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THIRD CIRCUIT COURT
STATE OF HAWAII
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Attorneys for Defendants
THE ESTATE OF JAMES CAMPBELL,
Deceased; W.H. McVAY, P.R.
CASSIDAY, in their fiduciary
capacity as Trustees under the
Will of James Campbell, Deceased

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

PELE DEFENSE FUND,

Plaintiff,

v.

WILLIAM PATY, in his capacity as)
Chairman of the Board of Land)
and Natural Resources, State of)
Hawaii; MOSES KEALOHA, DOUGLAS)
ING, LEONARD ZALOPANY, JOHN)
ARISUMI and HERBERT ARATA, in)
their capacity as members of the)
Board of Land and Natural)
Resources; The Estate of JAMES)
CAMPBELL, Deceased; FRED E.)
TROTTER, W.H. McVAY, P.R.)
CASSIDAY, and HERBERT C.)
CORNUELLE, in their fiduciary)
capacity as Trustees under the)
Will of James campbell,)
Deceased; TRUE ENERGY GEOTHERMAL)
CORPORATION; TRUE GEOTHERMAL)
DRILLING COMPANY, and MID-)
PACIFIC GEOTHERMAL, INC.,)

Defendants.)

CIVIL NO. 89-089 (Hilo)
(Declaratory
Judgment/Injunction)

DEFENDANTS THE ESTATE OF
JAMES CAMPBELL, DECEASED,
W.H. McVAY, AND P.R.
CASSIDAY'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF; EXHIBIT "A";
CERTIFICATE OF SERVICE

DATE: May 19, 1993
TIME: 8:30 a.m.
JUDGE: Hon. Riki Amano

TRIAL DATE: July 19, 1993

DEFENDANTS THE ESTATE OF JAMES CAMPBELL, DECEASED,
W.H. McVAY, AND P.R. CASSIDAY'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants the Estate of James Campbell, Deceased, Fred E. Trotter (who is no longer a Trustee), W.H. McVay, P.R. Cassidy and Herbert C. Cornuelle (who is no longer a Trustee), collectively the "Campbell Estate," agree that all claims against the State of Hawaii and against the former Campbell Estate Trustees should be dropped by amendment out of the Complaint, but oppose the remainder of Plaintiffs' motion to amend for the following reasons:

1. The Motion Is Far Too Late.

This case has been pending for nearly four years. Trial is scheduled to begin 60 days from the hearing of this motion. The facts giving rise to the proposed new claims allegedly occurred more than 100 years ago. Despite a vigorous media campaign, so far, Plaintiff has been able to identify only five people who claim the rights asserted in the Complaint. See, Plaintiff's Answers to Interrogatories, No. 2 and Attachment "A", attached hereto as Exhibit "A".

Proximity to trial is the primary reason why motions to amend are denied. This close to trial, the burden is on the movant to show a justifiable excuse for waiting four years to

amend, not upon the other parties. Even so, we are barely ready to go to trial on the issues that were specifically directed to be tried by the Supreme Court, in part, because the Plaintiff refuses to make reasonable discovery.

If Plaintiff contends that the trial should be continued, then the true purpose of the motion - to delay - would be apparent. The purpose of this action has always been to stop geothermal development, not to vindicate native Hawaiian rights (we are and have been willing to allow the five claimants reasonable access to the undeveloped portions of the subject land, even though it is obvious that most cannot qualify under the Hawaii Supreme Court's test). Prolonging this case, by waging a war of attrition, is Plaintiff's primary weapon.

2. These Same Issues Have Been Raised And Decided Before. The Motion Is Made In Bad Faith.

The proposed Fourth Claim purports to assert some kind of private claim under HRS Sec. 171-26 (marking trails). This same claim was raised against the State in the Second Amended Complaint (Claim Nine) and was decided on the merits against the Plaintiffs for several reasons, including that there is neither an express nor implied private right of action to enforce HRS Sec. 171-26 (Findings of Fact and Conclusions of Law at 31, entered herein on May 20, 1991; affirmed in Haw. Sup. Court No. 15373, slip opinion at 46-47 - except for the Art. XII, § 7 claim, the lower court's decision was affirmed in all respects).

If the prior ruling is not enough to show Plaintiff's bad faith, then the express wording of § 171-26, should squelch any doubt. The statute states in pertinent part as follows:

Rights-of-way to the sea, game management areas, and public hunting areas. Prior to the disposition of any public lands, the board of land and natural resources shall lay out and establish over and across such lands a reasonable number of rights-of-way... (emphasis added)

Plaintiff claims that the private defendants have violated § 171-26. However, it is evident from the statute that the obligation to lay out and/or identify trails and rights-of-way must be accomplished by the State prior to disposition. Thus, not only is Plaintiff barred from enforcing the statute, it is patently frivolous to assert that the statute applies to the private defendants.

Plaintiff's HRS § 1-1 claim is equally frivolous, as it impugns the very Supreme Court decision upon which Plaintiff now relies - the Supreme Court's Decision in this case that potentially extended Kalipi rights to native Hawaiians who reside in adjacent ahupua'as.

In its Decision, the Supreme Court noted that Mr. Kalipi had not prevailed on his claim because it was based upon native tenancy (land ownership), not Hawaiian custom and usage. To prevail on a native tenancy claim, Kalipi would have had to have lived within the ahupua'a in which he sought to assert his

rights. As a kuleana owner or native tenant, regardless of his race, Kalipi would automatically have been entitled to certain rights. In this case, the Supreme Court extended Kalipi rights, however, to native Hawaiians who live in adjacent ahupua'as if there is proof that their ancestors customarily used the property for certain cultural or religious purposes.

With respect to Kalipi we held that, regardless of the source of his asserted rights, he was not entitled to exercise them because he did not live in the ahupua'a in which he sought to assert his claimed rights. (citation omitted)

Like Kalipi, PDF members assert native Hawaiian rights based on Article XII, § 7 and HRS § 1-1 in an ahupua'a other than the ones in which they reside. (Slip opinion at 42, emphasis added).

After analyzing the case law and the statutes, including HRS § 1-1, the Supreme Court upheld and extended Kalipi's application of Art. XII, § 7, rights to qualified native Hawaiians (ethnic rights), as opposed to native tenants (land ownership rights):

We therefore hold that 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. (Slip opinion at 44, emphasis added).

Recognizing that the Hawaii Supreme Court's Decision singles out a particular ethnic group for special treatment¹, Plaintiff now wants to recast its claim so that it is exactly the same as that asserted by Mr. Kalipi in his case (i.e., a claim that the gathering and other rights are appurtenant to a native tenancy). However, that claim was expressly rejected both in Kalipi's case and in this case.

Moreover, as the Court can see from Plaintiff's answers to our interrogatories, none of the five claimants lives on or within any of the ahupua'as which are owned by the defendants. Accordingly, Plaintiff cannot in good faith even assert the native tenancy claim.

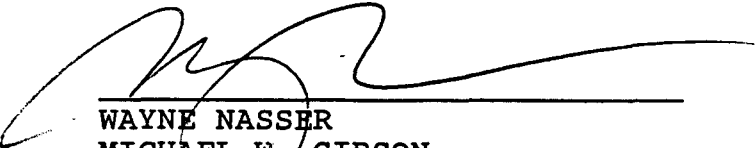
3. Conclusion.

While we agree that the current state of the pleadings should be amended to cull matters that have been decided and to delete reference to persons who are not appropriate parties, Plaintiff misleads the court and prejudices the defendants when it seeks to add matters on the eve of trial that have already been decided adversely to Plaintiff. As there are no plausible grounds for sustaining the motion and it is but another example of Plaintiff's pattern and practice of delay and attrition, we

¹ Plaintiff refused to divulge facts concerning the ethnicity of the claimants, their residence locations and the basis of the claimed rights (e.g., through ancestor use). Accordingly, we will hold Plaintiff to its objections and oppose any attempt to put such facts before the Court.

urge the court to impose sanctions under HRCp, Rule 11 equal to the fees and costs (including travel) incurred by the Campbell Estate in opposing this motion.

DATED: Honolulu, Hawaii, May 14, 1993.



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MICHAEL W. GIBSON
Attorneys for Defendants
The Estate of James Campbell,
Deceased, W. H. McVay and P. R.
Cassiday, Trustees Under the Will
and of the Estate of James
Campbell, Deceased, acting in their
fiduciary and not in their
individual capacities, Herbert C.
Cornuelle and F.E. Trotter

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Attorneys for Plaintiff
PELE DEFENSE FUND

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

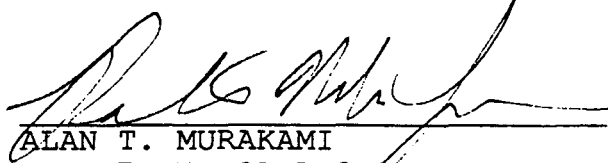
PELE DEFENSE FUND,)	CIVIL NO. 89-089 (Hilo)
)	(Declaratory Judgment/
Plaintiff,)	Injunction)
)	
vs.)	PLAINTIFF'S PELE DEFENSE FUND'S
)	ANSWERS TO THE ESTATE OF JAMES
WILLIAM PATY, in his capacity)	CAMPBELL, DECEASED'S FIRST
as Chairman of the Board of)	REQUEST FOR ANSWERS TO
Land and Natural Resources)	INTERROGATORIES TO PLAINTIFF
State of Hawaii, et al.,)	
)	
Defendants.)	

PLAINTIFF'S PELE DEFENSE FUND'S
ANSWERS TO THE ESTATE OF JAMES CAMPBELL, DECEASED'S
FIRST REQUEST FOR ANSWERS TO INTERROGATORIES TO PLAINTIFF

Pursuant to Rule 33 of the Hawaii Rules of Civil
Procedure, Plaintiff Pele Defense Fund hereby responds to the
Estate of James Campbell, Deceased's First Request for Answers to

Interrogatories to Plaintiff attached hereto.

DATED: Honolulu, Hawaii, MAY 6, 1993.

A handwritten signature in dark ink, appearing to read 'Alan T. Murakami', is written over a horizontal line.

ALAN T. MURAKAMI
PAUL F. NAHOA LUCAS
CARL C. CHRISTENSEN
YUKLIN ALULI
STEVEN C. MOORE
Attorneys for Plaintiff

INTERROGATORIES

1. State the name of each person who has assisted in preparing the responses to the Interrogatories.

ANSWER:

Paul F.N. Lucas
Steven C. Moore

2. Identify persons known to you who possess the right to practice customarily and traditionally exercised subsistence, cultural and religious practices with respect to the lands at issue herein.
 - a. Their name.
 - b. Their business and residence address.
 - c. His or her percentage of ethnic Hawaiian.
 - d. A summary of their use of the lands at issue herein.
 - e. The type of customary and traditional subsistence, cultural or religious activity which they or their ancestors practiced.
 - f. The inclusive dates of their use.
 - g. If the rights are claimed through an ancestor's use, a genealogy showing the familial relationship with the ancestor who was the tenant of an abutting ahupuaa who utilized the lands at issue herein.
 - h. The exact location of the use.
 - i. Name of the ahupuaa in which the ancestor, through whom the rights are claimed, resided and the location of his or her residence by reference to Land Commission Award number and tax key parcel number.
 - j. The location of the access from the residence of the ancestor, through whom the rights are claimed, to the site of the exercise or practice of the customary and traditional subsistence, cultural and religious practices.
 - k. Whether they are members of Pele Defense Fund.
 - l. If the ancestors use is the basis of the claim, state the source of information of the ancestor's use; identify all witnesses of that use; and identify all documents which support the genealogy and the claimed rights.

ANSWER:

- a. See Attachment "A."
 - b. See Attachment "A".
 - c. Objection: Relevance and Materiality-Requests information beyond the scope of Rule 26, HRCF.
 - d. See Attachment "A".
 - e. Objection: Question is vague.
 - f. See Attachment "A".
 - g. Objection: Relevance and Materiality-Requests information beyond the scope of Rule 26, HRCF.
 - h. Wao Kele O Puna and adjacent lands.
 - i. Objection: Relevance and Materiality-Requests information beyond the scope of Rule 26,, HRCF.
 - j. See Attachment "A".
 - k. See Attachment "A".
 - l. Objection: Relevance and Materiality-Requests information beyond the scope of Rule 26, HRCF.
3. You claim the right to hunt in the customary and traditional manner on the lands at issue herein. If so, identify them and as to each state the following:
- a. Name and address.
 - b. What animals were customarily and traditionally hunted.
 - c. How were the animals that were hunted used in the customary and traditional manner after they were captured or killed.

ANSWER:

- a. See Attachment "A"
- b. Pig, goat and cattle.
- c. See Affidavit of Clarence Hauanio.

Responses to these interrogatories are continuing.

4. You claim the right to gather in the customary and traditional manner on the lands at issue herein. If so, identify them and state the following:
- a. Name and address.
 - b. What materials were customarily and traditionally gathered.
 - c. How were those materials traditionally used.

ANSWER:

- a. See Attachment "A"
 - b. See Affidavits of Henry Auwae and Emily Naeole and deposition of Henry Auwae.
 - c. See Affidavit of Emily Naeole and Deposition of Henry Auwae.
5. You claim the right to practice religious activities in the lands at issue herein. If so, identify them and as to each state the following:
- a. Name and address.
 - b. What were the customary and traditional religious activities that were practiced.
 - c. Where were the customary and traditional religious activities held.

ANSWER:

- a. See Attachment "A"
- b. Offerings and chants made before, during and after hunting and gathering activities.
- c. Wao Kele O Puna and adjacent lands.

Responses to these interrogatories are continuing.

6. State the name of any person who was denied access to the lands at issue herein to practice religious activities in the lands at issue herein. As to each person, state the following:
- a. Name.
 - b. His or her residence and business address.
 - c. His or her residence and business telephone number.
 - d. The date they were stopped.
 - e. Who stopped them.
 - f. Where they were stopped.
 - g. What they were prohibited from doing.

ANSWER:

- a. See Attachment "A".
- b. See Attachment "A".
- c. Objection: Irrelevant.
- d. Various times after October 1989.
- e. Agents, employees, and contractors of Defendant True Geothermal and Campbell Estate.
- f. Various access points on the Kalapana and Pahoa sides leading into Wao Kele O Puna, primarily, the road and gate area leading to drill site no. 1.
- g. Entering Wao Kele O Puna.

Responses to these interrogatories are continuing.

7. State the name of each person known or believed by you to have information or knowledge relevant to the subject matter of this action. As to each person, state the following:
- Name.
 - His or her residence and business addresses.
 - His or her residence and business telephone numbers.
 - The substance of the information or knowledge relevant to this case possessed by this person.
 - Identify any documents relevant to the subject matter of this case possessed by each person identified.

ANSWER:

See answers nos. 1 - 6. Responses to these interrogatories are continuing.

8. State the full name of each person whom you expect to call as an expert witness at trial. As to each expert, state the following:
- His or her residence and business addresses.
 - The subject matter on which the expert is expected to testify.
 - The substance of the facts and opinions to which the expert is expected to testify.
 - A summary of the grounds for each opinion.
 - Identify any written report or document which has been prepared by the expert regarding any matter involved in the subject lawsuit.
 - If any such expert is in the process of preparing or has yet to complete any written report or document, the date on which such report or document is expected to be completed.
 - His or her qualifications, including education, experience in fields relating to the substance of testimony to be given and names and addresses of employers relative to the same.
 - Any trade or professional associations of which the expert is a member or any license issued by any authority which is held by the expert to practice in his or her field.
 - The title, subject matter and the publication date of any books, articles or papers published by the expert.
 - All documents which will be introduced in connection with the expert's testimony.
 - All facts and documents which have been given to the expert or reviewed by the expert in connection with his or her participation in this case.

ANSWER:

See Attachment "B" and responses to requests for production of documents. Responses are continuing.

9. Identify all non-expert witnesses whom you expect to call to testify at trial, and with regard to each person, state:
- a. The subject matter upon which he or she will testify.
 - b. The facts and opinions to which he or she is expected to testify.
 - c. All documents which will be introduced in connection with his or her testimony.

ANSWER:

See Attachment "A". Responses to these interrogatories are continuing.

10. Identify all exhibits which you intend to exhibit to the court or jury at trial.

ANSWER:

See responses to requests for production of documents. Responses to this interrogatory are continuing.

ATTACHMENT "A"

Answer to Interrogatory No. 2:

	<u>Name</u>	<u>Address</u>	<u>Use</u>	<u>Member</u>
1.	Clarence Hauanio	P.O. Box 949 Pahoa, HI 96778	Hunter/Gatherer	Yes
2.	Emily Naeole	P.O. Box 982 Pahoa, HI 96778	Gatherer	Yes
3.	Keala Kapua	P.O. Box 38 Pahoa, HI 96778	Gatherer	Yes
4.	Gordon Hoohuli	c/o P.O. Box 38 Pahoa, HI 96778	Hunter/Gatherer	Yes
5.	Henry Auwae	1408 Kalaniana'ole St. Hilo, Hawaii 96720	Gatherer	Yes

Mr. Hauanio accesses Wao Kele O Puna (hereinafter, "WKOP") from the Kalapana side of WKOP. Messrs. Naeole, Kapua and Hoohuli access WKOP from various points around WKOP, primarily through the Kalapana and Pahoa sides of WKOP.

All of the above-named have used WKOP for hunting and/or gathering at various times throughout their lives, beginning at childhood and continuing through adulthood.

Responses to this interrogatory is continuing.

ATTACHMENT "B"

Answer to Interrogatory No. 8:

The following experts will be called for trial:

<u>Name</u>	<u>Address</u>	<u>Nature of Testimony</u>
1. Dr. Davianna McGregor	1942 Naio Street Honolulu, HI 96817	Traditional and customary hunting and gathering practices in Wao Kele O Puna

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU) SS.

PALIKAPU DEDMAN, being first duly sworn on
oath, deposes and says:

That he is the President of Plaintiff Pele
Defense Fund and is authorized to answer these interrogatories on
behalf of Plaintiff Pele Defense Fund; and

That he has read the foregoing answers to interrogatories,
knows the contents thereof, and that the same are true and
correct to the best of his knowledge, information and belief.

Pali Kapa Dedman

Subscribed and sworn to before me
this 6th day of May, 1993.

Theresa J. Lanawala
Notary Public, State of Hawaii

My Commission expires: 6-3-96

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PELE DEFENSE FUND,)	CIVIL NO. 89-089 (Hilo)
)	(Declaratory
Plaintiff,)	Judgment/Injunction)
)	
v.)	CERTIFICATE OF SERVICE
)	
WILLIAM PATY, in his capacity as)	
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Hawaii; MOSES KEALOHA, DOUGLAS)	
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CORPORATION; TRUE GEOTHERMAL)	
DRILLING COMPANY, and MID-)	
PACIFIC GEOTHERMAL, INC.,)	
)	
Defendants.)	
)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below service of a copy of the foregoing document was made upon the parties below, by depositing the same in the United States mail, postage prepaid, addressed as follows:

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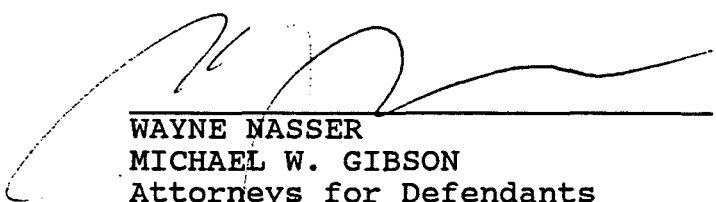
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Attorneys for Defendants
True Energy Geothermal Corp., True
Geothermal Drilling Co. and
Mid-Pacific Geothermal Inc.

DATED: Honolulu, Hawaii; May 14, 1993.



WAYNE NASSER
MICHAEL W. GIBSON
Attorneys for Defendants
The Estate of James
Campbell, Deceased, W. H.
McVay and P. R. Cassiday,
Trustees Under the Will and
of the Estate of James
Campbell, Deceased, acting
in their fiduciary and not
in their individual
capacities, Herbert C.
Cornuelle and F.E. Trotter