

Good afternoon Honorable Representatives to Congress and to all present or otherwise listening. My name is Dean C. Plaskett, Esquire, Commissioner of the Department of Planning and Natural Resources.

I have been invited here today to render testimony on behalf of the Government of the Virgin Islands with regard to the former President's creation of National Monuments here in the United States Virgin Islands.

Pursuant to the Antiquities Act, the President of the United States has the authority to designate national monuments on land "owned or controlled by the Government of the United States." 16 U.S.C.A. § 431. However, because the Virgin Islands owns virtually all of the submerged lands that President Clinton designated as national monument lands, he did not have the authority to make such designations under the Antiquities Act. Furthermore, President Clinton's proclamation regarding the Buck Island Reef National Monument breaches a contract between the Virgin Islands and the United States, entered into in 1961. In addition, the Department of Planning and Natural Resources ("DPNR") and the Territory as a whole, believe that President Clinton's Proclamations also violated several other federal statutes and the Constitution.

A. President Clinton Acted Beyond The Authority Conferred by the Antiquities Act

Since June 8, 1906, the Antiquities Act has authorized the President of the United States to declare by public proclamation "objects of historic or scientific interest that are *situated upon the lands owned or controlled by the Government of the United States* to be national monuments...." Id. (emphasis added). Thus, because the United States Government did not own the lands designated by President Clinton as national monument lands, President Clinton did not have the authority to designate such lands and such designation should be void *ab initio*. See *United States v. California*, 436 U.S. 32, 35n.7 (1978)("[b]ecause tidelands within the Monument were not 'owned or controlled' by the United States in 1938 or in 1949, Presidents Roosevelt and Truman could not have reserved them by simply issuing proclamations pursuant to the Antiquities Act").

In 1974, Congress passed and the President signed the Territorial Submerged Lands Act ("TSLA"), which provides:

Subject to valid existing rights, all right, title, and interest of the United States in lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastlines of the territories of Guam, the Virgin Islands, and American Samoa...are hereby conveyed to the governments of Guam, the Virgin Islands, and American Samoa, as the case may be, to be administered in trust for the benefit of the people thereof.

48 U.S.C.A. § 1705(a). Thus, pursuant to the TSLA, the United States transferred certain submerged lands to the Virgin Islands. However, the Territory acknowledges that such transfer had its limitations:

There are excepted from the transfer made by subsection (a) hereof-

(ii) all submerged lands adjacent to property owned by the United States above the line of mean high tide;

* * *

(vii) all submerged lands designated by the President within one hundred and twenty days after October 5, 1974;

* * *

(x) all submerged lands within the Virgin Islands National Park established by section 398 to 398b of title 16, including lands described in sections 398c and 398d of title 16; and

(xi) all submerged lands within the Buck Island Reef National Monument as described in Presidential Proclamation 3448 dated December 28, 1961.

48 U.S.C.A. § 1705(b). The dispute over ownership of the submerged lands underlying the Virgin Islands Coral Reef National Monument and expanded Buck Island Reef National Monument rest in these exceptions.

Specifically, the United States Government believes that it owns the newly designated submerged lands based upon the exception contained in 48 U.S.C.A. § 1705(b)(ii). In a September 6, 2000 memo from DOI senior counsel Karen Kovacs to Secretary Babbitt (“Kovacs Memorandum”), Ms. Kovacs wrote that “[i]n 1974, DOI reserved approximately 37,000 acres of submerged lands pursuant to the exception regarding adjacency of federally owned upland.” Chris Larson, *Sen. Cole Plans Hearings on Ownership of Monument Land*, *The Daily News*, Feb. 20, 2001, at 4 (quoting Kovacs Memorandum). However, in our opinion, such reasoning is substantially flawed.

On February 1, 1975, President Ford signed Proclamation 4346, which withheld from transfer to the Virgin Islands thirty acres of submerged lands contiguous to the Buck Island Reef National Monument, thereby expanding the Monument pursuant to the exception contained in 48 U.S.C.A. § 1705(b)(vii). As set forth above, this exception allowed the President to withhold additional submerged lands from being transferred to the Virgin Islands if the President designated such lands within one hundred twenty days of October 5, 1974. If submerged lands were excepted from transfer under one of the other paragraphs of Section 1705(b), there would be no need for President Ford to act pursuant to Section 1705(b)(vii) to withhold such lands. It is clear that President Ford believed that the submerged lands contiguous to Buck Island Monument were not excepted from transfer under any other provision of Section 1705(b):

[t]hese thirty acres of submerged lands are presently owned in fee by the United States. They will be conveyed to the Government of the Virgin Islands on February 3, 1975, pursuant to [48 U.S.C.A. § 1705(a)], unless the President, under Section [48 U.S.C.A. § 1705(b)(vii)] of that Act, designates otherwise.

* * *

The aforementioned thirty acres of submerged lands are contiguous to the site of the Buck Island Reef National Monument....

Proclamation No. 4346, 40 Fed. Reg. 5,127 (Feb. 4, 1975). Moreover, this view also was shared by others in his Administration, including Assistant Attorney General Antonin Scalia:

Unless the proclamation is issued by Sunday, February 2, 1975, the lands to be added to the National Monument will automatically be transferred to the Government of the Virgin Islands pursuant to Section 1(a) of Public Law 93-435 (88 Stat. 1210).

Letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to President Ford, dated Jan. 31, 1975; *see also* Letter from William M. Nichols, Acting General Counsel, Office of Management and Budget, to Attorney General, dated Jan. 29, 1975; Letter from Rogers Morton, Secretary of Interior, to President Ford, dated Jan. 22, 1975 (“It is essential that title to these lands be reserved. Under the provisions of P.L. 93-435 (October 5, 1974), these lands will automatically be transferred to the government of the Virgin Islands.”). These very submerged lands that President Ford and his Administration expressly interpreted as being subject to transfer to the Virgin Islands without the President’s intervention do not differ in character from the vast majority of lands the Clinton Administration claimed were never transferred to the Virgin Islands in 1975. Thus, there appears to be a direct contradiction between the Ford and Clinton Administrations with regard to how the exceptions to the TSLA should be interpreted. However, it is President Ford who signed the TSLA on October 5, 1974, not the DOI employees in the Clinton Administration who are apparently now trying to rewrite history. “The President, after all, has a part in the legislative process...except as to bills passed over his veto, and his intent must be considered relevant to determining the meaning of a law in close cases.” *United States v. Tharp*, 892 F.2d 691,695 (8th Cir. 1990). This is not simply a matter of Presidential interpretation of a federal law. It is a matter of Presidential interpretation where Congress explicitly delegated to a particular President, for a one hundred twenty day period, the authority to interpret the TSLA and to except from transfer additional submerged lands pursuant to Section 1705(b)(vii). President Ford’s interpretation is unambiguous. He believed that lands similar to those he withheld in 1975, now claimed to be federal lands by the Clinton Administration, were transferred to the Virgin Islands in 1975 when he decided not to except them from transfer. [\[1\]](#)

Perhaps even more significant than the Ford Administration’s interpretation of the TSLA is the weakness of the Clinton Administration’s rationale for federal ownership of the submerged lands. According to the Kovacs Memorandum, DOI believed that the submerged lands around the Buck Island Reef National Monument and the National Park around St. John were withheld from the Virgin Islands pursuant to the TSLA provision that excepts from transfer “all submerged lands adjacent to property owned by the United States above the line of mean high tide,” 48 U.S.C.A. § 1705(b)(ii). The problem with this theory is that almost all of the lands designated by President Clinton are not adjacent to uplands owned by the United States. In fact, all of the submerged lands designated to enlarge the Buck Island Reef National Monument are adjacent to other submerged lands, not uplands. With the exception of certain designated submerged lands in Hurricane Hole, Coral Bay, and Round Bay, none of the submerged lands designated as the Virgin Islands Coral Reef National Monument are adjacent to uplands owned by the United States. These submerged lands all border other submerged lands within the Virgin Islands National Park. The flaw in Ms. Kovacs’ analysis is that it would render superfluous the “above the line of mean high tide” language contained in § 1705(b)(ii). As you know, the federal courts follow the “well-established maxim of statutory construction that courts should avoid interpretations that render a statutory provision superfluous.” *Davis County Solid Waste Management v. EPA*, 101F.3d 1395, 1404 (D.C. Cir. 1996)(citing *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552,562,110 S.Ct. 2126, 2132,109 L.Ed.2d 588 (1990); Alabama

Power Co. v. EPA, 40 F.3d 450,455 (D.C. Cir. 1994)); *see Appalachian Power Co. v. EPA*, 135 F.3d 791,819 (D.C. Cir. 1998); *Asiana Airlines v. FAA*, 134 F.3d 393,398 (D.C. Cir.1998)(cardinal principle of interpretation requires us to construe statute ‘so that no provision is rendered inoperative of superfluous, void or significant’”(citations omitted).

President Clinton violated another requirement of the Antiquities Act as well. The President is required to confine the designation to the smallest area compatible with the proper care and management of the objects to be protected.” 16 U.S.C.A. § 431. Much of the area designated by President Clinton has no relationship with the proper care, management and protection ^[2] of the reef resources. In fact, President Clinton simply included within his designations all lands the United States claimed it owned and controlled in the vicinity. Thus, it does not appear that the Clinton Administration even considered the size of the area.

B. President Clinton’s Expansion of the Buck Island Reef National Monument Breached a Contract Between the United States and Territory And Constituted Takings

In 1936, the United States gave the Virgin Islands control, but not title, to Buck Island. See 28 U.S.C.A. § 1405c. In 1961, the Governor of the Virgin Islands, as authorized by the legislature of the Virgin Islands in an act of December 5, 1961, relinquished its control over Buck Island to facilitate the establishment and management of the Buck Island Reef National Monument. In exchange for this relinquishment of control by the Virgin Islands, however, the United States agreed not to adopt any regulation restricting the existing fishing and recreational privileges of Virgin Islands inhabitants in and around Buck Island. See Presidential Proclamation No. 3443 (1961). In January 2001, President Clinton reneged on this promise by restricting extractive uses within the Buck Island Reef National Monument. Accordingly, the Territory is entitled to damages for the United States’ breach of contract.

Moreover, when President Clinton designated the Virgin Islands Coral Reef National Monument and expanded the Buck Island Reef National Monument in January 2001, he effectuated a taking of the fishing and boating rights of the residents of the Virgin Islands without just compensation. Furthermore, to the extent that the President designated territorial, as opposed to federal lands, as monument lands, the Territory view this as a takings as well.

C. Procedural Requirements

We believe that the Territory also may be able to pursue arguments challenging the procedures followed by the Clinton Administration in designating and expanding the monuments. In this regard, the National Environmental Policy Act (“NEPA”) and the Coastal Zone Management Act (“CZMA”) would apply. For example, the procedural requirements of NEPA and the CZMA apply to the actions of agencies and departments who advised President Clinton. *See e.g., State of Alaska v. Carter*, 462 F. Supp. 1155,1160 (D. Alaska 1978)(NEPA); 16 U.S.C.A. §1456(c) (the CZMA requires each “Federal agency activity... to be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs”). Thus, to the extent DOI failed to follow required procedures, the Proclamations are invalid.

For the foregoing reasons, DPNR and the Territory believe that President Clinton’s Proclamations designating the Virgin Islands Coral Reef National Monument and expanding the Buck Island Reef National Monument are invalid.

If there is any concern, whatsoever with the manner in which we have protected our resources, in particular our marine resources, we feel that our creation of the Territorial Marine Park System addresses any such concern.

St. Croix East End Marine Park Management Plan Key Points

The East End of St. Croix has long been recognized for its unique marine resources and biodiversity. In 1960 it was recommended that the East End of St. Croix be designated as a Nature Preserve. During 1979 and 1980 it was designated as an Area of Particular Concern, an Area for Preservation and Restoration and nominated as a significant Natural Area.

The process that led to the development of the St. Croix East End Marine Park Management Plan grew out of the U.S. Coral Reef Task Force recommendations to protect coral reef ecosystems and the lifestyles and economies that are dependent on them. The primary recommendation is that states and territories with significant coral reefs place 5% of them under protection by 2002, 10% of them under protection by 2005, and 20% of them under protection by 2010. Of these figures, it is recommended that 20% be “no-take” areas.

At the Third Coral Reef Task Force Meeting held on St. Croix, Governor Turnbull announced that it is his desire to establish an underwater park that can be enjoyed by residents and visitors alike, while protecting the unique resources and biodiversity of the park.

The Department of Planning and Natural Resources/Division of Coastal Zone Management (DPNR/CZM) applied for and received a \$225,000 grant for its Marine Park Project. A Virgin Islands Marine Park Committee was formed with members composed of personnel from DPNR (CZM, Division of Environmental Enforcement, Division of Environmental Protection, and the Division of Fish and Wildlife), the University of the Virgin Islands, nonprofit organizations, for profit organizations, fishermen, dive shop operators, and federal government agencies to facilitate development of this Plan.

Four documents have been prepared under this grant:

1. The St. Croix East End Marine Park Management Plan;
2. A Resource Description Report;
3. A Management Framework for a System of Marine Protected Areas for the U.S. Virgin Islands; and
4. A Socio-Economic Assessment of Marine Resource Utilization in the U.S. Virgin Islands.

To develop the St. Croix East End Marine Park Management Plan, the Nature Conservancy – Virgin Islands Program facilitated a series of scoping meetings in September and October 2001 and public meetings in January and February 2002. This plan was reviewed by DPNR during March and April 2002, and is currently being put forth by the Coastal Zone Management Commission for comments and input.

The Plan outlines the purpose and manner in which the area is to be used. It sets the management objectives, policies, and strategies to achieve the stated objectives. It also addresses the administrative structure, resource use, zoning boundaries, financial support, staff needs and monitoring plans. The management plan is a working document that would be updated periodically, and should be used to actively and appropriately manage the park.

Upon legislative adoption of the Marine Park, rules and regulations will be developed, with public input, to effectively implement the park's plan.

Key points of the plan include:

1. The Marine Park surrounds the entire East End of the island. On the north shore the boundary begins at the western border of Chenay Bay and extends out to the 3-nautical mile territorial boundary.^[3] The Park extends around the eastern tip of St. Croix, with the southern boundary extending to the western border of Great Pond Bay.
2. The landward side of the boundary is the high-tide line.
3. The Marine Park is composed of 4 zones: No-Take Areas, a Turtle Wildlife Preserve Area, Recreational Areas, and Open Fishing Areas.
4. **No-Take Areas** are designed to encompass large, contiguous diverse habitats. They are intended to provide natural spawning, nursery, and permanent residence areas for the replenishment and genetic protection of marine life, and to protect and preserve all habitats and species; particularly those not protected by fisheries management regulations. Commercial and recreational fishing activities will not be permitted within these areas. Other uses, such as swimming, diving, and boating will be permitted. However, anchoring and jet skiing will not be permitted within the No-Take Area.
5. **The Turtle Wildlife Preserve Area** will be established to minimize disturbance to sensitive wildlife populations and their habitats and to ensure protection and preservation of wildlife resources in the Park. In particular, this designation will be applied to the primary turtle nesting beaches and near shore resting areas. Regulations governing access will be designed to protect the endangered turtles and their habitat, while providing opportunities for public use.
6. **Recreational Areas** are designed to provide areas for snorkeling, diving, and boating while prohibiting any activities that would compromise the recreational values for which the area may be designated. Catch and release fishing and baitfish collection will be permitted in recreational areas. Commercial fishing of any sort will not be permitted in recreational areas. Mooring of boats will be permitted in recreational areas, but only with the use of mooring buoys. General shipping will be restricted.
7. **Open Fishing Areas** are areas in which there are no restrictions on fishing, boating, and diving activities. These areas are governed by all the rules and regulations pertaining to commercial and recreational fishing in the Virgin Islands Code. These areas will be used as a control to monitor and evaluate the effects of resource zoning in the Park. Trawling and general shipping are prohibited, as well as those activities inconsistent with the Park's long-term conservation (e.g.,

mining and oil drilling).

In fiscal year 2001, DPNR secured an additional \$390,000 from the National Oceanic and Atmospheric Administration (NOAA) to hire staff, purchase equipment and begin implementation of non-enforceable management measures for the proposed Marine Park. DPNR is in the process of executing this work-plan and has already hired new staff, purchased a vehicle and is nearing completion of the procurement process for the acquisition of a marine vessel. A comprehensive education and outreach program is also included in this budget and DPNR is on schedule to complete the required tasks.

For fiscal year 2002, DPNR has requested \$400,000 in federal funding from NOAA to proceed with implementation of the Marine Park Plan. NOAA has indicated to DPNR that approval of this additional funding is contingent upon legislative approval of the East End Marine Park.^[4] DPNR plans to utilize these funds to refurbish the building at Cramer's Park and put the relevant boundary markers in place.

It is expected that as this Marine Park matures, it will not only provide a protected area for the ecosystems and the marine life they support, but it will also become a nursery for depleted fish stocks. Other benefits are the continued preservation of traditional uses for Virgin Islanders, the increase of St. Croix's tourism products through the restoration of the Visitor's Center, and possibly, the creation of alternative or expanded tourism products (i.e. guided fishing, scuba/snorkeling tours, daily sailing, etc.). A final benefit that is well-established throughout the United States is that lands abutting protected or preserved areas generally command a higher resale value relative to lands that do not. This extra value could allow the Virgin Islands Government to receive increased revenues from higher stamp taxes, increased property taxes and more income and business taxes from realtors, surveyors, and others involved in the real estate industry.

I would like to take this opportunity to thank the subcommittee for bringing this hearing to the United States Virgin Islands, and we offer sincere welcome to all.

^[1] In fact, because of a typographical error in the land description in the initial Proclamation by President Ford, he issued a subsequent Proclamation correcting the error. In a memorandum discussing the impact of this error, Antonin Scalia recognized that the time to reserve the lands had passed, but he believed that this error was correctable due to its clerical nature. *See* Memorandum by Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, dated Mar. 14, 1975.

^[2] Congress intended that the Antiquities Act be utilized only when "objects" needing protection are "threatened or endangered". *See Utah Ass'n of Counties v. Clinton*, Case Nos. 2:97 CV 479,492, and 863, 1999 U.S. Dist. LEXIS 15852, at *32-33 (D. Utah Aug. 12, 1999)(citing "Monumental Abuse: The Clinton Administration's Campaign of Misinformation in the Establishment of the Grand Staircase-Escalante National Monument," H.R. No. 105-824, 105th Cong., 2nd Sess. At4 (Comm. Print 1988)).

^[3] The Buck Island Reef National Monument, which is under federal jurisdiction, lies within this area.

^[4] NOAA Comments on Virgin Islands FY-02 Coral Reef Grant Application: "*The EEMP management plan and boundaries must be approved by the Virgin Islands Legislature before NOAA can authorize approval of federal funds to manage the EEMP. Therefore, approval of the Virgin Islands FY-02 grant application is contingent upon legislative approval of the EEMP, preferably before the start of FY-02.*"