

Options for 2025-2026 Legislative Session

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SCHOOL *of* LAW



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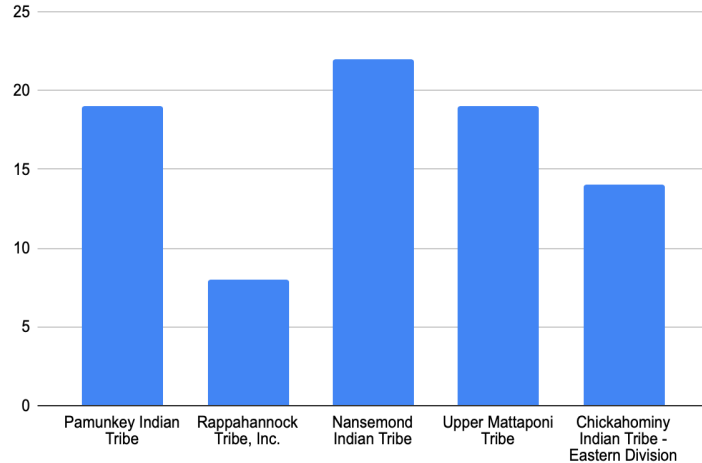
- Tribal Consultation
- Treaty Rights
 - Land Tax and Tax Exemptions
 - Hunting/Fishing Rights
 - Car Tax
- Tribal Jurisdiction

OLD BUSINESS

CONSERVATION EASEMENTS (LETTER FROM GLYMPH):

- **Adding Federally Recognized Tribes to definition of “Public Bodies”?**
 - “I believe that adding Virginia Tribes to the definition of a public body is consistent with the purposes of the Open-Space Land Act to allow governmental entities to hold conservation easements”
- **Are there differences in the tax benefits available to property owners whose land is subject to either an open-space easement or conservation easement ?**
 - “The answer is no. The federal and state tax benefits are available on equal terms for landowners who grant easements under the Conservation Easement Act or the Open-Space Land Act.”
- **Adding “cultural preservation” to the purposes of Open-Space Easement?**
 - “In my opinion, “cultural preservation” falls under “historical” preservation in the current code. However, if commission members are interested, this addition would be consistent with VA Code purposes and intentions to promote historic resource preservation.

IN STATE TUITION UPDATE:



Number of out-of-state Tribal High-School Aged Children (14-18)

- **5** tribes responded to survey.
- Per current survey responses, **82** Out-of-State Tribal High-schoolers (age 14-18) /4 per year of high-school = approx. **21** out-of-state high school graduates per year.
- Survey did not ask whether these children would, in fact, want to attend Virginia schools.
- No direct fiscal impact to state budget.
- Will inquire further re current attendance, and university concerns.

INDIAN CHILD WELFARE ACT UPDATE:

- Currently, and unlike other many other states, not incorporated into state law.
- Some stakeholders expressed concern about implementation and state level understanding.
- The Uniform Law Commission is developing model state legislation.
- Commission expects to conclude work by July of '26.

NEW BUSINESS

Va. CONSULTATION: Code Sec. §2.2-401.01

- ***Establishes Ombudsman for Tribal Consultation who ...***
 - Develops a list of localities in which tribes shall be consulted. § 2.2-401(B)(1).
 - Assists Department of Environmental Quality, Department of Conservation and Recreation, Department of Historic Resources, and Virginia Marine Resources Commission in developing consultation policies. § 2-401(B)(3).
 - Makes recommendations as to other permits and reviews that should require consultation. § 2-401(B)(4).

**Dept.
Environmental
Quality**
Va. Code Ann. §
10.1-1186.3:1

**Dept.
Conservation and
Recreation**
Va. Code Ann. §
10.1-104.02

**Dept.
Historic
Resources**
Va. Code Ann. §
10.1-2205.1

**Virginia Marine
Resources
Commission**
Va. Code Ann. §
28.2-104.01

STAKEHOLDER INPUT

- Current statute is the result of much work on the part of tribes and legislature and gives a lot of authority and discretion to Ombudsman.
- New consultation policies have not received official approval yet.
- Too soon to make major changes.
- Modest amendments might be helpful, including adding VDOT to list which has fed. legal obligation, and long history, to work with tribes.
- Other kinds of **notice/alert** provisions could be addressed:
- **Worth noting:** Other states have general statutes requiring each agency work with the tribes in the state. *See e.g.* RCW 43.376.020

EMERGENCY PLANNING AND NOTIFICATIONS

Background:

- By statute, VDEM required to work with “political subdivisions” and other “public and private entities”.
- Legally, Tribes not on list of government bodies covered under **Virginia Department of Emergency Management** statutes (see e.g. Va. Code Sec.44-146.18 and following).
- Practically, VDEM lists tribes as partner on website, and some tribal leaders report partnering.
- VDEM partners in different ways depending on needs/resources of the tribe.

POTENTIAL LEGISLATION

- **Add Virginia Department of Transportation to Consultation Statute**
- **Add Federally Recognized Tribes to list of VDEM partners.**
 - **Benefits and obligations come with this.**

INCORPORATING TREATY RIGHTS INTO STATE LAW

BACKGROUND



Treaty of Middle Plantation (1677)

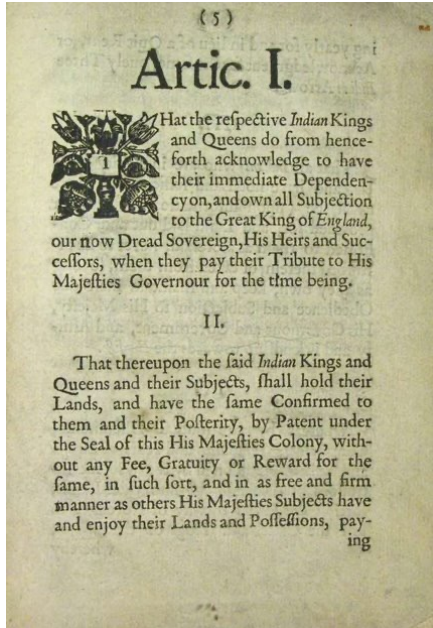
- Signed by England and several tribes to end hostilities after Bacon's Rebellion.
- Includes 21 articles potentially providing basis for various rights

Why is it relevant today?

Virginia still recognizes Treaty's validity, so it has been referenced in recent state practice and continues to carry historical and legal significance. Its terms have been cited in agency opinions and litigation.

Not proposing explicit reference to treaty in Code.

POTENTIAL RIGHTS TO CODIFY

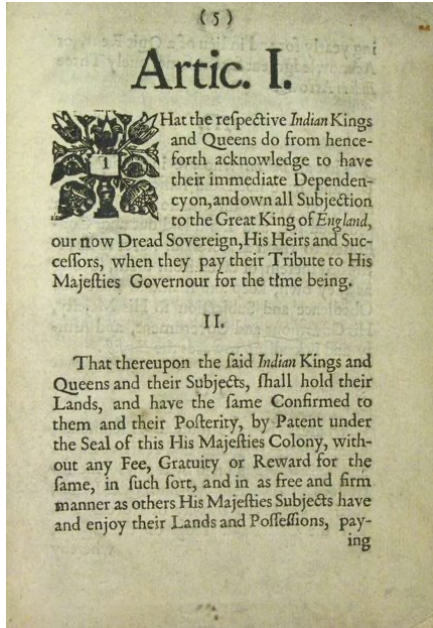


- **Article II:** Land holding guarantee and tax exemption.
- **Article VII:** Hunting, fishing, and gathering easements on "English land."

POTENTIAL LEGISLATIVE IDEAS

1. **Utility Tax Exemptions**
2. **Sales and use Tax Exemptions**
3. **Property Tax Exemptions**
4. **Car Tax Clarification/Expansion**
5. **Watercraft Tax Exemption**
6. **Expanded Fishing/Hunting Licensing**
7. **Required/Updated Training for Gamewardens**

ARTICLE II: LAND RIGHTS AND TAX EXEMPTION



"[Indians and their posterity] shall hold their Lands . . . without any Fee, Gratuity or Reward for the same. . . paying yearly for and in lieu of a Quit Rent, or Acknowledgment for the same, onely Three Indian Arrows."



BACKGROUND: VA TAX COMMISSIONER OPINION:

"Plainly, the agreement between the Crown and the Tribes was that in consideration for the Tribes submitting to the King, they would receive title to their lands without payment, and agreed to pay three Indian arrows as a yearly tax (i.e. quit rent). The waiver of "fee, gratuity or reward" was not in reference to an ongoing exemption from all potential excise taxation, but rather a waiver of purchase price. The quit rent, on the other hand, was waived and the Crown agreed to accept three Indian arrows in satisfaction thereof"

<https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/22-8>

BACKGROUND: FEDERAL LAW AND STATE TAXES

- Many state taxes **do not apply on federal reservations/lands held in trust by the federal government.**
 - States can choose to exempt tribes, even state recognized ones, from taxes.
 - State taxing jurisdiction can also be preempted by federal law or treaty rights
 - When most taxable activities occur off Indian land, then states may tax Indians in common with others.
- **Outside of Indian country, Indians are subject to nondiscriminatory state taxes,** except when federal law dictates otherwise. See Mescalero Apache Tribe v. Jones,
 - **Specific treaty provisions, however, can serve as a basis for state tax exemption outside of Indian country.**

BACKGROUND: TYPES OF TRIBAL LAND

- **Reservation:** A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.
- **Trust Lands:** Trust land is territory, whereby one party agrees to hold title to the property for the benefit of another party. Placing tribal land into a trust is the process where the Department of the Interior acquires the title to a land and holds it for the benefit of a tribe or individual tribal members.
- **Lands in Fee Simple:** Fee land is under complete control of its owner, which can be an individual or an entity such as a tribe, who holds the title to it. Fee simple ownership is the highest form of property possession. The owner can use the land for any legal purpose.
- **Tribal Service Areas:** A designated region approved by the BIA within which the tribe is eligible to provide federal services such as housing assistance, law enforcement, emergency management, medical care, and other functions.

BACKGROUND: CURRENT TRIBAL AND LOCAL GOV'T TAX EXEMPTIONS

Some Current Exemptions for Tribes

- Retail and Sales Tax on Reservation (**23 VAC 10-210-750**)
- Employees of Indian Tribes (**§ 60.2-507.1**)
- Land Tax on Reservation Land – Federal Preemption

Current Tax Exemptions for Local Governments:

- "Political subdivision" means a county, city, or town of the Commonwealth of Virginia.(§ 53.1-95.3)
 - Watercraft Tax (§ 58.1-1404)
 - Car Tax (§ 58.1-2403.2)
 - Land Tax Exemption (§ 58.1-3606.)
 - Utility Tax (§ 58.1-3816.2)
 - Sales and Use Tax (§ 58.1-609.1)

BACKGROUND: VIRGINIA AG OPINIONS ON TAX EXEMPTIONS

Virginia Attorney General's office has issued opinions on scope of exemption, generally requiring untaxable activity to happen on reservation land. (see Va. Dep't Taxation P.D. 20-113)

- **No state and local taxes** for tribal members "so long as they follow up their pursuits *upon the reservation* (1917 Op. Va. Att'y Gen. 160) "While not on a reservation, Tribes and members thereof are subject to state taxation in the same manner as all other individuals and businesses in the Commonwealth"
- **No locality license tax** on motor vehicles garaged *on reservation* (1956-1957 Op. Va. Att'y Gen. 183-185)
- Personal property owned by a deceased member of the tribe, which was located *on the reservation*, was not subject to **probate tax**, whereas property located *off the reservation* was. (1969-1970 Op. Va. Att'y Gen. 277-278)
- **Sales made by members of the tribe to other members of the tribe**, which occurred *on the reservation*, were not subject to retail sales and use taxes. (1970-1971 Op. Va. Att'y Gen. 277)
- **State and Local Electric Utility Consumption Tax on Reservations:** "Therefore, it is my opinion that the consumption tax on electricity may not be collected from Pamunkey and Mattaponi tribal members who live on the respective Indian reservations for electricity consumed on those reservations "(2003 Op. Va. Att'y Gen. 03-018)

RECOMMENDATION - UTILITY TAX EXEMPTION – CODIFICATION/EXPANSION

- Options for Exemptions for Utility Taxes on Reservation –
 - Narrow:
 - Codifying VA AG Opinion that Consumption Tax on Electricity is exempt on Reservation
 - Broader
 - Utility exemption to include Trust Land outside of reservation
 - AND
 - Applying Local Government Exemption to Tribal Government
 - **Local Government Exemption** : § 58.1-3816.2. “...The governing body of any county, city or town may exempt utilities consumed on all property that has been designated or classified as exempt...”

RECOMMENDATION: SALES AND USE TAX EXEMPTIONS:

- Include VA Federally recognized tribes into the Local Government exemption for “tangible personal property for use or consumption by the Commonwealth, any political subdivision of the Commonwealth, or the United States”. § 58.1-609.1.
- **Code already includes stipulations:**
 - “Not apply to sales and leases to privately owned financial and other privately owned corporations chartered by the United States”
 - “Not apply to tangible personal property which is acquired by the Commonwealth or any of its political subdivisions and then transferred to private businesses for their use in a facility or real property improvement to be used by a private entity or for nongovernmental purposes...”

BACKGROUND: LAND TAX EXEMPTION

- Tribal Land in Reservation or held in Trust is not taxed by state and federal governments.
- However, tribes may own considerable amounts of land that are in the process moving into trust.
- Other states have enacted legislation that exempts tribes from land tax on properties in the process of moving into trust or used for government services.
 - Montana – Land in process of conversion to Trust
 - Temporary Tribal Property Tax Exemption: Exempt if “the United States department of the interior, bureau of Indian affairs, has determined that the initial written request or trust application submitted by the tribe is complete” and “a decision on the trust application is officially pending before the United States department of interior, bureau of Indian affairs”.
 - Washington: Purpose-Based Exemption -
 - Exemption for property that “belongs exclusively to a federally recognized Indian tribe” and “used exclusively for essential government services.”

RECOMMENDATION: LAND TAX EXEMPTION EXPANSION

- **Options for Possible Land Tax Exemptions:**
 - Property Tax Exemption for land held in Fee Simple outside of the reservation, prior to going into trust.
 - Requirements for the application to be submitted/in process.
 - Possible time limit on number of years.
 - Property Tax exemptions mirroring Local Government property tax exemptions:
 - § 58.1-3606: "...the following classes of real and personal property shall be exempt from taxation: 1. Property owned directly or indirectly by the Commonwealth, or any political subdivision thereof..."
 - Could include a purpose requirement: "used for government services"

BACKGROUND: CAR TAX:

VA Code – Car Tax: § 58.1-2403. Exemptions.

“No tax shall be imposed as provided in § [58.1-2402](#) if the vehicle is:

...

2. Sold to or used by the Commonwealth of Virginia or any political subdivision thereof;

....

4. Registered to any member of the Mattaponi, Pamunkey, or Chickahominy Indian tribes or any other recognized Indian tribe of the Commonwealth **living on the tribal reservation.**”

Important to note:

- As it stands, this only benefits explicitly named tribes or members living on reservation.
- Confusing for tribal members and car salesmen.

CAR TAX CLARIFICATION - OPTIONS

- **Clarification on Tribes–**
 - Include names of other VA Federally Recognized Tribes
- **Expansion/Clarification of service area:**
 - Establish a method of determining “living on a reservation” – considering land in-trust, updated reservations.
 - “Service Area” rather than reservation.
- **Removing location requirements:**
 - Vehicle of any member of a Virginia Federally Recognized Tribe.
- **Tribal Government Vehicles –**
 - Vehicles purchased by the tribe in order to carry out tribal government purposes – Local Government currently has this exemption.

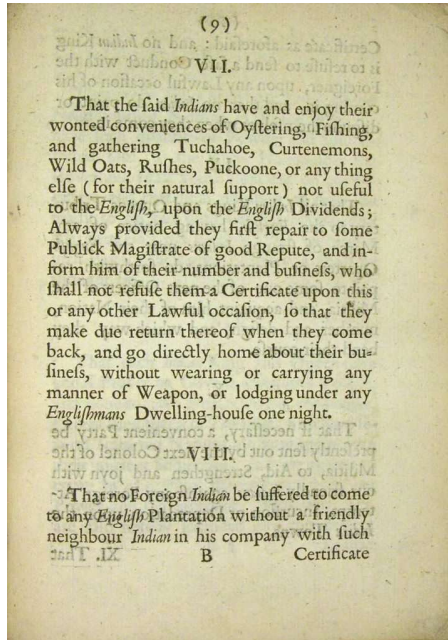
BACKGROUND: WATERCRAFT SALES AND USE TAX EXEMPTIONS

- Tax on watercraft purchase (§ 58.1-1402)
- State and Local Government Exemptions for Watercraft (§ 58.1-1404. Exemptions)
 - “Any watercraft sold to or used by the United States or any of the governmental agencies thereof or the Commonwealth of Virginia or any political subdivision thereof shall be exempt from the tax imposed by this chapter.”
- Other states however have tax exemptions for goods and services used directly in tribal fishing, hunting, and gathering, with agency forms for documentation. See Wash. Admin. Code 458-20-192 (2023)

RECOMMENDATION: WATERCRAFT TAX EXEMPTION

- Local Government Exemptions for Watercraft Tax, applied to the tribes.
- Similar provision to Car Tax – providing exemptions.

ARTICLE VII: HUNTING, FISHING & GATHERING



"That the said Indians have and enjoy their wonted conveniences of Oystering, Fishing, and gathering Tuchahoe, Curtenemons, Wild Oats, Rushes, Puckoone, or anything else"

≡ BAY JOURNAL

Legal ruling challenges VA tribes' traditional fishing rights

By Leslie Middleton Oct 16, 2014 Updated Jun 17, 2020



Pamunkey Indian Goveer Miles frees an American shad from his net in the Pamunkey River, where fish are caught for hatchery operations. (Dave Harp)

BACKGROUND: CURRENT VA LAW

“I. No license to hunt, trap or fish shall be required of any Indian who habitually resides on an Indian reservation or of a member of the Virginia recognized tribes who resides in the Commonwealth; however, such Indian must have on his person an identification card or paper signed by the chief of his tribe, a valid tribal identification card, written confirmation through a central tribal registry, or certification from a tribal office. Such card, paper, confirmation, or certification shall set forth that the person named is an actual resident upon such reservation or member of the recognized tribes in the Commonwealth, and such card, paper, confirmation or certification shall create a presumption of residence, which may be rebutted by proof of actual residence elsewhere.”

V.A Code § 29.1-301. I

BACKGROUND: VA AG INTERPRETATIONS

Va. Attorney General has interpreted Treaty to exempt Indians from license requirements, with some qualifications:

"... it is my opinion that an Indian who habitually resides on an Indian reservation or an Indian that is a member of a Virginia recognized tribe who resides in the Commonwealth is **not required to obtain a license to fish in Virginia's inland waters, or to hunt or trap** in Virginia."

"It is also my opinion that members of the Virginia tribes that were parties to the Treaty of 1677 with England are **not required to obtain a license to fish or oyster** in Virginia's tidal waters **provided the activity is limited to harvesting for sustenance.**"

"Finally, it is my opinion that Virginia **Indians are bound by the trapping, hunting and fishing laws** and regulations of the Commonwealth regardless of whether they live on or off a reservation."

2013 WL 3864408 (Va.A.G.)

BACKGROUND: VA TRIBES' INPUT:

- Hunting and Fishing are important rights to recognize.
- Reported cases of game wardens not recognizing the tribal enrollment documents as hunting/fishing licenses and legal disputes arising from this.

HUNTING/FISHING LEGISLATION – EXPANSION OF LICENSING EXEMPTIONS:

- **Require/Update training on accepting Tribal Enrollment documents as Hunting/Fishing Licenses**
- **Oystering License Exemptions for Tribal Members –**
 - Current VA Code makes no exemptions for oystering specifically for Tribal Members
 - Separate licensing for oystering is generally required. § 28.2-501.
- **Commercial Fisherman's License –**
 - Currently, a commercial license is required for selling any fish caught - §28.2-241.
 - \$190 per license – Virginia Marine Resources Commission

JURISDICTION?

- Mostly a question of Federal Law.
- Tribal Courts still evolving in Virginia.
- Given number of other potential bills, recommend waiting on this until after '26 session.

DISCUSSION

- Consultation – Add VDOT?
- VDEM Amendments
- Utility Tax Exemptions
- Sales and use Tax Exemptions
- Property Tax Exemptions
- Car Tax Clarification/Expansion
- Watercraft Tax Exemption
- Expanded Fishing/Hunting Licensing
- Required/Updated Training for Gamewardens

NEXT MEETING DATE?