



## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court on August 1-5, 8, 11, and 12, 1994, the Honorable Riki May Amano presiding. Yuklin Aluli, Paul Nahoia Lucas, and Steven C. Moore appeared on behalf of Plaintiff Pele Defense Fund. Michael W. Gibson and James K. Mee appeared on behalf of Defendant Trustees of the Estate of James Campbell, deceased, together with party representatives Edith MacKenzie and Rubellite Johnson.

Pursuant to the First Amended Complaint for Declaratory and Injunctive Relief filed herein, the opinion of the Supreme Court filed September 28, 1992 in *Pele Defense Fund v. Paty*, 73 Haw. 578 (1992), and the Judgment on Appeal filed by the Supreme Court on October 26, 1992, the Court has heard and considered the evidence presented, and being fully apprised of the premises, makes the following Findings of Fact and Conclusions of Law. These Findings of Fact and Conclusions of Law shall be construed as follows:

(1) If it is later determined that a Finding of Fact should be properly deemed to be a Conclusion of Law, the Court so concludes on those legal issues.

(2) If it is later determined that a Conclusion of Law should properly be deemed to be a Finding of Fact, the Court so finds on those factual issues.

(3) To the extent that any of the following Findings of Fact and Conclusions of Law include a mixed finding of fact and conclusion of law, each shall be given full effect.

### FINDINGS OF FACT

1. Plaintiff Pele Defense Fund (hereinafter "PDF") is a non-profit corporation incorporated in 1987, whose purpose is to perpetuate Hawaiian religion and culture.

2. Defendant Estate of James Campbell, Deceased (hereinafter "Campbell Estate"), is a private trust operated for the benefit of individual beneficiaries. Defendant Trustees under the Will and of the Estate of James Campbell, deceased (collectively referred to hereinafter as "Campbell Estate"), were sued in their fiduciary capacities and not their individual capacities.

3. Portions of the land that are the subject of this action are the former Wao Kele `O Puna ("WKOP") Natural Area Reserve and Puna Forest Reserve ("PFR"), situated in the District of Puna, Island of Hawaii, which were exchanged in 1987 by the State of Hawaii for lands at Kahauale`a which were owned by Defendant Campbell Estate.

4. Defendant Campbell Estate currently holds record title to the land pursuant to Land Patent Grant No. S-15,666, which land is described in Exhibit A attached hereto.

5. On September 28, 1992, the Hawaii Supreme Court issued its opinion in *Pele Defense Fund v. Paty*, 73 Haw. 578 (1992), reversing the lower court's dismissal of PDF's claim that Defendant Campbell Estate violated Article XII, § 7 of the Hawaii State Constitution, by preventing PDF's members from entering Campbell's undeveloped land for subsistence, cultural, and religious practices, and remanded that claim for a full trial on the merits.

6. On October 26, 1992 the Supreme Court entered its Judgment on Appeal, and expressly directed this Court that:

The case is remanded for trial on the claim alleging that Defendants-Appellees THE ESTATE OF JAMES CAMPBELL, FRED E. TROTTER, W.H. McVAY, P.R. CASSIDAY, HERBERT C. CORNUELLE, TRUE GEOTHERMAL ENERGY CORP., TRUE GEOTHERMAL DRILLING CO., and MID-PACIFIC GEOTHERMAL, INC. violated article XII, § 7 by the continued denial of access into the undeveloped areas of Wao Kele 'O Puna and other exchanged lands to native Hawaiian PDF members who seek access for customarily and traditionally exercised subsistence, cultural and religious practices.

## RESERVATION OF RIGHTS

7. On March 8, 1848, Kamehameha III conveyed to the Hawaiian government 38 *ahupua`a* and three `ili in the *Puna* district, and retained two *ahupua`a* and one `ili. 2 Rev.L.Haw. 2152-2176 (1925). The *ahupua`a* that the King conveyed to the government were: Aahalanui, Halepuaa, Halona, Hapaiki, Haukalua 1 and 2, Honolulu, Honomu, Kaikowowo, Kamaili, Kanekiki, Kaohe, Kapaahu, Kaualea, Kaukulau, Kealakomo and Kilauea, Keauohana, Keokea, Keonepoko, Ki, Kiapu, Kikala 1 and 2, Kupahua, three `ili in Kupahua, Lonokaeho, Makena, Makuu, Malama, Manawale, Oneloa, Opihikao, Panauiki, Pohoiki, Popoki, Poupou 1 and 2, and Waawaa. 2 Rev.L.Haw. 2156-2174 (1925). The *ahupua`a* in *Puna* retained by Kamehameha III (later known as Crown Lands) were Apua and Kaimu and the `ili of Waiakolea. 2 Rev.L.Haw. 2152-2156 (1925).

8. On June 7, 1848 the Hawaiian legislature ratified the King's action, declaring that all of the aforementioned government and Crown lands, which included the *ahupua`a*, were to be set aside for the Hawaiian government "subject always to the rights of tenants". 2 Rev.L.Haw. 2156, 2174 (1925).

9. On February 27, 1987, the BLNR issued Land Patent No. S-15,666, transferring the land to Campbell Estate in fee simple.

10. The Land Patent contains the following language: "excepting and reserving therefrom all existing trails within said Parcel B..." and "excepting and reserving therefrom all existing trails within said Parcel C."

11. On December 3, 1986, Campbell Estate entered into a sublease with True Mid-Pacific Geothermal, Inc. for the exploration and development of geothermal energy within the land. (Plaintiff's Trial Exhibit "2"). Less than 20 acres of the approximately 27,800 acres were

developed, as defined in Exhibit B attached hereto, pursuant to the sublease. The remaining acres are undeveloped.

12. The sublease expressly states that True Geothermal's lease is subject to "claims based on native rights, including roads and trails". (Plaintiff's Trial Exhibit "2", pp. 9-10).

13. The sublease also states that both Campbell and True Geothermal shall not "unreasonably interfere with the rights of others herein set forth" in the lease. (Plaintiff's Trial Exhibit "2", pp. 9-10).

#### HISTORICAL LAND USE OF WKOP AND PFR LANDS

14. The traditional place name for the former WKOP and PFR lands is unknown. (Tr. 8/11/94 (p.m.) at 44-46). The Hawaiian phrase "*Wao Kele `O Puna*" used to designate the former Natural Area Reserve, is merely a descriptive term which refers to the rainbelt of *Puna*, i.e., an area where clouds accumulate, being attracted by the forest. (Tr. 8/11/94 (p.m.) at 45)

15. *Wao Kele `O Puna* may be an abbreviated form of *Wao O ma`u O Kele O Puna*, referring to *Oma`u*, a diety who was part of the *Pele* clan, associated with a part of the rainforest. (Tr. 8/11/94 (p.m.) at 44-45).

16. Following the *Mahele* of 1848, the Hawaiian government received the bulk of lands in the *Puna* district. (Tr. 8/11/94 (p.m.) at 69). In 1911, these government forest lands were set aside for use as a Forest Reserve that came to be known as the *Puna* Forest Reserve. (Tr. 8/11/94 (p.m.) at 47).

17. PDF witnesses testified that these lands are not contained within any actual *ahupua`a*. According to maps dating as early as 1850 on file at the state archives, the former WKOP and PFR are not located within an *ahupua`a*. (Tr. 8/11/94 (a.m.) at 76)

18. For instance, a Territorial Survey Map prepared by Walter E. Wall, Surveyor in 1927, of the *Puna* Forest Reserve, *Keauohana* Forest Reserve, and *Malama-ki* Forest Reserve, *Puna*, Hawaii HTS Plat 814, illustrate the *ahupua`a* and *`ili*, including the boundaries of the *Puna* Forest Reserve, awarded in the *Puna* District. (Defendant's Trial Exhibit "AA").

#### HISTORICAL USE OF WKOP AND PFR

19. Subsistence and cultural activities were traditionally exercised in former WKOP and PFR by individuals prior to 1892.

20. The former WKOP and PFR land was used by early Hawaiians for the planting of native cultigens, i.e., kukui, ginger, *taro*, *ti* leaf, *awa*, etc. (Tr. 8/5/94 (p.m.) at 48; Tr. 8/3/94 (p.m.) at 73-77)

21. There are at least two known large lava tube systems in the *Puna* district which extend into the WKOP and PFR lands. (Tr. 8/5/94 (p.m.) at 43) The northern tube extends approximately three miles into the WKOP and PFR, and the middle tube extends at least 4.2 miles into the WKOP and PFR. (Tr. 8/5/94 (p.m.) at 43) Both systems contain archaeological evidence of prehistoric and historic use of the tubes and surface lands, for hunting, gathering, warfare, and burial purposes. (Tr. 8/5/94 (p.m.) at 44-47, 50, 60)

22. There were *mala`ai*, or dryland garden plots of land situated in the former WKOP lands in an area called "*Walaohia*", which were used primarily by Hawaiian families residing in the Kalapana, some as far back as the mid 19th century, for subsistence and cultural activities. (Tr. 8/2/94 (p.m.) at 35-37; Tr. 8/5/94 (a.m.) at 28; Tr. 8/8/94 at 15-16, 22).

23. Native Hawaiian members of PDF residing in the *Puna* District use the land for hunting and gathering, and other customary practices, all of which were in existence and practiced in the 19<sup>th</sup> century, through 1892.

24. Said members of PDF have been driven in part by the loss of suitable habitat in other areas, to hunt and gather on the subject lands.

25. Since acquiring title to the subject land, Campbell Estate has failed to recognize or acknowledge Plaintiff's members right to current and future usage, to which the Campbell Estate's land is subject, and have also failed to permit Plaintiff's members access to the land.

26. Due to Campbell Estate's failure, said members of PDF are no longer able to gain access to the land to gather herbs and other native plants, to hunt and to perform cultural practices.

#### VALUES OF THE `OHANA IN PUNA

27. The importance of the `ohana, or extended family, to the *Puna* people, and their continuing dependence on subsistence hunting and cultural gathering activities on the former WKOP and PFR land, has persisted over time.

28. From the earliest migration into the *Puna* area (300-600 A.D.), and continuing through the second (600-1100 A.D.) and third (1100-1400 A.D.) expansion and migration periods, the `ohana was the main social unit of organization in the maintenance and operation of the subsistence lifestyle. (Tr. 8/11/94 (a.m.) at 57-64) The *ahupua`a* concept or boundaries had not yet been established. (Tr. 8/11/94 (a.m.) at 57-64) *Ahupua`a* boundaries were not established in Hawaii or the District of *Puna* until the time of Liloa, circa. 1475 A.D. Thus, the division of *Puna* into *ahupua`a* has occurred within the last 300-500 years. (Tr. 8/11/94 (a.m.) at 64)

29. From the time of *Umialiloa*, *Liloa's* son, in the 15th century, when the *ahupua`a* system was established, the `ohana system was overlain or impressed with a more stratified, hierarchical system of chiefs and commoners. (Tr. 8/11/94 (a.m.) at 88) Accordingly, there were

two sets of values operating within the Hawaiian social system: 1) those values associated with the chiefs and konohiki, and 2) those values of the `ohana. (Tr. 8/11/94 (a.m.) at 88-89)

30. Under this two tiered system, the commoners lived on and took care of the land, and provided food and labor, and sometimes military service, for the *ali`i*. (Tr. 8/3/94 (p.m.) at 7-8; Tr. 8/12/94 (a.m.) at 44-52)

31. The values that the `ohana of *Puna* have maintained and exercised in their subsistence practices from 300 A.D. to the present maintain and sustain the `ohana, by feeding family members and allowing the cooperative relations essential to maintain the family network. (Tr. 8/11/94 (a.m.) at 83-84)

32. When Kamehameha I established control through a central government in 1795, he continued the practice of assigning lands in the *Puna* district to chiefs who were not from the *Puna* district, but who were his allies. (Tr. 8/11/94 (a.m.) at 65-66; Tr. 8/12/94 (a.m.) at 7)

33. Despite these changes the `ohana system was still paramount in the *Puna* district, persisting despite this hierarchy, that is, traditional values associated with hunting, gathering, and fishing continued to be handed down and practiced within the `ohana from one generation to the next. (Tr. 8/11/94 (a.m.) at 89)

#### AHUPUA`A BOUNDARIES

34. Unlike other areas in Hawaii, Hawaiians historically crossed *ahupua`a* boundaries in the *Puna* district. Testimony before the Boundary Commission establishes that individuals crossed regularly between the *ahupua`a* of Kapoho and Keahialaka, which were two lands owned by the same family, without regard to the interior boundary. (Tr. 8/11/94 (p.m.) at 74-76) In addition, Hawaiians would cross to the kula plains in the *ahupua`a* of Kalama. (Tr. 8/11/94 (p.m.) at 74-76) (Compare, Tr. 8/12/94 (a.m.) at 18).

35. It was customary for persons using the trails to gather along the trails, as well as temporarily reside overnight. (Tr. 8/11/94 (p.m.) at 78-80)

36. The lava tube system, used prehistorically and historically by Hawaiians, could have crossed several *ahupua`a* boundaries. (Tr. 8/5/94 (p.m.) at 62)

37. Members of PDF and their families hunt and gather in WKOP and PFR for subsistence and cultural purposes.

38. *Ahupua`a* boundaries are not well known by PDF members and other individuals conducting subsistence and cultural activities in *Puna*, and are not perceived as dividing lines over which they will not cross. (Tr. 8/11/94 (a.m.) at 77-78; Tr. 8/2/94 at 61-62; Tr. 8/4/94 (p.m.) at 17-18)

39. The evidence at trial established that in accord with Hawaiian custom, a person seeking access to gather mauka, or upland, would ask permission to cross land only if that person was met in the course of their activities. Failure to ask for permission, however, did not preclude one from engaging in a subsistence and cultural activity, because the land "owner" would eventually be informed, either by the person exercising that activity or by a third party, usually by a person familiar or knowledgeable in that area. (Tr. 8/3/94 (p.m.) at 24-26; 34; Tr. 8/4/94 (p.m.) at 26)

40. Traditionally, rather than ask for permission, one would *kahea* or *heahea*, i.e., announce your presence and intention by rattling keys, making loud noises, or leaving ceremonial markers, such as rocks wrapped in ti leaves, to let residents know that you were visiting the area. (Tr. 8/3/94 (a.m.) at 35-38) The custom and practice of *kahea* or *heahea* differed from place to place. (Tr. 8/3/94 (a.m.) at 37)

41. The hunting and gathering patterns in the *Puna* district are unique because they are influenced, to a large extent, by an active volcano, *Kilauea*. It can be reasonably inferred that volcanic eruptions in the *Puna* area force hunters and gatherers to change areas to find plants and animals for subsistence purposes.

42. For example, PDF members Hauanio and Peleiholani were forced to move from their original family homes and *ahupua`a* due to lava flows, but continue to hunt and gather in areas to which they were introduced prior to relocation. (Tr. 8/8/94 (a.m.) at 13-14, 18; Tr. 8/5/94 (a.m.) at 14, 41-45)

43. Hawaiians are "multi-local", i.e., much given to changes in residency from district to district and even island to island. (Tr. 8/12/94 (a.m.) at 42-43) With these changes in residence, one is introduced to new areas of subsistence practice.

44. Nonetheless, familiarity and preference for the gathering and hunting areas would not end with a change of residence. The traditional values of not overusing and sharing would protect the resource.

45. For example, PDF members Kobayashi and Auwae moved from their *ahupua`a* after they married, but continue to hunt and gather in areas to which they were introduced prior to relocation. (Tr. 8/5/94 (a.m.) at 62-65; Tr. 8/4/94 (a.m.) at 40-42, 48-50, 57-63)

46. Further, ties of family and friendship in *Puna* and the requirements of survival would allow non-*ahupua`a* residents to continue their subsistence and cultural activities in a given area.

#### CUSTOMARILY AND TRADITIONALLY EXERCISED PRACTICE

47. A "customary and traditional" activity is defined as consisting of those activities that have been practiced in one generation and passed to another generation within the values

practiced by that culture. (Tr. 8/11/94 (a.m.) at 39) A practice is "customarily and traditionally exercised" when a specific set of values are passed down to the next generation in the conduct of their subsistence and cultural activities. A subsistence living requires a person to adhere to cultural practices, norms and values in order to maintain order, harmony, balance, and respect for the resources and deities associated with those resources.

48. The primary values, or norms, associated with the traditional native Hawaiian subsistence lifestyle include taking care of and not over-using or abusing the resource, utilizing only certain resources of a certain level of maturity or age, sharing resources with the *`ohana*, respecting others' areas, and others. (Tr. 8/11/94 (a.m.) at 41-42, 90, 96; Tr. 8/2/94 (p.m.) at 62; Tr. 8/5/94 (a.m.) at 64; Tr. 8/8/94 (a.m.) at 31) In this case, these values have been passed down by the *Puna* Hawaiians from one generation to another. *Id.*

49. PDF members and other individuals continue to hunt and gather in forested areas in *Puna* based on where they were taught to go and gather from their *`ohana*, or family, usually a kupuna, or elder. (Tr. 8/11/94 (a.m.) at 78, 82-83).

50. Although there may be changes in the items that they gather, as well as how they gather it, the values and the uses for which they are made are consistent with the values and uses extant from 300-1400 A.D. in *Puna*. (Tr. 8/11/94 (a.m.) at 83).

51. Dr. McGregor was lead author and investigator of the *Native Hawaiian Ethnographic Study* on behalf of the U.S. Department of Energy.

52. The *Native Hawaiian Ethnographic Study* documented contemporary Hawaiian subsistence and cultural practices in *Puna*. The study included semi-structured interviews with 79 "key informants", individuals identified by the State Historic Preservation Office as tradition bearers in the *Puna* community having knowledge of Hawaiian cultural and subsistence practices

in *Puna*. Dr. McGregor, in her testimony, relied upon a map entitled "Native Hawaiian Ethnographic Survey". This map consists of color coded identification of ocean gathering, fishing, hunting, plant gathering, and trails and was created by the location of such areas on a USGS map by the 79 key informants during the interviews. (Plaintiff's Trial Exhibit "9").

53. In this case, the hunting and gathering practices carried on today by members of PDF and other individuals, are "traditional and customary", i.e., these subsistence activities are conducted with the same values as utilized by Hawaiians in the *Puna* District for generations.

54. The PDF members who testified consisted of native Hawaiian residents of the *Puna* district who hunt and gather in the former WKOP and PFR (key informant witnesses Clarence Hauanio, Elia Kaho`okaulana, Pi`ilani Ka`awaloa, and Wesley Kobayashi); a non-Hawaiian resident of the *Puna* district married to a Hawaiian who hunts and gathers in the former WKOP and PFR (key informant witness Al Jardine); a native Hawaiian non-resident of the *Puna* district who exercises a customary and traditional subsistence and cultural activity in the former WKOP and PFR (key informant witness Henry "Papa" Auwae).

55. All PDF members who testified identified their place of residence, their route to the land, point of entry, and route within the land. (Plaintiff's Exhibit "1"; Tr. 8/3/94 (p.m.) at 58-77; Tr.8/4/94 (a.m.) at 72-76; Tr.8/5/94 (a.m.) at 22-29, 65, 72-80; Tr.8/8/94 at 22-26).

56. Other PDF members were named as Plaintiff's lay witnesses for hunting and gathering activities in WKOP and PFR. For purposes of avoiding cumulative testimony, the testimony of: Emily Iwalani Naeole, Keala Kaipo, Gordon Hoohuli, John Kekahuna, James Costa-Ayers, Phillip Keli`iho`omalua, Albert Kaho`okaulana, Beverly Pavao, Keoni Kalawe, Robert Kelihoomalua, Darrin Kamanu, Edward Kamanu, and Elson Kalawe was accepted through PDF's offer of proof. (Tr. 8/8/94 (a.m.) at 80-81).

57. There are approximately six hunters in the Kalapana area, who supply meat to each of their families. (Tr. 8/5/94 (a.m.) at 21) There are approximately 50 to 60 individuals in each hunter's family. (Tr. 8/5/94 (a.m.) at 22)

58. PDF member Clarence Hulihe`e Hauanio is a 42 year old pure native Hawaiian who was born and raised in Kepauole-mauka, Kalapana. (Tr. 8/5/94 (a.m.) at 13-14).

59. PDF member Elia Kaho`okaulana is a 34-year old 100% Hawaiian who was born and raised in Kalapana at an area known as Mokuhulu. (Tr. 8/2/94 (p.m.) at 28). Kaho`okaulana presently resides in Mokuhulu, in the house that he was raised in, built by his grandfather, Elia Herman Kaho`okaulana, in the 1940's. (Tr. 8/2/94 (p.m.) at 27-28).

60. PDF member Wesley Kobayashi is a 35-year old native Hawaiian of no less than 50% Hawaiian blood. (Tr. 8/5/94 (a.m.) at 61).

61. PDF member Al Jardine is a 67-year old non-Hawaiian married to a pure Hawaiian woman, whose family is from *Kona*. (Tr.8/3/94 (p.m) at 39).

62. Their fathers trained these Hawaiians when they were young children to hunt using a knife and hunting dogs. (Tr. 8/5/94 (a.m.) at 18); (Tr. 8/2/94 (p.m.) at 32); (Tr. 8/5/94 (a.m.) at 64, 69); (Tr.8/3/94 (p.m) at 42,105).

63. Jardine has eight children, 23 grandchildren and nine great grandchildren. (Tr.8/3/94 (p.m) at 39-40). He has taught his sons and grandchildren to hunt. (Tr.8/3/94 (p.m) at 52).

64. Kobayashi is teaching his son to hunt. (Tr. 8/5/94 (a.m.) at 71).

65. Hauanio would hunt and gather with his father in an area ranging from Kepauole-mauka to *Kiula*. (Tr. 8/5/94 (a.m.) at 18).

66. Kaho`okaulana would hunt and gather with his father and two brothers primarily in an area called *Kiula*. (Tr. 8/2/94 (p.m.) at 31).

67. Kaho`okaulana's father would hunt in an area outside of his home because there was no game in his area. (Tr. 8/2/94 (p.m.) at 60).

68. Kobayashi would hunt and gather with his father in areas in the *Puna* district behind the Paho School, called "Big Mountain", and in an area behind the Black Sands subdivision in *Kalapana*. (Tr. 8/5/94 (a.m.) at 65).

69. Hauanio presently hunts approximately twice every month in WKOP, taking between 80-250 lbs. of meat out of the forest. (Tr. 8/5/94 (a.m.) at 19-20).

70. Jardine first started to hunt in the *Puna* district after World War II, in 1947 or 48. (Tr. 8/3/94 (p.m) at 44).

71. Kaho`okaulana presently hunts approximately once a week in WKOP, taking one pig out of the forest. (Tr. 8/2/94 (p.m.) at 46, 52, 70).

72. Kobayashi used to hunt primarily on weekends in WKOP with his father and friends from school, taking about 50-60 lbs. of meat out of the forest. (Tr. 8/5/94 (a.m.) at 67, 70-71).

73. Jardine, his uncle, father, and Hawaiian friends would hunt in WKOP and PFR between once and twice a month, sometimes sleeping overnight and taking their kill, approximately 200 lbs. of game, out the next day. (Tr.8/3/94 (p.m) at 46, 52).

74. Kaho`okaulana's older brother also hunts and shares his meat with his family. (Tr. 8/2/94 (p.m.) at 76).

75. Kaho`okaulana used to hunt with his maternal grandfather Samuel Ka`awaloa. (Tr. 8/2/94 (p.m.) at 33-34).

76. At the time of trial, Samuel Ka`awaloa was 88 or 89 years old. (Tr. 8/2/94 (p.m.) at 34).

77. Hauanio, Kaho`okaulana, and Jardine hunt with a knives and hunting dogs, but now also carry guns to hunt. (Tr. 8/5/94 (a.m.) at 19-20); (Tr. 8/2/94 (p.m.) at 70); (Tr.8/3/94 (p.m) at 49).

78. Hauanio salts or smokes the meat he shares with family, including his brothers and sisters, uncles and aunt. (Tr. 8/5/94 (a.m.) at 20-21). Kaho`okaulana also shares the meat he gathers with family, primarily his six brothers and six sisters some of whom live on *O`ahu*. (Tr. 8/2/94 (p.m.) at 29, 75-76). Kobayashi smokes or makes sausage and shares the meat he gathers with his family, which consists of more than 50 members.(Tr. 8/5/94 (a.m.) at 71). Jardine salts or smokes the meat and makes sausage he shares and gives to family, and those who were unable to hunt. (Tr.8/3/94 (p.m) at 47, 51).

79. The native Hawaiian hunters also simultaneously gather medicinal plants such as *mamaki*, *ko`oko`olau*, and *liko*, among others for their families and animals in WKOP. (Tr. 8/2/94 (p.m.) at 69-70, 77).

80. Kobayashi also picks *maile* for family members' wedding.(Tr. 8/5/94 (a.m.) at 70).

81. Jardine also gathers *kukui* nuts and Hawaiian ginger in the WKOP and PFR for medicinal use by his Hawaiian wife and others. (Tr.8/3/94 (p.m) at 73-77).

82. Hawaiians might have lived and had plantings in *mala`ai*, upland gardens located within the *waokanaka*, or forest area. (Tr. 8/3/94 (a.m.) at 58-59)

83. It was also customary that these *mala`ai* were never disturbed by persons visiting the area. However, if strangers needed these products for their survival, custom dictated that they

were free to use it, provided that they eventually inform the owner of its use. (Tr. 8/3/94 (a.m.) at 58-60).

84. At least once a week, Kaho`okaulana would accompany Sam Ka`awaloa from his grandfather's home in *Kapa`ahu, Puna*, on horseback to their family garden plot of land, or *mala`ai*, of approximately one acre upland of *Kapaahu*, in an area called *Walaohia*. (Tr. 8/2/94 (p.m.) at 35-38).

85. *Walaohia* is within the WKOP forest. (Tr. 8/2/94 (p.m.) at 54).

86. The *mala`ai* was first farmed by Samuel Ka`awaloa's great-grandfathers. (Tr. 8/2/94 (p.m.) at 40).

87. Other families, such as Konanui, Lum Ho, and Kauhi also had *mala`ai* in *Walaohia*. (Tr. 8/2/94 (p.m.) at 40-41).

88. Kaho`okaulana and his grandfather would stay at *Walaohia* for three days and two nights, and, before they came back home, would hunt for pigs, goats and cows, taking only enough to feed his family. (Tr. 8/2/94 (p.m.) at 38-40).

89. Kaho`okaulana and his grandfather would pull weeds and care for plots of taro, sweet potato, *ti* leaves, banana trees and *awa* roots, that his grandfather planted. (Tr. 8/2/94 (p.m.) at 36).

90. Kaho`okaulana also gathered *maile* below the family *mala`ai*. (Tr. 8/2/94 (p.m.) at 68).

91. At *Walaohia* there was a *hale kuke*, a small house, where they would obtain water from runoff. (Tr. 8/2/94 (p.m.) at 37-38).

92. *Walaohia* was partly destroyed in the lava flow of 1977; it was later completely destroyed by the lava flow of 1980. (Tr. 8/2/94 (p.m.) at 39, 52).

93. There is an area in the Puna uplands area called Walaohia, a homestead which consists of several mala`ai used by the Konanui, Kauhi, and Waipa families from Puna. (Tr. 8/8/94 at 15-16, 22; Tr.8/2/94 (p.m.) at 36-41).

94. PDF member Pi`ilani Gwendolyn Ka`awaloa was 29 years old at the time of trial, a native Hawaiian of no less than 50% Hawaiian blood who was born and raised at *Kupahua* in the district of *Puna*. (Tr. 8/8/94 at 8).

95. Ka`awaloa has been trained in the Hawaiian arts of lauhala weaving, mahi`ai farming, and la`au lapa`au healing, which Ka`awaloa learned from her grandmother, who in turn learned it from her grandmother. (Tr. 8/8/94 at 15-16, 22).

96. Ka`awaloa's grandmother also showed her where in *Puna* to gather items for medicine. (Tr. 8/8/94 at 22).

97. Jardine has observed plantings of *ti* leaves, taro, and awa root in WKOP and PFR. (Tr.8/3/94 (p.m) at 73-77).

98. PDF member Henry Auwae testified as a witness for the PDF and was found by this Court to be qualified as an expert in the area of *kahuna la`au lapa`au*, or traditional medicinal healing. (Tr. 8/4/94 (a.m.) at 51, 56).

99. Auwae was born in 1910 at Puako, Kawaihae, Hawaii. (Tr.8/4/94 (a.m.) at 8).

100. Auwae has sixteen children and 247 grandchildren, great grandchildren, and great great grandchildren.(Tr.8/4/94 (a.m.) at 7).

101. Auwae was trained by his great great grandmother Kapua Pai, and grandmother Kanalu Pai, in the early 1900s. (Tr. 8/4/94 (a.m.) at 8-9) Kapua Pai was born in 1810, and died at the age of 114, when Auwae was 14 years old. (Tr. 8/4/94 (a.m.) at 8-9) Kapua Pai was trained by her great great grandmother. (Tr. 8/4/94 (a.m.) at 28).

102. Auwae would accompany his great great grandmother on medicine gathering expeditions to the forest uplands of *Kawaihae-uka* and *Kahua*. (Tr. 8/4/94 (a.m.) at 15) Auwae would travel with his great great grandmother from *Kawaihae* as far as *Waimanu* valley to gather medicinal herbs. (Tr. 8/4/94 (a.m.) at 27) Auwae would also gather pure water from *Keanahanulunulu*, a cave between *Pu`ulapalapa*, *Pu`u Lapakahi*, and *Pu`uahi* in order to mix and prepare medicine. (Tr. 8/4/94 (a.m.) at 18).

103. Auwae and his great great grandmother did not ask permission from the landowner in 1917 to gather in *Waimanu*, nor to obtain water at *Pu`ulapalapa* in 1918. (Tr.8/4/94 (a.m.) at 24-25, 28).

104. Auwae moved to *Puna* in 1929 and lived there for seven years, until 1937 when he and his family moved to *Hilo* and eventually *Keaukaha*. (Tr.8/4/94 (a.m.) at 39).

105. During his years of residence in *Puna*, Auwae familiarized himself with areas of the former PFR where potent medicine, such as the `awa kolo, could be picked. He also hunted in that area. Upon moving to *Keaukaha*, he continued to gather for 52 years in the Campbell land. (Tr. 8/4/94 (a.m.) at 40-42, 48-50, 57-63)

106. Auwae continues to gather medicinal herbs well beyond his present district and *ahupua`a* of residence.

107. Auwae determines the location for gathering on where he finds the most efficacious medicine, not necessarily by *ahupua`a* boundaries. (Tr. 8/4/94 (a.m.) at 57-63, 65-68).

#### HAWAIIAN PRACTICES NOT RACE-BASED

108. The Court finds that the Hawaiian culture is inclusive, not exclusive, i.e., gathering was not limited to persons of Hawaiian ancestry. (Tr. 8/3/94 (a.m.) at 43-44; Tr. 8/11/94 (a.m.) at 74).

109. The *`ohana* concept is multi-generational; individuals who married into or were adopted into a family were considered part of the family, and were expected to participate in subsistence and cultural activities, such as gathering. (Tr. 8/3/94 (a.m.) at 47-48; Tr. 8/8/94 at 39; Tr. 8/11/94 (a.m.) at 61-62, 74).

110. The evidence at trial established that in *Puna*, family and friends were expected to participate with PDF members in subsistence and cultural activities. (Tr. 8/8/94 (a.m.) at 32).

111. PDF member Henry Auwae testified that neither in his care of patients nor in his training of students was race a criteria. (Tr. 8/4/94 (a.m.) at 68-71).

112. PDF members Clarence Hauanio and Elia Kaho`okauluna are married to non-Hawaiian women. Food is shared with family, including non-Hawaiian family.

113. PDF member Al Jardine is a caucasian man married to a full-blooded Hawaiian from Kona. His 8 children, 23 grandchildren and 9 great grandchildren are thus Hawaiian. He observes all of the traditional values associated with subsistence hunting and gathering.

#### HAWAIIAN PRACTICES SELF-REGULATING

114. The customs and practices of native Hawaiian activities in the *Puna* area are, to a large extent, self-regulating. (Tr. 8/11/94 (a.m.) at 96).

115. Custom requires that with the exercise of a right to hunt and gather comes the responsibility of managing the resource. (Tr. 8/3/94 (a.m.) at 53).

116. The custom and practice of hunting and gathering for Hawaiian subsistence and cultural purposes requires that those individuals who choose to engage in such activity adhere to certain norms. For example, these norms included: (a) not abusing resources but *malama ka`aina*, i.e., (b) to take care of the resource, (c) to aloha, i.e., share the resource with the family,

and (d) respect each individual/families gathering and hunting area. (Tr. 8/3/94 (a.m.) at 31-33, 34, 45-47, 53-54).

117. If a person failed to practice *malama*, there were several self-imposed measures which served as punishment, for example, self-punishment, or your family turning against you by refusing to take care of or look out for you. (Tr. 8/3/94 (p.m.) at 29).

118. These norms are more often practiced by persons who are from the rural country areas of neighbor islands. (Tr. 8/3/94 (a.m.) at 49-50).

119. Regulations such as requiring individuals to enroll in gun safety classes, or sign permission forms to enter property, is not Hawaiian custom and allows these individuals to be relieved of their attendant responsibility to self regulate. (Tr. 8/3/94 (a.m.) at 54-57).

#### INTERFERENCE WITH SUBSISTENCE AND CULTURAL ACTIVITIES

120. Campbell Estate's Geothermal development of the former WKOP and PFR lands interferes with the subsistence and cultural activities of *Puna* hunters and gatherers. Game has been chased away, plants are degraded or destroyed, and survival is affected because *Puna* families depend upon meat, plants and other resources. (Tr. 8/4/94 (p.m.) at 41-42; Tr. 8/11/94 (a.m.) at 95).

121. PDF Hunters and gatherers do not make a distinction between developed and undeveloped lands when they hunt and gather in WKOP and PFR. (Tr. 8/11/94 (a.m.) at 81-83).

122. Individuals conducting subsistence and cultural activities in WKOP and PFR often require access across "developed" areas, i.e., roads leading to and from geothermal drilling sites, to reach areas within which to carry out the activities.

123. PDF member Auwae does not use a "developed vs. undeveloped" criteria in selecting the areas where he gathers, his consideration is whether the plants he gathers for

medicine have become "polluted" and thus lost some or all of their power because of development in an area.

124. PDF members were turned away, or feared returning to WKOP and PFR lands due to the actions of Campbell Estate and/or their former lessee True Geothermal.

125. For example, PDF member Auwae testified that he was denied access in 1989 from going into WKOP to gather medicinal plants for la`au lapa`au, even after he informed them of the purpose for his visit. (Tr. 8/4/94 (a.m.) at 37-38, 42-46).

126. After that incident, Auwae was embarrassed and has not returned to WKOP since 1989. (Tr. 8/4/94 (a.m.) at 42-46).

127. PDF member Wesley Kobayashi testified that he was not allowed onto Campbell Estate's land to retrieve a lost hunting dog. (Tr. 8/5/94 (a.m.) at 80-81, 84).

128. Kobayashi has never returned to that area to hunt since. (Tr. 8/5/94 (a.m.) at 84).

129. PDF member Pi`ilani Ka`awaloa testified that she was stopped from gathering pili grass near the road to True Geothermal's gate. (Tr. 8/8/94 (a.m.) at 48).

130. Ka`awaloa has never been notified that she could gather in the undeveloped areas of WKOP and PFR. (Tr. 8/8/94 (a.m.) at 49).

131. Ka`awaloa testified that she would not return to that area for fear of being arrested. (Tr. 8/8/94 (a.m.) at 49).

132. Campbell Estate does not permit access by unauthorized individuals to the drill site, road and other improvements situate on its lands. (Tr. 8/5/94 (a.m.) at 95-96, 108).

133. Campbell Estate has no policy regarding access to the undeveloped areas of their land. (Tr. 8/5/94 (a.m.) at 96).

## HARM

134. Campbell Estate witness William Dement testified that True Geothermal is currently not actively drilling in WKOP and PFR. (Tr. 8/5/94 (a.m.) at 97-98).

135. Campbell Estate did not present evidence to establish any actual harm as a result of allowing PDF members to conduct subsistence and cultural activities on the undeveloped portions of the former WKOP and PFR lands.

## CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this matter and the parties in this action.

2. In its conveyance of the WKOP and PFR lands to the Campbell Estate in 1987, the State has excepted and reserved all of the existing trails in parcels B and C, as noted in Exhibit A attached hereto.

3. The customary rights of individuals to exercise subsistence and cultural activities in the WKOP and PFR lands have not been extinguished. *Public Access Shoreline Hawaii*, 79 Haw. 425, 442 (1995).

4. Article XII, § 7 of the Hawaii State Constitution states that:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua`a* tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

5. Since the protection of all customarily and traditionally exercised practices of native Hawaiians is now a matter of constitutional importance, this Court is obligated to give full force and effect to the protection of native rights. *Pele Defense Fund v. Paty*, 73 Haw. 578, 617-620 (1992).

6. As stated in the Standing Committee's Report, quoted by our Supreme Court in *Pele Defense Fund*, 73 Haw. at 620:

...your Committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. Your Committee did not intend to have the section narrowly construed or ignored by the Court. (Emphasis in the original).

7. PDF members are exercising customary and traditional cultural and subsistence rights possessed by *ahupua`a* tenants who are descendants of native Hawaiians inhabiting the Hawaiian islands prior to 1778.

8. Hunting and gathering are practices entitled to protection under Article XII, § 7.

The Standing Committee report states that:

Your Committee found that besides fishing rights, other rights for sustenance, cultural and religious purposes exist. Hunting, gathering, access and water rights, while not provided for in the State Constitution, were nevertheless an integral part of the ancient Hawaiian civilization and are retained by its descendants.

Stand. Comm. Rep. No. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 639-640 (Emphasis supplied).

9. Based on the undisputed testimony at trial, the customarily exercised activities that PDF members seek to exercise are hunting and gathering for subsistence and cultural purposes.

10. The plain language of Article XII, § 7 states that "...all rights, customarily and traditionally exercised..." will be protected.

11. From the operative word "exercise" it is clear that the framers of Article XII, § 7 sought to prevent any interference with the exercise of a traditional and customary practice.

12. These activities are protected under Article XII, § 7.

13. In *Pele Defense Fund*, the Supreme Court recognized that § 7-1 "contains two types of rights: `gathering rights which are specifically limited and enumerated, and rights to

access...which are framed in general terms." *Pele Defense Fund*, 73 Haw. at 617 (quoting Kalipi, 66 Haw. at 5).

14. H.R.S. § 1-1 represents the codification of the doctrine of custom in Hawaii.

*Public Access Shoreline Hawaii*, 79 Haw. at 447.

15. H.R.S. § 1-1 provides as follows:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State. (Emphasis supplied).

16. The Hawaiian Usage exception under § 1-1 is akin to the English doctrine of custom whereby practices and privileges unique to particular districts continue to apply to the residents of those districts even though in contravention of the common law. *Public Access Shoreline Hawaii*, 79 Haw. at 440 (quoting *Kalipi*, 66 Haw. at 10-11).

17. Not all of the elements of custom embodied in the English common law have been incorporated into § 1-1. Thus, Hawaiian custom need not meet all elements of the English common law definition of custom. *Public Access Shoreline Hawaii*, 79 Haw. at 447.

18. As the Court held in *Kalipi*:

[not] all [of] the requisite elements of the doctrine of custom were necessarily incorporated in §1-1. Rather, we believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm...(Emphasis supplied).

66 Haw. at 18.

19. In the application of custom in Hawaii, the Hawaiian usage must have been established in practice prior to November 25, 1892, the date of passage of § 1-1's predecessor.

*Public Access Shoreline Hawaii*, 79 Haw. at 447; the consistency of the custom is properly measured against other customs, not the spirit of the present laws. *Public Access Shoreline Hawaii*, 79 Haw. at 447, n. 39; the certainty of a custom is not subjectively determined, but objectively defined and applied. *Public Access Shoreline Hawaii*, 79 Haw. at 447, n.39; and the reasonableness of a custom concerns the manner in which an otherwise valid customary right is exercised, i.e., even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no "good legal reason" against it. *Public Access Shoreline Hawaii*, 79 Haw. at 447, n. 39.

20. The nature and scope of the rights reserved to *hoa`aina* [tenants] by custom and usage are to be defined according to the values, traditions and customs associated with a particular area as transmitted from one generation to the next in the conduct of subsistence, cultural, and religious activities.

21. As [the Court] stated in Kalipi, " the precise nature and scope of the rights retained by § 1-1 [and Article XII, § 7] would, of course, depend upon the particular circumstances of each case." *Pele Defense Fund*, 73 Haw. at 619 (quoting from *Kalipi*, 66 Haw. at 12).

22. "Native Hawaiian rights protected by Article XII, § 7 may extend beyond the *ahupua`a* in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner." *Pele Defense Fund*, 73 Haw. at 620.

23. PDF members customary rights to hunt and gather in WKOP and PFR are not limited by common law concepts associated with tenancy. *Public Access Shoreline Hawaii*, 79 Haw. at 448.

24. PDF members' hunting and gathering rights based on practiced customs raise different issues than land ownership. *Public Access Shoreline Hawaii*, 79 Haw. at 448.

25. PDF members, not claiming rights based on land ownership, but on the traditional access and gathering patterns practiced by native Hawaiians in the *Puna* region, *Pele Defense Fund*, 73 Haw. at 618-619, may conduct their activities outside the *ahupua`a* of their residence.

26. Based on the evidence presented, the hunting and gathering activities of PDF members were customary and traditional, i.e., that these activities were conducted in accordance with Hawaiian norms and values existing prior to November 25, 1892.

27. It has not been the practice of these individuals to limit the customarily and traditionally exercised subsistence and cultural activities to one's *ahupua`a* of residence.

28. Thus, PDF is not required to show that their members reside in an *ahupua`a* that abuts Campbell's land in order to exercise the rights protected under Article XII, § 7. *Public Access Shoreline Hawaii, supra*.

29. Persons seeking to assert claims based on Article XII, § 7 are not required to be individuals of 50% or more Hawaiian ancestry. *Public Access Shoreline Hawaii*, 79 Haw. 448-449.

30. Article XII, § 7 protects the customarily and traditionally exercised activities possessed by "descendants of native Hawaiians who inhabited the islands prior to 1778" conducted in furtherance of subsistence and cultural purposes, irrespective of the race of the practitioner. *Public Access Shoreline Hawaii*, 79 Haw. at 449.

31. Customary and traditional rights in Hawai`i do not derive from the race of the practitioner, but from native Hawaiians pre-existing sovereignty which was never extinguished by Hawai`i's inclusion within the territorial bounds of the United States. *Public Access Shoreline Hawaii*, 79 Haw. at 449.

32. It is undisputed that PDF members conduct traditionally and customarily exercised subsistence and cultural activities in WKOP and PFR. Accordingly, they have standing to assert rights based on Article XII, § 7, and H.R.S. §§ 1-1 and 7-1.

33. While Article XII, § 7 applies to persons of Hawaiian ancestry, there is nothing to indicate that the right is limited to native Hawaiians. For example, the legislative history establishes that persons who are married to Hawaiians and are engaged in traditional Hawaiian practices are protected as well. For example, Delegate Frenchy Desoto stated that:

These rights [under Article XII § 7] are rights. We have a different legal basis for rights--when I say "we" I mean the Hawaiian people. However, any right enjoyed by the native Hawaiian is also truly enjoyed by those who are non-Hawaiian. If you are fortunate enough to marry a Hawaiian, certainly you may follow her right down to the beach.

Debates in the Committee of the Whole on Hawaiian Affairs, II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION of 1978 at 436 (speech of Delegate Adelaide Desoto).

34. In addition, Delegate Calvin Ontai reaffirmed Delegate Desoto's remarks when he stated that:

A great portion of the people today, by design for one reason or another, married into the Hawaiian race, and as Delegate Desoto said, they can follow them wherever those rights go. The children can follow, also.

Debates in the Committee of the Whole on Hawaiian Affairs, II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION of 1978 at 437 (speech of Delegate Calvin Ontai).

35. In this case, PDF members include not only persons of Hawaiian ancestry, but non-Hawaiians related through marriage to Hawaiians.

36. Accordingly, non-Hawaiian PDF members married to Hawaiians have the same right to claim protection under Article XII, § 7, provided that the other requirements in this decision are met.

37. The reasonable exercise of ancient Hawaiian usage is entitled to protection under Article XII, § 7, and H.R.S. §§ 7-1 and 1-1. *Public Access Shoreline Hawaii*, 79 Haw. 442.

38. PDF members have proved, by a preponderance of the evidence, that they engage in traditional subsistence and cultural Hawaiian practices-access, hunting, and gathering, and that these activities have been conducted in the same manner in the *Puna* region since at least 1892.

39. Campbell Estate did not dispute that hunting and gathering is a traditional subsistence and cultural practice.

40. Campbell Estate did not dispute that PDF members are exercising these customary rights in a reasonable manner.

41. As persons exercising valid, constitutionally protected, customary rights in a reasonable manner, PDF members and other individuals are entitled to protection against unreasonable interference by Campbell's agents, officers, and employees.

42. The legislative history of Article XII, § 7, states that:

[Y]our Committee proposed this new section to provide the State with the power to protect these rights and to prevent any interference with the exercise of these rights.

Stand. Comm. Rep. No. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 639-640 (Emphasis supplied).

43. Since acquiring these lands in 1987, Campbell Estate, its sublessees, representatives, and agents have stopped and discouraged PDF members and other individuals from customarily and traditionally exercising subsistence and cultural activities on its lands.

44. The State is obligated to protect the reasonable exercise of customarily and traditionally exercised subsistence and cultural practices to the extent feasible. However, the

State can permit development that interferes with such rights in certain circumstances. *Public Access Shoreline Hawaii*, 79 Haw. at 450, n. 43.

45. Campbell's land are not "fully developed" because True Geothermal had stopped exploration and development of geothermal energy on the Campbell property, which in any case was limited to less than 20 acres of the land.

46. Based on the specific circumstances of this case, Campbell Estate has not shown that PDF members activities have resulted, or will result in actual harm to their operations or property.

47. Based on the balancing standard used in § 1-1, the balance tips in favor of PDF and its members and against Campbell.

48. The regulatory powers of the State extend to all fee simple property in Hawaii, which allows the State not only to regulate the activities of native practitioners, but landowners as well. *Public Access Shoreline Hawaii*, 79 Haw. at 450.

49. This analysis is consistent with Article XII, § 7's legislative history:

Your Committee decided to add this new section to the Constitution in order to reaffirm, for descendants of native Hawaiians, rights customarily and traditionally exercised for subsistence, cultural and religious purposes. Aware and concerned about past and present actions by private landowners, large corporations, ranches, large estates, hotels, and government entities which preclude native Hawaiians from following subsistence practices traditionally used by their ancestors, your Committee proposed this new section to provide the State with the power to protect these rights and to prevent any interference with the exercise of these rights.

Stand. Comm. Rep. No. 57, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 at 639-640 (emphasis added).

50. Thus, any scheme to regulate rights under Article XII, § 7 becomes a process by which both native rights and landowner actions are subject to reasonable protection and regulation. If landowner actions are not subject to regulation, the expressed legislative purpose of preventing landowner interference with the exercise of native rights cannot be accomplished.

51. The conduct of PDF members and other individuals in the exercise of traditional subsistence and cultural activities has been self-regulating, which is part of the asserted custom.

52. It is reasonable to bar PDF's members access to the developed portion of the land, except as reasonable access to the undeveloped portion to exercise their Article XII, § 7 rights.

#### CAMBELL ESTATE'S MOTION TO DISMISS

53. On August 10, 1994, Defendant Campbell Estate filed with the Court a motion to dismiss Plaintiff's complaint, to find Article XII, § 7 of the Hawaii Constitution unconstitutional, to deny Plaintiffs any relief or protections under Article XII, § 7, and to grant judgment as a matter of law in favor of Defendants. Plaintiffs filed a response thereto on August 18, 1994.

54. Defendants based their motion on several grounds: (a) violations of the First and Fourteenth Amendments to the United States Constitution, and Article I, § 4 of the Hawaii Constitution (establishment of religion); (b) violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and the equal protection clause of Article I, § 5 of the Hawaii Constitution; and (c) violation of the anti-nobility clause of Article I, § 10 of the United States Constitution; and the privileges or immunities clause of Article I, § 20 of the Hawaii Constitution.

55. The Court finds that Campbell does not have the proper standing to raise the constitutional violations as a basis for the dismissal of this action.

56. The "alleged" injured class does not include Campbell itself, which can conduct whatever legal activities it wishes on its *Wao Kele O Puna* lands and thus has no need to seek protection of its rights under Art. XII, § 7. Campbell undoubtedly believes it is injured whenever any person exercises his customary and traditional rights on Campbell's *Wao Kele O Puna* lands without Campbell's consent, but the identity of those exercising such rights (Hawaiian vs. non-Hawaiian) is irrelevant to the alleged injury Campbell suffers.

57. Campbell has offered no evidence whatsoever to establish either that one or more of Campbell's beneficiaries are seeking access for purposes consistent with Hawaiian traditional, cultural, or religious practices, have been denied access to other *ahupua`a* for such purposes, or that one or more of Campbell Estate's beneficiaries are (or are not) "part of the class of non-Hawaiians who are not protected by § 7."

58. In sum, Campbell has presented no evidence of injury in any way related to the basis of its defense, that Art. XII, § 7, unconstitutionally discriminates between Hawaiians and non-Hawaiians. Campbell therefore lacks standing to litigate the issue of the alleged constitutional defect. See, *Naliielua v. State of Hawaii*, 795 F. Supp. 1009, 1012 (D. Haw. 1990), *aff'd (mem.) on other grounds*, 940 F.2d 1535 (9th Cir. 1991).

59. The doctrine of third party standing does not aid Campbell here. *State v. O'Brien*, 5 Haw. App. 491, 494 (*quoting State v. Kaneakua*, 61 Haw. 136, 142-43 (1970)), *aff'd*, 68 Haw. 38 (1985). There is no evidence that Campbell represents non-Hawaiians who wish to engage in traditional subsistence, cultural, or religious practices in *Wao Kele `O Puna*.

60. Here, Campbell would be a singularly inappropriate representative to litigate the interests of non-Hawaiians who may seek to undertake "customary and traditional" activities at *Wao Kele O Puna* for their interests, because Campbell's interests in this litigation are adverse to

all who would wish to enter Campbell's *Wao Kele O Puna* lands without Campbell's consent, whether Hawaiians or non-Hawaiians. Accordingly, this is not a case where "the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton v. Wulff*, 428 U.S. 106, 115 (1976) (plurality opinion).

61. Accordingly, Campbell is not granted standing as a third party to argue the unconstitutionality of Art. XII, § 7, as a surrogate for absent non-Hawaiians.

62. Alternatively, even if Campbell had standing to assert the equal protection defenses it alleges, the claims raised by the Pele Defense Fund under Article XII, § 7 do not amount to invidious discrimination under the equal protection provisions of the federal and state constitutions.

63. As discussed by the Supreme Court, Article XII, § 7 rights are appurtenant rights and were unaffected by the land exchange in 1985. See, *Pele Defense Fund v. Paty*, 73 Haw. 578, 614 n.26 (1992). Accordingly, Campbell took title to the land in 1987 subject to the unique obligation to allow continued access by native Hawaiians for hunting and gathering in furtherance of the Hawaiian culture.

64. Furthermore, the rights that PDF members seek to exercise are based in Hawaiian usage and custom, having been in existence since time immemorial- before the *Mahele* of 1848, the overthrow of 1893, and the Admission of Hawaii into the Union in 1959. Article XII, § 7 (as well as H.R.S. § 1-1) merely acknowledge the existence of these rights. Even though Article XII, § 7 is limited on its face to persons of Hawaiian ancestry, none of Hawaii's case law interpreting Hawaiian usage and custom has limited the exercise of that right to native Hawaiians. *See, Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1 (1982); *State v. Zimring*, 58 Haw. 106 (1977); *In re Ashford*,

50 Haw. 314 (1968); *In re Estate of Nakuapa*, 3 Haw. 342 (1872). Indeed, the Supreme Court in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. at 449, n. 41, left this issue unresolved. Accordingly, non-Hawaiians could have the same right as Hawaiians, irrespective of Article XII, § 7 if they could prove that their rights were based on custom and usage.

65. Thus, Article XII, § 7 does not violate equal protection because it does not attempt to reallocate or redistribute the rights, nor does it discriminate against non Hawaiians who can prove that they possess the same rights based on custom and usage. In any event, Campbell cannot claim that it is being discriminated against when it never proved that it possessed the right in the first place. Accordingly, there can be no equal protection violation. Similarly, there can be no violation of the "Anti- Nobility" clauses under the federal and state constitutions.

66. A judgment in favor of Plaintiff herein is not a taking of private property without compensation. This Court is bound by the pronouncement of the Hawaii Supreme Court on this subject in *Public Access Shoreline Hawaii*, 79 Haw. at 451-452. (Court's recognition of Hawaiian custom and usage -- "always" a part of the law of this State -- does not constitute a judicial taking).

67. The Court, after consideration of the motion and response thereto, hereby denies the defendant's motion to dismiss.

#### ORDER

68. An order permanently enjoining interference by Campbell Estate with the subsistence and cultural practices of traditional and customary practitioners on undeveloped WKOP land is consistent with the overall purpose of Article XII § 7, which is to protect these customary rights from interference from the landowner.

69. The Pele Defense Fund is entitled to entry of judgment in its favor against the Estate of James Campbell, including the Trustees under the Will and of the Estate of James Campbell, deceased, which shall include a permanent injunction against excluding the following persons from entering the undeveloped portions of the land and using the developed portion for reasonable access to the undeveloped portions, (the developed areas are defined on Exhibit B attached hereto), to perform customarily and traditionally exercised subsistence and cultural practices:

(a) Hawaiian subsistence or cultural practitioners who are descendants of the inhabitants of the Hawaiian Islands prior to 1778;

(b) Person or persons accompanying Hawaiian subsistence or cultural practitioners described in (a); or

(c) Persons related by blood, marriage or adoption to Hawaiian subsistence or cultural practitioners described in (a).

70. Notwithstanding that the judgment will include a “permanent” injunction, the Estate of James Campbell and successor owners of the land, are not barred from and may seek to

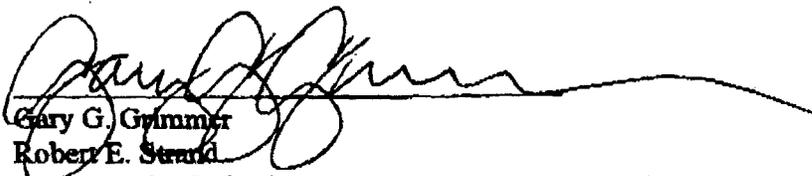
develop the undeveloped portions of the land consistent with applicable law; and PDF may oppose further development by lawful means.

DATED: Hilo, Hawaii,           AUG 26          , 2002.



Riki May Amano  
Judge of the above-entitled Court

APPROVED AS TO FORM:



Gary G. Gummer  
Robert E. Strand  
Attorneys for Defendant  
Trustees of Campbell Estate