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United States General Accounting Office
Washington, DC 20548

B-287626

November 15, 2002

The Honorable Donna M. Christian-Christensen
House of Representatives

Subject: Ownership and Control of U.S. Virgin Islands Monument Lands

Dear Mrs. Christian-Christensen:

This responds to your request for our opinion concerning two Presidential proclamations issued on January 17, 2001, pursuant to the Antiquities Act, 16 U.S.C. §§ 431 *et seq.* As you know, one proclamation enlarged the existing Buck Island Reef National Monument north of St. Croix, and the second proclamation created the Virgin Islands Coral Reef National Monument north and south of St. John. A number of questions have been raised relating to these monuments; you have asked for our opinion about who owns the lands encompassed by the monument designations. Under the Antiquities Act, objects designated by the President as national monuments must be located upon lands either "owned or controlled" by the United States.[1]

As summarized below and detailed in the enclosed opinion (Enclosure 1), we conclude that the United States both "owns" and "controls" the lands constituting the two monuments, as those terms are used under the Antiquities Act.[2] The only possible exception is an 1,185-marine acre "finger" of submerged lands off the southeast coast of St. John, which the relevant proclamation suggests may be included in the Virgin Islands Coral Reef monument; we conclude that those lands are neither U.S.-owned nor -controlled. For convenience and clarity, we enclose copies of the two proclamations (Enclosures 2 and 3), including their attached maps.[3]

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[1] *See* 16 U.S.C. § 431 ("The President of the United States is authorized, in his discretion, to declare by public proclamation . . . objects . . . that are situated upon the lands owned or controlled by the Government of the United States to be national monuments . . .") (emphasis added).

[2] The Antiquities Act also requires objects declared as national monuments to qualify as "historic landmarks, historic [or] prehistoric structures, [or] other objects of historic or scientific interest," and the monument area must be "confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* We express no opinion as to whether the lands comprising the two Virgin Islands monuments satisfy any of these other statutory criteria

[3] Enclosure 2 is the Buck Island Proclamation (Proclamation No. 7392, 66 Fed. Reg. 7335 (Jan. 22, 2001)) and Enclosure 3 is the Virgin Islands Coral Reef Proclamation (Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 22, 2001)). Enclosure 3 has been marked to indicate the 1,185-marine acre area which we believe is neither owned nor controlled by the United States.

As part of our analysis, we requested the legal views of the Virgin Islands Government and the Department of the Interior (DOI) on the issues raised by your request. (DOI makes recommendations to the President concerning national monument proclamations and recommended issuance of the two proclamations here.) We obtained the Territory's views by telephone interviews and correspondence with its outside legal counsel. With respect to DOI, we met and had several telephone interviews with Department legal and technical staff, who provided historical and technical information and informal legal comments. We then requested DOI's official legal views and additional factual information, but DOI ultimately declined to provide this input. We also obtained historical documents regarding previous Virgin Islands national monument proclamations from the Kennedy and Ford Presidential Libraries. Such information was not available for the 2001 Proclamations, issued by President Clinton, because access to President Clinton's papers is restricted until 2006.

By way of background, under a treaty known as the 1916 Convention, 39 Stat. 1706, the U.S. acquired from Denmark what today is the U.S. Virgin Islands. The 1916 Convention conveyed to the U.S. all property, dominion and sovereignty then possessed by Denmark in the islands of St. Thomas, St. Croix, St. John and some 50 nearby uninhabited islands, as well as in the so-called submerged lands (underwater coral reefs and other formations) surrounding these islands. The original Buck Island monument was created from some of these lands in 1961, by proclamation issued under the Antiquities Act by President Kennedy (1961 Proclamation).

In October 1974, Congress passed the statute at the center of the current debate over the 2001 Proclamations: the Territorial Submerged Lands Act (TSLA).[4] TSLA transferred to the governments of the Virgin Islands, Guam, and American Samoa "all right, title and interest of the United States" in submerged lands within the territories' so-called 3-mile coastal "belts" (perimeters drawn 3 miles out from the coastlines). In addition to transferring title, TSLA transferred "proprietary rights of ownership" and certain other rights, all of which were subservient to retained "paramount" constitutional powers of the United States. All of these conveyances were subject to eleven enumerated exclusions and to any other "valid existing rights" in the submerged lands.

A few months after TSLA's enactment, in January 1975, President Ford expanded the Buck Island monument under a second Antiquities Act proclamation (1975 Proclamation). In January 2001, under the two proclamations at issue here, President Clinton expanded the Buck Island monument again and created the Virgin Islands Coral Reef monument. Taken together, the 2001 Proclamations designated approximately 30,000 marine acres of coral reefs and other natural resources as national monuments, which is roughly 36 times the area previously set aside by the 1961 and 1975 Proclamations. Under the terms of the 2001 Proclamations, fishing and other "extractive" uses are banned within the vast majority of the monument lands, and boat anchorage is severely restricted.

As explained in Enclosure 1, we conclude that the United States "owns" and "controls" the lands constituting both monuments, as those terms are used in the Antiquities Act. Although the debate about the monuments has focused on the legal effect of TSLA, TSLA transferred only such "right, title and interest" as the United States held in 1974. Thus before evaluating the impact of TSLA, it is necessary to first identify who owned and controlled the lands in

[4] Pub. L. No. 93-435, 88 Stat. 1210, *codified at* 48 U.S.C. §§ 1545, 1705-08.

1974, and this requires determination of the meaning of the Antiquities Act's key terms "owns" and "controls." Although neither the Act nor its legislative history defines these terms, their common meanings – ownership as "the collection of rights allowing one to use and enjoy property, including the right to convey it to others" and control as "to exercise power or influence over" – indicate that the U.S. acquired these rights under the 1916 Convention. This conclusion is reinforced by Supreme Court precedent specifically addressing Antiquities Act ownership/control of submerged lands, *United States v. California,* 436 U.S. 32 (1978). The Court ruled in *California* that the U.S., not California, originally held "dominion" and Antiquities Act ownership/control over coastal submerged lands within California's 3-mile belt. By analogy, for the reasons explained in Enclosure 1, the United States likewise owned and controlled the Virgin Islands coastal submerged lands at the time of TSLA's enactment in 1974.

The U.S. retained this ownership and control even after TSLA was enacted. In the *California* case, the Supreme Court went on to find that the federal government's dominion and ownership/control was transferred to the respective states by a 1953 statute known as the Submerged Lands Act ("SLA"). The key language of the SLA is identical to the language of TSLA, and thus unless one of TSLA's eleven exclusions applied to the monument lands, they, like the lands in *California*, have been transferred out of federal jurisdiction. While the Territory contends that virtually none of the monument lands qualified for an exclusion, we believe their position is contrary to TSLA's language, legislative history, and case law. In our view, virtually all of the monument lands qualified under at least one TSLA exclusion, the vast majority under the so-called "(b)(ii)" exclusion (for submerged lands adjacent to U.S.-owned above-tideline "uplands"). The only potential exception is the 1,185-marine acre "finger" of lands off the coast of St. John, which we believe was not excluded and so was transferred under TSLA to the Virgin Islands.

In sum, we conclude that the lands encompassed by the two monuments are owned and controlled by the United States for purposes of the Antiquities Act. We recognize that the substantial size of the monuments and the restrictions attached to their use underscores the practical significance of this conclusion. If this result is deemed to be inadvisable as a matter of policy, Congress or the Executive may of course choose to take additional action.

Please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417 if there are any questions concerning this opinion. Doreen S. Feldman, Assistant General Counsel, and Mary W. Reich, Senior Attorney, also made key contributions to this opinion.

Sincerely yours,

Anthony H. Gamboa
General Counsel

Enclosures

OWNERSHIP AND CONTROL OF U.S. VIRGIN ISLANDS MONUMENT LANDS

On January 17, 2001, President Clinton issued two proclamations under the Antiquities Act of 1906, 16 U.S.C. §§ 431 *et seq.*, declaring certain coral reefs and other "submerged" (underwater) lands and formations in the U.S. Virgin Islands as national monuments. The first proclamation expanded the existing Buck Island Reef National Monument north of St. Croix by adding submerged lands surrounding the monument.[1] The second proclamation created a new Virgin Islands Coral Reef National Monument from submerged lands north and south of St. John.[2]

Under the Antiquities Act, the President may declare objects as national monuments if, among other things, they are situated upon lands either "owned or controlled" by the United States Government.[3] For the reasons discussed below, we conclude that the United States both owns and controls the lands encompassed by these two monuments, as those terms are used in the Antiquities Act, with the exception of an 1,185-marine acre "finger" of submerged lands off the southeast coast of St. John. In our view, those lands, which may be part of the Virgin Islands Coral Reef monument, are neither owned nor controlled by the United States.[4]

I. FACTUAL AND LEGAL BACKGROUND

A. U.S. Acquisition of Virgin Islands Lands (1916)

By the Convention of August 4, 1916 between Denmark and the United States (1916 Convention), the U.S. acquired what today is the U.S. Virgin Islands.[5] For a purchase price of $25 million, and subject to existing private rights in the conveyed lands, the U.S. obtained "all territory, dominion and sovereignty possessed, asserted or claimed by Denmark in the West Indies including the Islands of Saint Thomas, Saint John and

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[1] *See* Proclamation No. 7392, 66 Fed. Reg. 7335 (Jan. 22, 2001).

[2] *See* Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 22, 2001).

[3] *See* 16 U.S.C. § 431 ("The President of the United States is authorized, in his discretion, to declare by public proclamation . . . objects . . . that are situated upon the lands owned or controlled by the Government of the United States to be national monuments . . ..") (emphasis added).

[4] The Antiquities Act also requires objects declared as national monuments to qualify as "historic landmarks, historic [or] prehistoric structures, [or] other objects of historic or scientific interest," and the monument area must be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. We express no opinion as to whether the lands constituting the two Virgin Islands monuments satisfy these other statutory criteria.

[5] 39 Stat. 1706; *see generally* S. Rep. No. 1271, 83d Cong., *reprinted in* 1954 U.S.C.C.A.N. 2585, 2586-87. The treaty, which was signed in 1916 and ratified in 1917, is most commonly referred to by its signature date.

Saint Croix, together with the adjacent islands and rocks."[6] The 1916 Convention conveyed public and crown lands, wharves, ports, harbors and all other property then belonging to Denmark, as well as the submerged lands around the islands.[7]

B. Transfer of U.S. "Control" of "Property" to Virgin Islands Government (1936, 1954)

In 1936, Congress enacted the Virgin Islands Organic Act (1936 Act), establishing a permanent government for the Territory and transferring to it "control" of most of the "property" the U.S. had acquired from Denmark in 1916.[8] Congress reaffirmed this transfer when it passed the Revised Virgin Islands Organic Act in 1954 (1954 Act).[9] As discussed below, because we believe the 1936 and 1954 Acts pertained only to above-tideline property (so-called "uplands"),[10] we believe the acts did not alter control of the submerged lands at issue.

C. Return of Buck Island Control to U.S. and Creation of Buck Island Monument (1961)

In May 1961, then-Secretary of the Interior Udall recommended creation of Buck Island Reef National Monument from a portion of the lands the U.S. had acquired under the 1916 Convention, namely, Buck Island and some of the adjacent coral reefs and other submerged lands.[11] Although the Department of Justice (DOJ) concluded that the Antiquities Act's requirement of U.S. ownership-or-control was satisfied by the federal government's holding of "legal title" to the lands, DOJ determined that the U.S. also needed to "control" the lands so that the Department of the Interior (DOI)

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[6] 39 Stat. at 1706, 1707; *see* S. Rep. No. 1271, note 5 above, 1954 U.S.C.C.A.N. at 2587 ("There are some fifty-odd islands in the group ceded [to] the United States, but only three, St. Thomas, St. John, and St. Croix are inhabited."). *See generally Club Comanche, Inc. v. Gov't of the Virgin Islands,* 278 F.3d 250, 256 (3d Cir. 2002) (noting U.S. purchase from Denmark under 1916 Convention of "all of the state-owned lands in the islands of St. Croix, St. Thomas, and St. John."); *West Indian Co. v. Gov't of the Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988), *aff'g* 658 F. Supp. 619 (D.V.I. 1987) (discussing effect of 1916 Convention and subsequent U.S. legislation on pre-1916 ownership rights).

[7] *See, e.g., Burns v. Forbes*, 412 F.2d 995, 997 n.5 (3d Cir. 1969) (1916 Convention "undoubtedly included the submerged tidal lands surrounding the islands within the three-mile limit."); H.R. Rep. No. 93-902, 93d Cong. 2d Sess. (1974) at 9 (Department of Justice comments regarding purchase under the 1916 Convention of the Virgin Islands "and the adjacent submerged lands").

[8] *See* Sec. 4, Pub. L. No. 74-749, 49 Stat. 1807, 1808, *codified at* 48 U.S.C. § 1405c(a). With exceptions not relevant here, the 1936 Act provided that "[a]ll property which may have been acquired by the United States from Denmark in the Virgin Islands under the convention entered into August 4, 1916, not reserved by the United States for public purposes prior to June 22, 1937, is placed under the control of the Government of the Virgin Islands." *Id.*

[9] *See* Section 31(b), Pub. L. No. 83-517, 68 Stat. 497, 510 (repealed) ("The government of the Virgin Islands shall continue to have control over all public property that is under its control on the date of approval of this Act.").

[10] See note 45 below.

[11] *See* Letter from DOI Secretary Udall to the Director, Bureau of the Budget, Executive Office of the President (May 12, 1961).

could administer the new monument.[12] The U.S. therefore requested and received agreement from the Virgin Islands Government to convey back to the U.S. any "control" of "property" within the proposed monument boundaries that had been conveyed to the Territory by the 1936 Act. The Virgin Islands Legislature and Governor returned control over "Buck Island and certain adjoining shoals, rocks, coral reefs and waters," conditioned upon the United States' preservation of Virgin Islands residents' "existing" fishing, bathing and recreational uses within the monument boundaries.[13] With DOJ's approval,[14] President Kennedy signed Proclamation No. 3443 on December 28, 1961 (1961 Proclamation), designating the lands specified in the Territory's legislation and authorizing residents' continued "existing" uses.[15]

D. Authorization To Transfer U.S. Title Regarding Territorial Submerged Lands (1963)

In 1963, Congress passed the Territorial Submerged Lands Act of 1963 (1963 Act).[16] As relevant here, the 1963 Act authorized DOI to convey to the governments of the Virgin Islands, Guam and American Samoa "whatever right, title, or interest" the United States had in "submerged lands . . . in or adjacent to" those territories.[17] In addition to title, the Act authorized conveyance of "proprietary rights of ownership" and other specified rights; established separate procedures for conveyance of these "rights" and of "title"; and retained certain U.S. constitutional powers as to any lands conveyed. We understand that DOI did not finalize any conveyances of submerged lands to the Virgin Islands under the 1963 Act.

E. Transfer of U.S. Title Regarding Certain Territorial Submerged Lands and Property (1974)

On October 5, 1974, Congress repealed the submerged lands provisions of the 1963 Act and replaced them with the Territorial Submerged Lands Act of 1974 (TSLA).[18]

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[12] *See* Memorandum from Assistant Attorney General/Office of Legal Counsel Katzenbach to Deputy Special Counsel to the President (Aug. 24, 1961) ("Buck Island is not a part of the property reserved by the United States [under the 1936 Act] . . . and hence it is under the control of the Government of the Virgin Islands. Under the terms of the proposed proclamation, the whole of the monument area would be under the control of the Secretary of the Interior. It would appear, therefore, that the proposed proclamation is in conflict with the [1936 Act]."). *See also* Memorandum from Assistant Attorney General/Office of Legal Counsel Katzenbach to Deputy Special Counsel to the President (Oct. 31, 1961) (same).

[13] *See* 1961 V.I. Sess. Laws, Act No. 800 (Dec. 4, 1961); Letter from V.I. Governor Paiewonsky to President Kennedy (Dec. 22, 1961) (relinquishing "such control of Buck Island and adjacent submerged lands and waters as was vested" by 1936 Act).

[14] *See* Memorandum from the Acting Attorney General to President Kennedy (Dec. 22, 1961) at 2 (approving as to "form and legality"); *see also* Memorandum from Assistant Attorney General/Office of Legal Counsel Katzenbach to the Attorney General (Dec. 22, 1961).

[15] 76 Stat. 1441 (1961).

[16] *See* Pub. L. No. 88-183, 77 Stat. 338, *codified at* 48 U.S.C. §§ 1701-04 (repealed in part).

[17] *Id.*, Sec. 1(a) (repealed) (emphasis added).

[18] *See* Pub. L. No. 93-435, 88 Stat. 1210, enacting 48 U.S.C. §§ 1545, 1705-08 and repealing 48 U.S.C. §§ 1701-03.

TSLA made an outright conveyance to the three territorial governments – subject to any "valid existing rights" and eleven enumerated exclusions – of "all right, title and interest of the United States" in submerged lands within the territories' so-called 3-mile coastal "belts" (perimeters drawn 3 miles out from coastlines).[19] These conveyed submerged lands were "to be administered in trust for the benefit of the people" of the respective territories.[20] More specifically, in addition to "title," TSLA conveyed "proprietary rights of ownership [and] the rights of management, administration, leasing, use, and development of the lands and natural resources."[21] These TSLA-conveyed ownership and control rights were subservient to retained "paramount" constitutional powers of the United States, namely, the federal government's "powers of regulation and control for the . . . purposes of commerce, navigation, national defense, and international affairs,"[22] and its authority to "use, develop[], improve[], or control" the conveyed lands for purposes of navigation, flood control or the production of power.[23]

The excluded territorial submerged lands, as to which no conveyance of U.S. title or rights was made, included the following:

- "all submerged lands adjacent to property owned by the United States above the line of mean high tide," *i.e.,* submerged lands adjacent to U.S.-owned uplands **(TSLA § 1705(b)(ii));**

- "all submerged lands that have heretofore been determined by the President or the Congress to be of such scientific, scenic, or historic character as to warrant preservation and administration" under the National Park Service Act, *i.e.*, submerged lands previously designated as national monuments or national parks **(TSLA § 1705(b)(vi));**

- "all submerged lands designated by the President within 120 days" after enactment, *i.e.,* before February 3, 1975 **(TSLA § 1705(b)(vii));**

- "all submerged lands within the boundaries of Virgin Islands National Park" at the time of enactment **(TSLA § 1705(b)(x));** and

- "all submerged lands within the boundaries of Buck Island Reef National Monument" as designated by the 1961 Proclamation **(TSLA § 1705(b)(xi)).**

TSLA also transferred to the Virgin Islands Government all U.S. "right, title, and interest" in the "property" as to which "control" already had been transferred by the 1936 and 1954 Acts.[24] Again, as detailed below, because we believe those acts

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[19] 48 U.S.C. § 1705(a) (emphasis added).
[20] *Id.*
[21] *Id.* at § 1706(c) (emphasis added).
[22] *Id.*
[23] *Id.* § 1706(b).
[24] 48 U.S.C. § 1545(b)(1).

pertained only to uplands, we believe this transfer of ownership likewise pertained only to uplands, not to the submerged lands at issue here.

F. Reservation of U.S. Title Regarding Certain Buck Island Submerged Lands and Expansion of Buck Island Monument (1975)

In January 1975, then-Secretary of the Interior Morton recommended to President Ford that he expand the Buck Island monument by adding 30 acres of submerged lands adjacent to the existing monument, explaining that the 1961 Proclamation had "inadvertently failed to include" this acreage.[25] Believing that U.S. "title" to these lands was about to transfer to the Virgin Islands on February 3, 1975 by automatic operation of TSLA, the Secretary urged that a proclamation be issued immediately, first reserving the lands to the federal government pursuant to the TSLA (b)(vii) exclusion (covering submerged lands reserved by the President prior to February 3, 1975), and then adding the lands to the monument pursuant to the Antiquities Act.[26] DOJ approved DOI's proposed proclamation, including DOI's reference to (b)(vii) as the only TSLA exclusion allegedly available to prevent transfer of the 30 submerged acres to the Virgin Islands,[27] and on February 1, 1975, two days before the (b)(vii) statutory deadline, President Ford signed Proclamation 4346 (1975 Proclamation).[28] The 1975 Proclamation stated that "[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 [TSLA], unless the President, under Section . . . (b)(vii) of that Act, designates otherwise."[29]

G. Further Expansion of Buck Island Monument and Creation of Virgin Islands Coral Reef Monument (2001)

According to DOI officials with whom we spoke, during 1999 and 2000, the Department was considering various measures by which the federal government could protect additional coral reefs and other marine natural resources, including

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[25] *See* Letter from DOI Secretary Morton to President Ford (Jan. 22, 1975).

[26] *Id.* Secretary Morton stated in part, "[i]t is essential that title to these lands be reserved. Under the provisions of [TSLA], these lands will automatically be transferred to the government of the Virgin Islands, unless excepted from transfer by the President within 120 days after the date of enactment. Therefore, action must be taken by February 2, 1975. . . . The government of the Virgin Islands is agreeable to this reservation, and Delegate Ron de Lugo [of the Virgin Islands] and the House and Senate Interior Committees have been advised of our recommendation." *Id.*

[27] *See* Memorandum from Assistant Attorney General/Office of Legal Counsel Scalia to President Ford (Jan. 31, 1975) at 1 (recommending President sign proclamation immediately because "[u]nless 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 [TSLA]."); Memorandum from Assistant Attorney General/Office of Legal Counsel Scalia (Jan. 31, 1975) (stating that the proclamation "would exercise the President's authority under [TSLA] section . . . (b)(vii) . . . for the purpose of enlarging the National Monument established by [the 1961] Proclamation . . ..").

[28] 40 Fed. Reg. 5127 (Feb. 4, 1975), as corrected by Proclamation No. 4359, 40 Fed. Reg. 14565 (April 1, 1975).

[29] 40 Fed. Reg. at 5127 (emphasis added).

designating those resources as national monuments under the Antiquities Act. In order to evaluate the government's options in the U.S. Virgin Islands, DOI technical staff undertook an extensive effort to ascertain which resources were under U.S. versus Virgin Islands jurisdiction. DOI mapped the coastal high-tide lines (so-called "baselines") from which a TSLA belt could be drawn 3 miles out around each island; obtained title search results identifying the portions of those baselines that were U.S.-owned in 1974, for purposes of applying the TSLA exception (b)(ii) (retaining U.S. right, title and interest in submerged lands adjacent to U.S.-owned uplands); and finally, drew belts 3 miles out from the baselines of these U.S.-owned uplands (or closer, if an international boundary intervened) to demarcate the areas containing submerged lands in which the U.S. had retained its right, title and interest.

Based on these mapping and title search efforts and application of TSLA (b)(ii), the Department identified approximately 37,000 acres of submerged lands which it believed were within U.S. jurisdiction. In November 2000, DOI published a notice in the *Federal Register* announcing the availability of these results for public review and comment;[30] Department officials advised us that no comments were submitted. Accordingly, in December 2000, then-Secretary of the Interior Babbitt recommended to President Clinton that he issue the two proclamations at issue here, designating as monument lands the majority of the newly identified 37,000 acres. With regard to Buck Island, the Secretary proposed expansion of the existing monument to include additional submerged lands within the 3-mile belt surrounding the island.[31] Acknowledging that the Antiquities Act requires either U.S. ownership or control, the Secretary stated that the proposed lands were "owned by the federal government," albeit "not . . . as that concept is generally understood . . .," and that "the United States exercises paramount rights over the submerged lands, which makes them 'controlled' by the United States as that term is used in the Antiquities Act."[32] In asserting this "paramount rights" basis of U.S. control, the Secretary cited a 2000 Justice Department legal opinion discussing submerged lands off the coast of Hawaii.[33] Further explaining the federal government's ownership and control of the proposed lands, the Secretary quoted the TSLA (b)(ii) exclusion which had been

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[30] *See* 65 Fed. Reg. 68157 (Nov. 14, 2000) ("Availability of United States Virgin Islands Territorial Submerged Lands Act Boundary Determination and Submerged Lands Jurisdictions"). DOI explained that pursuant to TSLA § 1705(b) (the TSLA exclusions provision), it had conducted "coastline ownership record searches, field investigations, baseline point development, and review and mathematical computations to derive and define [the] boundaries and jurisdictions" of "the Territorial Submerged Lands Act Boundary Determinations and Submerged Jurisdictions for the United States Virgin Islands . . .," and DOI requested comment on these jurisdictional boundaries. *Id.*

[31] *See* Memorandum from DOI Secretary Babbitt to President Clinton, "Discussion of the Buck Island Reef National Monument Expansion Proposal and Modification" (Dec. 21, 2000) (Dec. 2000 Buck Island Memorandum) at 1; www.doi.gov/news/archives/001221.html ("The proposed Buck Island Reef National Monument expansion includes 18,135 marine acres of federal submerged lands off of St. Croix, within the 3-mile belt around Buck Island.").

[32] Dec. 2000 Buck Island Memorandum at 1, 2 (emphasis added).

[33] *Id.*, citing Memorandum from Assistant Attorney General/Office of Legal Counsel Moss to Solicitor/General Counsels, DOI, NOAA and CEQ, "Administration of Coral Reef Resources in the Northwest Hawaiian Islands" (Sept. 15, 2000) (2000 DOJ Opinion) (discussed below), available at http://www.atlantisforce.org/doj1.html.

applied in connection with DOI's mapping effort and noted that:

> [w]ithin this 3-mile belt [TSLA] . . . retained in the United States all its interests in 'all submerged lands adjacent to' [U.S.-owned uplands]. This retained area has now been delineated by a Departmental survey completed this year . . .Only those federally retained submerged lands – excluded from transfer to the Virgin Island Territory under the terms of the TSLA – are included in the proposed expansion.[34]

Finally, the Secretary proposed a ban on fishing and all other "extractive" uses throughout the expanded monument, and recommended severe restrictions on all boat anchorage. The Secretary explained that because the fishing methods used in 1961 were no longer in use in 2000, the 1961 Proclamation's preservation of "existing" fishing privileges was effectively moot and should be superceded by a ban in order to protect the marine resources in the area.[35]

Similarly, Secretary Babbitt recommended creation of a new Virgin Islands Coral Reef National Monument, comprised of certain submerged lands within the 3-mile belt around St. John.[36] Again, the Secretary stated that the proposed monument lands were both "owned" by the U.S. (although not in the conventional sense) and "controlled" by it, citing the 2000 DOJ legal opinion and referencing TSLA's (b)(ii) exclusion.[37] As with the Buck Island monument, the Secretary proposed substantial restrictions on boat anchorage and a ban on fishing and other extractive uses throughout most of the monument. With respect to a remaining 1,185-marine acre "finger" of submerged lands off the coast of St. John, the Secretary stated that these lands were controlled (and, apparently, owned) by the Virgin Islands and would not be part of the monument.

On January 17, 2001, President Clinton signed Proclamation Nos. 7392 (2001 Buck Island Proclamation)[38] and 7399 (2001 Virgin Islands Coral Reef Proclamation).[39] The 2001 Buck Island Proclamation enlarged the monument by adding approximately 18,135 marine acres of resources "owned or controlled by the United States" and surrounding the existing monument,[40] and adopted the recommended restrictions on extractive uses and boat anchorage. Similarly, the 2001 Virgin Islands Coral Reef

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[34] Dec. 2000 Buck Island Memorandum at 2 (emphasis added).

[35] *Id.* at 5-7 ("Given the increases in development, visitation, and fishing uses in the last four decades, this purpose [protecting Buck Island and its adjoining formations] can only be advanced by enlarging the area and prohibiting all extractive uses in it . . . The 'existing' way of fishing identified in the 1961 proclamation no longer exists in the area.").

[36] *See* Memorandum from DOI Secretary Babbitt to President Clinton, "Discussion of the Virgin Islands Coral Reef National Monument Proposal " (Dec. 21, 2000) (Dec. 2000 Coral Reef Memorandum) at 1; www.doi.gov/news/archives/001221.html ("The proposed U.S. Virgin Islands Coral Reef National Monument includes 12,708 acres of federal submerged lands within the 3-mile belt off of St. John . . ..").

[37] Dec. 2000 Coral Reef Memorandum at 1, 2.

[38] 66 Fed. Reg. 7335 (Jan. 22, 2001).

[39] 66 Fed. Reg. 7364 (Jan. 22, 2001).

[40] 66 Fed. Reg. at 7336.

Proclamation created the new monument by designating approximately 12,708 marine acres of resources "owned or controlled by the United States,"[41] and adopted the recommended restrictions. The 2001 Virgin Islands Coral Reef Proclamation was ambiguous concerning whether the 1,185-marine acre "finger" of submerged lands off St. John was included as part of the monument: the text of the Proclamation indicated that it was not included, while the attached map, which was part of the Proclamation, indicated that it was.[42] Taken together, the 2001 Proclamations designated approximately 30,000 marine acres of coral reefs and other submerged lands in the U.S. Virgin Islands as national monument lands, which is roughly 36 times the area previously set aside by the 1961 and 1975 Proclamations.[43]

II. ANALYSIS

A. Ownership and Control of Monument Uplands

With respect to the only "uplands" portion of the two Virgin Islands monuments – Buck Island itself – we conclude that the United States both owns and controls this proprerty, and DOI officials and the Virgin Islands have expressed no contrary view.[44] Denmark conveyed its ownership and control rights to the United States by the 1916 Convention (Buck Island was an "adjacent island" to St. Croix), and the U.S. transferred its control of the island to the Virgin Islands Government by the 1936 and 1954 Acts. (We believe the "property" subject to these acts consisted only of uplands, not submerged lands.[45]) The Virgin Islands transferred this control back to

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[41] *Id.* at 7365.

[42] The map's explanatory key states that areas marked with parallel lines constitute the "Coral Reef National Monument," and the 1,185-acre area is marked with such lines. *Id.* at 7367. The Proclamation text, however, states that lands "within the monument" which are not "owned or controlled by the United States shall be reserved as a part of the monument only upon acquisition of title or control thereto by the United States," *id.* at 7365, and Secretary Babbitt's Dec. 2000 Coral Reef Memorandum indicated that these lands were not U.S.-owned or -controlled. Thus in contrast to the Proclamation map, the text indicates that the lands were not being declared as part of the monument.

[43] According to recent DOI/National Park Service testimony, approximately 865 acres of U.S. Virgin Islands lands were designated as national monument lands prior to the 2001 Proclamations. The 2001 Proclamations added approximately 30,843 acres, bringing the current total Virgin Islands monuments area to approximately 31,708 acres. *See* Statements of Fran P. Mainella, Director, National Park Service, Before the House Committee on Resources, Subcommittee on National Parks, Recreation and Public Lands (July 20 and 22, 2002).

[44] Neither DOI officials nor the Virgin Islands provided comments to us about ownership of Buck Island. As noted above, DOJ opined in 1961 that the U.S. held "legal title" to the island.

[45] The use of the term "property" in the 1936 and 1954 Acts might be read to include property both above the tideline (land and buildings) and below it (submerged lands). The Virgin Islands Government appears to have interpreted the statutes in this manner – its 1961 legislation and correspondence re-conveying the 1936 Act's "control" referred to both Buck Island and the "adjacent submerged lands and waters" (see note 13 above) – and the Third Circuit suggested this interpretation in *dicta* in *Burns v. Forbes*, note 7 above, 412 F.2d at 997, n.5.

While the meaning of "property" in this context is somewhat unclear, we believe the better view is that it applied only to uplands. Neither the 1936 nor the 1954 Acts defined the term, and the predecessor to the 1936 Act – the Act of March 3, 1917, which established a temporary government for the Virgin Islands – did not use it at all. *See* Pub. L. No. 64-389, 39 Stat. 1132. Nor does the common meaning of "property" speak to this issue: it is defined as "[a]ny external thing over which

the United States in 1961, to facilitate creation of the original Buck Island monument, and the U.S. has retained control ever since. We believe ownership of Buck Island is even more straightforward than its control: the U.S. obtained Denmark's ownership rights in 1916 and never transferred them.[46] Although ownership of most Virgin Islands-"controlled" uplands was transferred to the Virgin Islands Government in 1974 under TSLA, control over Buck Island had been transferred back to the United States in 1961 and thus Buck Island remained under U.S. jurisdiction.

B. Ownership and Control of Monument Submerged Lands

Ownership and control of the submerged lands and overlying waters[47] encompassed

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the rights of possession, use, and enjoyment are exercised . . .." *Black's Law Dictionary* (7th ed. 1999) at 1095. The committee and conference reports accompanying the 1936 and 1954 Acts likewise shed little light on the issue; they simply paraphrase the final language of the statutes. *See* H.R. Rep. No. 2637, 74th Cong., 2d Sess. (1936) at 2; S. Rep. No. 1974, 74th Cong., 2d Sess. (1936) at 2; S. Rep. No. 1271, 83d Cong. (1954), *reprinted in* 1954 U.S.C.C.A.N. 2585, 2596, 2600; Conf. Rep. No. 2105, 83d Cong, (1954), *reprinted in* 1954 U.S.C.C.A.N. 2619, 2626.

However, a comparison of the 1936 Act with earlier versions of the bill finally enacted (S. 4524) indicates that Congress intentionally distinguished between uplands and submerged lands and intended to transfer control only over the former. As introduced, S. 4524 separately transferred control over, on the one hand, "all property which may have been acquired in the Virgin Islands . . . by the United States under cession of Denmark in any public bridges, roads, houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines, or minerals under the surface of private lands, and all public lands, waters, and public buildings not heretofore or within one year hereafter reserved by the United States for public purposes. . . ," and on the other hand, over "the harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the Virgin Islands . . . and adjacent thereto now owned by the United States and not heretofore or within one year hereafter reserved by the United States for public purposes . . .." Sec. 5, S. 4524, 74th Cong., 2d Sess. (Feb. 24, 1936) (emphasis added). As enacted, however, the statute contained only the first transfer of control, pertaining to "property" acquired under the 1916 Convention, indicating that Congress intended in the 1936 and 1954 Acts to retain U.S. control over U.S. Virgin Islands submerged lands.

Moreover, the legislative history of the 1963 Act, which unambiguously pertained only to submerged lands, makes clear Congress's understanding that the 1936 and 1954 Acts applied only to uplands. The Senate Report accompanying the 1963 Act explained that the legislation was needed because there was "no [existing] specific authorization by the Congress permitting the conveyance of or transfer of control over [submerged lands] . . . to the territorial governments . . .." S. Rep. No. 589, 88th Cong. 1st Sess. (1963) at 3. *See also* H. R. Rep. No. 1827, 87th Cong. 2d Sess. (1962) at 18 (citing to 1954 Act, DOJ notes that "(uplands) in . . . the Virgin Islands are now under the control of the government[] of those islands . . .."). Implicit in these descriptions is the understanding that the 1936 and 1954 Acts applied only to uplands, a conclusion underscored by the Senate Report's citation of a 1958 DOI legal opinion determining that in the absence of legislation explicitly conveying U.S. submerged lands to a territory, the U.S. retained its ownership of those lands, as well as its ownership of territorial uplands. (The DOI opinion is available at 1958 LEXIS 24.)

Finally, the fact that Congress took action regarding both "submerged lands" and "property" in TSLA in 1974, and gave different treatment to each category, confirms that Congress viewed these terms as having different meanings and that "property" referred only to uplands.

[46] *See generally Rivera v. United States*, 910 F. Supp. 239 (D.V.I. 1996) (stipulated U.S. ownership of Buck Island).

[47] Surface waters, including the territorial seas, can constitute "lands" designated as part of a national monument under the Antiquities Act, at least where such waters are "on or over" designated

by the two monuments is considerably more complex. We summarize below the views of the Virgin Islands and DOI officials on these issues, followed by our analysis and conclusion that the United States owns and controls the monument submerged lands and waters.

1. Position of the Virgin Islands Government

The Territory believes it owns virtually all of the submerged lands encompassed by the Buck Island and Virgin Islands Coral Reef monuments. Although the Territory provided no specific comment on ownership of the lands prior to TSLA's enactment in 1974, it appears to assume that the U.S. owned them. The Territory believes that TSLA then transferred the U.S. rights to the Virgin Islands with respect to all of the submerged lands except the following, which it believes are covered by the TSLA exclusions noted and thus are owned by the U.S.:

- the Buck Island submerged lands designated by the 1961 Proclamation (covered under the (b)(xi) exclusion expressly covering those lands);

- the submerged lands added to the Buck Island monument by the 1975 Proclamation (covered under the (b)(vii) exclusion allowing reservation prior to February 3, 1975);

- the submerged lands within Virgin Islands National Park (under the (b)(x) exclusion expressly covering those lands); and

- the submerged lands adjacent to the Hurricane Hole, Coral Bay and Round Bay areas within the Virgin Islands Coral Reef monument (covered under the (b)(ii) exclusion covering submerged lands adjacent to U.S.-owned uplands).

The only exclusions potentially applicable to the remaining lands, in the Territory's view, are (b)(vii) and (b)(ii). As discussed below, it contends that neither exclusion applies.

With respect to (b)(vii) (excluding submerged lands designated by the President by February 3, 1975), the Territory asserts that the 30 acres added by the 1975 Proclamation "do not differ in character" from the vast majority of lands designated by the 2001 Proclamations. Because the 1975 Proclamation identified (b)(vii) as the only exclusion allegedly available to preclude transfer of the lands, it follows, according to the Territory, that the 2001-designated lands also were required to have been reserved by the President prior to February 3, 1975. Because they were not, the Territory contends, they were transferred to the Territory and are no longer U.S.-owned or -controlled.

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submerged lands. *See United States v. California*, 436 U.S. 32, 36 n. 9 (1978); *Cappaert v. United States*, 426 US. 128, 138-42 (1976).

With respect to (b)(ii) (excluding submerged lands adjacent to U.S.-owned uplands), the Territory asserts that submerged lands are "adjacent" only if their perimeters directly abut U.S. uplands. Because the perimeters of virtually all of the 2001-designated lands (the perimeters of the newly declared monuments) were located next to the "submerged" boundaries of the existing Buck Island monument and Virgin Islands National Park, not directly next to the U.S.-owned coastlines of Buck Island and St. John, the Territory argues that these lands do not qualify under (b)(ii).[48]

Alternatively, in the Territory's view, under the general rule that statutory language should be interpreted so that each word has meaning and is not superfluous, TSLA's exclusions must be mutually exclusive and only one exclusion can apply per area of submerged lands. Under this reading, the Territory asserts that the only applicable exclusions for submerged lands in the vicinity of Buck Island and Virgin Islands National Park are, respectively, (b)(xi) (covering just the 1961 Buck Island monument) and (b)(x) (covering just Virgin Islands National Park), with the result, according to the Territory, that (b)(ii) cannot also apply to these lands.

Finally, the Virgin Islands contends that interpreting TSLA in a way that includes most of the 2001-designated lands as within U.S. jurisdiction would be inconsistent with Congressional intent in enacting the statute. According to the Territory, this intent was to grant greater autonomy to the territories by giving them control over their coastal submerged lands.

2. Position of DOI Officials

DOI officials did not provide specific comments regarding ownership of the lands designated by the 1961 and 1975 Proclamations. However, in discussing submerged lands generally and consistent with Secretary Babbitt's December 2000 recommendations, the officials stated that the 2001-designated lands are "owned" by the U.S. (although not in the traditional sense)[49] and subject to its sovereign "control," "dominion" and "jurisdiction." The officials contend that the U.S. retained ownership and control of these lands after TSLA by virtue of TSLA (b)(ii). In contrast to the Virgin Islands, which identified the (b)(ii) boundaries for the 2001-designated lands as the monument perimeters, DOI officials contend that the boundaries are the 1974 U.S.-owned coastlines. Because the United States owned 100 percent of the Buck Island coastline in 1974 (based on its ownership of the entire island), all of the submerged lands within the island's 3-mile belt qualified as adjacent, DOI officials believe, and remain so today. With respect to the new monument lands designated around St. John, DOI officials contend, because the U.S.

[48] As noted above, the exceptions, which are excluded under (b)(ii) according to the Territory, are the Virgin Islands Coral Reef monument lands whose perimeters do directly abut U.S.-owned coastlines, namely, the lands abutting the Hurricane Hole, Coral Bay and Round Bay uplands properties.

[49] On this aspect of Virgin Islands submerged lands ownership, current DOI officials and Secretary Babbitt appear to differ to some extent with President Ford, Secretary Morton and, at least in 1961 and 1975, DOJ. As discussed above, the latter officials stated that the U.S. owned the 1961- and 1975-designated lands in the traditional sense – by "title," "legal title" and in "fee simple."

owned only discrete portions of the St. John coastline in 1974, only submerged lands within demarcation lines drawn 3 miles seaward from the end points of each owned segment qualified as adjacent and remain so today.

DOI officials disagree with the Virgin Islands about the legal significance of the 1975 Proclamation. They believe that (b)(ii), as well as (b)(vii), applied to the 1975-designated lands because the lands were within the 3-mile belt of U.S.-owned Buck Island uplands. The fact that President Ford affirmatively reserved the 1975 lands under (b)(vii), rather than relying on the automatic operation of (b)(ii), did not render (b)(ii) inapplicable, DOI officials contend. Rather, this simply meant that Administration officials were in error in asserting that (b)(vii) was the only available exclusion, causing the President to perform a legally redundant act. DOI officials suggest that a lack of modern mapping methods in 1975 might have affected the Administration's analysis.

Finally, DOI officials contend that TSLA's exclusions should be read as overlapping, not mutually exclusive. They note that the 1961-designated lands undisputedly qualified for at least two exclusions: (b)(ii), because the 1961 monument lands directly abutted Buck Island, and (b)(xi), which by its terms is the 1961 Buck Island monument. The fact that Congress included the (b)(xi) exclusion in TSLA, even though the same lands also qualified under (b)(ii), simply reflected Congress's desire to ensure that this U.S. national monument remained in U.S. hands.

3. GAO's Analysis

a. Pre-TSLA Ownership and Control of Virgin Islands Submerged Lands Under the Antiquities Act

Although the recent debate concerning who owns the submerged lands encompassed by the two monuments for purposes of the Antiquities Act (and whether the 2001 Proclamations were legally issued under the Act) has focused on the legal effect of TSLA, TSLA transferred to the Virgin Islands only such "right, title and interest" as the United States held in 1974; it did not create or enhance any such rights.[50] Accordingly, before evaluating the impact of TSLA, the necessary starting point in determining who owns and controls the monument lands today is who owned and controlled them in 1974. This, in turn, requires a determination of the meaning of the Antiquities Act's key terms "ownership" and "control."

Although neither the Act nor its legislative history defines these terms, their

[50] Similarly, it is well settled that Presidential declaration of lands as a national monument does not create any new ownership or control rights; the lands must be owned or controlled at the time they are designated. *See United States v. California*, 436 U.S. 32, 40-41 (1978) ("[T]he 1949 reservation of the submerged lands and waters for Monument purposes [did not]. . . somehow change[] the nature of the Government's claim. . . . [R]eservation . . for a national monument purpose cannot operate to escalate the underlying claim of the United States to the land in question.").

common meanings[51] indicate that the U.S. both owned and controlled the Virgin Islands submerged lands in 1974 through the rights it acquired under the 1916 Convention. "Ownership" is commonly defined as "[t]he collection of rights allowing one to use and enjoy property including the right to convey it to others," and "control" means "[t]o exercise power or influence over."[52] Under the 1916 Convention, the U.S. acquired all of Denmark's "territory, dominion and sovereignty" in the Virgin Islands' submerged lands and overlying waters, and these rights plainly included ownership rights "to use and enjoy" the lands the U.S. had purchased and to convey the lands to others.[53] Acquisition of Denmark's "dominion and sovereignty over" the acquired lands also clearly authorized the U.S. to "exercise power or influence over" the purchased lands, authority the U.S. has exercised over the years through resident U.S. officials and application of various U.S. legal requirements.[54]

Case law specifically addressing ownership and control of submerged lands under the Antiquities Act[55] reinforces these conclusions, and, in our view, establishes that the U.S. both owned and controlled the Virgin Islands monument submerged lands in 1974. The case closest to the present facts[56] is the Supreme Court's 1978 decision in the long-running *United States v. California* dispute.[57] Similar to the current dispute in the Virgin Islands, *California* involved a disagreement between the federal

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[51] Under the so-called "plain meaning" rule, courts interpreting a statute must look first to the literal language of the act and apply the words as written if they are plain and unambiguous. *See, e.g., Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity as to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.").

[52] *Black's Law Dictionary* (7th ed. 1999) at 330 (control), 1131 (ownership).

[53] *See, e.g., United States v. Alaska*, 521 U.S. 1 (1997) ("Ownership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty.") (citation omitted).

[54] *See U.S. v. Alaska*, note 53 above; S. Rep. No. 1271, 83 Cong., *reprinted in* 1954 U.S.C.C.A.N. at 2585-87.

[55] Case law interpreting the Antiquities Act is sparse. Although approximately 125 national monuments have been declared by Presidential proclamation (thus requiring U.S. ownership or control), only a handful have resulted in court challenges, and only one of these cases, *U.S. v. California* (1978), discussed below, involved a dispute relating to the meaning of ownership or control in the context of a national monument designation. The remaining decisions to date, all upholding the Presidential designations, addressed compliance with other Antiquities Act requirements. *See generally* Note, "The Clinton National Monuments: Protecting Ecosystems With The Antiquities Act," 25 HARV. ENVT. L. REV. 535 (2001). The *Treasure Salvors* decision discussed in note 56 below involved a second provision of the Antiquities Act, also requiring U.S. ownership or control.

[56] The other case directly addressing ownership and control under the Antiquities Act is *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). In that case, the Fifth Circuit held that U.S. ownership and control of natural resources embedded in submerged lands – as opposed to ownership or control of the lands themselves – did not constitute ownership and control under § 433 of the Antiquities Act, which prohibits appropriation of antiquities situated on "lands owned or controlled by the Government of the United States." *Cf. United States v. Ray*, 423 F.2d 16 (5th Cir. 1970) (U.S. "sovereign rights" short of fee simple or other "ownership," held in coral reefs on outer continental shelf off Florida coast, deemed sufficient to warrant injunction against establishment of new "Atlantis"; Antiquities Act not at issue).

[57] See note 50 above, *United States v. California*, 436 U.S. 32 (1978).

government and the State of California based on President Truman's 1949 enlargement of a national monument off the California coast. The expanded monument included submerged lands within 3 miles of the California coastline, in an area where the State was operating a kelp-harvesting program. After passage in 1953 of the Submerged Lands Act ("SLA"),[58] which transferred all U.S. "right, title and interest" in coastal submerged lands within the 3-mile belts to the respective states, California challenged the federal government's continued "dominion" over these lands. The Supreme Court ruled that although the U.S. had held dominion – and Antiquities Act ownership/control – in the California disputed lands at the time the monument was expanded in 1949,[59] Congress transferred these rights to the State when it enacted the SLA. Thus in addition to declaring that California now had dominion over the submerged lands, the Court in effect nullified the submerged lands portion of the 1949 Presidential proclamation based on its determination that the U.S. no longer "owned or controlled" those lands.

In reaching these conclusions, the Court defined Antiquities Act ownership/control and "dominion" by reference to its earlier landmark decision in 1947 in the same *U.S. v. California* matter.[60] The 1947 decision had involved an attempt by the United States to bar California, as an alleged "trespasser," from leasing oil and other natural resource-extraction rights within the State's 3-mile belt. The U.S. argued that it had both fee simple ownership of all submerged lands, minerals and "other things of value" within the belt, as well as "paramount rights" of dominion and control over these resources.[61] California argued to the contrary, asserting that it was the "owner" of the resources based on sovereign rights the State held before being admitted to the Union. The Court denied California's ownership claim, was silent on the United States' fee simple claim, and held that California was a "trespasser" within its own 3-mile belt because the U.S. had "paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean" inside the belt.[62] The source of this U.S. "dominion and control" was the federal government's constitutional power to direct the national defense and foreign affairs, power which the Court ruled included the right to appropriate all natural resources adjacent to the nation's coastline.[63]

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[58] 43 U.S.C. §§ 1301 *et seq.* The SLA was the model for TSLA two decades later, as discussed in note 77 below, but the categories of submerged lands excluded from transfer by each statute were different.

[59] *See, e.g.,* 436 U.S. at 36 ("There can be no serious question . . . that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters . . . as a national monument, since they were then 'controlled by the Government of the United States.'").

[60] *United States v. California,* 332 U.S. 19 (1947).

[61] *Id.* at 22-23.

[62] *United States v. California*, 332 U.S. 804, 805 (1947) (Order and Decree); 332 U.S. at 38-39 ("the Federal Government rather than the state has paramount rights in and power over that [three-mile] belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.").

[63] As the Court stated, "[t]he three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt,

Having described these U.S. rights as articulated in its 1947 decision, the 1978 *California* Court went on to find that Congress had enacted the SLA precisely to "undo the effect of this Court's 1947 decision . . .."[64] Quoting the Antiquities Act's ownership-or-control requirement and the language of the SLA, the Court concluded that the SLA had "transferred [U.S.] 'title to and ownership of' the submerged lands and waters to California, along with the 'right and power to manage, administer, lease, develop, and use' them."[65] The Court therefore held that under the SLA, California, not the U.S., had "dominion" and, at least implicitly, Antiquities Act ownership/control over the submerged lands within the expanded monument.

This *California* analysis bolsters our conclusion that at the time of TSLA's enactment in 1974, the United States both "owned" and "controlled" the Virgin Islands submerged lands for purposes of the Antiquities Act. With respect to "control," the U.S. acquired the lands under the 1916 Convention in its sovereign capacity and held the same type of dominion and control rights in these lands as it held in the California submerged lands prior to the SLA. Although as a territory, the U.S. Virgin Islands stood (and still stands) in a somewhat different relationship to the federal government than does a state, the U.S. exercised national defense and foreign affairs powers and responsibilities regarding the Virgin Islands as it did regarding California in *U.S. v. California*.[66] The 2000 DOJ legal opinion relied upon by Secretary Babbitt in recommending the 2001 Proclamations also supports this conclusion. Based largely on *California*, the 2000 DOJ Opinion determined that because the federal government currently exercises sovereign dominion and "paramount rights" over coral reefs off the coast of Hawaii not covered by the SLA, it "controls" those lands for purposes of the Antiquities Act.[67]

California also reinforces our conclusion that the U.S. "owned" the Virgin Islands submerged lands for purposes of the Antiquities Act in 1974, and in fact owned them at least as of 1963 with the passage of the 1963 Act (authorizing DOI conveyance of U.S. title in submerged lands to the territorial governments). *California* indicates that U.S. "ownership" can be evidenced by a statute that, like the SLA, establishes or confirms "title" and "proprietary rights of ownership" in the United States, before

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will most naturally be appropriated for its use." *Id.* at 35. Using the ownership/control terminology of the Antiquities Act, the Court also ruled that the government's "assertion of national dominion" had effected an "acquisition, as it were, of the three-mile belt," which the U.S. had "protect[ed] and control[led] . . . [as] a function of national external sovereignty." *Id.* at 33-34 (emphasis added).

[64] *Id.* at 37 (emphasis added). *See also Texas v. Sec'y of the Interior*, 580 F. Supp. 1197, 1200-01 (E.D. Tex. 1984) (states' unsuccessful challenge in 1947 *California* decision and two 1950 decisions, to U.S. assertion of rights in mineral resources within states' 3-mile coastal belts, prompted "political solution" of SLA in 1953).

[65] 332 U.S. at 40, quoting the SLA, 43 U.S.C. § 1311(a)(emphasis added). *See also id.* at 37 (SLA "transferred dominion over" submerged lands within 3 miles of California coast), 41 ("[W]e hold that, by operation of the [SLA], the Government's proprietary and administrative interests in these areas passed to the State of California in 1953.").

[66] The U.S. Virgin Islands is an unincorporated territory of the United States, but is treated like a state in a number of respects. *See West Indian Co. v. Gov't of the Virgin Islands* ("*WICO*"), note 6 above, 844 F.2d at 1016, n.15, 1019.

[67] *See* 2000 DOJ Opinion at 3-5.

transferring those rights to the states.[68] That these rights are ownership rights is made clear by the Supreme Court's decision in *Alabama v. Texas,* issued shortly after the SLA's enactment.[69] In upholding the constitutionality of the SLA, the Court ruled in *Alabama* that submerged lands within the U.S. coastal 3-mile belt "belong[ed]" to the federal government under the Constitution's Property Clause,[70] and thus could be "dispose[d] of" and "regulate[d]" by Congress under the SLA.[71]

In the case of the Virgin Islands, SLA-like evidence of ownership was provided by the 1963 Act, passed more than a decade before TSLA. Using language identical to the SLA, the 1963 Act authorized DOI to transfer to the Virgin Islands and the other territories all U.S. "right, title or interest" and "proprietary rights of ownership" in submerged lands within their coastal 3-mile belts.[72] Because DOI could not transfer what it did not have, the U.S. must have had title and ownership rights in the Virgin Islands submerged lands as of 1963, a reading confirmed by the Senate committee reporting on TSLA a decade later.[73] Indeed, the 1963 Act's text, legislative history, and controlling case law demonstrate that the federal government owned the Virgin Islands submerged lands even in the "conventional sense" – by fee simple title – and

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[68] *See* 332 U.S. at 40, quoting the SLA, 43 U.S.C. § 1311(a); *see also id.* at § 1314(a). Other cases involving SLA title to submerged lands likewise characterize the lands as "owned." *See, e.g., United States v. Alaska*, 422 U.S. 184, 187 (1975) ("By [the SLA], Congress effectively confirmed to the States the ownership of submerged lands within three miles of their coastlines.")(emphasis added); *Alabama v. DOI*, 84 F.3d 410, 412 (11th Cir. 1996) (citing the SLA, court states that "[c]oastal states own submerged lands adjoining their coasts extending seaward three miles.") (emphasis added).

[69] *Alabama v. Texas*, 347 U.S. 272 (1954) (per curiam).

[70] The Property Clause provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .." U.S. Const., art. IV, § 3, cl. 2 (emphasis added).

[71] It is clear that the U.S. owned the submerged lands within coastal states' 3-mile belts no later than the SLA's enactment in 1953. Before the SLA was enacted, Justice Frankfurter, dissenting in the Supreme Court's 1947 decision in *California,* believed the U.S. lacked any "property" rights at all in California's 3-mile belt, an element he believed was a prerequisite to the federal government's trespass claim against California. Congress could cure this deficiency, according to Justice Frankfurter, by enacting a statute establishing "[r]ights of ownership" and "proprietary interests" sufficient to bring the submerged lands under the Property Clause. *U.S. v. California* (1947), 332 U.S. at 43-45. Congress then enacted the SLA, which included such provisions, and the Supreme Court promptly upheld these provisions under the Property Clause in *Alabama v. Texas.*

The U.S. may have owned these coastal submerged lands even before the SLA, by virtue of its general sovereign rights over the lands. The Supreme Court so indicated in a 1980 decision in *U.S. v. California, see* 447 U.S. 1, where the Court stated that "[i]n 1947 [before the SLA], this Court decreed that the United States owned all submerged lands extending seaward of the ordinary low-water mark on the California coast . . . When Congress enacted the [SLA], the United States, in effect, quitclaimed to California whatever interest the Federal Government may have had" in those lands. *Id.* at 3 (emphasis added). The Court's 1978 *California* decision, and its earlier ruling in *Alabama v. Texas* upholding the SLA as constitutional under the Property Clause, also suggest that the U.S. owned the submerged lands by virtue of its general sovereign rights.

[72] *Compare* SLA, 43 U.S.C. §§ 1311(a), 1311(b)(1), 1312-14, *with* 1963 Act, Secs. 1(a), (e)(repealed) (emphasis added).

[73] The TSLA Senate Report characterized the status of U.S. territorial submerged lands under the 1963 Act as being "owned" by the United States. *See* S. Rep. No. 93-1152, 93d Cong. 2d Sess. (1974) at 2.

even though the lands were held in the "public trust."[74] As the broadest property interest allowed by law, fee simple title certainly would appear to qualify as "ownership" under the Antiquities Act. That "public trust" submerged lands may be "owned" for Antiquities Act purposes also follows from the fundamental intent of the Act, which is to authorize the federal government, acting as a public trustee, to designate U.S. lands as national monuments in order to protect their historic or scientific value. DOJ's 2000 Opinion explicitly recognizes the original (1961) Buck Island monument as an example of such a U.S.-"owned" public-trust national monument.[75] In sum, at least upon enactment of the 1963 Act, if not earlier, the United States owned the Virgin Islands' 3-mile belt coastal submerged lands for purposes of the Antiquities Act.[76]

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[74] *First,* the 1963 Act's use of the term "title" – commonly defined as "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property" – suggests fee simple ownership. *See Black's Law Dictionary* (7th ed. 1999) at 1493 (emphasis added).

Second, fee simple title is reflected in the 1963 Act's special procedures for transferring title. DOI was required to make a higher showing of "necessity" when conveying U.S. "title," as opposed to other property rights, and was required to provide broad newspaper notice of the proposed transfer specifying the parties to "the proposed contract of conveyance" and the "purchase price" for the lands being conveyed. 1963 Act Secs. 1(b), 1(c), 1(e), 77 Stat. 338 (repealed). These steps are indicia of traditional title being transferred to a traditional entity (a private third party) by traditional means (a contract requiring payment of a purchase price).

Third, the legislative history of the 1963 Act makes clear that the reporting committees believed full and complete title must be available for transfer to the territories. They reasoned that this would enable the territories to then offer full title to private developers, as an incentive to purchase and reclaim (fill in) the coastal submerged lands, and thereby reduce population density and facilitate economic development. DOI, among others, supported this view. *See, e.g.,* S. Rep. No. 589, 86th Cong. 1st Sess. (1963) at 3-4 ("There is [currently] . . . no means by which the territorial governments can be encouraged either to develop these lands themselves or to persuade others to do so. There is no incentive to reclaim land which the territorial governments all sorely need and which could, in many instances, be filled at a reasonable cost . . . .Witnesses before the committee presented convincing testimony that certain tracts of submerged areas offered attractive economic development possibilities after filling, if title to the lands could be transferred to the affected territory."); H.R. Rep. No. 1827, 87th Cong. 2d Sess. (1962) at 8 (DOI, commenting on earlier bill allowing transfer of control but not title, stated: "It would not do enough. . . [W]e are persuaded that unless title to the submerged lands is transferred to those governments, the areas will not be developed to their fullest potential. . . .[T]he scarcity of land will increasingly compel the creation of new land areas by filling. . . Absent a conveyance of title, neither the territorial governments nor private parties holding interests from them can be expected to invest the substantial amounts necessary to develop and use these filled areas to their fullest extent.").

Fourth, in the *WICO* decision, see note 66 above, which is controlling law in the Virgin Islands, the Third Circuit found that the U.S. and the Virgin Islands held successive fee simple title to coastal submerged lands in the U.S. Virgin Islands, in particular, submerged lands in St. Thomas Harbor. The court determined that originally, "the United States held title to the submerged lands surrounding the Virgin Islands" in 1972, when the 1963 Act was in effect. After U.S. title to St. Thomas Harbor submerged lands was transferred to the Territory under TSLA (because none of TSLA's exclusions applied), the court upheld the Territory's agreement to re-convey the lands to a private developer for reclamation. The court rejected the argument that because the Territory owned the lands in "public trust" under TSLA, they could not be conveyed in fee simple to a third party.

[75] *See* 2000 DOJ Opinion at 10.

[76] The U.S. may have owned the Virgin Islands submerged lands even before the 1963 Act, just as it may have owned coastal state submerged lands even before the SLA in 1953, see note 71 above. In commenting on the draft 1961 Buck Island proclamation, DOJ stated that the U.S. held "legal title" to

b. Effect of TSLA on Ownership and Control of Virgin Islands Submerged Lands

The plain and unambiguous language of TSLA, which was modeled on the SLA,[77] makes clear that unless the Virgin Islands submerged lands were excluded from transfer or subject to other "valid existing rights," the lands were automatically conveyed to the Virgin Islands under the Supreme Court's *California* analysis. The case law provides examples of such TSLA transfers to the Virgin Islands.[78]

In our opinion, all or virtually all of the submerged lands encompassed by the two monuments at issue are covered by one or more of TSLA's exclusions. Accordingly, we conclude that the U.S. retained its "right, title, and interest" – including Antiquities Act ownership and control – in these lands upon TSLA's enactment in 1974, and continues to hold these rights today. The only potential exception is the 1,185-marine acre "finger" of submerged lands and waters off the coast of St. John, which may be included in the Virgin Islands Coral Reef monument; we do not believe these lands qualified for any exclusion and so conclude that they were transferred to the Virgin Islands under TSLA.[79]

As a threshold matter, we disagree with the Virgin Islands' contention that TSLA's exclusions are mutually exclusive and that only certain exclusions (which do not cover the lands disputed here) can apply to a given set of submerged lands. Although we agree that statutory language generally should be interpreted so as not to render portions of a statute superfluous, this general rule is inapplicable where the plain meaning of statutory language dictates otherwise.[80] Here, TSLA's plain meaning does dictate otherwise, because a number of the same parcels of Virgin

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the proposed monument lands, a conclusion it affirmed in its 2000 Opinion. The Senate committee reporting on the 1963 Act likewise understood that the U.S. already owned the Virgin Islands submerged lands; this was the impetus for the Act's authorization of DOI to transfer U.S. ownership to the Territory. *See* S. Rep. No. 589, 88th Cong. 1st Sess. (1963) at 3 (discussed at note 45 above).

[77] TSLA was modeled on the SLA and adopted the language of the SLA's key provisions, except that the categories of submerged lands excluded from transfer differed between the two statutes. *See, e.g., Marx v. Gov't of Guam,* 866 F.2d 294, 300 (9th Cir. 1989) ("Congress modeled [TSLA] after a similar statute giving coastal states control over lands within three miles of shore . . . the Submerged Lands Act."); 120 Cong. Rec. 6956-57 (March 18, 1974) (statements of TSLA co-sponsors Del. de Lugo, Rep. Burton and Rep. Clausen).

[78] *See, e.g., WICO*, note 66 above (St. Thomas Harbor lands transferred to Virgin Islands upon enactment of TSLA, although certain lands remained subject to developer's existing pre-1916 Convention rights); *Club Commanche, Inc.,* note 6 above; *Marx v. Gov't of Guam*, 866 F.2d 294, 300 (9th Cir. 1989) ("the plain language of [TSLA] conveys to Guam broad title and control over its submerged lands"); *Alexander Hamilton Life Ins. Co. v. Gov't of the Virgin Islands,* 757 F.2d 534 (3d Cir. 1985) (upholding Virgin Islands' claim to majority of disputed submerged lands by operation of TSLA); *Sunken Treasure, Inc. v. Gov't of the Virgin Islands*, 857 F. Supp. 1129 (D.V.I. 1994) (submerged lands within St. Croix's 3-mile belt belong to Virgin Islands).

[79] The only potentially applicable exclusion for these lands is TSLA (b)(ii), for submerged lands adjacent to U.S.-owned uplands. Based on our understanding of the results of DOI's 1999-2000 TSLA title search and mapping efforts, the St. John uplands which these submerged lands abut were not U.S.-owned in 1974, and thus the lands transferred to the Virgin Islands under TSLA.

[80] *See* 2A *Sutherland Statutes and Statutory Construction* (6th ed. 2000) § 46.6.

Islands submerged lands necessarily fall under more than one exclusion. For example, the 1961 Buck Island monument lands and the Virgin Islands National Park lands, excluded by name in (b)(xi) and (b)(x), are also necessarily excluded by (b)(vi), covering lands previously reserved as national monuments and parks. In addition, the 1961 Buck Island monument lands specified by (b)(xi) are also clearly covered by (b)(ii), excluding submerged lands adjacent to U.S.-owned uplands, because the U.S. owned Buck Island in its entirety and the submerged lands directly abutted the coastline.

In addition, carried to its logical conclusion, the Territory's argument that only one TSLA exclusion can apply to a given area of submerged lands conflicts with the Territory's own apparent acknowledgment of the validity of the 1975 Proclamation. That proclamation, which enlarged the Buck Island monument, relied on TSLA (b)(vii) authorizing reservation of submerged lands prior to February 3, 1975. Yet under the Virgin Islands' "mutually exclusive" argument, as we understand it, all submerged lands in the area of Buck Island had to either be excluded under (b)(xi) (the Buck Island-specific exclusion) or not at all. Because the 1975 lands could not qualify under (b)(xi) (the exclusion covered just the Buck Island monument lands designated in 1961), the lands would have transferred to the Virgin Islands and thus would not have been owned or controlled by the U.S. in 1975, rendering the 1975 Proclamation in conflict with the Antiquities Act. We do not believe this is a sensible result and the Territory appears to agree.

In any event, TSLA's legislative history indicates that Congress was aware of the overlapping nature of the exclusions and intended this effect. Reflecting the practical realities of legislative drafting and the fact that most of the exclusions had originally been drafted as part of the 1963 Act, the exclusions remained essentially as written when inserted 10 years later into the TSLA bills. Congress then added somewhat duplicative exclusions, sometimes as a conscious "safety net." For example, the (b)(vii) exclusion was added to TSLA at DOI's suggestion, to permit reservation of any submerged lands within 120 days of enactment. As DOI explained, (b)(vii) was "desirable, in the event that the first six exceptions are insufficient to protect fully the Federal interest."[81] Furthermore, even though the House committee reporting on TSLA was advised that (b)(vi), exempting existing national monuments and parks, also would cover "the reefs around Buck Island, off the coast of St. Croix," the committee nevertheless added (b)(xi), which covered the identical Buck Island monument lands.[82] In sum, we believe the TSLA exclusions are properly interpreted as overlapping rather than as mutually exclusive.

Having concluded that TSLA's exclusions are overlapping, the next issue is whether the Buck Island and Virgin Islands Coral Reef monument lands qualify for one or more of the exclusions. It is undisputed that certain of the 1961-, 1975- and 2001-

[81] H.R. Rep. No. 1827, 87th Cong. 2d Sess. (1962) at 21.
[82] *Id.* at 10 (DOI comment).

designated lands are excluded.[83] As to the remaining 2001-designated lands (the vast majority of the 30,000 acres), we agree with DOI officials' position that these constitute submerged lands adjacent to U.S.-owned uplands under the meaning of (b)(ii). TSLA does not define the pivotal term "adjacent," which is commonly defined as "lying near or close to but not necessarily touching."[84] The legislative history confirms that for TSLA purposes, submerged lands are adjacent to U.S. uplands if they are inside the 3-mile coastal belts and within U.S.-owned coastline boundaries. The Senate Report accompanying TSLA quotes with approval a DOJ explanation that the act would give the territorial governments "title to the . . . lands beneath the 3-mile territorial sea adjacent to those territories, with exceptions,"[85] and one of TSLA's sponsors, Delegate de Lugo of the Virgin Islands, confirmed this interpretation[86] during debate.[87] Similarly, TSLA's predecessor, the 1963 Act, had authorized DOI to convey U.S. interests in "submerged lands . . . in or adjacent to" the territories, and defined these submerged lands as all lands "seaward to a line three geographic miles distant from the coastlines" of the territories – again, equating "adjacent" submerged lands with all lands within the 3-mile belts.[88] Thus "adjacent" in (b)(ii) refers to the lands covered by TSLA itself – all lands within the territories' 3-mile belts – provided that they abutted U.S.-owned uplands in 1974.[89]

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[83] These excluded monument lands are: (1) the submerged lands within the original Buck Island monument (covered under (b)(xi) expressly identifying these lands and, in DOI officials' and our view, under (b)(ii) for submerged lands adjacent to U.S.-owned uplands); (2) the submerged lands added to the Buck Island monument by the 1975 Proclamation (covered under (b)(vii) allowing reservation prior to February 3, 1975 and, in DOI officials' and our view, under (b)(ii)); and (3) the 2001-designated submerged lands adjacent to the Hurricane Hole, Coral Bay and Round Bay areas within the new Virgin Islands Coral Reef monument (covered under (b)(ii)).

[84] *Black's Law Dictionary* (7th ed. 1999) at 42.

[85] S. Rep. No. 93-1152, 93d Cong. 2d Sess. (1974) at 3 (emphasis added).

[86] Delegate de Lugo explained that TSLA would convey submerged lands "seaward to a line 3 geographical miles distant from the [territories'] coastlines," "enabl[ing] the residents free use of submerged lands adjacent to their coastlines . . .." March 27, 1973 Cong. Rec. at E1855 (emphasis added).

[87] It has been suggested that the scope of (b)(ii) "adjacency" is unclear because a specific wording change proposed in some of the early TSLA bills was not adopted in the final statute. We disagree. On behalf of the Department of Defense (DOD), the Navy commented on three bills in which (b)(ii) excluded "all lands adjacent to property owned by the United States above the line of mean high tide," rather than as in the enacted version, "all submerged lands adjacent to property owned by the United States above the line of mean high tide." *See* H.R. Rep. No. 93-902, 93 Cong. 2d Sess. (1974) at 5-7, commenting on H.R. 4696, H.R. 6135 and H.R. 6775. To clarify that it was the adjacent "property" in (b)(ii) which was above high tide, not the (submerged) "lands," DOD proposed that "which is" be inserted before "above the line of mean high tide." Instead, to the same effect, the word "submerged" was inserted into (b)(ii) (and into the other TSLA exclusions). Thus DOD's suggestion was adopted in substance, although not in precise form, as confirmed by DOD's dropping this suggestion in its next round of comments after the word "submerged" had been added. *See* S. Rep. No. 93-1152, 93d Cong. 2d Sess. (1974) at 5-6, commenting on H.R. 11559.

[88] 1963 Act, 77 Stat. 338, Sec. 1(a) (repealed) (emphasis added).

[89] It has been suggested that the U.S. might now attempt to expand the universe of (b)(ii) submerged lands in the Virgin Islands by purchasing additional "adjacent" uplands. The terms of TSLA and its legislative history, however, indicate that (b)(ii) lands were "locked in" upon TSLA's enactment in 1974. Under 48 U.S.C. §§ 1705 (b) and (c) of TSLA, DOI is authorized to sell or otherwise transfer U.S. title and rights in individual submerged lands excluded under (b)(ii). The legislative history explains that this authority was provided so that the U.S. could divest itself of submerged lands it "no

Consistent with this TSLA legislative history, the case law on submerged lands uses the term "adjacent," and the related term "marginal sea," to refer to all lands and waters within the coastal 3-mile belts,[90] including, in the case of islands, individual belts around each island.[91] The cases also indicate that the 3-mile belt is to be bounded by the end points of the relevant adjacent uplands, to account for the situation where the U.S. owns only discrete portions of a coastline.[92] Applying this legislative history and case law to the results of DOI's recent TSLA title search and mapping efforts, we conclude that the 2001-desiganted lands are "adjacent" to U.S.-owned uplands under TSLA (b)(ii) and thus the U.S. has retained its Antiquities Act ownership and control. The 2001 lands appear to be both within the 3-mile belts of Buck Island and St. John, and where the U.S. owned only discrete portions of the coastline on St. John, within end-point boundaries of those U.S.-owned coastal uplands.

We believe the Territory's contrary interpretation of (b)(ii) is inconsistent with the statute's language, history and case law. First, the Territory's contention that the relevant boundary for TSLA adjacency purposes is the Antiquities Act (national monument) perimeter would insert Antiquities Act requirements into TSLA. As a practical matter, this reading would have required President Ford to "over-declare" as national monument lands all TSLA (b)(ii) adjacent lands in the Virgin Islands by the February 3, 1975 (b)(vii) deadline, to ensure the availability of any of these lands for future designation under the Antiquities Act. Alternatively, President Clinton would have had to re-declare in 2001, as part of the Buck Island monument, the same submerged lands that had already been declared by Presidents Kennedy and Ford in 1961 and 1975. Neither of these results is compelled by statute, past administrative practice or logic.[93] Rather, we believe Presidents are authorized to do

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longer needed," such as "land adjacent to Federal [upland] property holdings . . . when such holdings are themselves disposed of by the United States as excess or surplus property." H.R. Rep. No. 1827, 87th Cong. 2d Sess. (1962) at 10 (DOI comment). Such DOI authority would have been unnecessary if the U.S. was automatically divested of its ownership/control of (b)(ii) submerged lands whenever it divested its ownership of adjacent uplands. Thus once the universe of (b)(ii)-covered lands was established in 1974, it did not increase or decrease, meaning that even if the U.S. were to purchase additional Virgin Islands coastal uplands today, it would not increase the federal government's inventory of (b)(ii) submerged lands.

[90] *See, e.g., United States v. Maine*, 420 U.S. 515, 520 (1975); *Alabama v. DOI*, 84 F.3d 410, 412 (11th Cir. 1996); *United States v. California*, 381 U.S. 139, 178 (1965) (Black, J., dissenting on other grounds). The only reported case specifically arising under the TSLA (b)(ii) exclusion does not address the meaning of "adjacent" but instead focuses on whether the uplands were U.S.-owned. *See Gov't of Guam v. United States,* 179 F.2d 630, 640 (9th Cir. 1999).

[91] *See, e.g., United States v. Quemener*, 789 F.2d 145 (2d Cir. 1986).

[92] *See, e.g., U.S. v. California,* note 62 above, 332 U.S. at 805 (1947 Order and Decree).

[93] When Presidents expand existing national monuments under the Antiquities Act, their general practice has been to designate only the lands being added to the monument, rather than re-declaring all of the lands constituting the expanded monument. When President Ford expanded the Buck Island monument in the 1975 Proclamation, for example, he identified just the latitude and longitude of the newly added 30 acres, not the 30 acres plus the lands designated by the 1961 Proclamation. An administrative pattern or practice developed in implementing a statute, which Congress does not

as they have done here, namely, to declare subsets of (b)(ii) lands as national monuments from time to time, if and to the extent that they meet the remaining Antiquities Act criteria. As a related matter, we see no legal problem arising from the fact that DOI did not identify the universe of (b)(ii) submerged lands in the Virgin Islands until issuance of its November 2000 TSLA jurisdictional maps. TSLA imposes no obligation on the United States to list or otherwise identify which specific lands qualify as "adjacent" under (b)(ii).

We also disagree with the Territory's contention that because the 2001-designated lands purportedly "do not differ in character" from the lands designated in the 1975 Proclamation, they, like the 1975 lands, allegedly had to be reserved under (b)(vii) by February 3, 1975. First, we believe the 1975 Proclamation's citation of (b)(vii) may well reflect understandable caution by the officials involved, given the lack of experience at that time under TSLA (the statute had been enacted just a few months before). The acreage being added had been omitted once before from a monument designation, in the 1961 Proclamation, and thus officials may have wanted to ensure that the same omission did not occur again. In addition, time was short – it appears that DOI did not formally advise the President of its recommendation to add the lands until less than two weeks before the (b)(vii) deadline. Thus even assuming the officials believed (correctly, in our view) that (b)(ii) applied automatically, they may have decided to err on the side of caution by invoking the "failsafe" (b)(vii) exclusion as well. Alternatively, even if the officials believed that (b)(vii) was the only legally applicable exclusion – an error in our view – this was, at most, a harmless error, because more than one TSLA exclusion can apply to the same set of submerged lands. In any event, the 1975 Proclamation is not dispositive on what grounds exist for U.S. ownership or control. The Antiquities Act requires that there be U.S. ownership or control, but it does not require that the basis for this ownership or control be specified in the proclamation.

Finally, contrary to the position of the Virgin Islands, we do not believe that interpreting TSLA's exclusions to apply to the 2001-designated lands would undermine Congress's intent in enacting the statute. The plain language of the statute, which is deemed the best evidence of legislative intent, together with the legislative history and case law, clearly show that the 2001 lands are excluded under (b)(ii). Moreover, while the principal purpose of TSLA was to provide the territories with greater autonomy, by transferring ownership and control over their coastal submerged lands to the local governments, Congress was careful to preserve the federal government's interests while accomplishing this goal. TSLA's wholesale exclusion of multiple categories of submerged lands was one method of preserving U.S. interests, as DOI explained during the drafting process.[94] The (b)(vi), (b)(x) and (b)(xi) exclusions, for example, covering national monuments and parks in

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overrule by subsequent legislation, can be taken as Congressional acquiescence in the practice. *See* 2B *Sutherland Statutes and Statutory Construction* (6th ed. 2000) § 49.10.

[94] *See* S. Rep. No. 93-1152, 93d Cong. 2d Sess. (1974) at 4 ("Section 1(b)i-xi of this bill [the full set of TSLA (b)(i)-(b)(xi) exclusions] appears adequate to exempt from transfer lands and minerals necessary to protect the national interest . . ..").

general and two locations in particular, preserved U.S. interests in protecting the nation's historic, scientific and scenic resources. The more general exclusions, such as (b)(ii) (adjacent submerged lands) and (b)(vii) (submerged lands reserved within 120 days of enactment), also protected U.S. interests because they created a safety net in the event the other exceptions prove insufficient.

Congress's intent to preserve federal interests also was reflected, even as to the submerged lands conveyed to the territories, in TSLA's retention of the "paramount" U.S. constitutional powers over commerce, navigation, national defense and international affairs. Courts have interpreted identical language in the SLA as permitting concurrent, and even preemptive, U.S. regulation of fishing and anchorage within states' 3-mile coastal belts.[95] Thus even if the submerged lands disputed here had been conveyed to the Virgin Islands under TSLA, the Territory would not necessarily have complete, or even significant, control over fishing and anchorage in these areas. We believe this reading of the TSLA exclusions and other limiting provisions gives them the effect Congress intended, without frustrating the more global aims of the statute.[96]

In sum, we conclude that the uplands and submerged lands encompassed by Buck Island Reef National Monument and Virgin Islands Coral Reef National Monument, with the exception of the "finger" of submerged lands off the coast of St. John, are both owned and controlled by the United States for purposes of the Antiquities Act.

November 15, 2002

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[95] *See, e.g., Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Barber v. Hawaii*, 42 F.3d 1185 (9th Cir. 1994); *Murphy v. Dep't of Natural Resources*, 837 F. Supp. 1217 (S.D. Fla. 1993).

[96] It has also been suggested that the Virgin Islands Government owns and controls the Buck Island monument lands by virtue of the 2001 Buck Island Proclamation's alleged conflict with the 1961 Virgin Islands legislation. Specifically, it is suggested that: (a) the Virgin Islands' 1961 legislative relinquishment of "control" over Buck Island monument lands was conditioned on U.S. preservation of "existing" fishing and other uses within the monument; (b) this condition allegedly was violated by the 2001 Buck Island Proclamation's fishing ban and anchorage limitations; (c) control of the lands therefore allegedly reverted to the Virgin Islands; and (d) ownership of the lands then allegedly transferred to the Virgin Islands under TSLA's conveyance of Virgin Islands-"controlled" property.

We disagree with this position. First, the vast majority of Buck Island monument lands, as currently designated, were not covered by the 1961 Virgin Islands legislation. Second, as to the covered lands (those designated by the 1961 Proclamation), this argument assumes that the 1961 fishing methods still "exist" today, a view disputed by DOI. Third, it assumes that TSLA applies retroactively, contrary to general statutory construction principles. Finally, even if these other arguments were correct, the Virgin Islands still would not own or control the submerged lands next to Buck Island. As discussed above, under the 1936 Act, the Virgin Islands never had, and thus never relinquished, control over the Buck Island submerged lands, because the 1936 Act pertained only to uplands. Given that fishing and boating occurs primarily in the Buck Island marine areas, not on Buck Island dry land, we believe this argument would not resolve the reported concerns of residents now seeking to preserve these uses within the monument boundaries.

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Presidential Documents

ENCLOSURE 2

Title 3—

The President

Proclamation 7392 of January 17, 2001

Boundary Enlargement and Modifications of the Buck Island Reef National Monument

By the President of the United States of America

A Proclamation

Buck Island Reef National Monument was established on December 28, 1961 (Presidential Proclamation 3443), just north of St. Croix in the U.S. Virgin Islands, for the purpose of protecting Buck Island and its adjoining shoals, rocks, and undersea coral reef formations. Considered one of the finest marine gardens in the Caribbean Sea, the unique natural area and the rare marine life which are dependent upon it are subject to the constant threat of commercial exploitation and destruction. The monument's vulnerable floral and faunal communities live in a fragile, interdependent relationship and include habitats essential for sustaining the tropical marine ecosystem: coral reefs, sea grass beds, octocoral hardbottom, sand communities, algal plains, shelf edge, and oceanic habitats. The boundary enlargement effected by this proclamation brings into the monument additional objects of scientific and historic interest, and provides necessary further protection for the resources of the existing monument.

The expansion area includes additional coral reefs (patch, pur and groove, and deep and wall), unusual "haystacks" of elkhorn coral, barrier reefs, sea grass beds, and sand communities, as well as algal plains, shelf edge, and other supporting habitats not included within the initial boundary. Oceanic currents carry planktonic larvae of coral reef associated animals to the shallow nearshore coral reef and sea grass habitats, where they transform into their juvenile stage. As they mature over months or years, they move offshore and take up residence in the deeper coral reefs, octocoral hardbottom, and algal plains. Between the monument's nearshore habitats and its shelf edge spawning sites are habitats that play essential roles during specific developmental stages of many reef-associated species, including spawning migrations of many reef fish species and crustaceans. Several threatened and endangered species forage, breed, nest, rest, or calve in the waters included in the enlarged monument, including humpback whales, pilot whales, four species of dolphins, brown pelicans, least terns, and the hawksbill, leatherback, and green sea turtles. Countless species of reef fishes, invertebrates, plants, and over 12 species of sea birds utilize this area.

The ecologically important shelf edge is the spawning site for many reef species, such as most groupers and snappers, and the spiny lobster. Plummeting to abyssal depths, this habitat of vertical walls, honeycombed with holes and caves, is home to deepwater species and a refuge for other species.

The expansion area also contains significant cultural and historical objects. In March 1797, the slave ship Mary, captained by James Hunter of Liverpool, sank in this area, and its cargo of 240 slaves was saved and brought to Christiansted. In March 1803, the General Abercrombie, captained by James Booth of Liverpool, also wrecked in this area, and its cargo of 339 slaves was brought to Christiansted. Slave shipwrecks in U.S. waters are rare. The monument contains remnants of these wrecks. Other wrecks may also exist in the monument.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other 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, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as an addition to the Buck Island Reef National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as an addition to the Buck Island Reef National Monument, for the purpose of care, management, and protection of the objects of historic and scientific interest situated on lands within the said monument, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Buck Island Reef National Monument Boundary Enlargement" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 18,135 marine acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

For the purpose of protecting the objects identified above, the Secretary shall prohibit all boat anchoring, provided that the Secretary may permit exceptions for emergency or authorized administrative purposes, and may issue permits for anchoring in deep sand bottom areas, to the extent that it is consistent with the protection of the objects.

For the purposes of protecting the objects identified above, the Secretary shall prohibit all extractive uses. This prohibition supersedes the limited authorization for extractive uses included in Proclamation 3443 of December 28, 1961.

Lands and interests in lands within the monument not owned or controlled by the United States shall be reserved as a part of the monument upon acquisition of title or control thereto by the United States.

The Secretary of the Interior shall manage the monument through the National Park Service, pursuant to applicable legal authorities, to implement the purposes of this proclamation. The National Park Service will manage the monument in a manner consistent with international law.

The Secretary of the Interior shall prepare a management plan, including the management of vessels in the monument, within 2 years that will address any further specific actions necessary to protect the objects identified above.

The enlargement of this monument is subject to valid existing rights.

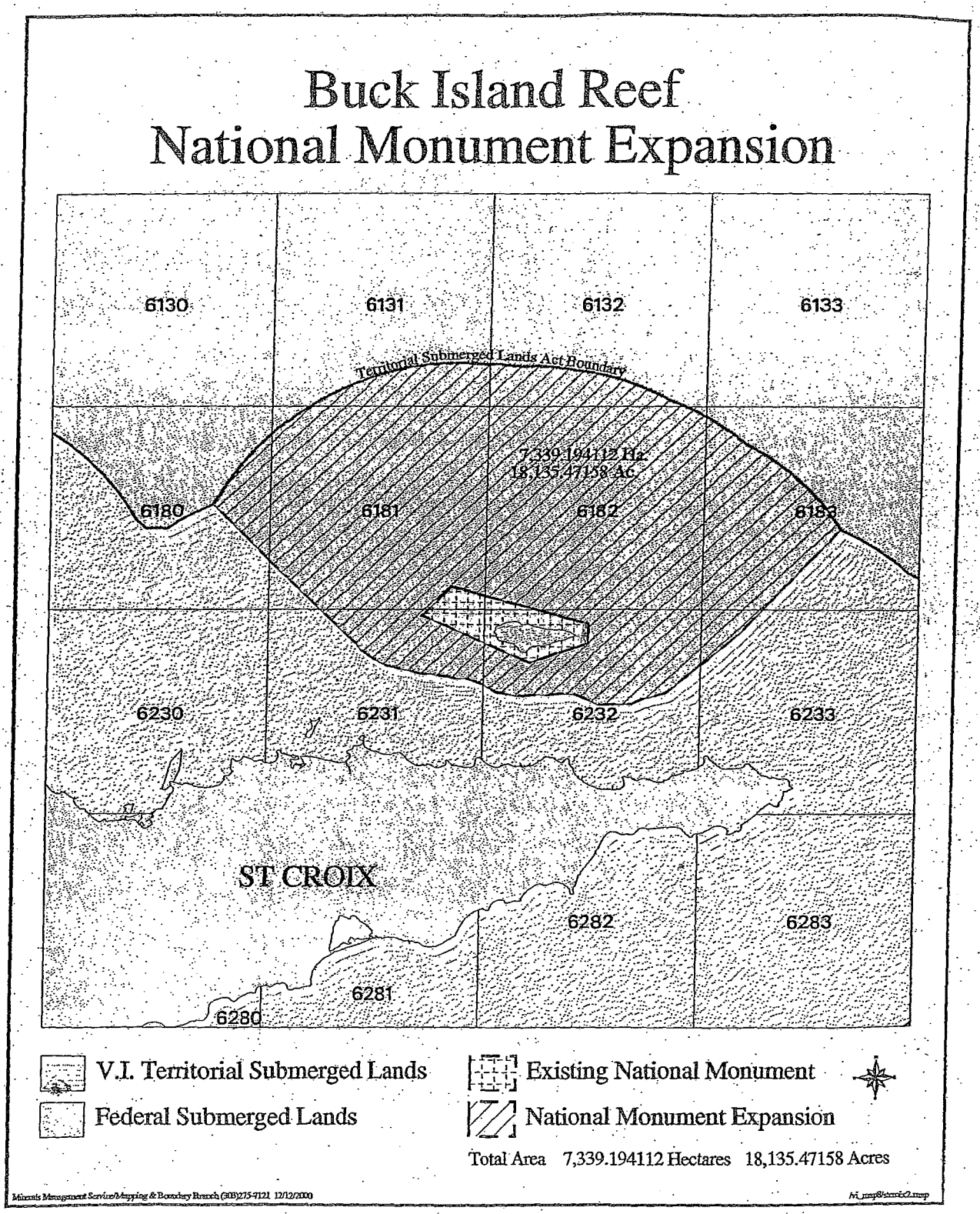
Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of January, in the year of our Lord two thousand one, and of the Independence of the United States of America the two hundred and twenty-fifth.

William J. Clinton

Billing code 3195–01–P



[FR Doc. 01–2097

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Billing code 3195–01–C

ENCLOSURE 3

Proclamation 7399 of January 17, 2001

Establishment of the Virgin Islands Coral Reef National Monument

By the President of the United States of America

A Proclamation

The Virgin Islands Coral Reef National Monument, in the submerged lands off the island of St. John in the U.S. Virgin Islands, contains all the elements of a Caribbean tropical marine ecosystem. This designation furthers the protection of the scientific objects included in the Virgin Islands National Park, created in 1956 and expanded in 1962. The biological communities of the monument live in a fragile, interdependent relationship and include habitats essential for sustaining and enhancing the tropical marine ecosystem: mangroves, sea grass beds, coral reefs, octocoral hardbottom, sand communities, shallow mud and fine sediment habitat, and algal plains. The fishery habitats, deeper coral reefs, octocoral hardbottom, and algal plains of the monument are all objects of scientific interest and essential to the long-term sustenance of the tropical marine ecosystem.

The monument is within the Virgin Islands, which lie at the heart of the insular Caribbean biome, and is representative of the Lesser Antillean biogeographic province. The island of St. John rises from a platform that extends several miles from shore before plunging to the abyssal depths of the Anegada trough to the south and the Puerto Rican trench to the north, the deepest part of the Atlantic Ocean. This platform contains a multitude of species that exist in a delicate balance, interlinked through complex relationships that have developed over tens of thousands of years.

As part of this important ecosystem, the monument contains biological objects including several threatened and endangered species, which forage, breed, nest, rest, or calve in the waters. Humpback whales, pilot whales, four species of dolphins, brown pelicans, roseate terns, least terns, and the hawksbill, leatherback, and green sea turtles all use portions of the monument. Countless species of reef fish, invertebrates, and plants utilize these submerged lands during their lives, and over 25 species of sea birds feed in the waters. Between the nearshore nursery habitats and the shelf edge spawning sites in the monument are habitats that play essential roles during specific developmental stages of reef-associated species, including spawning migrations of many reef fish species and crustaceans.

The submerged monument lands within Hurricane Hole include the most extensive and well-developed mangrove habitat on St. John. The Hurricane Hole area is an important nursery area for reef associated fish and invertebrates, instrumental in maintaining water quality by filtering and trapping sediment and debris in fresh water runoff from the fast land, and essential to the overall functioning and productivity of regional fisheries. Numerous coral reef-associated species, including the spiny lobster, queen conch, and Nassau grouper, transform from planktonic larvae to bottom-dwelling juveniles in the shallow nearshore habitats of Hurricane Hole. As they mature, they move offshore and take up residence in the deeper coral patch reefs, octocoral hardbottom, and algal plains of the submerged monument lands to the south and north of St. John.

The monument lands south of St. John are predominantly deep algal plains with scattered areas of raised hard bottom. The algal plains include communities of mostly red and calcareous algae with canopies as much as half a meter high. The raised hard bottom is sparsely colonized with corals, sponges, gorgonians, and other invertebrates, thus providing shelter for lobster, groupers, and snappers as well as spawning sites for some reef fish species. These algal plains and raised hard bottom areas link the shallow water reef, sea grass, and mangrove communities with the deep water shelf and shelf edge communities of fish and invertebrates.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other 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, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Virgin Islands Coral Reef National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Virgin Islands Coral Reef National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Virgin Islands Coral Reef National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 12,708 marine acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument. For the purpose of protecting the objects identified above, the Secretary shall prohibit all boat anchoring, except for emergency or authorized administrative purposes.

For the purposes of protecting the objects identified above, the Secretary shall prohibit all extractive uses, except that the Secretary may issue permits for bait fishing at Hurricane Hole and for blue runner (hard nose) line fishing in the area south of St. John, to the extent that such fishing is consistent with the protection of the objects identified in this proclamation.

Lands and interests in lands within the monument not owned or controlled by the United States shall be reserved as a part of the monument upon acquisition of title or control thereto by the United States.

The Secretary of the Interior shall manage the monument through the National Park Service, pursuant to applicable legal authorities, to implement the purposes of this proclamation. The National Park Service will manage the monument in a manner consistent with international law.

The Secretary of the Interior shall prepare a management plan, including the management of vessels in the monument, within 3 years, which addresses any further specific actions necessary to protect the objects identified in this proclamation.

The establishment of this monument is subject to valid existing rights.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of January, in the year of our Lord two thousand one, and of the Independence of the United States of America the two hundred and twenty-fifth.

William J Clinton

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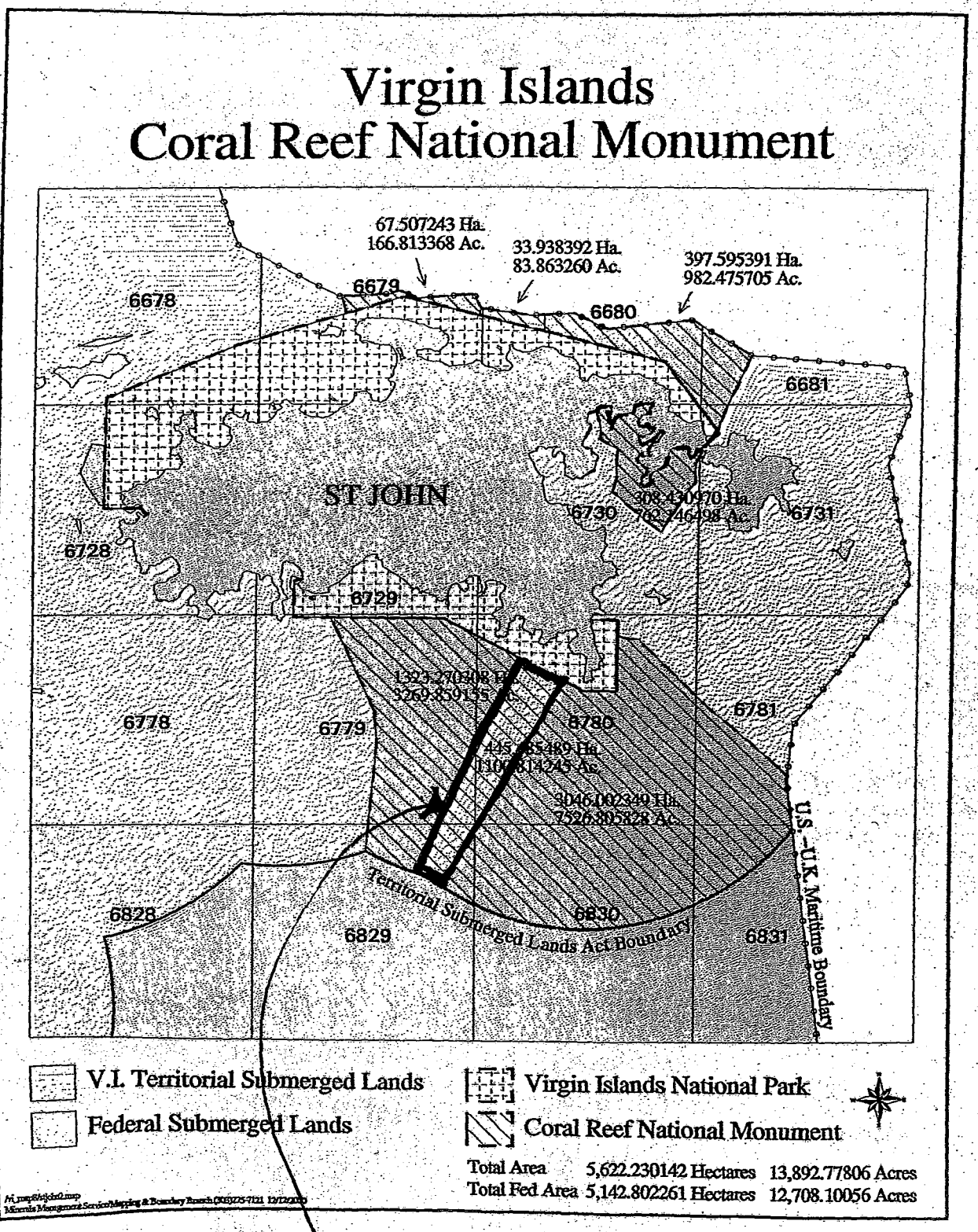

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In GAO's opinion, these lands are neither U.S.-owned nor -controlled.