

## Testimony of David Callies

**Q Please state your name and background.**

**A** My name is David Callies. I currently hold the position of Benjamin A. Kudo Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa, where I teach courses in state and local government, land use, and property law. My teaching focuses on land use planning and development permitting at the local, state, and national levels, with a particular emphasis on land use controls in Hawaii.

I hold law degrees from the University of Michigan (J.D.) and Nottingham University (L.L.M., planning law) and am a past foreign fellow (research on customary law) and life member of Clare Hall, Cambridge University.

I am the coauthor of two legal casebooks, one on land use (6th edition) and one on real property (fifth edition). I have also coauthored a monograph on land use and eminent domain published in 2008 by LexisNexis, and an edited collection of case studies on eminent domain (with Kotaka) entitled *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries*, which was published in 2002 by the University of Hawaii Press, republished in updated form by Nichols on Eminent Domain in 2004, and republished in Japanese in 2008. I coauthored (with Orebech, Bosselman, Bjarup, Chanock, and Peterson) the book, *The Role of Customary Law in Sustainable Development*, which was published by the Cambridge University Press in 2005, and then published as a paperback in 2010.

As an elected member of the American Law Institute (ALI), I served on the consultative committee which reviewed, commented on, and amended the Restatement of Property, Third. I am currently on the advisory committee which meets annually to review and comment on drafts of the Restatement of the Law, Property, 4<sup>th</sup>. I am also an elected member of the American Institute of Certified Planners (AICP) and of its College of Fellows (FAICP), an elected member of the American College of Real Estate Lawyers, past chair of the Hawaii State Bar Association Section on Real Property and Financial Services, past chair of the American Bar Association Section on State and Local Government Law and recipient of its Jefferson Fordham Lifetime Achievement Award in 2006, and past chair of the American Association of Law Schools Section on State and Local Government Law.

I am also the co-editor of the annual Land Use and Environmental Law Review, which publishes the best law review articles on land use and environmental law, based on a 2-level review board process.

My most recent book, published in July of 2010, is a rewritten second edition of my Hawaii land use law treatise, *Regulating Paradise: Land Use Controls in Hawaii*, which details the complexity of the land development process in Hawaii.

I am a regular invited lecturer at the annual conference of the American Planning Association and the Hawaii Congress of Planning Officials. Additionally, I co-chair and lecture at the biennial land use conference of the Hawaii State Bar Association's Section on Real Property and Financial Services, where I speak primarily on topics of the public trust doctrine, customary law, planning, land development conditions, eminent domain, development and annexation agreements, and vested rights.

**Q Are you familiar with the Thirty Meter Telescope ("TMT") Project?**

A Yes. I have reviewed numerous documents related to the conservation district use application ("CDUA") for TMT, with a focus on the planning and land use issues. I have also reviewed all of the appellate court pleadings and opinions on this matter, and I am well-aware of the issues presented to the Board of Land and Natural Resource ("BLNR") and the Hearings Officer on remand. I most recently visited the TMT site in August 2016.

**Q In your capacity as one of the foremost recognized experts in planning and land use in Hawaii, can you please generally describe your understanding of the public trust doctrine?**

A The public trust doctrine provides that the State holds public trust resources in trust for the benefit of the people. The history and origins of the public trust doctrine make it crystal clear that the public trust doctrine does not require pristine and absolute preservation. Instead, the public trust doctrine requires a balancing process between protection and conservation of public trust resources, on the one hand, and the development and utilization of these resources, on the other. Thus, the public trust doctrine contemplates a balancing of use, both public and private, and not the elimination of one at the expense of the other. Under the doctrine, a resource that is subject to the public trust doctrine generally may not be conveyed to a private owner.

However, a designation as a public trust doctrine resource does not foreclose private uses of that public trust doctrine resource.

**Q What is the relationship between the public trust doctrine and Article XI, section 1 of the Hawaii State Constitution?**

The public trust doctrine in Hawaii appears to have been "constitutionalized" to the extent that once a resource like water or submerged land is impressed with the public trust doctrine, Article XI Section 1 of the state constitution reinforces the obligation of state and county agencies in their decision-making to carefully examine any proposed use of or on that resource to insure that the public use of that resource remain paramount and intact. Thus, for example, the Conservation District statute was enacted to "conserve, protect, and preserve the important natural resources of the State." Haw. Rev. Stat. § 183C-1 The administrative rules implementing the Conservation District statute are for "for the purpose of conserving, protecting, and preserving the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare." Haw. Admin. R. §13-5-1. One of those rules within that chapter, HAR § 13-5-30(c), sets forth the framework (often referred to as the Eight Criteria) by which the BLNR evaluates a CDUA. The Eight Criteria embody the policy goals and objectives of the public trust doctrine. For instance, HAR § 13-5-30(c)(4) assesses whether "[t]he proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region." HAR § 13-5-30(c)(6) considers whether "[t]he existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable." HAR § 13-5-30(c)(8) is concerned with whether "[t]he proposed land use will not be materially detrimental to the public health, safety, and welfare." Therefore, to the extent the public trust doctrine and/or Article XI, section 1 of the Hawai'i Constitution applies to a resource, the doctrine's and the state constitution's public use requirements are implemented.

**Q Based on your review of the facts of this case, does the public trust doctrine apply to the TMT project?**

A No. The public trust doctrine has traditionally been exclusively connected to water. The Hawaii Supreme Court has interpreted the scope of the doctrine to include all water resources. Based on my review of the documents related to the CDUA, there is no

evidence that the proposed project would restrict or otherwise impair any water resource. No court in Hawai'i has ever applied the public trust doctrine to a land use that did not implicate the availability and use of water for the benefit of the public, and in my professional opinion as a land use expert, there is no reason that the proposed TMT construction necessitates an extension of the public trust doctrine.

Furthermore, if the proposed land use is public or quasi-public, then the public trust doctrine would not require a balancing between public and private uses at all. Public use means use by the public, whereas quasi-public use means a use that is public in nature but may affect other public uses in or on public trust doctrine resources. In this case, the TMT project is an observatory that will be managed by a consortium of research institutions and will result in benefits to the public in the form of educational, research, and economic opportunities. Based on my experience, the TMT project easily qualifies as public or quasi-public use and is thus consistent with most, if not all, other public uses so that the need to balance public and private uses does not apply.

**Q Please explain the analysis behind your conclusion that the public trust doctrine should not be extended beyond its traditional application to water issues in this matter.**

A A review of the applicable literature demonstrates that the public trust doctrine has almost never been extended beyond its traditional association with water, and for good reason. To extend the public trust doctrine to any land that is held or "owned" by the State of Hawai'i such as the top of a mountain would represent a breathtakingly huge leap from a legal perspective, and would send a shockwave through the planning community.

The public trust doctrine has always traditionally applied to water due to the unique interplay between public and private uses on land adjacent to or submerged under water. Those considerations are not transferable to a mountain top.

Moreover, once land is impressed with and bound by the public trust doctrine, it cannot be transferred. This would be an absurd result if applied to all land and resources held or "owned" by the state of Hawaii - or indeed any other state.

**Q Can you further elaborate on your conclusion that TMT Project is a public or quasi-public use of land and the implications of this conclusion?**

A Yes. The proposed construction of the TMT is clearly contemplated by both the lease to the University of Hawaii of land for an astronomy precinct and the sublease from the University to the Thirty Meter Telescope International Observatory LLC (“TIO”) for the construction of the TMT. TIO’s membership is comprised of the California Institute of Technology, the National Astronomical Observatories of the Chinese Academy of Sciences, the National Institutes of Natural Sciences/National Astronomical Observatory of Japan, the University of California, the Department of Science and Technology of India, and the National Research Council Canada. In my experience, this would be considered a public or perhaps quasi-public use of land.

Traditionally, under the public trust doctrine, the most common permitted uses are private piers and wharves that extend into water (or on submerged land) that are held by the state under the public trust doctrine. Contrast this with the TMT Project on Mauna Kea, which involves a lease from the State of Hawaii (through its Department of Land and Natural Resources) to the University of Hawaii, a state university and entity, and a further sublease to a nonprofit consortium of research institutions for the construction of the TMT. The TMT Project is not simply a private undertaking that is in conflict with the public trust resources. Rather, the TMT Project involves public and quasi-public entities for an educational use that will benefit the public and is consistent with the designated conservation use of that area. In my experience and to my knowledge, under the public trust doctrine, this type of situation has never been treated as conflicting with protection of a resource – usually water – or use by the public. Therefore, the public trust doctrine is inapplicable.

**Q What effect would it have on the public trust doctrine if the TMT Project were viewed as a private use of land?**

A If property is impressed with the public trust doctrine any private use of that property must be consistent with the public's right to use and enjoy the property. Therefore, the fact that a given natural resource is held by the state under the public trust doctrine operates to restrict what would otherwise be absolute private property rights to that resource. As discussed above, the classic example involves piers and wharves: The public's right to use the ocean burdens-but does not foreclose - the littoral right of beachfront landowners to build a pier.

Even if one were to concede both that the public trust doctrine is applicable to the summit of Mauna Kea and that the proposed TMT Project constitutes a private use of that public trust resource, it is well-established that (1) the public trust doctrine encompasses both private and public uses, the latter being usually described as use by the public, and (2) private uses are not in conflict with the basic principles and purpose of the public trust doctrine if they do not diminish the public use of the public trust doctrine property and/or enhance public use on the public trust property. The Board then would have to perform a fact-specific inquiry to balance the alleged private use with the public's use of the resource. As I mentioned earlier, the public trust doctrine has only been applied to water resources in Hawaii. There is no evidence of any impairment to the public's use of a water resource due to the TMT project. The absence of adverse impacts combined with the obvious benefits of the project to the public leads me to conclude that, even if the TMT project were to be viewed as a private use, the TMT project is consistent with the public trust doctrine.

**Q What is your opinion with respect to the native Hawaiian traditional and customary rights on the subleased site of the proposed TMT Project?**

A It is not altogether clear that the standard set forth in the Ka Pa'akai case applies to a public or quasi-public proposed use on state land that is specifically leased and designated for astronomy uses. TIO is not a private developer, and its partner and sublessee, the University of Hawaii, is clearly a public institution.

Even if one were to apply the Ka Pa'akai standard to such a public/quasi-public institutional use, it is also unclear what traditional and customary rights are adversely affected by the construction of the TMT. The main sites on Mauna Kea where cultural access and gathering have been shown to take place - Lake Waiau and the nearby adze quarry - are some distance away from the proposed site of the TMT Project. To my knowledge, there is no evidence whatsoever that TMT construction will adversely affect access to either site, either for quarrying purposes (not demonstrably done for decades), or for visiting the lake.

There are a number of both recent and older stone assemblages that could arguably be described as religious sites, but, as with the adze quarry and Lake Waiau, there is no indication that access to these will be impeded by the construction of the TMT, or that the TMT will in any way interfere with whatever traditional or customary rights might be practiced at these assemblages.

While the state has a recognized duty to protect native Hawaiian traditional and customary rights on undeveloped land, in the context of fully developed land, the duty to protect such rights is much less burdensome and inconsistent with private ownership. In my experience, the duty to protect native Hawaiian rights in substantially developed areas is analogous to the less stringent protections for “fully developed land.” Thus, the constitutional protections for native Hawaiian traditional and customary rights in substantially developed areas should focus on the additional impacts, if any, of the proposed use on native Hawaiian traditional and customary rights in light of the preexisting conditions.

Here, the summit of Mauna Kea and other parts of Mauna Kea are substantially developed. There are thirteen telescopes and related roads, structures, and buildings on the summit of Mauna Kea, together with a food service and dormitory facility for 500 and a visitors center at the approximately 9,000 foot elevation, as well as other parking facilities, roadways and trails. Given that all of this development is located in one of the State Conservation District's less restrictive subzones, there is no credible evidence that the addition of a 14th telescope affects any native Hawaiian traditional and customary rights more than those already on the summit.

Finally, TMT and the University of Hawaii have proposed an array of mitigation measures to lessen, if not eliminate, the effects on whatever constitutionally-protected traditional and customary rights might be affected by the proposed TMT Project.

**Q What is your opinion with respect to the proposals to mitigate adverse effects, if any, to native Hawaiian rights?**

A Even assuming that there are traditional and customary rights being exercised on Mauna Kea that could potentially be affected adversely by the proposed TMT, the University of Hawaii and TIO have proposed a series of localized and area-wide mitigation measures.

The University and TIO employed project design elements to minimize the visual impact of the TMT Project for cultural practitioners. For instance, the telescope employed the smallest dome possible to reduce the size and height of the observatory. The project site was specifically chosen so that the observatory would be at a lower elevation and the top of the dome would actually be at a lower altitude than other observatories on Mauna Kea. Moreover, the project site is intentionally located away from known historic properties and cultural resources.

In addition to those mitigation measures at the project-level, the State Administration has also proposed area-wide mitigation measures, including:

1. Formally and legally binding itself to the commitment that this is the last area on the mountain where a telescope project will be contemplated or sought.
2. Decommission – beginning this year – as many telescopes as possible with at least 25 percent of all telescopes gone by the time TMT is ready for operation.
3. Restart the EIS process for the university's lease extension and conduct a full cultural impact assessment as part of that process.
4. Move expeditiously the access rules that significantly limit and put conditions on non-cultural access to the mountain.
5. Require training in the cultural aspects of the mountain and how to be respectful to the cultural areas for anyone going on the mountain.
6. Substantially reduce the length of its request for a lease extension from the Board of Land and Natural Resources.
7. Voluntarily return to full DLNR jurisdiction all lands (over 10,000 acres) not specifically needed for astronomy.
8. Ensure full use of its scheduled telescope time.
9. Make a good faith effort to revisit the issue of payments by the existing telescope now as well as requiring it in the new lease.

As part of this effort the University of Hawaii President and the Chair of the Board of Land and Natural Resources co-signed a letter confirming the University's commitment to implementing its Comprehensive Management Plan for the stewardship and management of Mauna Kea. The University also formally announced its commitment to decommission the Caltech Submillimeter Observatory, Hoku Kea and the United Kingdom Infra-Red Telescope ("UKIRT"). These actions go beyond simply addressing the impact of the TMT Project. They will substantially mitigate any adverse impact of the astronomy site on Mauna Kea as a whole on native Hawaiian traditional and customary rights.

In my experience, the use of mitigation measures is a universally recognized and widely adopted means of lessening adverse impacts in land use projects. The University of Hawaii and the TMT consortium have made prudent and diligent efforts to mitigate potential adverse impacts of the TMT Project, through strategic locationing, design, and other mitigation commitments. Short of abandoning the TMT project altogether – an alternative never endorsed by the Hawaii Supreme Court or any other Hawaii court – the University of Hawaii and the TMT consortium appear to be satisfying and exceeding all standards in an effort to mitigate effects on any native Hawaiian traditional and customary rights.



**Q     What is your opinion regarding the allegations that Hawaii County’s subdivision ordinance applies to the subleased parcel atop Mauna Kea?**

A     I disagree with such allegations. The CDUA states that the University intends to sublease part of the Science Reserve to TIO. My opinion is that such a sublease does not create a subdivision. Some parties opposed to a CDUP for the TMT on Mauna Kea's summit have suggested that Hawaii County's subdivision ordinance applies to the subleased parcel upon which the TMT is proposed to be constructed. It does not. As set forth in my books, Regulating Paradise: Land Use Controls in Hawaii 54-56 (1984) and Cases and Materials on Land Use 465-468 (6th ed. 2012), subdivision codes like Hawaii County's evolved from state planning enabling statutes and plat acts as a method of simplifying the descriptions of lots in multi-lot residential developments, in order to avoid the complication of describing each lot in a proposed subdivision by metes and bounds. Subdivision ordinances also are the means by which land development conditions relating to public facilities are applied and levied upon landowners and developers proposing such a development. Lastly, subdivision ordinances are the primary means for ensuring the streets, roads, water and wastewater facilities on a subdivided parcel link up to such facilities outside the site.

None of these purposes are relevant to the proposed TMT construction on a subleased parcel of land owned by the State of Hawaii and leased to the University of Hawaii for an astronomy precinct. The inclusion of a legal description of the parcel to be subleased does not transform the sublease into a subdivision. Every transfer of an interest in land, however, either contains such a description or (in the case of easements on land) displays such an interest on a map showing its location. Converting every such description of an interest in land, however slight, into a subdivided parcel falling under a county subdivision code would subject every real property transaction in the county to an ordinance that is designed to regulate residential development, regardless of whether the subject property is actually being used for a residential purpose.