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Got Guts? The Iconic Streams of the U.S. Virgin Islands and the Law's Ephemeral Edge

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The legal status of “guts”—the ephemeral streams of the U.S. Virgin Islands that typically flow only after rainfall—is uncertain. Furthermore, it is unclear what, if any, property interest the Government of the Virgin Islands, and the public, have in these watercourses. This uncertainty stems from the non-navigable nature of guts, and is compounded by the Virgin Islands’ unique legal system, a legal system that recognizes at least some Danish law from its colonial past, and has seemingly inconsistent provisions purporting to confer legal and regulatory interests in these guts to the Government of the Virgin Islands. The uncertain legal status of guts, coupled with the Territory’s lack of a cohesive watercourse management regime, has caused guts to remain largely unmanaged and environmentally threatened. Land use changes, poorly sited development, pollution, illegal clearing, and other practices threaten the health of these guts. This Article first examines the legal status of guts in the Virgin Islands within the Territory’s existing laws and legal precedents. Next, it looks to other jurisdictions for guidance regarding best practices for regulating intermittent and ephemeral waterways, and methods of ensuring government access to these waterways for better management and protection. Finally, it proposes certain proprietary, regulatory, and management policy measures that could be implemented within this legal framework to better manage and protect guts for the entire Territory.

INTRODUCTION

The U.S. Virgin Islands (“Virgin Islands”) is an unincorporated territory boasting many miles of beautiful sandy beaches and lush tropical forests. It lies next to Puerto Rico in the middle of the Caribbean Sea.¹ The Territory’s largest and most populous islands are St. Croix, St. Thomas, and St. John. The Virgin Islands faces a variety of threats, including overdevelopment, solid waste disposal, lack of

¹ BETTE A. TAYLOR, CONG. RESEARCH SERV., 88-429, THE VIRGIN ISLANDS OF THE UNITED STATES: A DESCRIPTIVE AND HISTORICAL PROFILE 1 (1988).

conservation of green space, diminishing availability of fresh water, and the loss of public access to natural and recreational resources.² Ensuring a reliable water supply has long been an issue in the Virgin Islands, and has even led to legislation requiring that homes be built with the ability to harvest rainwater.³ Part and parcel with addressing the legal status of its watercourses is finding ways to protect the Virgin Islands' existing, but scarce, water sources.

The Virgin Islands features various types of water bodies, but it is largely devoid of perennial streams. Instead, the Islands feature various intermittent and ephemeral streams that drain from its mountainous terrain, known locally as “guts.”⁴ Guts provide various environmental services for the Virgin Islands and are culturally and recreationally important to its residents. Despite their import, the legal status of these watercourses is uncertain, especially where they run through private property. Furthermore, the right of public access to and along these watercourses remains unresolved. These uncertainties owe in part to the Territory's unique legal history and have made management of guts an issue for the agencies charged with enforcing the laws that govern these waterways and the public that relies on them.

This Article attempts to unravel the legal status of these “guts.” First, it explains what guts are, why they are important, and how they are threatened. Next, it examines the legal framework of the Virgin Islands, with an eye on its unique legal history, current legal system, and existing references to guts in the Virgin Islands Code. Then it considers how a Virgin Islands court might settle a dispute over the legal status of guts under Virgin Islands territorial law, but also within the framework of Danish law, including how Danish law might govern rights that existed before the former Danish colony was transferred to the United States. It then notes how other jurisdictions, including the United States federal government, have addressed this issue—i.e., how they regulate intermittent and ephemeral streams. Finally, it offers recommendations for strengthening the Virgin Islands' legal

² Adlah Donastrong, *Remarks on Environmental Stewardship in the U.S. Virgin Islands*, 56 U. KAN. L. REV. 1159, 1159–67 (2008).

³ V.I. CODE ANN. tit. 29 § 308 (2008).

⁴ “Guts” are alternatively spelled “ghuts.” See LLOYD GARDNER, STEVIE HENRY & TONI THOMAS, *WATERCOURSES AS LANDSCAPES IN THE U.S. VIRGIN ISLANDS: STATE OF KNOWLEDGE* 8 (2008) (“In the case where a watercourse has been given a name, then reference to that specific watercourse will utilize the formal name, while a general reference will use the form ‘ghut’.”). For this paper, we use the spelling of “gut” found in the Virgin Islands Code. See, e.g., V.I. CODE ANN. tit. 29 § 225(55A) (1990).

framework regarding guts. These recommendations aim to provide permissible policy pathways for managers of these resources to do their jobs, and to ensure that the public's interest in guts is protected, even on private property.

I GUTS

The Virgin Islands features several diverse types of wetlands, including guts, marshes, swamps, artificial ponds and impoundments, salt ponds, lagoons, and seagrass beds.⁵ However, its mountainous terrain precludes significant streams of flowing freshwater, except when it rains. Guts are defined in the Virgin Islands Code as any “natural or constructed waterway or any permanent or intermittent stream.”⁶ The origin of the term “gut” is uncertain.⁷ Notwithstanding the broad definition offered by the Code, we focus our inquiry on ephemeral streams and not on permanent waterbodies, such as the estuaries and lagoons where guts reach the tide.⁸ First, the legal status of permanent water bodies is less likely to be questioned than

⁵ THE UNIVERSITY OF THE VIRGIN ISLANDS, WETLANDS OF THE U.S. VIRGIN ISLANDS 7–14 (2010), https://data.nodc.noaa.gov/coris/library/NOAA/CRCP/other/other_crcp_publications/Watershed_USVI/steer_exisiting_studies/USVIWetlandsdraft2.pdf.

⁶ V.I. CODE ANN. tit. 29. § 225(55A) (1991).

⁷ GARDNER ET AL., WATERCOURSES, *supra* note 4, at 8 (describing the mysterious origins of the term, which has been linked to the term “ghats,” describing mountain passes in India, and “gutters,” from medieval Europe. The term is also generally used in the British Virgin Islands, and less generically to describe specific streams elsewhere in the Eastern Caribbean. *Id.*).

⁸ 30 C.F.R. § 701.5 (2008) (“Ephemeral stream means a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.”); 30 C.F.R. § 701.5 (“Perennial stream means a stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include intermittent stream or ephemeral stream.”); 30 C.F.R. § 701.5 (“Intermittent stream means—

(a) A stream or reach of a stream that drains a watershed of at least one square mile, or

(b) A stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.”); *see also* BRENDA ZOLLITSCH & JEANNE CHRISTIE, REPORT ON STATE DEFINITIONS, JURISDICTION AND MITIGATION REQUIREMENTS IN STATE PROGRAMS FOR EPHEMERAL, INTERMITTENT AND PERENNIAL STREAMS IN THE UNITED STATES 2 (2014).

ephemeral ones.⁹ Second, beyond the point of tidal influence there are few, if any, perennially flowing streams in the Virgin Islands.¹⁰

The Territory's lack of permanent rivers does not appear to be a recent or unique phenomenon.¹¹ Its riverine deficiency is the result of several factors, including that the Territory's islands are generally small, steep, and volcanically formed.¹² These qualities are not ideal for the formation of perennial watercourses.¹³ Instead, as a leaflet from the then Danish West Indies explained:

The Central islands of the Virgin Group, present the appearance of a steep ridge, precipitously sloping to the north and the south, and cut up by numerous ravines, which during heavy rains are the beds of small torrents, but which generally are without running water, and which at their lower end, widen into small level tracts on the sea coast, often forming a lagoon on the sandy shore.¹⁴

St. Croix was the apparent exception to the Territory's lack of rivers until somewhat recently.¹⁵ Early colonists reported that St. Croix, known then by its Spanish name of Santa Cruz, possessed three rivers

⁹ Perennial streams are likely navigable and carry with them the easements and navigational servitudes of that classification. *The Daniel Ball*, 77 U.S. 557, 563 (1870) (describing the test for navigability for rivers in the United States).

¹⁰ LLOYD GARDNER, *CHANGES IN RIVERINE HYDROLOGY ON ST. THOMAS, U.S. VIRGIN ISLANDS: A PILOT STUDY* 8 (2008) ("The main sources of potable water in the United States Virgin Islands (USVI) were traditionally streams, springs, and rainfall. Though the streams have largely been reduced to only intermittent flow, they are still important for water supply and recreation.").

¹¹ GEORGE SUCKLING, *AN HISTORICAL ACCOUNT OF THE VIRGIN ISLANDS, IN THE WEST INDIES* 4 (1780) (explaining that the neighboring British Virgin Islands similarly had limited water supplies).

¹² ISAAC DOOKHAN, *A HISTORY OF THE VIRGIN ISLANDS OF THE UNITED STATES* 4 (1974) ("The smallness of the islands and the steepness of the land account for the absence of rivers in the Virgin Islands."). St. Croix is not volcanic in origin, but is made up of rocks of volcanic origin. John T. Whetten, *Field Guide to the Geology of St. Croix*, in *U.S. VIRGIN ISLANDS GUIDEBOOK TO THE GEOLOGY AND ECOLOGY OF SOME MARINE AND TERRESTRIAL ENVIRONMENTS, ST. CROIX U.S. VIRGIN ISLANDS* 129, 129 (H. Gray Multer & Lee C. Gerhard eds., 1974) ("A popular misconception in tourist lore is that St. Croix was formerly a volcano. Although volcanoes are present on many nearby islands, there are none on St. Croix, and there probably have not been for tens of millions of years, if ever. Yet, paradoxically, most of the rocks are originally of volcanic origin.").

¹³ DOOKHAN, *supra* note 12, at 4 ("In St. Thomas and St. John, because of the steep coastline, gullies or 'ghuts' are the order and these serve more to drain away rainwater rather than to conserve it.").

¹⁴ CHARLES E. TAYLOR, *LEAFLETS FROM THE DANISH WEST INDIES* 181 (1970).

¹⁵ DOOKHAN, *supra* note 12, at 4 ("The exception [to the general absence of rivers in the Virgin Islands] is St. Croix where there are a few streams bearing the names of rivers.").

and sixteen guts.¹⁶ Author George Seaman also recalled from his time as a schoolboy on St. Croix that “[a]s late as 1918 there were a number of perennially running streams on the island, and the Lower Love and Bethlehem guts were really small rivers.”¹⁷ Seaman further reminisced about passing five flowing guts on his way to school each morning in Frederiksted.¹⁸ Writing in 1974, historian Isaac Dookhan explained that St. Croix had one permanent river—the Salt River—and that its other rivers become dry in the absence of rains.¹⁹ The claim that St. Croix once had bountiful, flowing surface waters is bolstered by the fact that cultivation and processing of indigo, an industry that requires an abundant amount of freshwater, and which was a primary commercial endeavor of early colonists on St. Croix.²⁰

Regardless of its wetter, riverine past, St. Croix is now devoid of perennial streams or rivers.²¹ For instance, the “Salt River” is itself better described as an estuary or bay, fed by an ephemeral stream rather than a river.²² Intensive land use changes on St. Croix likely led to the

¹⁶ GEORGE A. SEAMAN, *AY-AY AN ISLAND ALMANAC* 9 (1980).

¹⁷ *Id.*

¹⁸ *Id.* (Seaman’s point would make sense since the west end of St. Croix, where Frederiksted lies, is much wetter and less arid than the east end.) Earl B. Shaw, *St. Croix: A Marginal Sugar-Producing Island*, 23 *GEOGRAPHICAL REV.* 414, 416 (1933) (Figure 2: a map showing dry west end and wetter western portion of St. Croix); see also JOHN B. ADAMS, *Environmental Geology of St. Croix: The Impact of Man on the Natural Resources of an Island*, in *GUIDEBOOK TO THE GEOLOGY AND ECOLOGY OF SOME MARINE AND TERRESTRIAL ENVIRONMENTS, ST. CROIX U.S. VIRGIN ISLANDS*, *supra* note 12, at 145, 147 (“Annual rainfall on St. Croix ranges from up to 60 inches on the northwest coast to 25 to 30 inches on the east end of the island.”).

¹⁹ DOOKHAN, *supra* note 12, at 4.

²⁰ Olasee Davis, *Rivers, fresh water fish were abundant in past*, *THE VIRGIN ISLANDS DAILY NEWS* (Feb. 8 1993), <http://ufdc.ufl.edu/CA01300919/00027>; SEAMAN, *supra* note 16, at 113 (“Today I nostalgically wonder how so much change could have taken place in so short a time; how the norms of a people and the soul of an island could have vanished so tracelessly and completely within the memory of one man. I also wonder about the great wheeling and fluting hordes of golden and black-bellied plover, for they too have vanished.”).

²¹ JOHN C. OGDEN, *The Major Marine Environments of St. Croix, U.S. Virgin Islands*, in *GUIDEBOOK TO THE GEOLOGY AND ECOLOGY OF SOME MARINE AND TERRESTRIAL ENVIRONMENTS, ST. CROIX U.S. VIRGIN ISLANDS*, *supra* note 12, at 5, 5 (“There are no permanently flowing streams [on St. Croix].”).

²² DENNIS HUBBARD, *DEPOSITIONAL ENVIRONMENTS OF SALT RIVER ESTUARY AND SUBMARINE CANYON, ST. CROIX, U.S.V.I.* 181 (1989) (“Although Salt River is presently an ephemeral stream and does not reduce salinities within the bay to below brackish levels, there is historical evidence of a greater and more permanent discharge during earlier times.”).

island's current drier state.²³ Development and land clearing has also exacerbated soil erosion, which, along with loss of vegetation, has reduced the amount of water that remains on the island.²⁴ These changes have wrought various other changes on St. Croix, and have even changed the chemical nature of the water and the ability of that water to be absorbed into the ground.²⁵ Furthermore, pumping water up from the water table has also been a reason for the reduction of running streams on St. Croix.²⁶

Similar stressors have adversely affected guts on St. Thomas. Specifically, development pressures adversely affected St. Thomas's guts' watersheds and have changed their watercourses, including consistency and stream flow.²⁷ Additionally, poor land management practices on St. Thomas are contaminating its guts.²⁸ Prior to these land use changes, streams provided much of the potable water for St. Thomas from the sixteenth century through the middle of the twentieth century.²⁹ Some even report St. Thomas had perennial streams through

²³ GARDNER ET AL., WATERCOURSES, *supra* note 4, at 33 (“[i]ncreased volume and velocity of surface runoff”).

²⁴ JOHN B. ADAMS, *Environmental Geology of St. Croix: The Impact of Man on the Natural Resources of an Island*, in GUIDEBOOK TO THE GEOLOGY AND ECOLOGY OF SOME MARINE AND TERRESTRIAL ENVIRONMENTS, ST. CROIX U.S. VIRGIN ISLANDS, *supra* note 12, at 145, 150 (“Clearing of vegetation has accelerated the erosion of soil, and it is a common sight after a heavy rain to see a red-brown plume of sediment in the sea, downstream from a new construction site.”).

²⁵ VIRGIN ISLANDS WATER RESOURCES RESEARCH INSTITUTE, ANNUAL TECHNICAL REPORT FY 2009 (“We conclude that land-cover change in St. Croix is directly linked to the degradation of ephemeral waterways or guts. Degradation in the Virgin Islands can be measured by decreased water infiltration rates and increased pH, bulk density and electro-conductivity. We interpret these results to be a proximal measure of soil compaction and increased run off volume and velocity.”).

²⁶ *Id.* at 148 (“Lowering of the water table by pumping, and the reduction of recharge by changes in vegetation may account in large part for the virtual disappearance of running streams in the last forty years.”).

²⁷ GARDNER, CHANGES, *supra* note 10, at 5.

²⁸ *Id.* Similar land use changes affected the guts on St. John as well. EDWARD A. O'NEILL, RAPE OF THE AMERICAN VIRGINS 150 (1972) (“[B]locked a natural drainage outlet for surface water from a large area of hills behind the bay, a blockage that during rainstorms floods the road to town used by a sizable number of people near Chocolate Hole and Rendezvous Bay.”).

²⁹ GARDNER, CHANGES, *supra* note 10, at 6.

the early 1960s.³⁰ Development and changes to the landscape necessitated wells and catchments after these streams began to falter.³¹

Guts on St. Thomas have been managed in ecologically devastating ways. For instance, guts in colonial St. Thomas were “paved with stone” in the same manner as gutters in the streets.³² Further development resulted in the paving of other watercourses on St. Thomas.³³ Degradation of St. Thomas’s guts is expected to continue.³⁴

In contrast, St. John is the “best-watered” of the U.S. Virgin Islands.³⁵ Its landscape is dominated by the Virgin Islands National Park, which occupies three-quarters of the island’s area. St. John has five so-called “guts of interest,” guts deemed important due to important features they possess or because they are currently threatened.³⁶ Because most of St. John is protected land, its guts are less threatened than those on the other islands.

While the Virgin Islands’ perennial streams have become a thing of the past, guts persist to this day. But land use changes and other stressors continue to threaten these critical landscape features.³⁷ Yet, guts are important and should be protected for several reasons. They

³⁰ *Id.* at 35 (“The springs contained ‘much more’ water in the past, and some, such as the spring in the deJongh Gut, were perennial streams. The spring in the deJongh Gut ran all year until the early 1960, and became a seasonal stream thereafter.”).

³¹ *Id.* at 6.

³² CHARLES EDWIN TAYLOR, *AN ISLAND OF THE SEA* 31 (2nd ed. 1896) (“The three principal water courses, or ‘Guts,’ as they are called, are paved in the same manner [as gutters in the street], and carry down the water from the mountains to the sea.”).

³³ GARDNER, *CHANGES*, *supra* note 10, at 35 (“Construction activity resulted in the paving of some stream beds (e.g. watercourse adjacent to the Jane E. Tuitt Elementary School), and the closing of some watercourses (e.g. Upper Hospital Ground).”).

³⁴ *Id.* at 40 (“Increased development pressure in the watersheds is expected, resulting in an increase in factors such as percentage of impervious surface, increased number of septic systems, and modification of drainage systems. Those changes in the watersheds should continue to alter stream flows in the watercourses, with the potential to negatively impact on water availability (surface and ground water), flooding, continued degradation of coastal water quality, and loss of biodiversity.”).

³⁵ ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/place/Virgin-Islands> (last visited Sept. 1, 2016).

³⁶ LLOYD GARDNER, *A STRATEGY FOR MANAGEMENT OF GHUTS IN THE U.S. VIRGIN ISLANDS* 23 (2008) (“[G]uts of interest are those that meet any one of the following criteria: guts with permanent pools; guts currently used for recreational purposes; [g]uts supporting other community uses; [g]uts containing critical habitats; [g]uts supporting endangered species of plants or animals; [g]uts containing significant historic, archeological, or cultural resources; or [g]uts facing significant threats.”).

³⁷ GARDNER, *CHANGES*, *supra* note 10, at 7 (“Today, guts remain threatened landscapes, with direct and indirect impacts resulting from construction activities and other poor land management practices.”).

provide ecological value, acting as habitats for a wide range of plants and animals.³⁸ Also, guts do provide water supply, primarily for agricultural and recreational purposes.³⁹ And they serve as linear public pathways facilitating recreational activities such as hunting, swimming, hiking, and fishing.⁴⁰ Guts are cultural and historical resources, representing uniquely Virgin Islander habitats, which even feature archaeological artifacts linking the present to the island's pre-Columbian and colonial pasts.⁴¹ They provide aesthetic scenic value,⁴² offering "spiritual renewal" to some Virgin Islanders.⁴³ Finally, guts are living laboratories, which provide many opportunities for research and teaching.⁴⁴

Ecologically, intermittent and ephemeral streams provide numerous benefits wherever they are found; many of these benefits were only recently recognized. Specifically, "[t]emporary rivers and streams are among the most common and most hydrologically dynamic freshwater ecosystems."⁴⁵ Likewise, naturally temporary waterways "are critical conduits for water, energy, material, and organisms even when surface water is not present."⁴⁶ Furthermore, dry riverbeds act as migration and navigation corridors for both terrestrial and aquatic biota, thus increasing landscape connectivity.⁴⁷ Dry riverbeds also act as egg banks for animals, and seed banks for plants.⁴⁸ Further, there is some concern that intermittent and ephemeral streams and rivers will diminish even further in the future due to climate change and increased

³⁸ *Id.* at 6.

³⁹ *Id.* at 33.

⁴⁰ *Id.* at 35.

⁴¹ GARDNER, A STRATEGY, *supra* note 36, at 11.

⁴² *Id.* at 10.

⁴³ GARDNER, CHANGES, *supra* note 10, at 33.

⁴⁴ GARDNER, A STRATEGY, *supra* note 36, at 10.

⁴⁵ Scott T. Larned et al., *Emerging concepts in temporary-river ecology*, 55 FRESHWATER BIOLOGY 717, 717 (2010).

⁴⁶ V. Acuña et al., *Why Should We Care about Temporary Waterways?*, 343 SCIENCE 1080, 1080 (2014).

⁴⁷ Alisha L. Steward et al., *When the River Runs Dry: Human and Ecological Values of Dry Riverbeds*, 10 FRONTIERS IN ECOLOGY 202, 206 (2012).

⁴⁸ *Id.* at 205; *see also* LAINIE R. LEVICK ET AL., EPA, THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST 65 (2008).

water use.⁴⁹ For these and other reasons, scientists are calling on policymakers to act now to proactively manage and protect intermittent and ephemeral streams and rivers.⁵⁰

Intermittent and ephemeral streams and rivers also provide various ecosystem services. For instance, they provide flood control by acting as natural drainages to dispel rising waters when needed.⁵¹ The Government of the Virgin Islands (GVI) has pointed out that guts might have the capability to mitigate natural disasters, such as floods, and that this role could increase with the threat of development and climate change.⁵² Virgin Islands courts have also noted guts' ability to dispel flooding waters.⁵³ Guts also trap excess sediment that would otherwise end up suspended in downstream waters.⁵⁴ This service is lost once guts are paved, or flows are otherwise hastened by land use changes. Dry and temporary streams also naturally cleanse water as it flows.⁵⁵ This aspect of guts' services is important because these waters eventually flow into the waters near beaches where people swim, thus potentially

⁴⁹ GARDNER ET AL., WATERCOURSES, *supra* note 4, at 53 (“The continued degradation of watersheds from human activities is expected to be exacerbated by the impacts of climate change resulting from global warming.”).

⁵⁰ Acuña et al., *supra* note 46, at 1080 (“We stress here the importance of policies to protect intermittently flowing streams and rivers and outline information needs that are critical to implementation of those policies.”); *see also* Larned et al., *supra* note 45, at 718 (“We end with a call for conservation and resource management that addresses the unique properties of temporary rivers.”); *see also* Steward et al., *supra* note 47, at 208 (“In order to safeguard the many valuable aspects we have identified here, the protection of dry riverbed habitats should be incorporated into biodiversity and conservation planning.”).

⁵¹ JUDY L. MEYER ET AL., WHERE RIVERS ARE BORN: THE SCIENTIFIC IMPERATIVE FOR DEFENDING SMALL STREAMS AND WETLANDS 10 (2003).

⁵² GARDNER ET AL., WATERCOURSES, *supra* note 4, at 53 (“It is generally accepted that the characteristics of some ecosystems mitigate natural hazards, such as flooding. Storm water management in the USVI has particular implications for ghuts, hence the initiative by the Division of Environmental Protection and the Federal Emergency Management Agency to assess the capacity of ghuts to manage run-off during storm events. This takes on increased importance when viewed within the context of increased development density in the watersheds and projected changes in the weather pattern as a result of global warming.”).

⁵³ *People of the Virgin Islands v. Rohn*, 55 V.I. 100, 117 (V.I. Super. Ct. 2011) (“Six months out of every year hurricanes and tropical storms threaten our islands. Rainfall often comes in intense bursts. Floodwaters can peak very rapidly and the soil cannot always absorb the rainwater fast enough. Flash-flooding can occur within minutes during an intense storm.”).

⁵⁴ MEYER ET AL., *supra* note 51, at 12.

⁵⁵ *Id.* at 13.

affecting these beaches' swimmability.⁵⁶ Guts also recharge groundwater, especially when they pool.⁵⁷

Scientists in the Virgin Islands have identified and catalogued the most important guts in the Territory, which they call "guts of interest."⁵⁸ They identified thirteen guts of interest on St. Croix, five on St. John, and ten on St. Thomas.⁵⁹ Several issues currently threaten these guts of interest,⁶⁰ such as land use change and altered drainage patterns, sedimentation of waterways, illegal dumping, and the disappearance of plant species.⁶¹ Several types of pollution currently threaten guts, including solid waste, agricultural waste, sewage disposal, and bacterial and nutrient contamination.⁶² Further issues facing all guts include poor stormwater management and inadequate enforcement of existing laws.⁶³ Finally, the current policy framework for protecting guts is inadequate. While current laws offer some protection for guts, "the policy statements contained in the [Virgin Islands Code, the Territory's statutory law] have not, for the most part, been translated into a cohesive policy framework that includes any specific reference to gut management."⁶⁴

The existing policy framework remains problematic for several reasons. For instance, while several statutes in the Virgin Islands Code purport to protect guts and other watercourses, "there is no program that translates the law into actual protection strategies or that offers protection of guts through the development control process."⁶⁵ This lack of implementation has led to other related issues. Importantly, the GVI's inability to adequately manage guts threatens the Territory's groundwater supply. Specifically, "development patterns have

⁵⁶ The Territory's beaches routinely face closures after heavy rains due to stormwater runoff. See, e.g., Ernice Gilbert, *DPNR Warns Residents to Stay Away from all VI Beaches This Weekend*, THE VIRGIN ISLANDS CONSORTIUM (Oct. 9, 2015), <http://viconsortium.com/featured/dpnr-warns-residents-to-stay-away-from-all-vi-beaches-this-weekend>.

⁵⁷ Conversely, groundwater recharge is reduced when runoff is swift and the waters do not pool. GARDNER ET AL., *WATERCOURSES*, *supra* note 4, at 52 ("The rapid movement of surface runoff from the hills to the coastal areas has been noted elsewhere in this report. This decreases the recharge of the aquifers.").

⁵⁸ GARDNER, *A STRATEGY*, *supra* note 36, at 23.

⁵⁹ *Id.*

⁶⁰ *Id.* at 11.

⁶¹ *Id.*

⁶² *Id.* at 12.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ GARDNER, *CHANGES*, *supra* note 10, at 9.

increased surface runoff, thereby reducing groundwater recharge.”⁶⁶ Reduced recharge leads to reduced stream flows, which in turn influences stream ecology.⁶⁷ In response to these issues and the others outlined above, the GVI has prioritized the “[d]evelopment of a policy framework and plan for management of watercourses in the U.S. Virgin Islands.”⁶⁸

In sum, the historical accounts and literature addressing how many and what kinds of rivers existed in the Virgin Islands are not consistent, and do not provide a conclusive picture of how the guts that persist today compare with those of the past. Regardless, the consensus is that there are currently fewer guts in the Virgin Islands than previously existed, and those that remain flow less frequently. Water is scarce, and becoming even scarcer in the Virgin Islands. Finally, despite their often dry, and perhaps subtle or nondescript appearance, guts provide many ecological services and societal benefits to the Virgin Islands. Overdevelopment of the Territory exacerbates water supply issues, and further highlights the current need for proper management and conservation of guts.⁶⁹ Current water resources will be further stressed as more development occurs.⁷⁰ Water scarcity issues, together with the ecological significance of guts, and the role of guts as cultural landmarks and de facto right of ways, justify the priority that the GVI has begun placing on managing these resources.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 40.

⁶⁹ Donastrong, *supra* note 2, at 1163 (“Our most serious problem now is overdevelopment.”); *see also* O’NEILL, *supra* note 28, at 134–35 (1972) (explaining that problems in the Virgin Islands, such as single-track development of land resources and environmental despoliation, coupled with a division within the community, “are all symptoms of a world disease clearly brought on—here as elsewhere—by a failure to fashion, and hold to, fair and reasonable controls on growth”).

⁷⁰ Because of the water shortage in the Territory, U.S. Virgin Islands law mandates that new developments include cisterns. V.I. CODE ANN. tit. 29. § 308(a) (2008). (“After May 1, 1964, no building; except commercial developments dwellings and single unit apartments with connected access to the potable water system, shall be constructed, enlarged, or moved unless the owner thereof shall make provision for a self-sustaining water supply system. This system shall consist of a well or rainwater collection area and cistern.”). But these cisterns often fail to meet the water requirements of those who dwell in the buildings where the cisterns collect water, prompting Virgin Islanders to purchase water by the truckload from local water providers. Lynda Lohr, *Rainfall Totals Well Below Normal*, ST. CROIX SOURCE, July 22, 2015, <http://stcroixsource.com/content/news/local-news/2015/07/22/rain-fall-totals-well-below-normal>.

II LEGAL FRAMEWORK

A. Virgin Islands' Legal History

Seven flags have flown over the Virgin Islands since Columbus visited in 1493.⁷¹ This rich and diverse history has contributed to the Territory's unique legal system. Despite its various overseers, not much effort was made to colonize the islands until Denmark chartered the Danish West India Company in 1671.⁷² Denmark launched the Company to enter into commercial competition with its European neighbors in the Caribbean,⁷³ but even the Company's monetarily motivated colonization was limited.⁷⁴ During its tenure, the Company administered justice to all within the Company's service and within its immediate jurisdiction.⁷⁵ Danish law purportedly applied during this period, but local officials routinely administered justice according to custom and necessity, particularly when it came to punishing slaves.⁷⁶ The Danish Supreme Court in Copenhagen took appeals of the Company's decisions during this time.⁷⁷

Denmark took control of St. Croix by way of a treaty with France, which was concluded at Copenhagen on June 15, 1733.⁷⁸ Christian VI granted a reorganized West India Company a new charter on February 5, 1734, to resume operations in the newly expanded Danish colony.⁷⁹ The new charter authorized the Company "to try all cases arising within

⁷¹ HAROLD W.L. WILLOCKS, *THE UMBILICAL CORD: THE HISTORY OF THE UNITED STATES VIRGIN ISLANDS FROM PRE-COLUMBIAN ERA TO PRESENT* 3 (1995) (showing the seven flags of the seven countries that once occupied St. Croix: the English, Spanish, French, Knights of Malta, the Netherlands, Denmark, and the United States).

⁷² WALDEMAR WESTERGAARD, *THE DANISH WEST INDIES UNDER COMPANY RULE* xi (1917) ("Establishment of West India Company."). *Id.* at 32 (explaining that instead of colonization, the Danish West India Company was interested in the exploitation of the New World).

⁷³ *Id.*

⁷⁴ DITLEV TAMM, *THE HISTORY OF DANISH LAW* 77 (2011) ("This was a colonization on a rather limited scale though it lasted for more than 200 years.").

⁷⁵ WESTERGAARD, *supra* note 72, at 33.

⁷⁶ *Id.* at 162 ("In theory the 'Danish law' of Christian V was supposed to apply, but the local officials were given considerable leeway in its administration, with the result that punishments were inflicted pretty much according to custom and necessity.").

⁷⁷ *Id.* at 33 ("Direct appeal to the Supreme Court at Copenhagen was permitted by the Danish company.").

⁷⁸ *Id.* at 211.

⁷⁹ *Id.* at 213.

its jurisdiction.”⁸⁰ Company courts consisted of three of its shareholders, and appeals to the Danish Supreme Court were only permitted in cases involving life or honor.⁸¹ Danish law filled the gaps, and applied where the Charter itself did not govern a given situation.⁸²

In 1754, ownership of the Danish West India Company passed to the Danish Crown.⁸³ With this transfer came an overt shift toward applying Danish law, embodied at the time in the Danish Code of 1683.⁸⁴ An English translation of the Danish Code was introduced into the Islands in 1756, though its contents were reportedly not entirely accurate.⁸⁵ Furthermore, scholars have pointed out that Danish law still did not necessarily reign supreme in the islands during this period, particularly when it came to laws regarding the treatment of slaves.⁸⁶ Instead, the Danish West Indies had formal “slave laws” which applied only to slaves, and which did not take into account Danish law.⁸⁷

In addition to these slave laws, various iterations of “Colonial Laws” ruled the Territory from the time the Danish Crown took the colony to the time it was transferred to the United States.⁸⁸ For instance, the Colonial Law of March 26, 1852, established the Colonial Council for the Virgin Islands.⁸⁹ Importantly, the Council could recommend the use of Danish laws in the Islands.⁹⁰ The next iteration of law specific to the Territory, the Colonial Law of November 27, 1863, divided the colony

⁸⁰ *Id.* at 214.

⁸¹ *Id.*

⁸² *Id.*

⁸³ WESTERGAARD, *supra* note 72, at xi (“Company’s shares sold to king; Danish islands become royal colonies.”).

⁸⁴ TAMM, *supra* note 74, at 77 (“In 1755 the Danish Crown took over the islands and it was expressly stated that judicial authorities should judge according to Danish law—including of course the Code of 1683.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 78 (explaining that Danish law did not provide an escaped West Indian slave his freedom despite the fact that “[s]lavery was an unknown institution in Denmark [in 1802] and no provision in the Danish Code gave any solution of the issue”). In fact, laws regulating slaves provided for particularly harsh punishments for those who broke the slave laws. See NEVILLE A.T. HALL, *SLAVE SOCIETY IN THE DANISH WEST INDIES: ST. THOMAS, ST. JOHN, AND ST. CROIX* (B.W. Higman ed., 1994).

⁸⁷ TAMM, *supra* note 74, at 56–57 (“The formal slave laws of the Danish West Indies in the later eighteenth century comprised the two seminal codes of 1733 and 1755, and a vast number of ad hoc proclamations, especially in the later decades of the century.”).

⁸⁸ Prompted by a slave revolt, Denmark abolished slavery in the Virgin Islands in 1848, but many freed slaves remained reliant on their former owners for economic reasons. O’NEILL, *supra* note 28, at 174.

⁸⁹ DOOKHAN, *supra* note 12, at 205.

⁹⁰ *Id.* at 206.

between two municipalities; St. Croix became one municipality, and St. Thomas and St. John became the other.⁹¹ During this period there were several courts, including a “Reconciling Court,” a “Town Court” for criminal cases, a “Special Court,” and a “Dealing Court,” which acted like a probate court does today.⁹² Denmark updated the colonial law of the Territory a final time when it established the Colonial Law of 1906.⁹³

On August 4, 1916, the United States and Denmark signed a treaty, which provided that the United States would purchase the Danish West Indies from Denmark for \$25 million.⁹⁴ Denmark officially transferred the Islands to the United States on March 31, 1917.⁹⁵ After the transfer, the U.S. Congress passed the Act of March 3, 1917, which kept in place the existing law in effect at the time, the Colonial Law of 1906.⁹⁶ This legislation also kept in place “the other local laws, in force and effect in said islands on the seventeenth day of January, nineteen hundred and seventeen.”⁹⁷ The Act of March 3, 1917, did make one noteworthy change, replacing the appellate court, formerly the Supreme Court of Denmark, with the Third Circuit Court of Appeals in Philadelphia.⁹⁸

The Colonial Law of 1906 law remained in effect until 1936, when Congress passed the Territory’s original Organic Act of the Virgin

⁹¹ *Id.* at 210.

⁹² TAYLOR, AN ISLAND OF THE SEA, *supra* note 32, at 36.

⁹³ WILLIAM W. BOYER, AMERICA’S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS 4 (2010) 114 (explaining that the Colonial Law of 1906 was “itself a virtual re-enactment of the Colonial Law of 1863”); *see also* WILLOCKS, *supra* note 71, at 225 (explaining the differences between the Colonial Law of 1863 and the Colonial Law of 1906).

⁹⁴ BOYER, *supra* note 93, at 86.

⁹⁵ *Id.*

⁹⁶ Act of March 3, 1917, ch. 171, 39 Stat. 1132 (1917) (codified at 48 U.S.C. § 1392 (1917)). After this transfer, the Congress saddled the U.S. Navy with the task of administering the new Territory. BOYER, *supra* note 93, at 120.

⁹⁷ Act of March 3, 1917, ch. 171, 39 Stat. 1132 (1917) (codified at 48 U.S.C. § 1392 (1917)). The local laws at the date of transfer were largely codified in the Colonial Law of 1906, which proclaimed that “[t]he Common and Statute Law of Denmark shall as hitherto be applicable to the colonies, as more accurately defined by the Laws and Ordinances.” Colonial Law of April 6, 1906, *reprinted in* V.I. Code Ann. Historical Documents, Organic Acts, and U.S. Constitution at 1-25.

⁹⁸ *Id.* (“In all cases arising in the said West Indian Islands and now reviewable by the courts of Denmark, writs of error and appeals shall be to the Circuit Court of Appeals for the Third Circuit, and, except as provided in sections two hundred and thirty-nine and two hundred and forty of the Judicial Code, the judgments, orders, and decrees of such court shall be final in all such cases.”); *see also* *Clen v. Jorgensen*, 265 F. 120, 123 (3d Cir. 1920) (quoting the Act of 1917).

Islands.⁹⁹ The Organic Act established the Territory's District Court, through Congress's power to do so under Article IV of the U.S. Constitution.¹⁰⁰ The Organic Act was subsequently revised in 1954.¹⁰¹ The Revised Organic Act of the Virgin Islands repealed and replaced the previous Organic Act, and acts as the Territory's *de facto* constitution to this day.¹⁰² The Revised Organic Act abolished the two Virgin Islands municipal councils, established the Legislature of the Virgin Islands, and set forth a bill of rights for the Territory.¹⁰³

What would later become the Virgin Islands Code had its origins in the municipal codes of St. Croix, St. Thomas, and St. John.¹⁰⁴ These two municipal codes were adopted in 1921 and were largely based on the Alaska Code, which was itself based on the Oregon Code.¹⁰⁵ On September 1, 1957, the Virgin Islands Code was established.¹⁰⁶ The Code collected and classified all existing laws of the Territory according to subject matter.¹⁰⁷ It also eliminated many of the laws left over from Danish rule in order to modernize the Territory's body of

⁹⁹ Act of June 22, 1936, ch. 699, 49 Stat. 1807 (1936) (codified at 48 USCS §§ 1391-1409 (1936)).

¹⁰⁰ U.S. CONST. art. IV, § 3 ("The 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.").

¹⁰¹ Act of July 22, 1954, ch. 558, 68 Stat. 497 (1954) (codified at 48 U.S.C. §§ 1541-1546 (1954)).

¹⁰² *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 577 (3d Cir. 1967) ("The very fact that the Act of 1954 is described in its title as 'An Act to revise the Organic Act of the Virgin Islands of the United States' and in its first section as the 'Revised Organic Act of the Virgin Islands' indicates that it was intended to supersede and take the place of the Organic Act of 1936 and not merely to amend or repeal portions of it.").

¹⁰³ WILLOCKS, *supra* note 71, at 327-28.

¹⁰⁴ See generally St. Thomas/St. John Mun. Code (1921); St. Croix Mun. Code (1921), *microformed on* Codes, Ordinance, Laws, and Resolutions of the Virgin Islands: 1917-1954, call no. LL-0301 (Library of Congress), *repealed by* V.I. CODE ANN. tit. 1, § 5 (1957 ed.).

¹⁰⁵ John D. Merwin, *The U.S. Virgin Islands Come of Age: A Saga of Progress in the Law*, 47 A.B.A. J. 778, 779 (1961).

¹⁰⁶ V.I. CODE ANN. tit. 1 § 3 ("This Code shall take effect and be in force in the Virgin Islands on and after September 1, 1957, except as otherwise expressly provided.").

¹⁰⁷ Merwin, *supra* note 105, at 779 ("All available laws, including the 1921 Codes of St. Thomas-St. John and St. Croix, were classified according to subject matter, carefully edited and arranged into thirty-four subject titles."); see also Act of July 22, 1954, ch. 558, 68 Stat. 517 (1954) ("The Secretary of the Interior shall arrange for the preparation, at Federal expense, of a code of laws of the Virgin Islands, to be entitled the 'Virgin Islands Code', which shall be a consolidation, codification and revision of the local laws and ordinances in force in the Virgin Islands.").

law.¹⁰⁸ Finally, the Code repealed the municipal codes, and any existing laws, that conflicted with the Code.¹⁰⁹

The Virgin Islands Code currently comprises the statutory law of the Territory. Other sources of law also govern the Virgin Islands, including the Organic Act of 1954, applicable provisions of the U.S. Constitution, and federal laws applicable to the Virgin Islands.¹¹⁰ Additionally, GVI agencies issue administrative rules and regulations to execute the laws of the Territory, which are compiled in the Virgin Islands Rules and Regulations. Both trial and appellate courts shape the common law in the Territory, particularly issues of law not explicitly addressed by the Code.¹¹¹ Furthermore, Denmark's pre-transfer law still has a limited role in adjudicating cases involving rights that existed prior to that transfer, including property law.¹¹² Finally, courts have recognized "customary law" in certain limited circumstances.¹¹³

The Virgin Islands' legal status is that of an unincorporated, organized U.S. territory.¹¹⁴ Because it is unincorporated, the Territory

¹⁰⁸ Merwin, *supra* note 105, at 779 ("In addition to several thousand ordinances passed by local legislative bodies since 1917, many laws enacted during the years of Danish sovereignty were still in force. One of the desiderata to be achieved by the revision of this mass of material was the elimination of as many of these antiquated laws as possible and the formation of a modern body of statute law more in consonance with present-day needs in the Virgin Islands.").

¹⁰⁹ 1 V.I.C. § 5.

¹¹⁰ STANLEY K. LAUGHLIN, JR., *THE LAW OF THE UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 387–92 (1995).

¹¹¹ *Better Bldg. Maint. of the Virgin Is., Inc. v. Lee*, 60 V.I. 740, 757 (V.I. 2014) ("[T]he Superior Court has the authority—subject to this Court's review—to shape the common law of the Territory.").

¹¹² *Red Hook Marina Corp. v. Antilles Yachting Corp No.*, 216-1971, 9 V.I. 236, WL 262427 at 241-42 (V.I. Oct. 8, 1971) (V.I. 1971) ("[T]he rules of common law do not necessarily determine property relationships in the Virgin Islands. Anglo-American common law has been received into Virgin Islands jurisprudence only in relatively recent times. Therefore, property rights in the islands are rooted in the law existing while the islands were under Danish sovereignty, which law remained in force even after the transfer of sovereignty to the United States in 1917. These rights were preserved after cession by treaty and generally understood rules of international law and remained unaffected as well by the later adoption of common law.").

¹¹³ *United States v. St. Thomas Beach Resorts Inc.*, 386 F. Supp. 769, 772, 11 V.I. 79, 84 (V.I. 1974) ("This I do not find to be the case, however, for I conclude that the act is constitutionally sound, that whatever defendant's property right in and to Bolongo Bay Beach, they have always been subject to the paramount right of the public to use the said beach as established by firmly, well settled, long standing custom. Insofar as this beach front property is concerned, the Open Shorelines Act does no more than merely codify this confirmed right.").

¹¹⁴ LAUGHLIN, *supra* note 110, at 377.

is not fully a part of the United States, and not all federal laws, or even the entire U.S. Constitution, apply.¹¹⁵ Being unincorporated also means that Congress can override decisions made by the Virgin Islands Legislature, and Congress has final say in most matters.¹¹⁶ The Virgin Islands is “organized” because it has an organic act, meaning it rules itself to some extent.¹¹⁷ Furthermore, Virgin Islanders are U.S. citizens.¹¹⁸ Finally, the Treaty of Acquisition between the United States and the Kingdom of Denmark protected the property rights, as well as other legal rights existing at the time the Territory transferred from Denmark to the United States.¹¹⁹

The Territory’s court system is composed at present of trial level superior courts and an appellate Supreme Court.¹²⁰ The superior courts are divided into two divisions residing on St. Croix and St. Thomas,¹²¹

¹¹⁵ See generally *id.* at 387–92.

¹¹⁶ Congress’s power emanates from the Territorial Clause of the Constitution. U.S. CONST. art. IV, § 3, cl. 2. 48 U.S.C. § 1574(c) (further providing “[t]hat the legislature shall have power, when within its jurisdiction and not inconsistent with the other provisions of this Act [48 USCS §§ 1541-1645], to amend, alter, modify, or repeal any local law or ordinance, public or private, civil or criminal, continued in force and effect by this Act [48 USCS §§ 1541-1645], except as herein otherwise provided, and to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands, *subject to the power of Congress to annul any such Act of the legislature.*”) (emphasis added).

¹¹⁷ LAUGHLIN, *supra* note 110, at 377. For instance, the U.S. Virgin Islands has its own Legislature, which passes its own laws.

¹¹⁸ *Id.* (“By an act of Congress of February 27, 1927, residents of the Virgin Islands were given United States citizenship as of January 17, 1917.”). This fact contrasts with the status of American Samoans who are not automatically granted citizenship at birth. *Id.* at 294 (“Samoans are United States nationals at birth, and with the right of ingress to the States and a right to immediate citizenship after establishing domicile in one, many Samoans are United States citizens.”).

¹¹⁹ Convention Between the United States and Denmark for Cession of the Danish West Indies, U.S.-Den., art. 6, Aug. 4, 1916, 39 Stat. 1706 (“Danish citizens residing in said islands may remain therein or may remove therefrom at will, retaining in either event all their rights of property, including the right to sell or dispose of such property or its proceeds.”).

¹²⁰ V.I. CODE ANN. tit. 4 § 76. The “police courts,” “municipal courts,” and the “territorial courts” preceded the Superior courts. The three police courts were in Fredericksted, Christiansted, and Charlotte Amalie, and existed under the 1921 Codes of St. Thomas and St. John, and St. Croix. *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 978 n.6 (V.I. 2011). The Territorial Courts of the Virgin Islands existed from 1976 until they were renamed the Superior Courts in 2004. Act of Sept. 9, 1976, No. 3876, § 4, 1976 V.I. Sess. 197.

¹²¹ The Division of St. Thomas and St. John resides on St. Thomas. V.I. CODE ANN. tit. 4 § 1 (“[T]he Territory of the Virgin Islands is divided into two judicial divisions: the division of Saint Croix, comprising the island of Saint Croix and adjacent islands and cays, and the division of Saint Thomas and Saint John, comprising the islands of Saint Thomas and Saint John and adjacent islands and cays.”).

respectively.¹²² The Supreme Court of the Virgin Islands hears appeals from the superior courts' decisions.¹²³ The Territory's federal court is the U.S. District Court for the Virgin Islands, which also has divisions on St. Croix and St. Thomas. This federal court shares jurisdiction with the local superior courts on many matters, and is appealable to the Third Circuit Court of Appeals. The U.S. District Court served as the court of appeal for all issues from the local trial courts before the advent of the territorial Supreme Court.¹²⁴ The U.S. Supreme Court considers appeals from the Virgin Islands Supreme Court.¹²⁵

B. How Virgin Islands Courts Decide Cases

As a comparably young U.S. territory, the Virgin Islands lacks the established common law and well developed case law of other jurisdictions on the mainland United States, as well as that of its older territorial brethren. Because of its limited precedential case law, the Virgin Islands had looked to the American Legal Institute's (ALI) Restatements¹²⁶ for a time when no statutory law is on point for a given legal issue.¹²⁷ This requirement was eventually incorporated into the Virgin Islands Code.¹²⁸ The relevant Code provision provided that

¹²² V.I. CODE ANN. tit. 4 § 71 ("The Superior Court of the Virgin Islands shall consist of not less than six (6) judges learned in the law, one half of whom shall reside in the division of St. Croix and one half of whom shall reside in the division of St. Thomas-St. John.").

¹²³ V.I. CODE ANN. tit. 4 § 32 ("The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law.").

¹²⁴ John D. Marsh, *Court Modernization in the Virgin Islands*, 58 JUDICATURE 86, 87 (1974) ("Orders and judgments of the municipal court are reviewed on appeal to the district court and finally determined there by one of the judges' unless a party is dissatisfied with the result and appeals to the United States Court of Appeals for the Third Circuit in Philadelphia.").

¹²⁵ Subject, of course, to the Supreme Court's grant of certiorari. 28 U.S.C. § 1260 (2012) ("Final judgments or decrees rendered by the Supreme Court of the Virgin Islands may be reviewed by the Supreme Court by writ of certiorari.").

¹²⁶ According to the ALI, the Restatements "aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court." AMERICAN LAW INSTITUTE, *Frequently Asked Questions*, <https://www.ali.org/publications/frequently-asked-questions/> (last visited Sept. 4, 2016).

¹²⁷ *Callwood v. Virgin Islands National Bank*, 221 F.2d 770, 774-75 (3d Cir. 1955) (setting the precedent that the rule from the Restatement is "therefore, to be applied in the Virgin Islands in the absence of a local statute or rule to the contrary").

¹²⁸ V.I. CODE ANN. tit. 1 § 4.

[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.¹²⁹

By codifying the Restatements, the legislature took away the judiciary's discretion to choose between those Restatements that accurately reflected the common law of the United States, and those that did not. This straitjacketed the judiciary into applying the Restatements across the board regardless of their accuracy or soundness in the context of the Virgin Islands.¹³⁰

The courts' codified reliance on the Restatements had several drawbacks. First, the Code was unclear as to how to apply, or rely on, the Restatements.¹³¹ Further, as at least one court pointed out, the Code essentially delegated lawmaking authority to the ALI.¹³² This shortcoming was compounded by the fact that the judge who first declared that the Virgin Islands should rely on the Restatements in the absence of local law on point, was himself a member of the ALI.¹³³ That judge was also a federal appellate judge sitting in the Third Circuit, and not a judge in the Virgin Islands, making any perceived bias worse.¹³⁴ A final drawback to relying on the Restatements was the

¹²⁹ *Id.*

¹³⁰ Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 432 (2005) ("In enacting the new statute, the Senate expanded *Callwood* in an important respect. In *Callwood*, the court had acted as many other United States courts have in adopting a single provision of a single Restatement, having determined that provision to represent accurately the common law of the United States. . . . The Virgin Islands Senate followed the *Callwood* court's incremental, ordinary step with a sweeping, extraordinary measure by declaring that all provisions of all Restatements were to be considered as being representative of United States common law.").

¹³¹ *Id.* at 426 ("[T]he statute remains unclear as to whether the language 'as expressed' means that Virgin Islands courts are expected to undertake an independent analysis of whether the Restatements express United States common law, or whether the courts are to assume that, when the Restatements have purported to express common law, they have done so accurately.").

¹³² *Manboth v. Hess Oil V.I. Corp.* (In re *Manboth Asbestos Litigation Series*), 47 V.I. 215, 229 (V.I. Super. Ct. 2005) ("[T]his list of historical sources [a list which included *Callwood*] fails to conclusively explain the apparent delegation of the Legislature's lawmaking authority and responsibility to a non-governmental entity, the ALI, in the plain language of [T]itle 1, [S]ection 4 of the Virgin Islands Code.").

¹³³ Adams, *supra* note 130, at 430 ("Perhaps it is significant that the author of the opinion, Judge Albert Maris, was an active member of the American Law Institute at that time.").

¹³⁴ *Id.* at 430–31 ("It is also important to note that this decision was not made by a local court of the Virgin Islands, but instead by the United States Court of Appeals for the Third

fact that the Code was silent regarding which edition of the Restatements courts should apply.¹³⁵

Using the Restatements as a primary source of law became problematic for other reasons. First, there is some debate over whether the Restatements are descriptive of what the law “is” or whether they represent a normative approach to the law—i.e., what the law “should” be.¹³⁶ Second, despite the ALI’s stated goals to the contrary, there have been allegations that the Restatements have been captured by special interests and are therefore biased.¹³⁷ Finally, some have accused the drafters of the Restatements of, at times, affecting the shaping of the common law to such an extent that the Restatements become a “self-fulfilled prophecy.”¹³⁸

After the Legislature of the Virgin Islands vested the supreme judicial power of the Territory in a supreme court in 2004, the role that the Restatements played in Virgin Islands court decisions changed.¹³⁹ The Supreme Court of the Virgin Islands clarified the role that Virgin Islands courts play in shaping the Territory’s common law and delimited the role that the Restatements play in that endeavor in *Banks v. International Rental & Leasing Corporation*.¹⁴⁰ The *Banks* court

Circuit in its position of general appellate jurisdiction over all matters heard, not only by the United States District Court in the Virgin Islands, but also by local Territorial Courts.”); *but see* Hartzog v. United Corp., 59 V.I. 58, 83 (V.I. Super. Ct. 2011) (lauding Judge Maris’s service to the Virgin Islands, explaining that his “service to the Virgin Islands and dedication to advancing Virgin Islands jurisprudence cannot be overemphasized. The Legislature of the Virgin Islands twice honored Judge Maris formally. In 1956, the Legislature bestowed upon him the Virgin Islands Medal of Honor for ‘his extraordinary and outstanding contributions to the preparation of the Virgin Islands Code’”).

¹³⁵ Manbodh, 47 V.I. at 227–28 (“The meaning of ‘restatements of law’ in this context is also ambiguous as it is unclear to which installment of the Restatement local law must be contrary. No court has ever identified which version of the ‘restatements of law’ was mandated by the Legislature to be applied in disputes, whether the obligation was both continuing and automatically updating, and whether the drafters intended the adoption to be by section, topic, chapter, division or in its entirety.”).

¹³⁶ Adams, *supra* note 130, at 439.

¹³⁷ *Id.* at 440.

¹³⁸ *Id.* at 442 n.75 (recounting a story about the famous *Palsgraf* decision, wherein, as the story goes, Judge Cardozo influenced the Restatement’s treatment of negligence as relational, while at the same time influencing the opinion of the court in that decision by claiming that he knew the Restatement would treat negligence as relational as well).

¹³⁹ V.I. CODE ANN. tit. 4 § 21 (“The Supreme Court of the Virgin Islands is established pursuant to [S]ection 21(a) of the Revised Organic Act of the Virgin Islands, as amended, as the highest court of the Virgin Islands and in it shall be reposed the supreme judicial power of the Territory.”).

¹⁴⁰ V.I. CODE ANN. tit. 55 § 967 (V.I. 2011).

explained that when the Virgin Islands Legislature conferred supreme judicial power on the Virgin Islands Supreme Court this conferral superseded and altered the previous law, which had mandated that the court follow the Restatements.¹⁴¹ *Banks* also explained that the power to shape common law in the Territory, to the extent not bound by precedent of the Virgin Islands Supreme Court, extends to the Superior Court of the Virgin Islands, as well.¹⁴²

In a subsequent case, *Government of the Virgin Islands v. Connor*, the court reaffirmed *Banks*, and clarified the inquiry that courts should use to determine which rule to apply when a court is charged with shaping the Territory's common law. In that case, the Court laid out the "*Banks* analysis" as follows:

[C]ourts should consider three non-dispositive factors to determine Virgin Islands common law: (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands.¹⁴³

The Supreme Court explained that courts should consider these three *Banks* factors "instead of mechanistically following the Restatements . . . to determine Virgin Islands common law."¹⁴⁴ Furthermore, the Supreme Court explicitly stated that the Legislature implicitly repealed the provision requiring courts to look to the Restatements when it established the Territory's Supreme Court.¹⁴⁵

Accordingly, to adjudicate a court case, Virgin Islands courts look to existing, on-point provisions in the Code. If none exist, the court performs a *Banks* analysis to determine what common law rule should apply. The most important part of the *Banks* analysis is step three, which encourages courts to find the soundest rule for the Virgin Islands.¹⁴⁶ Accordingly, Virgin Islands Courts no longer apply the Restatements "mechanistically," but whether this change alters the outcome of a given case depends upon its facts.¹⁴⁷

¹⁴¹ *Id.* at 979.

¹⁴² *Id.* ("[T]his Court and—to the extent not bound by precedent, the Superior Court . . . may determine the common law without automatically and mechanistically following the Restatements.").

¹⁴³ Gov't of the V.I. v. Connor, 60 V.I. 597, 600 (V.I. 2014) (quotations omitted).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Machado v. Yacht Haven, 61 V.I. 373, 396 (V.I. 2014).

¹⁴⁷ After performing the three step analysis the court might come out the same way as the restatement if the Court determines that the soundest rule is what the Restatement happens to say anyway. *See, e.g.,* Joseph v. Daily News Publ'g Co., Inc., 57 V.I. 566, 585

C. Provisions Currently Addressing Guts

There are several provisions of the Virgin Islands Code that explicitly refer to guts. For instance, the Virgin Islands' zoning and subdivision law defines a gut as "[a] natural or constructed waterway or any permanent or intermittent stream."¹⁴⁸ Another section of that law explains that guts "are essential for the maintenance of the health and general welfare of the people of the Virgin Islands."¹⁴⁹ It goes on to explain that "[a]ny encroachment upon, filling or destruction of these guts or drainage channels, unless approved by the Department of Planning and Natural Resources, is a violation of this subchapter."¹⁵⁰ Another section of the zoning law describes guts as "public rights-of-way," much like streets.¹⁵¹ This characterization of guts as public spaces is echoed elsewhere in the Code, where public place is defined to include any "gutter . . . waters, watercourse, [or] stream."¹⁵² Likewise, the Code's Water Resources Conservation Section declares, "all waters within the United States Virgin Islands are hereby declared to be public waters belonging to the people of the United States Virgin Islands."¹⁵³

Other provisions in the Code implicitly apply to guts. One such provision in the Code restricts anyone from cutting trees close to watercourses.¹⁵⁴ It defines watercourses as "any stream with a reasonable well-defined channel, and includes streams which have a permanent flow, as well as those which result from the accumulation of water after rainfalls and which regularly flow through channels formed by the force of the waters."¹⁵⁵ Furthermore, the Code provision implementing the federal Clean Water Act defines "Waters of the United States Virgin Islands" as "streams . . . water-courses, water-

n.10 (V.I. 2012) ("Applying the three non-dispositive Banks factors, we see no reason to depart from our decision in Kendall to follow the approach set forth in the Second Restatement.").

¹⁴⁸ V.I. CODE ANN. tit. 29 § 225.

¹⁴⁹ V.I. CODE ANN. tit. 29 § 226(p).

¹⁵⁰ *Id.*

¹⁵¹ V.I. CODE ANN. tit. 29 § 224(c)(2) ("Zoning District boundary lines when located in streets or other public rights-of-way (guts) shall be interpreted as located in the center line of such rights-of-way.").

¹⁵² V.I. CODE ANN. tit. 19 § 1552.

¹⁵³ V.I. CODE ANN. tit. 12 § 151.

¹⁵⁴ V.I. CODE ANN. tit. 12 § 123.

¹⁵⁵ V.I. CODE ANN. tit. 12 § 123(b).

ways . . . drainage systems and all other bodies or accumulations of water . . . public or private”¹⁵⁶

III

LEGAL STATUS OF GUTS

As explained above, several provisions of the Virgin Islands Code regulate guts, and at least one of these purports to confer public use rights over them.¹⁵⁷ These laws may be problematic for the following reasons. First, private property owners could dispute the notion that parts of their properties, which only intermittently convey water, create public rights to use them.¹⁵⁸ These claims might be challenged as takings without just compensation if enforced. Conversely, assuming that the public holds some sort of property interest in guts, the GVI has a concomitant duty to protect and manage them as trustees.¹⁵⁹ Accordingly, the issue—balancing private property rights with traditional public access—boils down to the legal status of these guts under Virgin Islands law.

A. Case Law

A Virgin Islands Supreme Court case, *Malloy v. Reyes*, is informative on the issue of the legal status of guts. In that case, the court had to determine whether an unpaved trail constituted a public right-of-way easement across a private piece of property.¹⁶⁰ The court concluded that the trail did constitute a public right-of-way.¹⁶¹ The court relied on U.S. Supreme Court precedent, which recognizes that when a foreign country transfers a territory to the United States, its public property transfers to the U.S. government as well.¹⁶² In *Malloy*, the right-of-way had been recognized as a public right-of-way by the

¹⁵⁶ V.I. CODE ANN. tit. 12 § 182(f).

¹⁵⁷ See *supra* Part III.C.

¹⁵⁸ See, e.g., Press Release, Pacific Legal Foundation, Santa Fe Couple Sue over Federal Land Grab That Labels Their Dry Land as a “Water Body” (Dec. 11, 2012), <http://www.pacificlegal.org/releases/Santa-Fe-couple-sue-over-federal-land-grab-that-labels>.

¹⁵⁹ See, e.g., *West Indian Co. v. Gov’t of V. I.*, 844 F.2d 1007, 1018 (3d Cir. 1988) (explaining that public lands such as “[s]ubmerged lands are thus impressed with a trust for the benefit of the public, and the sovereign’s use and disposition of those lands must be consistent with that trust”).

¹⁶⁰ *Malloy v. Reyes*, 61 V.I. 163, 167 (V.I. 2014).

¹⁶¹ *Id.* at 173.

¹⁶² *Id.* (“The United States Supreme Court has long recognized that when a territory is transferred to the United States by a foreign country, ownership of public property transfers to the U.S. government, while private property rights remain unaffected.”).

Danish government before the Virgin Islands was transferred to the United States, and then by the U.S. government after the transfer.¹⁶³ This distinction informed the court's determination that the trail was a public right-of-way.

While the *Malloy* court found that the Territorial government only possessed an easement in the trail—"the same as any other public road in the Territory"—it left open the question of whether the government owned the property in fee simple.¹⁶⁴ The court explained that Malloy waived this argument because she "cited no relevant legal authorities in support of this argument—such as an authority on Danish property law."¹⁶⁵ Accordingly, the court left open the possibility that certain public spaces, which are currently considered private, could be deemed public if they had been considered public spaces under prior Danish law.

Malloy also established the Virgin Islands rule for abandonment of public easements. After finding no Virgin Islands Code provision on point, the Court employed a three-step *Banks* analysis.¹⁶⁶ The Supreme Court first recognized that no Virgin Islands court had previously addressed the abandonment of a public easement at common law.¹⁶⁷ Next, the court identified the majority rule on this issue explaining that "virtually every United States jurisdiction recognizes that '[o]nce a highway always a highway' is an ancient maxim of the common law."¹⁶⁸ Finally, it established that the soundest rule for the Virgin Islands is that abandonment of a public easement is limited "to only those instances where the evidence shows both nonuse by the public and that the Government has taken an affirmative step demonstrating a clear intention never to make use of it again."¹⁶⁹

The *Malloy* decision, and other case law, highlight two principles of Virgin Islands law that can guide an analysis of the legal status of guts in the Virgin Islands. The first principle is that courts will look to

¹⁶³ *Id.* at 174 ("[B]ecause Old Broad Road was recognized as a public trail by the Danish government before 1917, and by the U.S. government after, it is clear that the Danish government's interest in Old Broad Road was among the public property interests transferred to the U.S. government on March 31, 1917.").

¹⁶⁴ *Id.* at 176 n.10.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* 176–79.

¹⁶⁷ *Id.* at 176. ("[I]t does not appear that any other Virgin Islands court has ever addressed the abandonment of a public easement at common law.").

¹⁶⁸ *Id.* at 176–77.

¹⁶⁹ *Id.* at 178 (citation omitted) (quotations omitted).

Danish law to settle disputes regarding rights that originated *before* the Virgin Islands were transferred to the United States.¹⁷⁰ Courts established this rule shortly after the Virgin Islands became a U.S. territory.¹⁷¹ The extent to which the Virgin Islands relies on Danish law has evolved as the GVI gained more autonomy from Congress, and as its legal system established its own laws.¹⁷² The reliance continued to evolve after the Virgin Islands Code was enacted, which did away with many of the arcane Danish statutory laws that were still on the books.¹⁷³ In addition to real property disputes, like the one at issue in *Malloy*, Virgin Islands courts have looked to Danish law to determine the applicable law regarding marriage, elections, inheritance, and customs.¹⁷⁴

Clearly, *Malloy* demonstrates that courts will continue to look to Danish law in cases regarding property ownership. For instance, in one property dispute case, the court looked to the 1683 Code of King Christian for the rule regarding adverse possession in the Virgin Islands.¹⁷⁵ Another case highlighted that English common law does not necessarily determine property relationships in the Virgin Islands.¹⁷⁶ Instead, “property rights in the islands are rooted in the law existing while the islands were under Danish sovereignty, which law remained in force even after the transfer of sovereignty to the United States in

¹⁷⁰ See, e.g., *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 433 n.21 (V.I. 2016) (implying that Danish common law may also play a role in Virgin Islands common law, citing to Spanish civil law, which has been incorporated into New Mexico’s common law).

¹⁷¹ *Soto v. United States* 273 F. 628, 634 (3d Cir. 1921); see also *In re Richardson*, 1 V.I. 301, 315–16 (V.I. 1936) (“Reading the statute as a whole it is clear that Congress did not intend to make a complete and entire break with the existing Danish law.”).

¹⁷² BOYER, *supra* note 93, at 429.

¹⁷³ Merwin, *supra* note 105, at 779.

¹⁷⁴ *Burch v. Burch*, 195 F.2d 799, 808 (3d Cir. 1952) (“In determining this question we look first to the background of Danish law.”); *Richardson v. Electoral Boards for Town & Suburbs of Frederiksted*, No. 119, 1936 WL 73545, at *4 (V.I. Apr. 15, 1936) (“It is clear that the election laws which are found in the Amalienborg Code of 1906, are expressly kept in force and effect only so far as they are not in conflict with the provisions of the Act of March 3, 1917, and so far as they are ‘compatible with the changed sovereignty.’”); *In re Admin. of Estate of Sewer*, 208 F. Supp. 2d 557, 561 (V.I. 2002) (“Because Smalls claims lineage by virtue of an illegitimate ancestor, Alphonse Sewer, this requires that the Court review Danish law in force prior to Denmark’s transfer of the Virgin Islands to the United States in 1917.”); *Paradise Motors, Inc. v. Murphy*, 892 F. Supp. 703, 705 (V.I. 1994) (“The 1917 Organic Act, the first charter of government for the territory under American rule, specifically extended the Danish customs laws in place in the islands at the time of the transfer.”).

¹⁷⁵ *Smith v. Defreitas*, 329 F.2d 629 (3d Cir. 1964).

¹⁷⁶ See, e.g., *Red Hook Marina Corp. v. Antilles Yachting Corp.*, 9 V.I. 236 (V.I. 1971).

1917.”¹⁷⁷ Another opinion quotes the Colonial Law of 1906 for the proposition that “[t]he right of property is inviolable.”¹⁷⁸ This portion of the Colonial Code is almost identical to a similar provision in Denmark’s Ground Law, which is the Denmark Constitution.¹⁷⁹

The second trend that emerges from *Malloy*, and similar cases, is that notions of public access to property and resources were broad under pre-transfer Danish law, and Virgin Islands policies perpetuate this idea. One decision showcases both the Virgin Islands’ broad embrace of public places as well as its reliance on Danish law to determine pre-transfer rights. That case involved a dispute over the public and private boundary of a public beach area.¹⁸⁰ After considering what law to apply in this dispute, the court held that “the Danish law, as it existed in 1917 will determine the boundary between public and private property for purposes of the motions under consideration in this case.”¹⁸¹ The court also noted that “[t]he Danish rule as to the shoreline boundary between public and private property has evolved along similar lines as the common law rule, although the rights of the public to the use of the beach above high tide may be somewhat broader under Danish law.”¹⁸²

The Virgin Islands’ generous public access tradition is also codified in the Virgin Islands Code. The policy declaring that the Virgin Islands’ beaches are open and accessible is codified in the Open Shorelines

¹⁷⁷ *Id.* at 242.

¹⁷⁸ *Golden Resorts, LLP v. Simpson*, No. SX-08-CV-109, 2011 WL 4444072, at *13 (V.I. Super. May 13, 2011), *rev’d sub nom.* *Simpson v. Golden Resorts, LLLP*, No. SCTCIV20110069, 2012 WL 1673892 (V.I. Apr. 13, 2012) (“The legal right to private ownership of real property was specifically recognized and protected by existing Danish law at the time the Virgin Islands became a Territory of the United States of America. This body of Danish law was the Colonial Law of 1906 which was printed under the heading Historic Documents in Title 1 of the Virgin Islands Code in July, 1957. Section 75 of that Colonial Law dealt with property and is reproduced below: The right of property is inviolable. No person can be compelled to cede his property, except when the public welfare demands it. This can only be effected according to a Law or an Ordinance, and full compensation must be given.”).

¹⁷⁹ The Ground-Law (Fundamental Law, Constitution) of the Kingdom of Denmark Revised and Promulgated the 28th of July 1866 § 82. DENMARK: ITS HISTORY AND TOPOGRAPHY, LANGUAGE, LITERATURE, FINE-ARTS, SOCIAL LIFE AND FINANCE 215 (H. Weitemeyer ed., 1891). (“The right of property is inviolable. No one can be compelled to give up what he owns, unless the common weal require it. This can only take place in accordance with law, and on full compensation.”).

¹⁸⁰ *Red Hook Marina Corp.*, 9 V.I. at 240.

¹⁸¹ *Id.* at 243.

¹⁸² *Id.*

Act.¹⁸³ That law declares that “the public, individually and collectively, has and shall continue to have the right to use and enjoy the shorelines of the United States Virgin Islands.”¹⁸⁴ That law further outlaws any obstruction of the Territory’s beaches.¹⁸⁵

Several other sections of the Virgin Islands Code codify the Territory’s stance toward public resources. As discussed,¹⁸⁶ the Territory’s water conservation law declares that “all waters within the United States Virgin Islands are hereby declared to be public waters belonging to the people of the United States Virgin Islands.”¹⁸⁷ Likewise, the Territory’s solid and hazardous waste management law defines “public place” broadly.¹⁸⁸ Importantly, this definition includes watercourses, streams, and beaches.¹⁸⁹ Finally, the Code specifically authorizes the use of eminent domain for public uses.¹⁹⁰ The Code further specifies that eminent domain may be used to take estates in fee simple, easements, and for rights of entry for public uses.¹⁹¹

In addition to the Territory’s stance toward public access in the Code, Virgin Islands case law establishes the existence of the Public Trust Doctrine in the Territory.¹⁹² The Public Trust Doctrine is an ancient legal doctrine recognizing the government’s role in protecting

¹⁸³ V.I. CODE ANN. tit. 12 §§ 401–403; *see also* O’NEILL, *supra* note 28, at 83 (“All the bill did was just reaffirm that the public had a right to the beaches.”).

¹⁸⁴ V.I. CODE ANN. tit. 12 § 402(a). (defining the shoreline as “the area along the coastlines of the United States Virgin Islands from the seaward line of low tide, running inland a distance of fifty (50) feet; or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier; whichever is the shortest distance”) 12 V.I.C. § 402(b).

¹⁸⁵ V.I. CODE ANN. tit. 12 § 403 (“No person, firm, corporation, association or other legal entity shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature whatsoever upon, across or within the shorelines of the United States Virgin Islands as defined in this section, which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline.”).

¹⁸⁶ *See supra* Part III.C.

¹⁸⁷ V.I. CODE ANN. tit. 12 § 151.

¹⁸⁸ V.I. CODE ANN. tit. 19 § 1552(t) (“‘Public place’ means any street, curb, sidewalk, alley, lane, square, open sewer, gutter or any public highway (including the limits of the highway right-of-way) or any public park, building, recreational area, wharf, dock, pier, landing place, airport or airport terminal, waters, watercourse, stream or beach.”).

¹⁸⁹ *Id.*

¹⁹⁰ SONJA KLOPF, PRIVATE LANDS CONSERVATION IN THE U.S. VIRGIN ISLANDS 16 (2004); 28 V.I.C. § 411.

¹⁹¹ *Id.* at 16; V.I. CODE ANN. tit. 28 § 412.

¹⁹² *West Indian Co. v. Gov’t of V.I.*, 844 F.2d 1007, 1018 (3d Cir. 1988) (“Submerged lands are thus impressed with a trust for the benefit of the public, and the sovereign’s use and disposition of those lands must be consistent with that trust.”).

public resources for all, limiting the government's ability to abdicate this duty, and to relinquish these resources to private hands.¹⁹³ A more in-depth analysis of the Public Trust Doctrine is provided below.¹⁹⁴

Other cases involving adjudication of rights of ways similarly establish that the courts will look to Danish law to determine their outcomes. In *Smith v. Defreitas*, the court looked to a Danish property law treatise to determine that rights of way by necessity need not be registered to be enforceable.¹⁹⁵ This case also highlighted that there were multiple theories under which the defendant could continue its use of the right of way at issue in that case. Specifically, in addition to right of way by necessity, the court pointed out that defendant's predecessors in the property "acquired a prescriptive right to its use."¹⁹⁶ The court again looked to Danish law, this time to the Code of Christian,¹⁹⁷ to determine the correct rule for adjudication, explaining that the defendant's predecessors had satisfied the statutory time period for obtaining a right to the right of way's prescriptive use.¹⁹⁸

B. Three Scenarios

We can take several directives from *Malloy* and its lineage and apply them to guts. First, whatever title or interest in property that belonged to the Danish government when the Danish West Indies passed to the United States became GVI property when it became a U.S. territory.¹⁹⁹ Furthermore, it is clear from *Malloy* that abandonment of a public easement requires evidence showing both nonuse by the public *and* evidence that the government has taken an affirmative step

¹⁹³ See generally MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (2013); see also Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

¹⁹⁴ See Part IV.B.2 *infra*.

¹⁹⁵ *Smith v. Defreitas*, 329 F.2d 629, 633 (3d Cir. 1964).

¹⁹⁶ *Id.* at 634.

¹⁹⁷ *Id.* ("Here it is clear that the passageway in question has existed for more than 100 years and the evidence supports the finding that it had been used by the parties and their predecessors in interest for many years, certainly for at least 20 years prior to 1921.").

¹⁹⁸ Code of Christian 1683 Book 5 Chapter V Art. 1.

¹⁹⁹ This land then became property of the Government of the Virgin Islands. 48 U.S.C. § 1405c(a) ("All 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.").

demonstrating a clear intention never to make use of that easement again.

Malloy, and the legal tenets stemming from it and other road cases, can be analogized to guts, and access to guts, for several reasons.²⁰⁰ First, many guts act as footpaths and have for many years, likely since well before the transfer or even colonization. Second, without access to these guts, islanders might be unable to access beaches or other public areas that they have a legal right to access. For instance, a gut provides a path for beachgoers to access the beaches at Smith Bay on St. Thomas.²⁰¹ In this circumstance, the gut serves as a public trail to access the beaches—a resource declared to be public by the law.²⁰² Accordingly, this situation invokes protections of access to this gut for Virgin Islanders under several legal theories, including the Open Shorelines Act, prescription, the Public Trust Doctrine, and customary use.

Under *Malloy*, the GVI could prove that it owns a full or partial interest in guts if it can establish that the Danish government possessed these interests pre-transfer. Alternatively, it is possible that, if the GVI does not own any interest in the guts, the public still possesses use rights that provide access to guts and restricts what owners may do within these guts. In these cases, theories of prescription, customary use, or the Public Trust Doctrine might still offer the public, or a subset of the public, the right of use of guts on a case-by-case basis.²⁰³ Furthermore, it is possible that the GVI has no prior interest in guts. But even under this possibility, they would still probably be able to protect guts through regulation. These possibilities are discussed below.

1. Government Owns Guts in Fee Simple

One possibility is that the GVI owns the guts in fee simple, similar to the way that lands underlying navigable waters are public under federal and state law in the United States. The Code provisions and regulations declaring that guts are public property suggest this possibility. Regardless, this option probably only applies when the GVI

²⁰⁰ See also *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671 (V.I. 2015).

²⁰¹ GARDNER, *CHANGES*, *supra* note 10, at 33 (“Current uses include . . . Recreation . . . hiking, and provision of access to the beach (latter activity observed at Smith Bay).”).

²⁰² V.I. CODE ANN. tit. 12 §§ 401–403.

²⁰³ Except for the customary use doctrine, the others suggest some sort of property interest. See *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974).

owns, or can prove the Danish government owned, these guts prior to the Virgin Islands transfer to the United States. Otherwise, the assertions in the Virgin Islands Code are subject to challenge as impermissible takings under both the U.S. Constitution and Virgin Islands law.²⁰⁴ A different result would occur if Danish law in 1917 provided that the land underlying non-navigable watercourses or footpaths, even those running through otherwise privately owned property, remained in public ownership. However, nothing in the case law, or other English language sources, suggests this conclusion.

2. The Government, or a Sub-set of the Public, Possesses Less than Fee Interests in, or Use Rights to, Guts

Alternatively, the GVI, or some uniquely situated sub-set of its people, could hold a less than fee interest affording access to guts. Less than fee interests arise in different ways. These can be demonstrated through prescription recognized by both the modern Virgin Islands law and in the Danish law applicable at the time of transfer. Prescription, or a prescriptive easement, is a property interest giving a right of access to or through property. Here, the underlying fee remains with the owner while the easement holder enjoys a lesser interest, a mere right of access through the land.²⁰⁵ Again, this possibility could attain if the GVI or interested parties can prove the elements of prescription have been met.²⁰⁶ Furthermore, *Malloy* holds that abandonment of these rights requires evidence showing both nonuse and that the government has taken an affirmative step demonstrating a clear intention never to make use of the easement again.²⁰⁷

It is also conceivable that the public has always had, and retains, a customary right to use guts and the resources they offer. Here, one would have to look to the common law, and perhaps the law of Denmark or the Danish West Indies in effect at the time of transfer, as well as the doctrine of customary use. Another option would be to apply the Public Trust Doctrine to these guts.

²⁰⁴ U.S. CONST. amend. V., Takings Clause; V.I. Revised Organic Act § 3 (“Private Property shall not be taken for public use except upon payment of just compensation.”).

²⁰⁵ Furthermore, the easement could be either express or implied. *See generally* 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34 (Michael Allan Wolf ed., 2016); *see also id.* at § 34.07.

²⁰⁶ *See supra* note 160.

²⁰⁷ *Malloy v. Reyes*, 61 V.I. 163, 178 (V.I. 2014).

a. Customary Use Law

The doctrine of customary use has been applied in the Virgin Islands to secure public access to privately owned dry sand beaches above the mean high-tide mark. In *United States v. St. Thomas Beach Resorts, Inc.*, the court upheld a government order to remove fences obstructing beach access under the authority of the Open Shorelines Act.²⁰⁸ The Court found that the Open Shorelines Act did not deprive the landowner of a property interest in violation of the U.S. Constitution. Notably, the general public had traditionally used the area in question both before and after the transfer in a way that satisfied the elements of customary use under the common law.²⁰⁹ The court relied on a case from the Supreme Court of Oregon that found a similar result for its beaches,²¹⁰ and on previous authority in the Virgin Islands.²¹¹ A similar analysis could apply in the case of guts that have served as traditional pathways. As was the case with beaches under the Open Shorelines Act, the GVI refers to guts as “public rights of way” under its zoning and subdivision code, though admittedly without a similarly articulated public policy rationale.²¹²

If the Virgin Islands were to look to Danish law to resolve the legal status of guts, it would result in a very different approach to public rights in private property. Although quite distinct from its Scandinavian and Northern European neighbors, in terms of its deference to private property rights, Denmark nonetheless falls within the European tradition of liberal access, at least compared to the United States.²¹³ This tradition is best encompassed in the phrase “[t]he Right to Roam,” about which much has been written.²¹⁴ At its most expansive, the Right to Roam accords individuals the ability to traverse private property without fear of prosecution for trespass, subject to various and sundry statutory limitations.

²⁰⁸ *U.S. v. St. Thomas Beach Resorts*, 386 F. Supp. 769 (V.I. 1974); *see also* Aliya T. Felix, “Take Back the Beach!” *An Analysis of the Need for Enforcement of Beach Access Rights for Virgin Islanders*, 10 FLA. A&M U. L. REV. (2015).

²⁰⁹ *St. Thomas Beach Resorts*, 386 F. Supp. at 772.

²¹⁰ *Id.* at 773 (citing *State ex rel. Thornton v. Hay*, 254 Or. 584 (1969)).

²¹¹ *Id.* at 771 n.1 (citing *Red Hook Marina Corp. v. Antilles Yachting Corp.*, 9 V.I. 236, 242–44 (3 Cir. 1971)).

²¹² V.I. CODE ANN. tit. 29 § 224(c)(2).

²¹³ PETER SCOTT PLANNING SERVICES, *COUNTRYSIDE ACCESS IN EUROPE: A REVIEW OF ACCESS RIGHTS, LEGISLATION AND PROVISION IN SELECTED EUROPEAN COUNTRIES* (photo. reprint 1999) (1991).

²¹⁴ *See* MARION SHOARD, *A RIGHT TO ROAM* (1999).

The Right to Roam has emerged as a countervailing force to the “right to exclude,” the latter of which has become a hallmark of western property law. The right to exclude has origins in the enclosure movement that swept across Europe in the early enlightenment era.²¹⁵ In the late seventeenth century, private property began to replace feudal notions of property and fencing became a significant means of demarking ownership. Norms that allowed through passage and limited public uses of newly created private property emerged out of necessity. For example, public access along the foreshore to gather seaweed for use as fertilizer requires public access to the foreshore, which in turn may require landlocked farmers to cross private property. To some extent, these norms evolved through customary law, modified to varying degrees by modern statutes.

As previously noted, Denmark has evolved a relatively restricted notion of public access, in contrast to the rest of Scandinavia, or, for that matter, elsewhere in Europe.²¹⁶ Danish landowners’ right to exclude was codified in 1873,²¹⁷ and must have been sufficiently broad for subsequent parliaments to feel the need to clarify public access rights. For example, in 1937, a statute affirmed the right of the public to use privately owned beaches.²¹⁸ And, in 1968, a statute granted the public the right to walk in uncultivated and unfenced forests greater than 5 acres.²¹⁹ Given that these subsequent reforms appear to be an effort to walk back a strongly provisioned right to exclude, it would appear that, at the time the Virgin Islands became a U.S. territory in 1916, the Danish statutory law in effect would not have been especially kind to arguments that a general right to freely roam across the Danish countryside existed.

However, these general statutory access provisions do not necessarily preclude the continued viability of non-statutory law as it relates to access in Denmark prior to 1917. These do not address the

²¹⁵ See Judith Perle, *The Invisible Fence: An Exploration of the Potential Conflict Between the Right to Roam and the Right to Exclude*, 3 BIERBECK L. REV. 77 (2015).

²¹⁶ Brian Sawers, *The Right to Exclude from Unimproved land*, 83 TEMPLE L. REV. 665, 687 (2011).

²¹⁷ Katrine Højring, *The Right to Roam the Countryside-Law and Reality Concerning Public Access to the Landscape in Denmark*, 59 LANDSCAPE & URB. PLAN. 29, 29–41 (2002). The authors have been unable to obtain an English language translation of this 1873 statute, and thus rely on secondary literature both for proof of its existence and for the substance of the statute.

²¹⁸ *Id.* at 30.

²¹⁹ *Id.*

use of specific pathways that have been traditionally used since “time immemorial,” a customary law concept common to both common and civil law traditions. In at least some cases, the public status of private roads was considered by Danish courts to be based on customary law, including the use of a road since “time immemorial.”²²⁰ Accordingly, while a complete exploration of the state of Danish customary law relating to public access to private property in Denmark is beyond the scope of this Article and the linguistic capacity of its authors, it appears plausible that Danish law permitted in 1917, and still permits, the determination of public access rights to private property based on non-statutory theories rooted in customary law.

b. The Public Trust Doctrine

The Public Trust Doctrine might also provide for public access and allow the GVI to protect guts, even if they are not navigable and are not influenced by the tides. The Public Trust Doctrine is an ancient legal concept that recognizes the public’s right to certain common resources, and a government’s responsibility to hold these resources in trust for all.²²¹ The Doctrine has been recognized at least as far back as the Roman Justinian Code and traces its path to the United States through the Magna Carta and English common law.²²² Each state has developed its own Public Trust Doctrine, and several foreign versions of it also exist.²²³ U.S. territories and the District of Columbia have public trust doctrines similar to those of the fifty United States.²²⁴

As noted previously, Virgin Islands courts have recognized the Public Trust Doctrine in the Territory.²²⁵ Regardless, because the Public Trust Doctrine is not codified in the Virgin Islands Code, a Virgin Islands court would perform a *Banks* analysis to determine this

²²⁰ Peter Ørebech, *Western Scandinavia: Exit Burgerliches Gesetzbuch—the Resurrection of Customary Laws*, 48 TEX. INT’L L.J. 405, 420 (2013).

²²¹ See generally BLUMM & WOOD, *supra* note 193.

²²² INSTITUTES OF JUSTINIAN § II.1.1; Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989).

²²³ Wilkinson, *supra* note 222, at 425 (“The public trust doctrine is complicated—there are fifty-one public trust doctrines in this country alone.”); Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxon Vision*, 45 U.C. DAVIS L. REV. 741, 760–807 (2012).

²²⁴ COASTAL STATES ORGANIZATION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 3 (1997) (“Rather, there are over fifty different applications of the doctrine, one for each State, Territory or Commonwealth, as well as the federal government.”).

²²⁵ See *supra* Part III.A.

common law tenet's current and future applicability in the Territory.²²⁶ Under this analysis, the court would first consider whether any Virgin Islands courts have previously adopted a particular rule regarding this tenet.²²⁷ At least two Virgin Islands decisions have referenced the Public Trust Doctrine. In *West Indian Company, Ltd. v. Government of Virgin Islands*, the court explained that “[i]n general, the Public Trust Doctrine recognizes that some types of natural resources are held in trust by a government for the benefit of the public.”²²⁸ That decision also explained that the Public Trust Doctrine did not exist before the Territory was transferred by Denmark to the United States.²²⁹ A subsequent decision cited the U.S. Supreme Court and declared that “[a] sovereign power has the right to define the nature and extent of its trust properties.”²³⁰ This case also established some of the procedural Public Trust characteristics in the Virgin Islands, namely that the GVI is the trustee of the Public Trust Doctrine for the Territory.²³¹ Finally, under this trustee power, it is established that the GVI may sue on the Territory's behalf for natural resource damages.²³²

Next, a Virgin Islands court would consider what position the majority of courts from other jurisdictions have taken on the issue.²³³ All fifty of the United States have recognized the Public Trust Doctrine in some shape or form, nudged on by Supreme Court precedent declaring that “individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”²³⁴ Accordingly, the majority rule is recognition of the Doctrine.

²²⁶ Gov't of the V.I. v. Connor, 60 V.I. 597, 600 (V.I. 2014) (explaining the three-part *Banks* analysis).

²²⁷ *Id.*

²²⁸ *W. Indian Co. v. Gov't of V. I.*, 643 F. Supp. 869, 875 (V.I. 1986), *aff'd*, 812 F.2d 134 (3d Cir. 1987).

²²⁹ *Id.* at 877 (“predated that point in time when California and the Virgin Islands had control over the respective tidelands . . . [and] therefore, occurred prior to the existence of the public trust doctrine”).

²³⁰ *Comm'r of Dep't of Planning & Nat. Res. v. Century Alumina Co.*, No. CIV. 2005/0062, 2008 WL 4809897, *9 (V.I. Oct. 31, 2008) (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988)).

²³¹ *Id.*

²³² *Id.*

²³³ Gov't of the V.I. v. Connor, 60 V.I. 597, 600 (V.I. 2014).

²³⁴ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (citations omitted).

Finally, the third step of a *Banks* analysis requires a court to determine the soundest rule for the Virgin Islands.²³⁵ There are several reasons a court might determine that recognizing the Public Trust Doctrine is the soundest rule for the Virgin Islands. First, it is universally recognized in the United States; even in Louisiana, which retains significant aspects of its Franco-civil law heritage. Second, the Virgin Islands holds title to its submerged lands, the prototypical “trust lands.” This point is important because it is the trigger for extending the Doctrine to states when they achieve statehood. The Virgin Islands is not a state, but it does seem to meet the criteria for this Doctrine to be recognized in the Territory. Accordingly, a Virgin Islands court could readily find that the soundest rule for the Virgin Islands is to recognize the Doctrine.

The question is what the Public Trust Doctrine applies to in the Virgin Islands. Under English common law, the Doctrine covered at least tidally-influenced submerged lands.²³⁶ The U.S. Supreme Court extended this historical footprint to all navigable waters. Subsequent Supreme Court precedent explained that “the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”²³⁷ As explained below, states have extended the limits of the Doctrine to make it clear that its reach is not limited to the tidelands, or even to navigable waters. Accordingly, the question is whether the Doctrine can be expanded, or stretched, to include the Virgin Islands’ ephemeral and non-navigable guts.

Several states use the Doctrine’s flexible nature to extend it past its historical limits. For instance, some states expanded the Doctrine to include the right to access navigational waters via dry land.²³⁸ Hawaii’s Constitution specifies that “[a]ll public natural resources are held in

²³⁵ *Connor*, 60 V.I. at 600.

²³⁶ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (“At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide.”).

²³⁷ *Phillips Petroleum*, 484 U.S. at 475.

²³⁸ See, e.g., *Matthews v. Bay Head Improv. Assn.*, 95 N.J. 306, 325 (N.J. 1984) (“[W]here use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public’s use of the upland dry sand area subject to an accommodation of the interests of the owner.”).

trust by the State for the benefit of the people.”²³⁹ California’s Supreme Court explained that the Public Trust Doctrine is “sufficiently flexible to encompass changing public needs.”²⁴⁰ In the so-called “Mono Lake” case, the California Supreme Court remarked that:

The principal values plaintiffs seek to protect . . . are recreational and ecological . . . the scenic views of the lake and its shore, the purity of the air and the use of the lake for nesting and feeding by birds. . . . it is clear that protection of these values is among the purposes of the public trust.²⁴¹

Montana law establishes that “all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.”²⁴² Specifically relying on the public trust doctrine, Montana courts have held this law to allow the public to use the beds of non-navigable streams for recreation, up to the high water mark.²⁴³ Specifically, Montana’s “Constitution, statutes and precedent preclude a riparian landowner from excluding public use of a streambed.”²⁴⁴ The Utah Supreme Court also recognized the public’s right to touch privately owned riverbeds when the public utilizes its easement over these otherwise public waterways.²⁴⁵

Under the precedent set by other states, which also protect uses and reaches not traditionally included within the Doctrine’s ambit, the Virgin Islands could also extend the Doctrine to its guts. Protecting the ecological integrity and public accessibility of guts aligns with the purposes of the Doctrine, as it has evolved. The Doctrine’s original purpose was to ensure the public’s access to common resources; traditionally this included navigation, fishing, and bathing. These traditional purposes require ecological integrity, and, hence, it is not a stretch to extend the Doctrine to include an ecological purpose. Trust resources are meaningless without meaningful access; while it may be

²³⁹ HAW. CONST. art. XI, § 1.

²⁴⁰ *Marks v. Whitney*, 6 Cal. 3d 251, 259 (Cal. 1971).

²⁴¹ *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 435 (Cal. 1983).

²⁴² MONT. CODE § 23-2-302.

²⁴³ *Public Lands Access Ass’n v. Bd. of County Comm’rs*, 2014 MT 10, P62, 373 Mont. 277, 299, 321 P.3d 38, 51, 2014 Mont. LEXIS 10, at *42, 2014 WL 173164 (Mont. 2014) (“[I]t is settled law in Montana that the public may use the beds of non-navigable rivers, up to the high water mark, for recreation.”).

²⁴⁴ *Id.*

²⁴⁵ *Conatser v. Johnson*, 194 P.3d 897, 902 (Utah 2008) (finding that “touching the water’s bed is a common action in fishing and that it is reasonably necessary for the effective enjoyment of it”).

more intrusive on private property rights, allowing use rights over guts also supports the traditional purposes, and this is recognized in other jurisdictions. In the Virgin Islands, there are few, if any, resources that its residents consider public resources more than its beaches and the guts that lead to them.²⁴⁶ Traditionally, guts and beaches have been open to the public and have served similar purposes to one another. Both of these resources provide recreation, and also serve as traditional sources for food and spiritual renewal for Virgin Islanders. Moreover, because guts flow into the Territory's beaches, they are physically and ecologically linked. Thus, they should remain public resources, and furthermore they should remain open for public trust uses. The Virgin Islands could ensure this by adopting a broad Public Trust Doctrine for the Territory that protects access to its guts.

3. The Government Has No Property Interest in Guts

Finally, the GVI could have no property interest in guts at all. This scenario would occur where the public had no customary use rights under Danish law, and where the Public Trust Doctrine did not apply, so the Government had no historical property interest in a gut, as evidenced in records. Instead, these guts are wholly private, and those who owned the land underlying the occasionally flowing water in guts had an unbridled right to exclude trespassers. In such cases, access can only be assured through voluntary land acquisition or eminent domain.²⁴⁷

Regardless of its property interest, both the federal government and the Virgin Islands can, and do, assert regulatory jurisdiction over these guts through federal law and Territorial police power. For instance, the federal government can regulate “waters of the United States” under the Clean Water Act if the waters meet the test set forth by the Supreme Court in cases such as *Rapanos*.²⁴⁸ In addition, the Territorial government has even more geographically extensive police power authority over “waters of the United States Virgin Islands,” and under its land use authority.²⁴⁹ The regulatory authority to manage guts is described below.

²⁴⁶ Elizabeth Rezende, *Water Gut: The Guts Were Essential to the Well-Being of the Neighborhood*, THE VIRGIN ISLANDS DAILY NEWS, June 23, 2016, at A10-11; see also Felix, *supra* note 208.

²⁴⁷ See, e.g., KLOPF, *supra* note 190.

²⁴⁸ See *infra* notes 260–63 and accompanying text.

²⁴⁹ See *infra* Part V.

IV THE REGULATORY LAY OF THE LAND

Now that we have described the possible legal statuses of Virgin Islands guts from a proprietary standpoint, we will examine how these watercourses are regulated at the federal and territorial levels. We then turn to a brief discussion of the extent other jurisdictions treat similar “gut-like” streams. To set the table, we first explain from where governments get the authority to regulate watercourses, such as guts. Next, we present an overview of the current regulatory lay of the land regarding regulation of watercourses—i.e., which jurisdictions are currently regulating ephemeral and intermittent watercourses, and to what extent.

As landowners, governments have the power to manage guts appearing wholly on their property, without resorting to the police power.²⁵⁰ But in order to govern non-navigable streams that run through private property, they need an applicable and permissible policy lever to do so. Both the federal and territorial governments provide these levers.

A. Federal Jurisdiction to Regulate Non-Navigable Watercourses

The Clean Water Act requires federal agencies to regulate wetlands and watercourses, even those that are not navigable in the traditional sense of the term, so long as those water bodies have a “significant nexus” to navigable waters of the United States.²⁵¹ At the federal level, the U.S. Environmental Protection Agency (EPA) administers the Clean Water Act. The U.S. Army Corps of Engineers, however, makes jurisdictional determinations, delineating between waters that fall under their jurisdiction via the Clean Water Act and those that do not.²⁵² What constitutes “a significant nexus” has been the subject of protracted litigation that has reached the U.S. Supreme Court through a trilogy of cases,²⁵³ and an issue over which a considerable amount of

²⁵⁰ See generally *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387 (1892).

²⁵¹ 33 U.S.C. §§ 1251–1274; *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). See also 33 C.F.R. § 328.3 (rule currently stayed by Circuit Court).

²⁵² 33 U.S.C. §§ 1311(a), 1342, 1344.

²⁵³ *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

ink has been spilled.²⁵⁴ In response to the confusion engendered by the case law, the EPA recently revised its “Waters of the United States” (WOTUS) rule.²⁵⁵ EPA’s new rule was stayed pending a court challenge.²⁵⁶

Unsurprisingly, ephemeral streams such as guts, lie at the edge of the gradient of connectivity that results in federal jurisdiction.²⁵⁷ The nature of guts as discrete, erosive, and seasonally dry channels that work their way downslope toward the sea yields an analysis that suggests they may not be jurisdictional through some, or even most, of their course. At some point along that course a gut will intersect with a tidally influenced water body, or a tributary to such a water body. These water bodies and their tributaries are defined by the presence of a mean high water mark (tidewater) or an ordinary high water mark (freshwater), and are categorically jurisdictional, e.g., they are “traditional navigable waters.” Waters that do not lend themselves to categorical jurisdiction then undergo the “significant nexus” test, either based on court rules or under the EPA’s new WOTUS rule.

The new rule identifies waters that are categorically not subject to jurisdiction in a way that may be significant for guts. Excluded from the regulatory reach of waters of the United States are “[e]rosional features, including gullies and rills and other erosional features that do not meet the definition of tributary . . .”²⁵⁸ Neither gully nor rill is defined, but many guts would appear to fit within their technical meaning.²⁵⁹ Thus federal jurisdiction may not apply to those guts, or

²⁵⁴ Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy’s Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators and Developers?*, 40 IND. L. REV. 291 (2007); Kevin Frankel, *A Flood of Uncertainty: Rapanos and Carabell*, 32 COLUM. J. ENVTL. L. 141, 158 (2007); Jennifer L. Dusenberry, *Undermining the Clean Water Act: One Court’s Attack on Another Safeguard for America’s Waters*, 80 TENN. L. REV. 585, 591 (2013).

²⁵⁵ 33 C.F.R. § 328.3 (validity called into doubt by *Ohio v. United States Army Corps of Eng’rs* (In re EPA) 803 F.3d 804 (6th Cir. 2015)).

²⁵⁶ *Ohio v. United States Army Corps of Eng’rs* (In re EPA), 803 F.3d 804 (6th Cir. 2015).

²⁵⁷ CLAUDIA COPELAND, CONG. RESEARCH SERV. R43455, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” (2016), <https://www.fas.org/sgp/crs/misc/R43455.pdf>.

²⁵⁸ Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,054, 37,098 (June 29, 2015) (to be codified at 40 C.F.R. 230.3).

²⁵⁹ NATURAL RESOURCES CONSERVATION SERVICE, EPHEMERAL GULLIES AND RILLS—DEFINITIONS, www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_023211.doc (last visited Oct. 22, 2016).

those portions of guts, that do not possess physical indicators of a bed or bank *and* an ordinary high-water mark.

Under the existing rule and case law, ephemeral streams would instead be subject to a case-by-case analysis under the *Rapanos* decision—a decision that failed to garner a majority opinion.²⁶⁰ An analysis of the legal status of guts under *Rapanos* can proceed at least two ways. Under application of the rule in *Marks v. United States*,²⁶¹ the Kennedy concurrence, discussed below, most likely represents the current lay of the land regarding which waters are jurisdictional.²⁶² Alternatively, a predictive analysis, i.e., using past decisions to predict how a subsequent Supreme Court headcount on this issue would turn out, might have yielded either Justice Scalia's plurality opinion in *Rapanos*, or Kennedy's concurrence, as legitimately yielding usable tests for determining which waters constitute "waters of the United States" under the Clean Water Act.²⁶³ However, the predictive approach is likely unhelpful in the wake of Justice Scalia's passing.²⁶⁴ Regardless, Justice Scalia's plurality opinion, which set out the "continuous surface water connection" test, clearly seems to exclude guts. The Court held that water of the United States "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."²⁶⁵ Kennedy's concurrence, on the other hand, relies on the significant nexus text that had been announced in previous case law and endorsed in the U.S. Army Corps of Engineers' regulations.²⁶⁶ Under the significant nexus test, guts are possibly included under the Clean Water Act's meaning of waters of the United States.

²⁶⁰ *Rapanos v. United States*, 547 U.S. 715 (2006).

²⁶¹ *Id.* at 758 (citing *Marks v. United States*, 430 U.S. 188 (1977)).

²⁶² *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .") quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976).

²⁶³ Justice Stevens had remarked that either Justice Kennedy's concurrence or the plurality could represent the rule for Waters of the United States under this predictive method. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting).

²⁶⁴ Patrick Parenteau, *What Antonin Scalia's Death Means for Environment and Climate*, U.S. NEWS & WORLD REP. (Feb. 18, 2016), <http://www.usnews.com/news/articles/2016-02-18/what-antonin-scalias-death-means-for-environment-and-climate>.

²⁶⁵ *Rapanos*, 547 U.S. at 739.

²⁶⁶ *Solid Waste Agency v. United States Army Corp. of Eng'rs*, 531 U.S. 159, 167 (2001).

Perhaps the most noteworthy point regarding the ongoing saga of *Rapanos* and the WOTUS rule is how problematic defining waterways, like guts, is for policymakers. This issue is expected to worsen as climate change potentially shifts entire ecosystems, and dries up waterways.²⁶⁷ Furthermore, this issue could also worsen as water becomes scarcer and demand increases, and as waterways are tapped to the point of drying out completely.²⁶⁸

Other sources of federal jurisdiction to manage waterways include the Federal Emergency Management Agency's (FEMA) authority over floodplains and the Endangered Species Act.²⁶⁹ FEMA's jurisdiction is noteworthy because many, and perhaps most, guts potentially fall into flood hazard areas identified by FEMA. To be eligible for flood insurance from FEMA, local authorities must restrict the type and nature of development that occurs in such areas. The Endangered Species Act applies to private land, including guts, inhabited by species listed under that act.²⁷⁰

B. State and Territorial Jurisdiction

States and territories have independent police power authority to regulate watercourses and the activities that affect them. These powers can be broader than federal regulation, but remain subject to constitutional limitations. Specifically, such regulations must be within the rather large ambit of regulations aiming to protect public health, safety, welfare, or morals,²⁷¹ and cannot affect a taking.²⁷² The Virgin Islands Code includes a number of provisions that purport to regulate, or that could support the regulation of, guts, including an expansive definition of "waters of the Virgin Islands," which likely encompasses guts. Title 12, Chapter 7, of the Virgin Islands Code, titled Water Pollution Control, regulates activities affecting the "waters of the

²⁶⁷ Jesse Reiblich & Christine A. Klein, *Climate Change and Water Transfers*, 41 PEPP. L. REV. 439, 444–45 (2014).

²⁶⁸ See, e.g., Sarah Zielinski, *The Colorado River Runs Dry*, SMITHSONIAN, Oct. 2010, <http://www.smithsonianmag.com/science-nature/the-colorado-river-runs-dry-61427169/?no-ist>.

²⁶⁹ NAT'L RESEARCH COUNCIL, RIPARIAN AREAS: FUNCTIONS AND STRATEGIES FOR MANAGEMENT 230–31 (2002).

²⁷⁰ 16 U.S.C. §§ 1531–1544.

²⁷¹ U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

²⁷² U.S. CONST. amend. V.

Virgin Islands” by implementing the federal Clean Water Act.²⁷³ The term “waters of the United States Virgin Islands” is defined to include “all waters within the jurisdiction . . . including all . . . streams, lakes, ponds, . . . water-courses, water-ways . . . drainage systems . . . and all other bodies or accumulations of water”²⁷⁴ Guts are not specifically mentioned in this definition, but the definition seems to support their inclusion, especially given the definitions and descriptions provided elsewhere in the Code.²⁷⁵ Importantly, the Code makes it unlawful to “discharge . . . any pollutant into the waters of the United States Virgin Islands” without authorization.²⁷⁶

Thus, notwithstanding any potential limitations on federal jurisdiction over guts, it would seem that the Territory has the authority under the existing law to extend their jurisdiction in order to ensure that ephemeral guts—a water resource that may be less important in other U.S. geographical contexts—can be protected in the Virgin Islands. The Virgin Islands’ jurisdiction over its guts is not limited to water pollution control permitting. The same chapter requires the Virgin Islands Planning and Zoning Board “to bring to the attention of the Commissioner all proposed zoning actions pending before the Planning Board.”²⁷⁷ Perhaps even more importantly, this chapter requires the Commissioner to “take no proposed action inconsistent with a specific finding by the Commissioner that the same would result in pollution of the waters of the Virgin Islands.”²⁷⁸

Aside from environmental permitting, guts find protection through the development process under the Virgin Islands’ land use regulations. The Code provides that “existing guts,” and those that have been indicated on certain maps,²⁷⁹ are essential to the health and well-being

²⁷³ V.I. CODE ANN. tit. 12 §§ 181–198 (implementing the Clean Water Act).

²⁷⁴ *Id.* at § 182(f) (defining “Waters of the United States Virgin Islands”).

²⁷⁵ V.I. CODE ANN. tit. 12 § 184-2(102); *see also* 29 V.I.C. § 3-225(55A) (defining “Gut” as “A natural or constructed waterway or any permanent or intermittent stream”).

²⁷⁶ V.I. CODE ANN. tit. 12 § 185(a).

²⁷⁷ V.I. CODE ANN. tit. 12 § 187(b); V.I. CODE ANN. tit. 12 § 182(h) (“‘Commissioner’ means the Commissioner of the Department of Planning and Natural Resources, or his designee.”).

²⁷⁸ *Id.*

²⁷⁹ V.I. CODE ANN. tit. 29 § 3-226(p) (“Guts and drainage channels which exist and which are indicated on the General Development plan or zoning maps of the Virgin Islands are essential for the maintenance of the health and general welfare of the people of the Virgin Islands. Any encroachment upon, filling or destruction of these guts or drainage channels, unless approved by the Department of Planning and Natural Resources, is a violation of this subchapter.”).

of the people of the Virgin Islands, and prohibits “[a]ny encroachment upon, filling or destruction of these guts or drainage channels” without approval.²⁸⁰ Approval in this context comes from the Planning Office.²⁸¹ In addition, the Code calls for buffers to restrict activities adjacent to, but not within, guts.²⁸² The Code also outlaws cutting any trees or vegetation within thirty feet of a watercourse.²⁸³ Despite this law, there is evidence that these activities have occurred in direct violation of the Code.²⁸⁴ Enforcing this provision may be especially difficult since, lacking some of the traditional indicia of wetlands and watercourses such as hydric soils and high water marks, guts do not lend themselves to easy jurisdictional determinations.

The regulation of ephemeral and intermittent streams varies from state to state, and any detailed analysis is beyond the scope of this Article. In 2014, Zollitsch & Christie conducted such an analysis. Like the Virgin Islands, the vast majority of states include all streams in their definitions of “waters of the state.”²⁸⁵ About half of these states then go on to further define “streams.”²⁸⁶ Most of these definitions break the term down into “perennial,” “intermittent,” or “ephemeral.”²⁸⁷ At least ten states regulate only perennial and intermittent streams,²⁸⁸ leaving out ephemeral streams. Nonetheless, at least thirty-six states regulate “at least a portion of ephemeral [streams] at least some of the time.”²⁸⁹ Overall, Zollitsch & Christie contend, with some exceptions, that states

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Maximilian Merrill, *Riparian Buffers: The Lack of Buffer Protection Policies and Recommendations to Expand Protection*, 30 J. ENVTL. L. & LITIG. 65, 68 (2015).

²⁸³ V.I. CODE ANN. tit. 12 § 123 (a) (“No landowner or other person shall, except as provided in this Chapter, encourage, procure, cause or aid in the cutting or injury of any tree or vegetation within 30 feet of the center of any natural watercourse, or within 25 feet of the edge of such watercourse, whichever is greater.”). Section b makes it clear that this prohibition applies to guts. *Id.* at (b) (“For purposes of this Chapter, a natural watercourse means any stream with a reasonable well-defined channel, and includes streams which have a permanent flow, as well as those which result from the accumulation of water after rainfall and which regularly flow through channels formed by the force of the waters.”) (emphasis added).

²⁸⁴ GARDNER ET AL., WATERCOURSES, *supra* note 4, at 45 (“A computer simulation carried out by the Conservation Data Center during this project showed that several homes were well within the 30ft. buffer zone (set in law) along the Bonne Resolution Gut.”).

²⁸⁵ ZOLLITSCH & CHRISTIE, *supra* note 8, at 2.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ ZOLLITSCH & CHRISTIE, *supra* note 8, at 20.

tend to regulate streams as much as the Corps does, if not more.²⁹⁰ At least twenty-four states employ supplemental procedures that go beyond those employed by the Corps.²⁹¹ The trend seems to reflect increasing regulation for intermittent and ephemeral streams, presumably in an effort to better manage water quality and other concerns at the state level. Should EPA's WOTUS rule come into force in its current form, it is likely this regulatory landscape will shift, though it is uncertain in what direction. When free from federal regulation, some states may abandon further regulation, preferring to be consistent with federal law. Other states may decide to step in to fill the void.

V

POLICY RECOMMENDATIONS

This Article examined the current legal status of guts in the Virgin Islands from both proprietary and regulatory standpoints. The ephemeral nature of guts and their ecological and cultural significance stand in contradistinction to one another. Elsewhere in the United States, similar geomorphic features would be marginalized, as evidenced by the recent determination of the EPA to exclude erosive features, like guts, from the regulatory ambit of the Clean Water Act. But, in the Virgin Islands, guts serve to convey all of the flowing water on the islands; they also serve to literally convey the people of the Virgin Islands, by means of logical footpaths through difficult terrain, down to the beaches and marine waters that have sustained Virgin Islanders since “time immemorial.” Arguably, it is because of their importance that guts deserve special scrutiny in the law.

The Virgin Islands Code suggests that guts are “public places” and “rights of way,” but the legal basis for these conclusions has not been systematically addressed through titling, or even in the courts.²⁹² In addition, the Supreme Court of the Virgin Islands has stated in simple

²⁹⁰ *Id.* at 3 (“Only Delaware and Maryland indicate that they delineate slightly less than the Corps.”).

²⁹¹ *Id.*

²⁹² This might be challenging because of the land records. *See, e.g., Malloy, supra* note 160, at 179 (“[T]he last century has seen significant changes in the administration of the Territory—transitioning from a Danish colony to a U.S. territory, first under the administration of the Navy, then the Department of the Interior, then attaining greater local autonomy—providing countless opportunities for the loss of records and the neglect of certain governmental functions.”).

terms that the Territory's loss of historical records "should not prejudice Virgin Islanders' right to the use of historically public rights-of-way that have existed for centuries."²⁹³ In addition to necessitating a "call to arms" for legal scholars to resurrect, reclaim, translate, and preserve the Virgins Islands' legal history, these legislative and judicial public policy determinations lend credence to broader arguments that even guts on private property may be impressed with a public purpose that the law can recognize. Any analysis of property law in the Virgin Islands inevitably takes a turn to continental Europe, and the colonial heritage of Denmark. What was public in Denmark at the time of transfer in 1916 would likely be considered public in the Virgin Islands, regardless of title records. But chronically dry streambeds do not occupy a prominent role in the geomorphology of Denmark, and Denmark's deference to private property's core principle of the "right to exclude" stands in contrast to the expansive "right to roam" found elsewhere in Scandinavia and Europe. Even so, there is evidence in the judge-made law of Denmark that the law deferred to the public in disputes over paths that have been used since "time immemorial."

It may be that this is a doctrinal approach shared by both the common law and civil law; one where the specific law applied is less important than whether any law is applied. Virgin Islands courts have recognized two legal doctrines embedded in the common law, but that may be trans-systemic, both owing their origins to ancient Rome. The Public Trust Doctrine and the Customary Use Doctrine are asserted in the Virgin Islands, and both trace their lineage to continental Europe. In addition, a number of U.S. states assert these doctrines to ensure public access over private property where it makes sense to do so. Most analogous to this are decisions undergirded by statutes in Montana and Utah, giving the public access to non-navigable (hence privately owned) streams. A similar result could be attained for guts, or at least those guts where public use can be consistently demonstrated over time.

Beyond their cultural significance, guts play a key role in the ecology of the Virgin Islands. This role has been documented by science and recognized in the law. Here, the federal role is diminished due to the ephemeral nature of guts. However, the Virgin Islands has the authority to extend its jurisdiction over water resources beyond that covered by federal law, particularly to guts, and has an evidence-based, public policy rationale to do so. Indeed, the broad definition of "waters

²⁹³ *Malloy*, 61 V.I. at 179 (V.I. 2014).

of the Virgin Islands” suggests it has done so. That definition could be amended to specifically include the term guts in its laundry list of waters, thereby removing any doubt of their status. The Virgin Islands also treats guts as a matter of land use importance through its land use and subdivision code, prohibiting activities that affect guts without a permit. In addition, the Code creates a regulatory buffer that extends beyond the erosive impression guts make on the landscape. It may be that these provisions could be revisited to clarify and tighten the language, perhaps interjecting a science-based formula for establishing the limits of guts (in the absence of the traditional indicia of hydric soils and an ordinary high water mark).

From a regulatory standpoint, what may be lacking is enforcement, which is compounded by regulatory uncertainty. The definition of “natural watercourse” in the buffer section, prohibiting cutting or injuring certain trees, could also be improved. Specifically, the term “regularly” flows should give us pause.²⁹⁴ This definition could be amended to remove the term to better encompass guts in this definition, or the phrase could be modified to encompass watercourses that “regularly flow after rainfall events.” Alternatively, other more protective gut-specific riparian buffers could be established in the Virgin Islands.²⁹⁵

The Virgin Islands could also adopt regulations or legislation identifying special protection areas or special management zones for guts based on their unique characteristics.²⁹⁶ FEMA flood zones could offer one vehicle for delineation. Coupling regulatory justifications with management-based incentives might make both regulation and enforcement more palatable.²⁹⁷ This option might be especially suitable for the guts that the GVI has identified as guts of interest.²⁹⁸ Such incentives might include prioritization of land purchases, including

²⁹⁴ V.I. CODE ANN. tit. 12 § 123.

²⁹⁵ See NATIONAL RESEARCH COUNCIL, *supra* note 269, at 293.

²⁹⁶ *Id.* at 238–39.

²⁹⁷ *Id.* at 227 (“Private owners of riparian lands typically have only limited motivation to use these areas in a manner protective of their functions. In the absence of improved education about riparian functioning, legal strategies for protecting the ecological value of privately owned riparian lands must be based either on implementing regulatory requirements or on providing special incentives.”).

²⁹⁸ GARDNER, A STRATEGY FOR MANAGEMENT OF GUTS IN THE U.S. VIRGIN ISLANDS, *supra* note 36, at 23.

less-than-fee acquisitions (conservation easements),²⁹⁹ property tax relief, subsidized loans or grants for restoration, landowner liability relief where privately owned guts provide public access, and technical assistance.³⁰⁰

CONCLUSION

While Virgin Islands law already includes some protections for guts, the Territory lacks a cohesive policy framework and plan for their management.³⁰¹ A recent report identified several steps the Territory should take in order to manage its guts,³⁰² including consolidating the policy framework for guts.³⁰³ The report also recommended developing new institutional arrangements, establishing management-focused research interventions, and improving enforcement mechanisms.³⁰⁴ These recommendations are steps in the right direction for developing a cohesive, effective management and protection strategy for the Territory's guts. By comprehensively addressing both the proprietary and regulatory status of guts, the authors hope that this Article will inform that effort.

²⁹⁹ V.I. CODE ANN. tit. 12 §§ 601–607, KLOPF, *supra* note 190, at 45 (“There are some federal conservation programs including the Forest Legacy Program, the Wetlands Reserve Program, the Farm and Ranchland Protection Program, and the Farmland Protection Program, which explicitly authorize the acquisition of conservation easements. The Virgin Islands is eligible to participate in each of these programs.”).

³⁰⁰ Proponents of this approach argue that, “incentives promote active management and can motivate landowners of ecologically sensitive lands to restore or protect such lands.”

³⁰¹ *See supra* Part II.

³⁰² *Id.*

³⁰³ *Id.* at 14.

³⁰⁴ *Id.* at 6.