

Potential Topics for 2026 Legislative Session

Andrew Block, Thomas Ross, Mary Guardino,
Samer Saffarini



UNIVERSITY
of VIRGINIA

SCHOOL *of* LAW

REVIEW AND PREVIEW

Review:

- Began meeting last summer
- Developed legislative proposals (HB2134 and SB949) which now await action from Governor Youngkin.
 - Uniform Definitions
 - Sovereignty Statement
 - New Code Section

Preview:

- Provide preliminary information on potential legislative topics for Commission consideration.
- Ideally, Commission identifies priorities and sequence of meetings and topics.



1. Consultation
2. Treaty Rights
3. Car Tax
4. ICWA
5. Jurisdiction
6. Conservation Easements
7. Discussion

TRIBAL CONSULTATION

BACKGROUND

- Rooted in treaties and the trust responsibility.
 - "The history of the nation-to-nation relationship and negotiations between tribal nations and the United States, treaties and other intergovernmental agreements, and the trust responsibility distinguish tribal consultation from other consultation processes." 1 Cohen's Handbook of Federal Indian Law § 9.03 (2025)
- Sources of authority for consultation requirements (focused on federal level):
 - Treaties
 - Statutes
 - Executive Documents (executive orders, memoranda, policy)
 - International law
 - Tribal Law

FEDERAL CONSULTATION

- Main sources: (1) Federal Statutes and (2) Executive Orders
- Statutes: focus on cultural and resource protection
 - Judicially enforceable
- Executive Orders: Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000)
 - Directs federal agencies to have a consultation process for policies that may impact tribes. Referenced by Presidential memo as recently as 2022.
 - Not always judicially enforceable

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

SUMMARY

- Current statute is robust and the result of much work on the part of tribes and legislature but gives a lot of authority and discretion to Ombudsman.
- Any consideration by commission would be in addition to the current structure.
- Other states have general statutes requiring each agency work with the tribes in the state. *See e.g.* RCW 43.376.020

RESEARCH OPTIONS FOR THE COMMISSION

1. How, if at all, should the General Assembly expand consultation requirements for state/local agencies and federally recognized tribes? For example:
 - Add additional agencies?
 - Provide for a general obligation for all agencies?
 - Give more authority to the Ombudsman?

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.



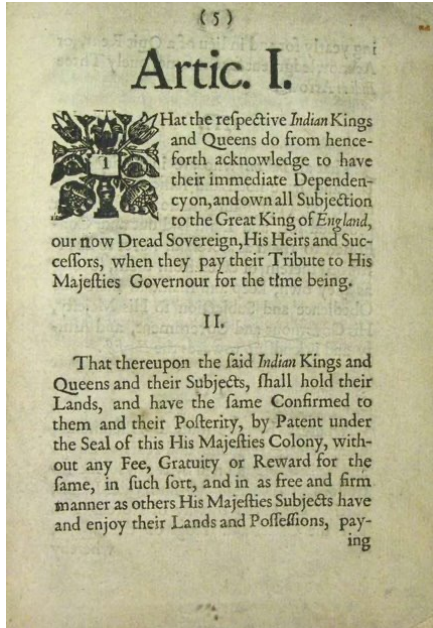
WHY SHOULD COMMISSION CONSIDER TREATY PROVISIONS?

Virginia recognizes Treaty as relevant and operative:

- Regularly referenced in opinions by Va. Attorney General and Tax Commissioner as recently as 2022
- Virginia conceded its validity in litigation: “. . . the Commonwealth agrees that the Treaty is valid . . .”
Alliance to Save the Mattaponi v. Commonwealth (Va. 2005)
- Still ceremoniously recognized.



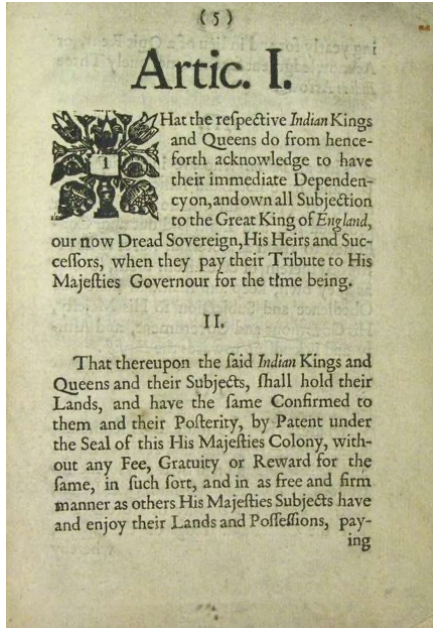
POTENTIAL TREATY PROVISIONS TO CONSIDER



Examples of provisions that have been historically referenced in legal and administrative contexts and may warrant further research or clarification in the code.

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

ARTICLE II: LAND RIGHTS AND TAX EXEMPTION



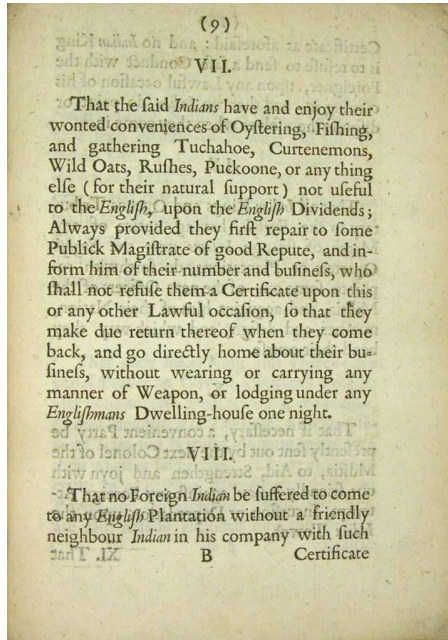
"[Indians and their posterity] shall hold their Lands . . . without any Fee, Gratuity or Reward for the same. . . paying yearly for and in lieu of a Quit Rent, or Acknowledgment for the same, only Three Indian Arrows."



ARTICLE II: LAND RIGHTS AND TAX EXEMPTION

- This article is subject of ongoing policy consideration.
- For example, Virginia Attorney General's office has issued opinions on scope of exemption, generally requiring exempt taxable 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)
 - 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)

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)

ARTICLE VII: HUNTING, FISHING & GATHERING

As with Article II, Article VII is subject of ongoing policy consideration:

- Va. Attorney General has interpreted application of Treaty to hunting and fishing regulations (2013 WL 3864408 (Va.A.G.)).
- Virginia Code exempts tribal members from having to purchase hunting and fishing licenses.

RESEARCH QUESTIONS

1. What is the full extent of Tribal hunting and fishing rights under the Treaty (beyond license exemption), or what should it be?
2. Should the Virginia Code clarify these rights beyond what is currently in state law?
3. Under what situations does, or should, the Treaty's apparent tax exemption apply?
4. Should the Virginia code clarify and specify these exemptions?

DMV/CAR TAX

BACKGROUND

- The Current Virginia Code grants a state vehicle tax exemption to Virginia Indian Tribes.
 - § 58.1-2403. Exemptions.
 - No tax shall be imposed as provided in § 58.1-2402 if the vehicle is:
 - 4. Registered to any member **or citizen** of the Mattaponi, Pamunkey, or Chickahominy Indian tribes or any other ~~recognized Indian tribe~~ **Virginia Indian Tribe** of the Commonwealth living on the tribal reservation.*
 - *strikethroughs part of pending HB2134
- Some confusion exists over the meaning of this provision, particularly with the impacts of federally recognized tribes, and the reference to *“living on the tribal reservation.”*

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 it is clear that 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..**

RESEARCH QUESTIONS

1. What was the intent of the "living on a tribal reservation" language and should this language be updated to account for various forms of tribal land ownership and trust agreements in Virginia.
2. Should the code language be updated to more clearly (i.e. should the General Assembly strike the specifically enumerated tribes) clarify that this provision applies equally to all Virginia recognized tribes?
3. How could, or should, the state tax vehicles purchased for tribal use?
4. Or should these vehicles be exempt?

INDIAN CHILD WELFARE ACT (ICWA)

25 U.S.C. §§ 1901-1963 (1988)

WHAT IS ICWA?

- A law that prioritizes placement of tribal children, who are the subject of child welfare proceedings, with tribal members.
- Congress passed the law in response to the repeated and disparate government removal of tribal children from tribes and reservations.
- Creates substantive and procedural protections against such removal of children.
- When does it apply?
 - Child custody proceedings that involve a statutorily defined "Indian Child"
 - "Indian child": "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe" 25 U.S.C. § 1903(4).
 - Applicable to federally recognized tribes. 25 U.S.C. § 1903(8)

JURISDICTION

- Jurisdiction: 25 U.S.C. §1911
 - **Exclusive Jurisdiction:** Tribes have exclusive jurisdiction over the custody proceedings of an Indian child domiciled in/residing on reservation land. 25. U.S.C. § 1911(a). Also, if the child is a "ward of tribal court." Id.
 - **Concurrent Jurisdiction:** Concurrent jurisdiction exists between the state and the tribe when an Indian child is not domiciled/does not reside on a reservation. 25. U.S.C. § 1911(b).
 - This means the state court "shall transfer" jurisdiction to the tribe if there is no objection by the parents. 25. U.S.C. § 1911(b).
- Note: Decisions of a tribal court in Indian child custody proceedings are entitled to full faith and credit. 25. U.S.C. § 1911(d).

SUBSTANTIVE & PROCEDURAL EXAMPLES

- **Requirement of notice:** to parent and relevant tribe(s) if "the court knows or has reason to know that an Indian child is involved" in an *involuntary proceeding*. 25 U.S.C. 1912(a).
- **Adoptive Placement preferences:** "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S. Code § 1915(a).
- **Requirement of "active efforts":** No foster care placement or parental rights termination unless demonstrated that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. 1912(d)
 - Higher standard than "reasonable efforts" standard in non-ICWA proceedings.

ICWA IN VA LAW

The following provision of the Virginia Code makes reference to ICWA:

Va. Code An. § 20-146.3. Application to Indian tribes.

§ 20-146.3. Application to Indian tribes.

- A. A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to this act to the extent that it is governed by the Indian Child Welfare Act.
- B. A court of this Commonwealth shall treat a tribe as if it were a state of the United States for the purpose of applying this article and Article 2 (§ 20-146.12 et seq.) of this chapter.
- C. A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this act must be recognized and enforced under Article 3 (§ 20-146.22 et seq.) of this chapter.

APPLICATION OF ICWA IN VA

- While ICWA is not incorporated by statute, the Virginia Department of Social Services has indicated that it works to comply with ICWA and provides guidance on compliance in its practice manual.
 - *See Child and Family Services Manual 2024*, Virginia Department of Social Services (Mar. 2025).
- In 2022, Attorney General Mark Herring opined that ICWA applies in VA.
- However, the Juvenile and Domestic Relations Court code sections (Va. Code Sec. 16.1-228 and following) contain virtually no mention of ICWA.

OTHER STATES HAVE INCORPORATED ICWA

- Comprehensive state ICWA laws" codified in 14 states by 2022. 1 Cohen's Handbook of Federal Indian Law § 15.01 (2025)
- Examples:
 - Oregon has enacted its own version of ICWA (ORICWA), with modifications. Oregon Laws 2020. ch. 14.
 - Michigan Indian Family Preservation Act (also modified). Mich. Comp. Laws §§ 712b.1 et seq.
 - Washington also has a version of ICWA in code. Wash. Rev. Code § 13.38

POTENTIAL RESEARCH QUESTIONS

1. Should VA more explicitly incorporate ICWA into state law?
2. If so, what is best legislative approach?
3. How should the code address newly formed tribal courts?

JURISDICTION & LAW ENFORCEMENT

Upper Mattaponi establishes tribal court, a historic first for Virginia

RADIO IQ | By Pamela D'Angelo
Published January 4, 2024 at 5:26 AM EST



▶ LISTEN • 1:36



BACKGROUND

- Upper Mattaponi recently set up first Tribal court system in Virginia
 - Nansemond Tribe is also planning to establish courts
- Raises questions: What authority do these courts have, and should the Virginia Code recognize this authority?
- Most often, though not always, tribal jurisdiction is tied to tribal land or tribal members.

CRIMINAL JURISDICTION

Federal law divides criminal jurisdiction in Indian country based on:

- (a) **Identity** of the offender and the victim (Indian or Non-Indian)
- (b) **Location** of the crime (Indian country or not)
- (c) **Type** of crime ("Major crime"; violation of Tribal code; etc.)

Tribal jurisdiction often overlaps with State and Federal jurisdiction, leading to situations of concurrent jurisdiction

CIVIL JURISDICTION: MEMBERS

Tribal civil jurisdiction focuses on whether parties are Tribal Members or Non-Members

- Generally, Tribes exercise "inherent authority" over Members and government functions unless Congress explicitly says otherwise
- Examples of civil jurisdiction
 - Family law and domestic relations involving Tribal members
 - Child welfare matters under ICWA
 - Administration of estates for Tribal members
 - Land use, zoning, and leasing on Tribal lands
 - Regulation of Tribal health, education, and economic programs
 - Civil regulation of Tribal enterprises and employment

PROPOSALS FOR COORDINATION

Full Faith and Credit Statutes

- Eases problems with overlapping jurisdiction by providing that State courts must defer to Tribal court decisions

PROPOSALS FOR COORDINATION

Cross-Deputization

- Agreements allowing State and Tribal law enforcement to extend authority across jurisdictions

What It Looks Like

- Tribal police officers may enforce State laws
- State or county officers may enforce Tribal laws (if permitted by Tribe)
- Agreements are formalized by memorandum

RESEARCH QUESTIONS

- How can or should Virginia courts recognize tribal court orders (full faith and credit) or tribal court jurisdiction?
- How can or should tribes and neighboring jurisdictions enter into “cross-deputization agreements” granting local law enforcement jurisdiction and authority on tribal land and tribal police authority to enforce state law.
- What land, if any, qualifies as "Indian country" for purposes of tribal court jurisdiction?
 - Will land status change in the near future as trust applications are processed by the Department of the Interior?

CONSERVATION AND OPEN SPACE EASEMENTS

TYPES OF "CONSERVATION" EASEMENTS

- Open Space Easements
 - Governed by the Open Spaces act,
 - Held by "Public Bodies."
- Conservation Easements
 - Governed by the Virginia Conservation Easements Act
 - Held by private individuals/groups
- ***these easements have similar purpose, but are held by different "holders"

BASICS OF OPEN SPACE EASEMENTS

- Voluntary legal agreement between a landowner and a government agency or land trust –permanently limits future development on land.
- Primary benefit–keeping the land in its natural state.
- Land is held by a public body.

HOLDERS

- Held by Public Bodies per Va. Code §10.1-1700 (**governed by open spaces act**).
- "Public body" means any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority.
- **Tribes are not included as public bodies.**

BASICS OF CONSERVATION EASEMENTS

- Exist to keep the land in its natural state, with the goal of allowing one's family to keep living/working there.
- Held by **private groups** - typically charitable trusts (like Ducks Unlimited)
- Primary benefit: Tax credits/relief

HOLDERS

- Governed by the **Virginia Conservation Easement Act §10.1-1009**
- Holders can be " (a) charitable corporation, charitable association, or charitable trust which has been declared exempt from taxation pursuant to 26 U.S.C. § 501(c)(3) and the primary purposes or powers of which include: (i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property.
- A conservation easement **shall be perpetual in duration** unless the instrument creating it otherwise provides a specific time. For all easements, the holder shall (i) meet the criteria in § 10.1-1009 and (ii) either have had a **principal office in the Commonwealth for at least five years, or be a national organization in existence for at least five years which has an office in the Commonwealth** and has registered and is in good standing with the State Corporation Commission. Until a holder has met these requirements, the **holder may co-hold a conservation easement with another holder** that meets the requirements.

CURRENT TRIBAL EXAMPLES

- Mattanock- Nansemond/Ducks Unlimited Easement Partnership
- Cross Swamp - Nansemond/Ducks Unlimited Easement Partnership

RESEARCH QUESTIONS

1. Should the General Assembly amend the code to allow federally recognized tribes to hold conservation easements, open space easements, or both?
2. What would be the best way to make this changes?

FINAL DISCUSSION

1. Consultation
2. Treaty Rights
3. Car Tax
4. ICWA
5. Jurisdiction
6. Conservation Easements
7. Other Topics?

FUTURE MEETING RESEARCH AGENDA?