mechanism creates the potential for future conflict with others.
- 3.12 For example, we have some significant discomfort with the idea that a part ownership right in MRP would enable us to have greater operational engagement with MRP on a day to day basis. Not only does this appear to conflict with a separation between governance and management of the company itself (which is likely to create difficulties for MRP) it risks creating conflict with other shareholders who may become concerned their similar, or greater, shareholding is not affording them similar rights.
- 3.13 Alternatively, the risk is that this is simply not an affective mechanism for preserving our current relationship as we simply become one of many minority shareholders in MRP and any relationship we may have (whether through enhanced 'share plus rights or not) will become significantly diluted.



- 3.14 As a result we do not believe that the concept of “shares plus” will adequately protect our current relationships and interests.
- 3.15 Instead, if the IPO is to proceed, we strongly believe that prior to this some form of strengthened relationship agreement (including Raukawa, the Crown, and MRP) must be put in place to preserve our current relationships and provide a sound basis for that relationship to grow into the future.

*What other issues arise as a result of “shares plus”?*

- 3.16 In addition, we also have a number of other concerns with the concepts of “shares plus”.
- 3.17 Effectively, as we understand it, the “shares plus” concept would provide that if we were to take up shares in MRP (or other SOEs) extra rights would flow with those shares giving us a greater say in the management of the resources being used by the SOE. For us to acquire shares would require a financial investment.
- 3.18 Unfortunately it appears that what this concept does is essentially combine a financial decision to invest Raukawa assets in a commercial entity with a desire to achieve the cultural outcomes of preserving our relationship with our taonga. To use an analogy from the Treaty Settlement process – it appears that this proposal is effectively the equivalent of being required to invest settlement quantum to secure cultural redress such as a Statutory Acknowledgement.
- 3.19 We do not believe that it is appropriate for cultural associations and interests to be recognised via what are effectively commercial means. Instead doing so creates enormous difficulties for iwi, as it effectively requires iwi to make a commercial investment in order to achieve a cultural relationship. We believe this is wrong – our association with the water and geothermal resources in our rohe is not dependant on whether or not we have made a commercial decision to invest in particular companies.
- 3.20 This is particularly so given that arguments that it is possible that a “shares plus” option would lower the value of the shares in the entities due to the enhanced rights it would create for some shareholders. In that case it may be that taking up a “shares plus” offer would not be a commercially sound option for Raukawa to take.
- 3.21 It is not clear what the situation would be, for example, if Raukawa viewed the opportunity to purchase shares as not being the best financial decision and so elected not to acquire shares. In that situation what rights would Raukawa have in relation to the management of particular resources?. Effectively Raukawa would be caught in a ‘Catch-22’ situation where we are required to make a commercial investment to protect our cultural interests, but the nature of those cultural protections makes that investment commercially undesirable.
- 3.22 Again we question whether it is appropriate that the level of engagement we may have over particular resources should be tied to a commercial decision of whether or not to invest in the SOEs.
- 3.23 We are also concerned that the “shares plus” concept is a very blunt tool and would appear to create enhanced rights over particular resources for iwi who may not have mana whenua connections with those particular resources.



- 3.24 For example, while we may expect a high degree of involvement in MRP's operation of its power stations along the Waikato River as a result of our connections with the awa, we do not expect to have a right to engage with MRP over the operation of its power stations in Kawerau or Southdown as these are outside of our rohe. It is unclear to us how a 'shares plus' mechanism would make this distinction.
- 3.25 In addition we are concerned that a "shares plus" offering to iwi generally may provide the ability for iwi with no traditional associations with the Waikato River to have a similar level of input as those iwi who have mana whenua and mana whakahaere.
- 3.26 This concern is compounded by the issue noted above that "share plus" rights conflates cultural rights with commercial investment. For example, we are concerned that the degree of input that iwi might have over the management of particular resources would become dependent on the level of their shareholding, and effectively the degree to which they can afford to make a commercial investment, rather than the strength of their manawhenua and mana whakahaere.

#### **4 Conclusion**

- 4.1 In conclusion, the Raukawa view on the IPO for SOEs and the concept of "shares plus" is:
- a Raukawa has continuing proprietary and customary interests and rights in the water and geothermal resources within our rohe;
  - b The current debate is a contemporary issue, and is one which concerns existing customary rights to particular resources and as a result is specifically not affected by our Deed of Settlement. Instead our rights to be engaged in this discussion have in fact been enhanced by our Deed of Settlement and Co-Management agreements;
  - c We are concerned that the Crown's focus on "shares plus" is too narrow and is avoiding the underlying issues that have arisen as a result of the IPO proposals. We strongly encourage the Crown not to avoid these issues, but instead to engage with iwi on how underlying customary rights, including proprietary rights, in water and geothermal resources can be recognised and provided for.
  - d We are concerned that the IPO will negatively impact on our currently strong relationship with MRP, and particularly the potential for us to grow and enhance that relationship in the future;
  - e We do not believe that it is possible for the Crown to address this issue following the IPO, as by then the structure of MRP will have already changed;
  - f Nor do we believe that a "shares plus" mechanism is the appropriate method to address this concern;
  - g In order to preserve our existing relationships, and provide the ability for those relationships to grown into the future, we suggest that the Crown, MRP, and Raukawa enter into further relationship agreements to protect all the parties against any potential impacts arising from the IPO and losing the valuable progress made to date





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- h We are also concerned that the concept of "shares plus" creates an inherent conflict between commercial investment and cultural rights in respect of particular resources. We believe that this is inappropriate and creates a range of difficulties; and
  - i We are also concerned that the concept of "shares plus" creates the potential for iwi who do not have a cultural association with particular resources to have a voice in the management of those resources.
- 4.2 We look forward to continuing the discussion on these issues in a proactive manner with the Crown, and would particularly welcome the opportunity to discuss further with officials and Ministers the steps that we might put in place to protect the current relationship between Raukawa and MRP.

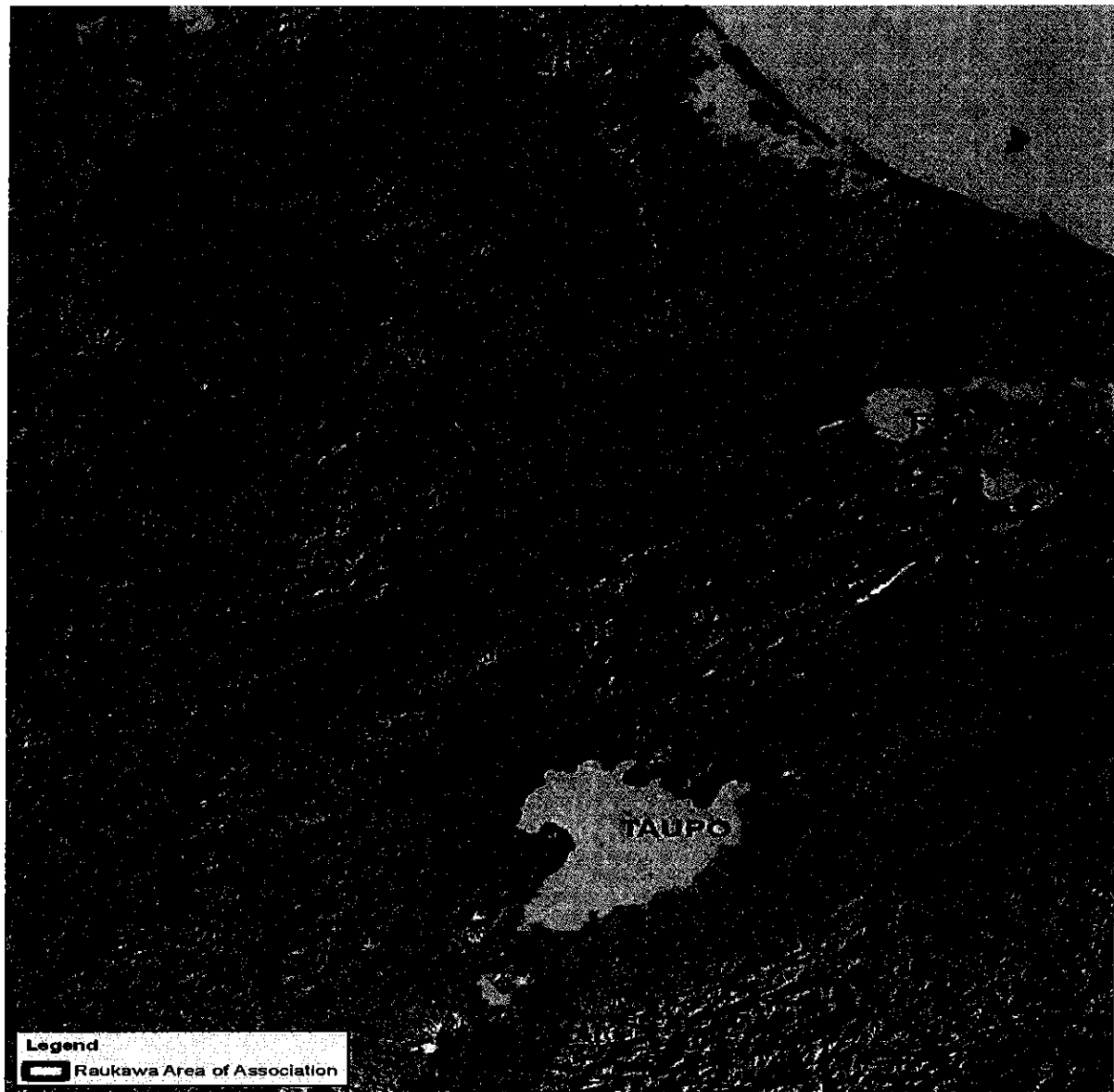


Vanessa Eparaima  
Chair and Chief Negotiator  
Raukawa Settlement Trust



## Appendix A<sup>1</sup>

### Raukawa area of association and the rivers and streams

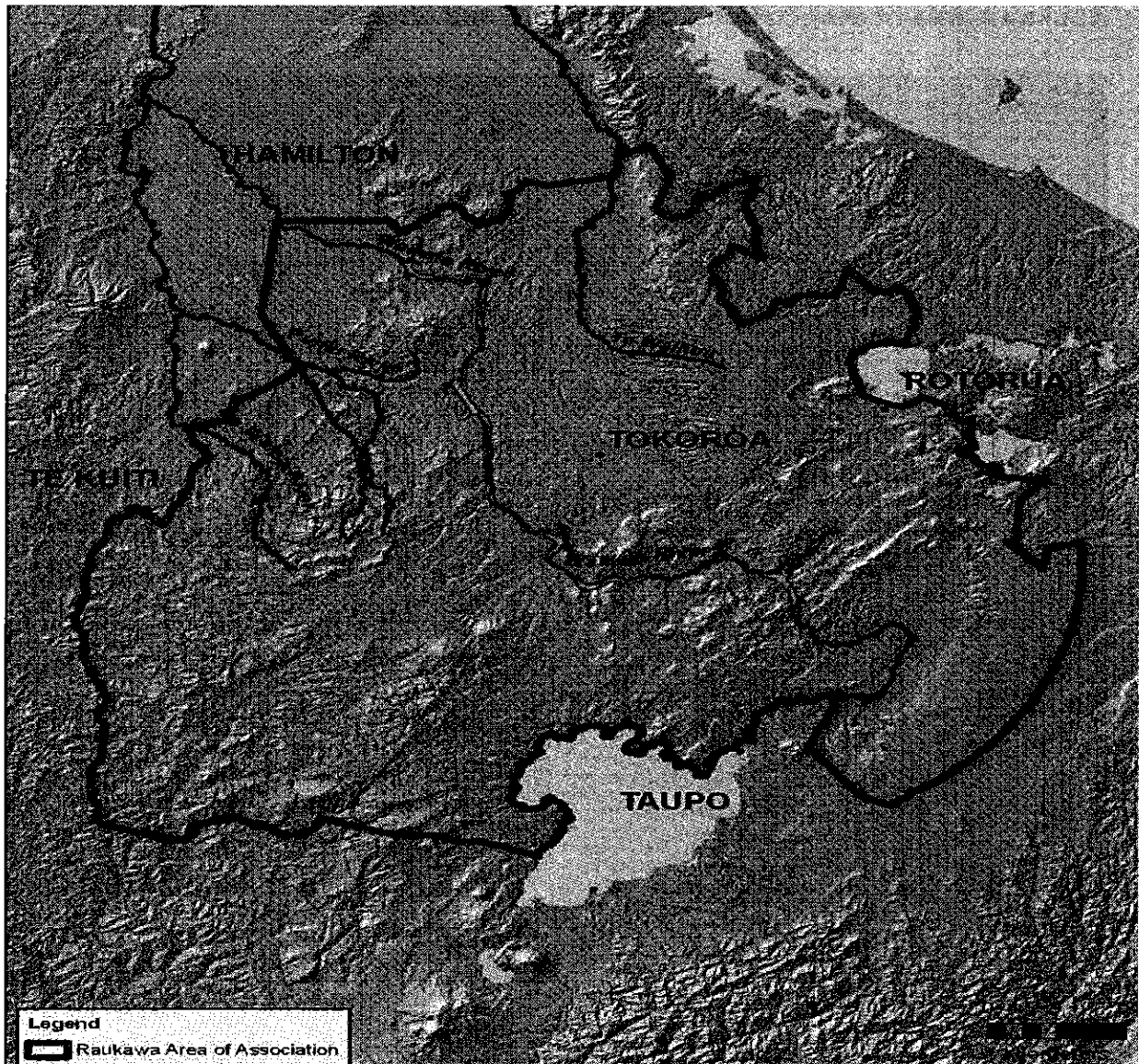


<sup>1</sup> Please note that these maps do not depict a tribal boundary but instead illustrate areas of importance to Raukawa for a range of reasons. In some areas Raukawa do not have exclusive or predominant interests and acknowledge that in such areas other groups may hold mana whenua.



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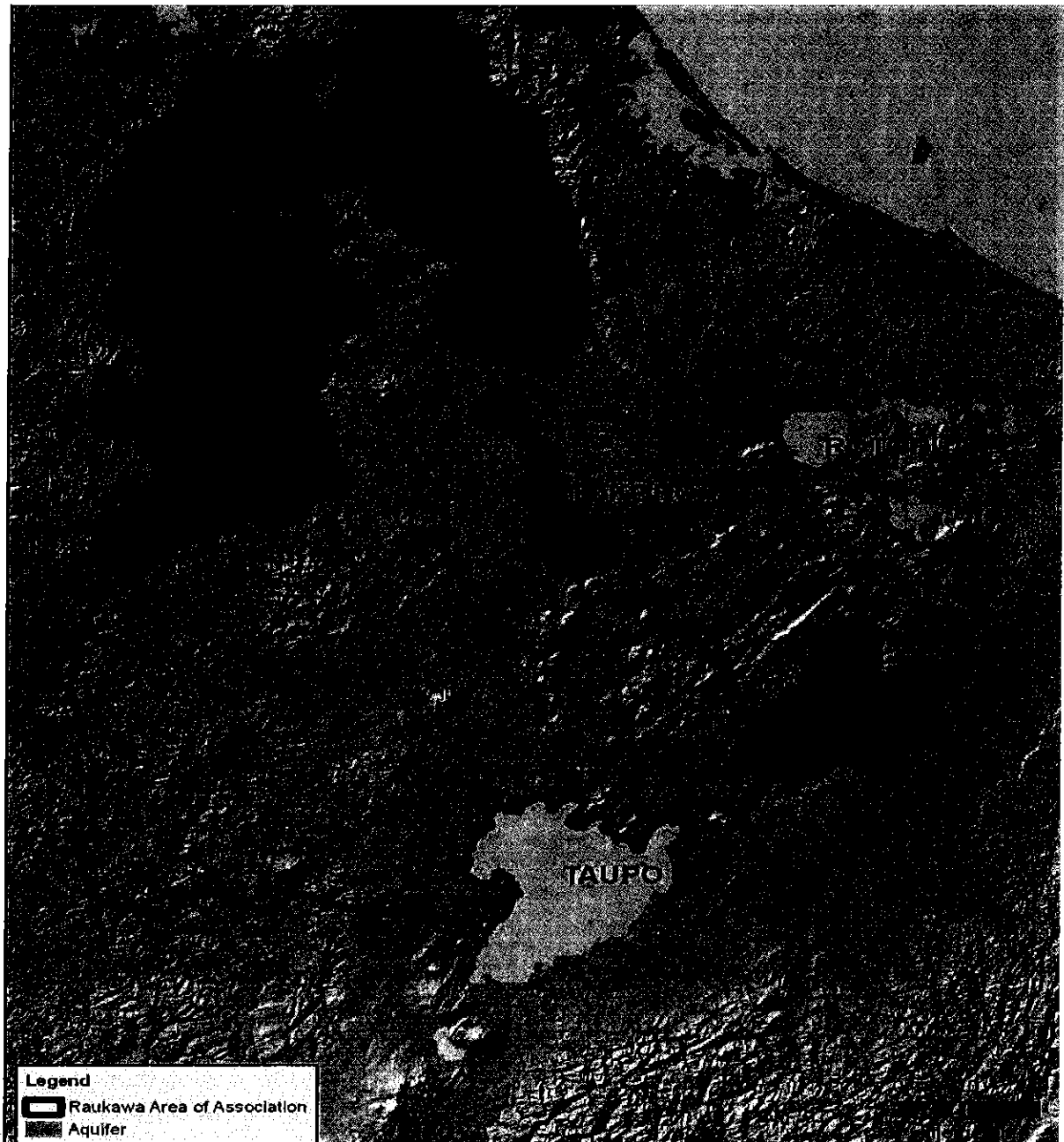
## Raukawa area of association and the major rivers





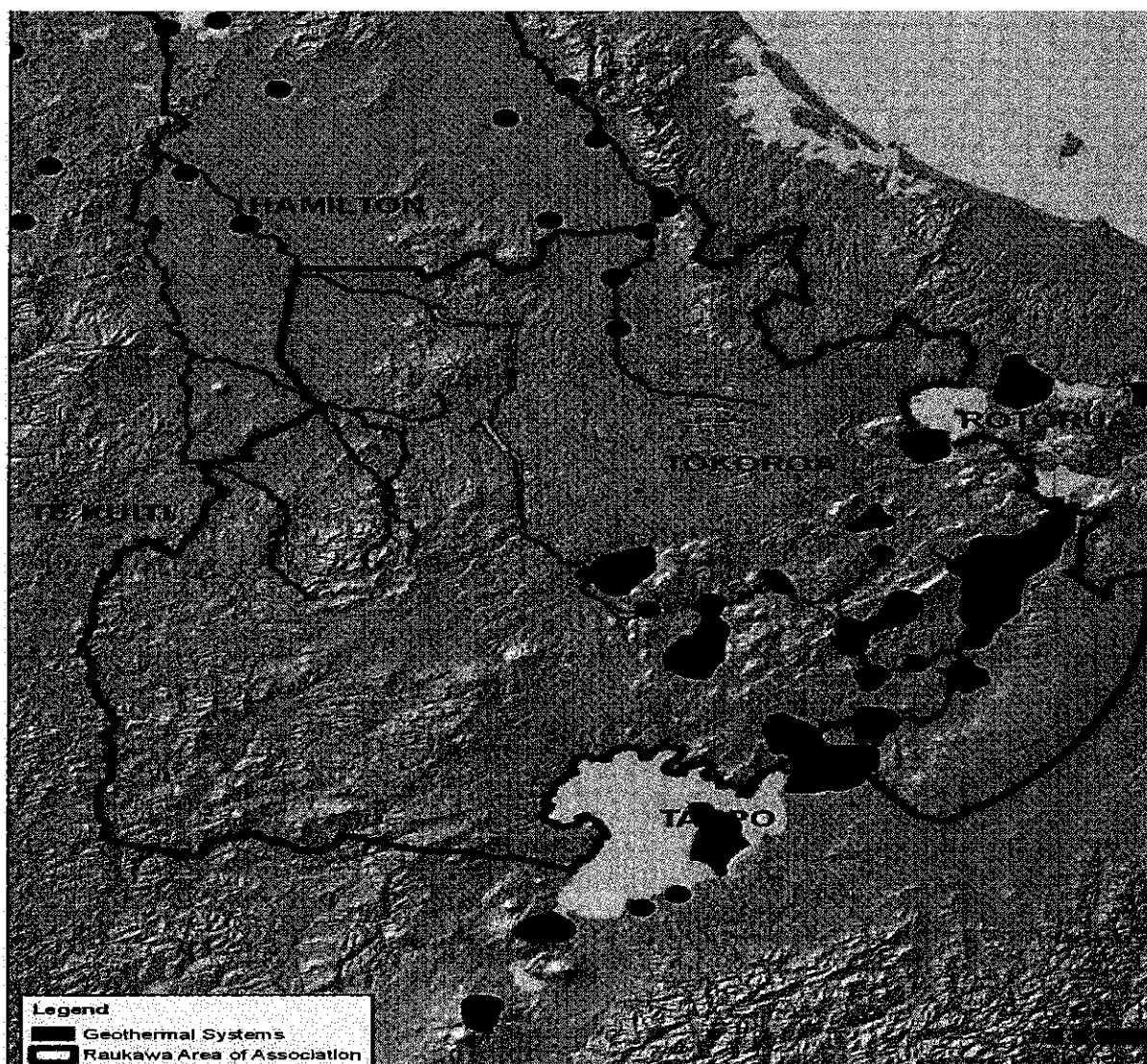
# TE POARI MATUA O RAUKAWA RAUKAWA SETTLEMENT TRUST

## Raukawa area of association and the aquifer





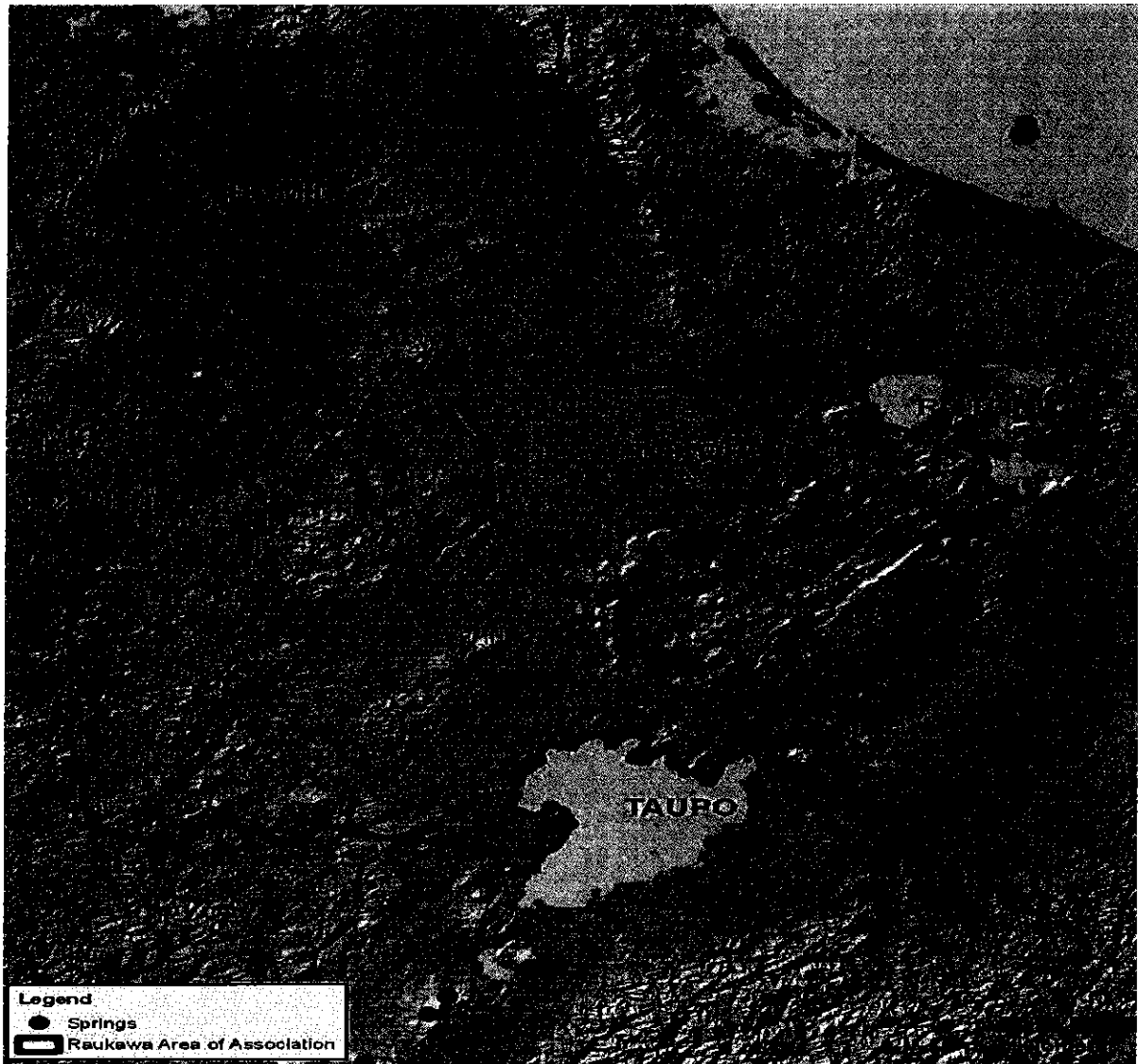
## Raukawa area of association and the geothermal systems





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## Raukawa area of association and the springs

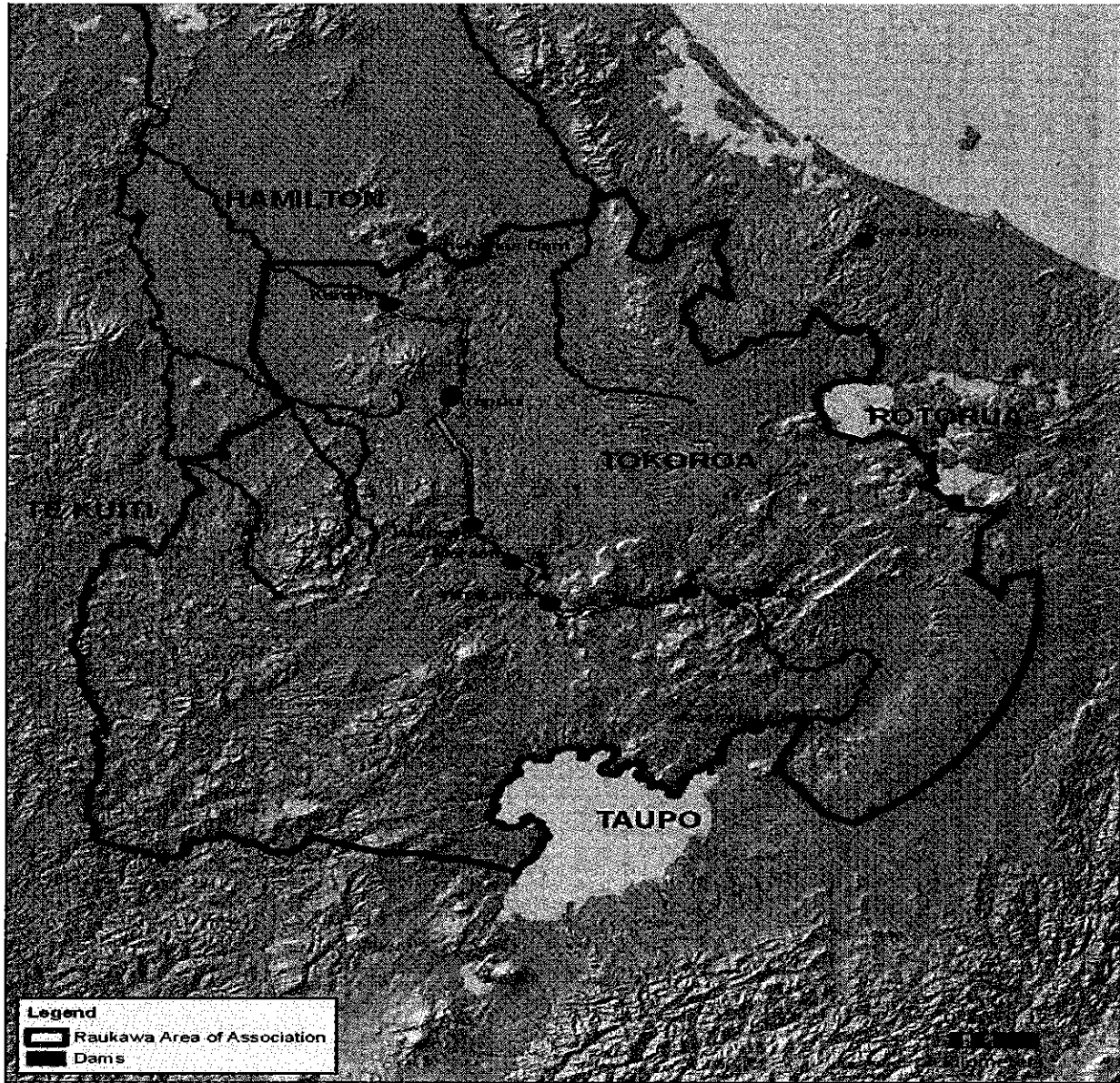






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## Raukawa area of association and the dams





## Raukawa area of association and the power stations

