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Protecting Pocahontas's World: The Mattaponi Tribe's Struggle Against Virginia's King William Reservoir Project

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PROTECTING POCAHONTAS'S WORLD: THE MATTAPONI TRIBE'S STRUGGLE AGAINST VIRGINIA'S KING WILLIAM RESERVOIR PROJECT

Allison M. Dussias *

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I. Introduction

It was difficult for the Indians, who knew their world thoroughly, to believe that these blustering foreigners who could not even feed themselves actually intended to make Virginia into an outpost of English culture.¹

I have caused to be drawn up these ensuing Articles . . . for the firm Grounding and sure Establishment of a good and just Peace with the said Indians. And that it may be a Secure and Lasting one (Founded upon the strong Pillars of Reciprocal Justice) by Confirming to them their Just Rights [N]o English, shall Seat or Plant nearer then Three miles of any Indian town²

Who Ever Said "Life As An English Colonist was Easy." Indians, Fires & Bears, Oh My.³

In 2007, the Commonwealth of Virginia celebrated the 400th anniversary of the founding of the English settlement at Jamestown. State tourism authorities operated in high gear, determined to wring the maximum number of dollars from the occasion. Like the story of the Pilgrims and the first Thanksgiving, the story of Jamestown – and particularly the story of the “Indian princess,” Pocahontas, saving Captain John Smith – looms large in the nation’s historical imagination. The 1995 Disney animated film *Pocahontas*,⁴ along with whatever formal education taught regarding colonial Virginia, immortalized the Pocahontas story in the minds of American children. The dubious rescue story was most recently brought to

1. HELEN C. ROUNTREE, *POCAHONTAS'S PEOPLE: THE POWHATAN INDIANS OF VIRGINIA THROUGH FOUR CENTURIES* 29 (1990) [hereinafter ROUNTREE, *POCAHONTAS'S PEOPLE*].

2. Treaty at Middle Plantation with Tributary Indians After Bacon’s Rebellion, May 29, 1677, reprinted in 4 *VIRGINIA TREATIES, 1607-1722*, at 82-87 (W. Stitt Robinson ed., 1983) [hereinafter *Treaty at Middle Plantation*].

3. HISTORIC JAMESTOWNE, <http://www.historicjamestowne.org/index.php> (last visited Apr. 23, 2012). The Jamestown site is owned and managed by the National Park Service and the Association for the Preservation of Virginia Antiquities, which was created because of “the need to save Jamestown Island, site of the first permanent English settlement in America.” *APVA Fact Sheet*, PRESERVATION VIRGINIA (Feb. 2000), <http://preservationvirginia.org/pressroom/pdf/apvafact.pdf>.

4. *POCAHONTAS* (Walt Disney Pictures 1995). A 1998 direct-to-video sequel, *Pocahontas: Journey to a New World*, provided a fictionalized account of Pocahontas’s life in London. *POCAHONTAS: JOURNEY TO A NEW WORLD* (Walt Disney Pictures 1998).

the screen for adult audiences in *The New World*, marketed as a drama about the clash between Native Americans and settlers.⁵

As tourism promoters trumpeted the significance of the Jamestown settlement in the development of “who and what we are as a people and as a nation,”⁶ others envisioned the event as an opportunity to look beyond the experiences of the English settlers to contemplate the experiences of the other side in the colonial “clash of cultures.” For the Indian tribes whose ancestors called Virginia home for thousands of years before Captain John Smith and his compatriots set foot on tidewater soil, the Jamestown anniversary was more than just an occasion to revisit their ancestors’ experiences. It also provided an opportunity to focus public attention on the Tribe’s present experience. From this perspective, the Jamestown settlement does indeed teach important lessons about “who and what we are as a people and as a nation.” But these lessons are not the tourism promoters’ tales of the brave and resourceful colonists who remade their lives in a sometimes hostile “new” land and ultimately rose up against English oppression to form an independent nation. Rather, these lessons are about Americans as a people and a nation that embraces principles of dispossession and denial – dispossession of Indian land and other resources, denial of tribal legal rights, and, at times, denial of the very existence of the Virginia tribes themselves.

This article examines the Mattaponi Tribe of Virginia’s efforts to combat the latest threat posed to its land, waterways, and continued existence by the Jamestown colonists’ descendants – the King William Reservoir Project. This examination reveals how one can aptly view this threat as a repetition and continuation of past experiences, dominated by seemingly never-ending non-Indian demands for tribal resources and skeptical treatment of tribal claims for continued existence as peoples entitled to the right of self-determination and to preservation of their homeland and sovereignty. The Tribe, whose ancestral members and territory formed a part of the seventeenth century Powhatan paramount chiefdom, engaged in litigation

5. THE NEW WORLD (New Line Cinema 2005); see also *New Line Cinema: The New World*, NEWLINE.COM, <http://www.newline.com/properties/newworldthe.html> (last visited Apr. 23, 2012).

6. See *Historic Jamestown—Guided Tours*, U.S. NAT’L PARK SERV., <http://www.nps.gov/jame/planyourvisit/guidedtours.htm> (last updated Mar. 15, 2011). The National Park Service’s Jamestown website, for example, issues a rousing invitation along these lines: “Join such personalities as Rachel Stanton, Joan Peirce, John Rolfe, or Lady Yeardley to travel back in time to when the foundations of who and what we are as a people and a nation were laid.” *Id.*

aimed at preventing the construction of a 12.2 billion-gallon water reservoir, filled with water pumped from the Mattaponi River but used for the benefit of coastal Virginia cities. The proposed King William Reservoir Project would flood sacred and archaeological sites, and would threaten the existence of fish species upon which the Tribe has historically depended and which have been preserved from extinction through the Tribe's fish hatchery on its reservation along the Mattaponi River. Moreover, the project would infringe upon rights guaranteed to the Tribe by the Treaty at Middle Plantation of 1677, and would cause the greatest destruction of wetlands in the mid-Atlantic region since the enactment of the Clean Water Act.

As the Mattaponi Tribe struggles to protect its land and waters from outsiders' resource demands and to preserve and defend its existence as a tribe, age-old issues of Indian identity and tribal status emerge. As English settlement in Virginia expanded in the seventeenth century, the Tribe and other coastal Virginia tribes faced pressure to abandon their ways of life and assimilate into English society. The Tribe persevered on its reservation and refused to melt away into the surrounding non-Indian community.

Beginning in the early twentieth century, the Virginia tribes faced a new threat: an attempt at what might be termed "bureaucratic genocide" in the form of Virginia officials' decades-long effort to require all Virginia birth certificates to record everyone as either "white" or "colored," and thereby to deny the continued existence of Indians in Virginia. Virginia tribes today must still contend with the continuing effects of this now-repudiated policy as they seek formal federal government acknowledgment of their continuing existence as tribes. At a time when multiculturalism and ethnic identity are matters of much public discussion and debate, the Mattaponi Tribe's experience provides important historical and contemporary examples for continued exploration of these issues.

The dispute over the King William Reservoir highlights the difficulties that tribes encounter in their efforts to protect their treaty-guaranteed rights to land and subsistence resources, and to overcome threats to their enduring, culturally crucial connection with their environments. The Mattaponi Tribe's struggle provides just one example of the environmental issues faced by tribes throughout the United States, as well as an example of the pressures that competing non-Indian interests impose upon federal, state, and local officials, as they balance tribal rights and needs against the claims of their non-Indian constituents. The ultimate disposition of the land, water, and subsistence-related claims raised by the dispute provides insight into the willingness of government officials to respect the rule of

law as embodied in treaty and common law rights, as well as their willingness to respect differing views regarding the proper use of land and water resources.

Part II of this article draws upon the work of ethnohistorians, archaeologists, anthropologists, and legal scholars to examine the Mattaponi Tribe's geographical, historical, cultural, political, and legal landscape. This examination highlights the aspects of the physical environment that have long been crucial to Mattaponi life, and documents the survival of the Mattaponi Tribe in the face of efforts aimed at dispossessing the Tribe of its land and other resources and at denying its continued existence. Part III analyzes the King William Reservoir Project and the regulatory process that led to its ultimate approval by federal and state officials. Part IV follows the Tribe's path in the litigation that culminated in the project's derailment. Part V provides an analysis of the issues raised, but not definitively answered, during the litigation surrounding the project. Part VI offers concluding thoughts on the Tribe's struggle to protect its homeland.

II. The Past Is Always with Us: Mattaponi Dispossession and Persistence

[T]he so-called lessons of history are for the most part the rationalizations of the victors. History is written by the survivors.⁷

The King William Reservoir Project called for the construction of a 78-foot-high dam and a 1,500-acre reservoir in King William County, and was expected to result in the destruction of more than 400 acres of wetlands and 21 miles of streams.⁸ In addition, the project would inundate 875 acres of upland wildlife habitat and would adversely impact another 105 acres of wetlands located downstream of the dam.⁹ Over 150 archaeological sites, most of which are Indian sites, are located in the area.¹⁰ Using a water intake and pumping station, the project would extract up to 75 million

7. MAX LERNER, *IT IS LATER THAN YOU THINK: THE NEED FOR A MILITANT DEMOCRACY* 255 (1938).

8. *Mattaponi Indian Tribe v. Va. Dep't of Env'tl. Quality ex rel. State Water Control Bd.* (*Mattaponi III*), 541 S.E.2d 920, 922 (Va. 2001); N. ATL. DIV., U.S. ARMY CORPS OF ENG'RS, RECORD OF DECISION MEMORANDUM FOR PERMIT APPLICATION NUMBER 93-0902-12 (2005), available at <http://www.nad.usace.army.mil/kwr/decision.pdf> [hereinafter ACE N.A. DIVISION DECISION].

9. *Mattaponi III*, 541 S.E.2d at 922.

10. ACE N.A. DIVISION DECISION, *supra* note 8, at 186.

gallons of water each day from the Mattaponi River, which flows along the border of the Mattaponi Indian Reservation.¹¹ Such withdrawals would threaten prime shad spawning grounds, and would possibly alter salinity patterns in a way that affects other aquatic animal and plant species as well.¹² The project would be located within three miles of the Mattaponi Reservation.¹³ In short, this was a major project, the impact of which on the area's land, water, people (both living and dead), flora, and fauna would be difficult to overstate.

The Mattaponi Tribe voiced its opposition to the reservoir project to local, state, and federal officials, and pursued litigation against the project in state and federal court. The Tribe explained that its opposition was based on a number of concerns about the impact of the project: the damage to archaeological and sacred sites, the negative impact on the shad population, the severe impact on the Tribe's treaty-protected hunting and gathering practices, the threat to the Tribe's religious practices and traditional ways of life, and the disproportionate impact on Native Americans resulting from the project's location.¹⁴

A 1677 agreement, intended to create an enduring peace between the Virginia colonists and the tribes upon whose land they settled, was at the center of the Mattaponi Tribe's legal struggle to protect the Mattaponi River and its homeland. The Treaty at Middle Plantation, entered into between "several Indian Kings and Queens" and Charles II (and on which the United States relied after achieving independence),¹⁵ reflected the historical and contemporary relations between the Virginia colonists and the signatory tribes. The Treaty recognized the importance and justness of protecting the tribes' land and other resources from non-Indian interference. To understand the significance of the reservoir project to the Mattaponi Tribe today and to explore the proper resolution of the conflict between tribal water rights and non-tribal water demands, it is necessary to examine the significance of the threatened resources to the coastal Virginia tribes, as

11. *Mattaponi III*, 541 S.E.2d at 922.

12. *See* *Mattaponi Indian Tribe v. Va. Dep't of Envtl. Quality ex rel. State Water Control Bd. (Mattaponi IV)*, 601 S.E.2d 667, 680 (Va. Ct. App. 2004).

13. *See* LERNER, *supra* note 7, at 671.

14. *See* NORFOLK DIST., U.S. ARMY CORPS OF ENG'RS, FINAL RECOMMENDED RECORD OF DECISION OF THE DISTRICT COMMANDER ON PERMIT APPLICATION NUMBER 93-0902-12, at 197 (2001), available at <http://www.nad.usace.army.mil/kwr/KWRFRRD.pdf> [hereinafter ACE DISTRICT DECISION].

15. *Mattaponi IV*, 601 S.E.2d at 671.

well as the history of the dealings between the tribes and the original colonists and their descendants.

A. Envisioning Pocahontas's World

*All my life, I've fished out there. From a little boy on up You had to eat the fish, you had to get out here and dig in the earth to get what you needed to live. . . . We wouldn't be here today without that river.*¹⁶

*So then here is a place, a nurse for soldiers, a practice for mariners, a trade for merchants, a reward for the good, and that which is most of all, a business (most acceptable to God) to bring such poor infidels to the knowledge of God and His holy gospel.*¹⁷

The native peoples of Virginia, including the ancestral members of the tribe that survives today as the Mattaponi Tribe, faced European encroachment on their lands and their world at an early date. This fact has not been lost on tourism promoters, who rely upon their state's "first in America" claims to lure tourists to Virginia.¹⁸ The coastal Virginia Indians who found would-be settlers within their territory were faced with increasing demands for their land and other resources from people whom they had at first welcomed hospitably. Indeed, these newcomers' very survival in the early years was dependent upon access – whether through trade or theft – to the products of Indian agriculture. The newcomers brought with them their own perspectives, as well as their own laws on land ownership and entitlement to natural resources. Tapping into indigenous knowledge of the land, water, climate, and other aspects of the environment of the "New World" of Virginia (and to the tangible benefits that resulted from this knowledge) was essential to the success of the colonial enterprise.

The first English arrivals met members of a number of tribes, collectively referred to by historians and anthropologists as the

16. Robert Little, *'We've Had Enough'; Mattaponi Tribe Cites 320-Year-Old Treaty to Thwart County's Reservoir Plans*, VIRGINIAN-PILOT (Norfolk, Va.), Apr. 6, 1997, at A2 (quoting Webster "Little Eagle" Custalow, Chief of the Mattaponi Tribe).

17. CAPTAIN JOHN SMITH'S AMERICA: SELECTIONS FROM HIS WRITINGS 17 (John Lankford ed., 1967) [hereinafter CAPTAIN JOHN SMITH'S AMERICA].

18. See, e.g., *Area Attractions*, VIRGINIA CAMPGROUNDS, http://virginiacampgrounds.org/area_att.php (last visited Apr. 23, 2012). Virginia's tourism website states that "Virginia's past is the beginning of the nation's history and heritage. From the first permanent English settlement of Jamestown in 1607 through the Revolutionary War and the Civil War, Virginia was where the nation originated . . ." *Id.*

“Powhatans” or “Powhatan Indians,” totaling at least 14,000 people.¹⁹ The Powhatans inhabited a 6,000-square-mile area corresponding to the coastal plain of Virginia today, extending from the Atlantic Ocean on the east to the fall line in the west, where Virginia’s east-west running rivers cease to be navigable.²⁰ Their lands extended northward to the Potomac River and southward roughly to the border between Virginia and North Carolina.²¹ The Powhatans spoke an Algonquian language²² like many other tribes of the East Coast, including another tribe that experienced early colonization, the Wampanoags of Massachusetts.²³ The Mattaponi, as one of the Powhatan tribes, enjoyed a way of life that was common to the tribes of coastal Virginia.

Reconstructing life (both human and non-human) in tidewater Virginia in the early seventeenth century to understand its significance to the 1677 Treaty and to contemporary legal issues is a challenging task. Written records are limited to the records left by Englishmen who lived in or communicated with those who lived in colonial Virginia, or who met Indians who had traveled to England.²⁴ These writers were not anthropologists or ethnographers, and they were usually motivated by practical and political concerns, rather than by intellectual curiosity about the Powhatans and their way of life.²⁵ The earliest writers, like John Smith, viewed Indians as sources of information and as potential providers of food and other desirable resources, and the information that these writers recorded reflected this agenda.²⁶ As Professor Helen Rountree explained,

19. See ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 3. Professor Rountree explains that “[t]he name ‘Powhatan’ is derived from a paramount chief’s ‘empire’ . . . which covered most of the Virginia coastal plain . . . and which was organized by the man Powhatan, who had in turn taken his name from his natal town, Powhatan, near the falls of the James River.” HELEN C. ROUNTREE, THE POWHATAN INDIANS OF VIRGINIA: THEIR TRADITIONAL CULTURE 7 (1989) [hereinafter ROUNTREE, THE POWHATAN INDIANS]. Other writers prefer to use the term “Virginia Algonquians.” *See id.*

20. ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 3. The territory included both the eastern shore of Chesapeake Bay (an area often called the “Eastern Shore”) and the western shore of the Bay. *Id.*

21. *Id.* at 3-4. The northern boundary of their lands on the Eastern Shore was approximately the Virginia-Maryland line. *Id.* at 4.

22. *Id.* at 3.

23. *See, e.g.,* Kathleen J. Bragdon, *The Northeast Culture Area*, in NATIVE NORTH AMERICANS: AN ETHNOHISTORICAL APPROACH 91, 118 (Daniel L. Boxberger ed., 1990) (discussing coastal Algonquians).

24. ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 3.

25. *See id.*

26. *See id.*

late seventeenth century writers saw the Indians as the losers in the contest over the control of Virginia, and their perceptions of the Indians as conquered peoples influenced their accounts.²⁷ Both early and later seventeenth century writers' accounts were thus limited in scope, and incorporated the interests and biases of those who wrote them. Furthermore, government records tend to reflect matters that interested the government, rather than describing Indian life more generally. These accounts and records can be supplemented by evidence from archaeology and related disciplines, which provide information about both the Indian and non-Indian human inhabitants of Virginia, as well as the flora, fauna, and other aspects of the environment in which they lived. The Powhatans themselves did not leave written records until considerably later.²⁸

The evidence from these sources cannot, however, be viewed in isolation. To construct a more complete understanding of Powhatan life in the seventeenth century and beyond, this evidence must be combined with contemporary Virginia Indians' knowledge of their ancestors' lifeways. A recent book on the life of Pocahontas, *The True Story of Pocahontas*,²⁹ for example, demonstrates this approach by drawing on orally transmitted Mattaponi history. In addition, current uses of the land and water that continue the uses of the past can help to shed light on the world in which the 1677 Treaty was signed, and on the understandings and intentions of those who signed it.³⁰

Despite these reconstruction challenges, however, it is clear that the daily lives of the Powhatans were intimately connected with their environment. Three key components of this environment – water, fish, and land – and the threat posed to them by English settlement are discussed below. These same components were threatened by the King William Reservoir Project. A careful examination of the past and continuing significance of the region's water, fish, and land illuminates the gravity of the threat that the project posed to the Mattaponi Tribe today. This analysis uncovers the persistence of central aspects of Powhatan culture within the Mattaponi

27. *Id.* (discussing the limitations of the information sources for seventeenth century Virginia). For descriptions of the early and later seventeenth century Englishmen who wrote about Virginia, see *id.* at 3-6.

28. *Id.* at 3.

29. LINWOOD "LITTLE BEAR" CUSTALOW & ANGELA L. DANIEL "SILVER STAR," *THE TRUE STORY OF POCAHONTAS: THE OTHER SIDE OF HISTORY* (2007).

30. See generally SANDRA F. WAUGAMAN & DANIELLE MORETTI-LANGHOLTZ, *WE'RE STILL HERE: CONTEMPORARY VIRGINIA INDIANS TELL THEIR STORIES* (2006).

Tribe, and demonstrates the capacity of the Powhatan tribes for cultural adaptation in the face of pressure for complete assimilation.

1. Water

*Within is a country that may have the prerogative . . . over the most pleasant places known, for large and pleasant navigable rivers, heaven and earth never agreed better to frame a place for man's habitation. . . . The country is . . . watered so conveniently with fresh brooks and springs, no less commodious than delightful. By the rivers are many plain marshes . . .*³¹

*The river is more than a source of food and money for the tribe. The river and the shad are the basis of our culture and traditions.*³²

The Powhatans' land was, and is, a land with no shortage of water sources. Their homeland, a coastal plain that slopes into the Atlantic Ocean, receives plentiful rainfall and is traversed by four wide, southeastward-flowing tidal rivers.³³ Every year, these rivers (listed from south to north: the James, York, Rappahannock, and Potomac) carry countless gallons of freshwater from the Appalachian Mountains and Virginia's piedmont region into the Chesapeake Bay.³⁴ The four rivers become estuaries (coastal bodies of water in which sea water mixes with freshwater) in their eastern reaches.³⁵ Consequently, their waters transition from freshwater, to brackish, to saltwater as they approach the Bay.³⁶ As they flow from the mountains, the rivers form a series of cataracts, called the "fall line," below which the rivers lie in drowned channels that experience a regularly shifting balance between their fresh- and salt-water components. The tide's ebb and flow in the rivers led to the region being termed "tidewater Virginia" or "the tidewater."³⁷ Each of the rivers has its own large tributaries, and some of them in turn have large tributaries, with

31. CAPTAIN JOHN SMITH'S AMERICA, *supra* note 17, at 4-5.

32. Public Hearing on Federal Consistency Certification for King William Reservoir - Regional Raw Water Supply Plan for Lower Peninsula, 6 (Oct. 20, 2004) (remarks by Chief Carl Custalow), *available at* <http://www.deq.state.va.us/eir/documents/KWRPublicHearing.pdf> [hereinafter Custalow Remarks].

33. ROUNDTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 4.

34. *Id.*

35. *Id.*

36. *Id.*; *see also* STEPHEN R. POTTER, COMMONERS, TRIBUTE, AND CHIEFS: THE DEVELOPMENT OF ALGONQUIAN CULTURE IN THE POTOMAC VALLEY 8 (1993).

37. POTTER, *supra* note 36, at 8.

smaller branches or swamps at their heads.³⁸ The proposed water source for the King William Reservoir Project, the Mattaponi River, joins with the Pamunkey River to form the York River.³⁹ The land between the Mattaponi and Pamunkey rivers is known as "Pamunkey Neck."⁴⁰

The Chesapeake Bay, the largest estuary in the United States,⁴¹ has a watershed covering over 74,000 square miles⁴² in the District of Columbia and parts of six states. Hundreds of creeks, bays, and rivers (in addition to the four major Virginia rivers mentioned above) empty into the Bay.⁴³ For the Powhatans of colonial times, the Bay was the source of quahog, conch, and whelk shells, which were used for bead-making.⁴⁴ Today, the Bay's water and the life that it supports are gravely threatened, leading in 2000 to an inter-state agreement for its protection,⁴⁵ and to new EPA efforts to prevent further degradation.⁴⁶

Like many estuaries, the James, York, Rappahannock, and Potomac rivers have a sedimentation of silt, and their sand, mud banks, and waters provide habitat for a variety of birds and other animals, and a rich environment for plant species. The region's waterways provided the

38. ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 4.

39. ROUNTREE, *THE POWHATAN INDIANS*, *supra* note 19, at 18.

40. *Id.*

41. POTTER, *supra* note 36, at 7. The Bay is the drowned lower valley of the Susquehanna River, meaning that the river flowed through this channel prior to a rise in sea level that began about 15,000 years ago. *Id.* (noting that the Bay's formation began with "the rise in sea level that followed global warming and melting of the continental ice sheets, beginning 15,000 years ago"); *see also* ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 4.

42. POTTER, *supra* note 36, at 7.

43. *See id.* It is 30 miles wide at its widest point, with a total shoreline of over 8,000 miles. *Id.*

44. *See* ROUNTREE, *THE POWHATAN INDIANS*, *supra* note 19, at 56, 71-73.

45. *Chesapeake 2000*, CHESAPEAKE BAY PROGRAM, http://www.chesapeakebay.net/content/publications/cbp_12081.pdf (last visited Apr. 23, 2012) [hereinafter *Chesapeake 2000 Agreement*]. For a discussion of the Chesapeake 2000 Agreement and progress to date, see the 2008 report to Congress prepared by Region 3 of the Environmental Protection Agency, entitled *Strengthening the Management, Coordination, and Accountability of the Chesapeake Bay Program*. U.S. ENVTL. PROT. AGENCY, CBP/TRS-292-08, *STRENGTHENING THE MANAGEMENT, COORDINATION, AND ACCOUNTABILITY OF THE CHESAPEAKE BAY PROGRAM* (2008), available at http://cap.chesapeakebay.net/docs/EPA_Chesapeake_Bay_CAP.pdf.

46. *See* Timothy B. Wheeler, *EPA Sets Tough New Chesapeake Pollution Caps*, *BALT. SUN*, July 1, 2010, http://articles.baltimoresun.com/2010-07-01/features/bs-gr-bay-pollution-diet-20100701_1_pollution-diet-bay-cleanup-effort-pollution-caps.

Powhatans with an abundance of fish, shellfish, and migratory birds.⁴⁷ Reeds (used for mat-making) and edible plants (such as arrow arum and tuckahoe) grew in the marshes.⁴⁸

The Powhatans' enjoyment of the rivers was readily apparent to early English observers. Accounts by late sixteenth century visitor John White,⁴⁹ for example, indicate that the Powhatans enjoyed walking along the rivers and nearby fields to witness the activities taking place there. Describing the life of one of the "chieff ladyes" of the region, White wrote that the women are "delighted with walkinge in to the fields, and beside the rivers, to see the huntinge of deers and catchinge of fische."⁵⁰ The Powhatans' aesthetic sense was stimulated not only by the beauty of the watercourses, but also by one of their products, pearls, which were worn by both men and women.⁵¹

The region's extensive, connected waterways also played a key role in transportation, making it possible for the Powhatans to get almost anywhere they needed to travel by water.⁵² Consequently, most of their traveling was done by canoe,⁵³ which John White described as being made in a "wonderfull" manner: "wheras they want Instruments of yron, or other like unto ours, yet they knowe howe to make them as handsomelye, to saile with whear they liste in their Rivers, and to fishe withall, as ours . . ." ⁵⁴ John Smith also described the making of dugout canoes, which the Powhatans were able to "row faster than our barges."⁵⁵

47. See POTTER, *supra* note 36, at 41-42. John Smith and other Englishmen recorded the local consumption of fish and shellfish, and of waterfowl, including swans, cranes, geese, and mallards. *Id.*

48. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 5.

49. White also served briefly as governor of the ill-fated "Lost Colony" of Roanoke. His paintings were copied in the form of engravings by Theodore De Bry and used as illustrations for Thomas Harriot's 1590 book on America. See *Fort Raleigh National Historic Site—John White*, U.S. NAT'L PARK SERV., <http://www.nps.gov/fora/forteachers/john-white.htm> (last updated Oct. 5, 2010).

50. JOHN WHITE, THE TRUE PICTURES AND FASHIONS OF THE PEOPLE IN THAT PART OF AMERICA NOW CALLED VIRGINIA ch. IV (2d ed. 1588), available at <http://etext.lib.virginia.edu/toc/modeng/public/J1010.html>.

51. See *id.* ch. III (noting that the women "hange at their eares chaynes of longe Pearles" and that the "cheefe men" would "hange pearles stringe uppon a threed att their eares, and weare bracelets on their arnes of pearles"); ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 70-71 (discussing the use of pearls).

52. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 4.

53. *Id.*

54. WHITE, *supra* note 50, ch. XII.

55. CAPTAIN JOHN SMITH'S AMERICA, *supra* note 17, at 21.

As both transportation corridors and significant sources of food and other valuable resources, the waterways were not seen as boundaries (as the English often viewed them), but rather as the centers of districts.⁵⁶ Towns and villages were built on both sides of waterways that were a mile or less wide.⁵⁷ The Pamunkey Tribe, for example, settled on both sides of the river that bears the Tribe's name.⁵⁸ In both major towns and small villages, houses were located fairly close to the key waterway's shore, in locations that provided a good view of the waterway and its travelers.⁵⁹ Houses were dispersed along the waterway such that a small village might extend along it for a mile.⁶⁰ Waterways thus unified, rather than divided, Powhatan communities.

The waterways were vital to Powhatan well-being in yet another way, as their banks were the site of the Powhatan towns' sweathouses.⁶¹ Constructed of saplings and mats,⁶² the sweathouses were used by those suffering from certain diseases and infirmities, along with healthy people who wished to enjoy their invigorating benefits.⁶³ Water was also used for personal hygiene, as the Powhatans (unlike the English) bathed daily in streams.⁶⁴ Water played an important dietary role as well, as it was the preferred accompaniment for Powhatan meals.⁶⁵

The Powhatans' reliance on their territory's wealth of water was not limited to the waterways. The availability of a freshwater spring was an important factor in the placement of towns and villages, as the summertime increased brackishness and sluggishness of the rivers, thereby making it unhealthful to drink their waters (a fact that the English learned the hard

56. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 6.

57. *Id.*

58. *Id.* Towns and villages were usually located along the smaller rivers, rather than along the banks of the mouths of the four main rivers. Because these rivers are so broad at their mouths, any village or town located along their lower stretches would have been exposed to storms, wind, and colder winter temperatures. POTTER, *supra* note 36, at 29.

59. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 6.

60. *See id.* at 280 n.33.

61. *See* ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 62-63.

62. *Id.*

63. *Id.* at 129. Red hot stones covered with the inner bark of the white oak tree were placed in the hearth in the middle of the sweathouse. Water was poured on the stones to create steam. After spending about 15 minutes in the sauna-like sweathouse, participants would plunge into the nearby water. *Id.*

64. *See id.* at 58. They also washed their hands in streams before and after eating. *See id.* at 54.

65. *Id.* at 54.

way).⁶⁶ Springs were plentiful, and did not need to be large to be adequate for Powhatan needs because of the tribes' dispersed settlement pattern and willingness to use even saltwater streams for bathing.⁶⁷ Then, as now, Indian water-use patterns required a smaller freshwater supply than non-Indian water-use patterns demanded.⁶⁸

In summary, the Powhatans' homeland was rich in water and water-based resources, and the Powhatans made the most of them. The abundance of water-based resources and the ease of communication by water that this environment provided allowed the Powhatan paramount chiefdom to become by far the largest of the Atlantic Coast's Algonquian chiefdoms.⁶⁹ Today, these waters continue to be a dominant feature of the region and play a central role in the lives of Mattaponi tribal members. But the waters are overtaxed and faced the threat of further damage by the King William Reservoir project. Moreover, the interconnectedness of these waterways means that a direct threat to one of them translates into indirect threats to others as well, as the Mattaponi Tribe made clear to the Army Corps of Engineers staff evaluating the project.⁷⁰

2. Fish

*Of fish we were best acquainted with sturgeon, grampus, porpoise, seals, [and] stingrays . . . Brit, mullets, white salmon, trout, sole, plaice, herring, conyfish, rockfish, eels, lampreys, catfish, shad, perch of three sorts, crabs, shrimps, crayfish, oysters, cockles, and mussels.*⁷¹

*I have fished for shad in the Mattaponi River since I was a small boy. Every winter and spring through the spawning season, I and other tribal members catch female shad, fertilize their eggs, and raise young fry in our hatchery. . . . The intake pipe [for the proposed reservoir project] will withdraw from one-third of the river's flow from the most productive shad spawning area in the entire Chesapeake region.*⁷²

66. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 34, 290 n.31.

67. ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 58.

68. *Id.*

69. *See id.* at 22.

70. *See infra* notes 396-409 and accompanying text.

71. CAPTAIN JOHN SMITH'S AMERICA, *supra* note 17, at 14.

72. Custalow Remarks, *supra* note 32, at 6.

Fish played an important role in the Powhatans' diet and in the work of Powhatan men, who fished by methods that included angling, netting, shooting, and trapping in fish weirs.⁷³ Powhatan men were skilled in the art of making weirs, as the English who hired them recognized.⁷⁴ Powhatan men continued the use of fishing weirs to the present day.⁷⁵

Because of the number of different environments found in coastal Virginia waters, the Powhatans enjoyed various kinds of fish, including strictly freshwater fish (like large and smallmouth bass); freshwater fish that can tolerate some brackish water (like some catfish species); semianadromous fish (like white perch); anadromous fish (species that live in saltwater but spawn in freshwater, like herring and shad); catadromous fish (species that travel to saltwater to spawn, like eels); and saltwater fish (like bluefish).⁷⁶ The largest fish in the rivers were sturgeons, which were big enough to pull fishermen overboard.⁷⁷ English observers were understandably impressed by the abundance and size of the fish in the Powhatans' territory.⁷⁸

Anadromous fish were caught in the spring and summer, with April and May being the peak months, and sturgeon runs lasting until mid-September.⁷⁹ Some of the fishing was done at night, using fires in the canoes to attract fish.⁸⁰ Impressed by Powhatan fishing techniques, John White wrote that there "was never seene amonge us soe cunninge a way to take fish withall."⁸¹

Harvesting shellfish (such as clams, oysters, and crabs) from wetlands and waterways was also important work.⁸² Saltwater marshes provided periwinkles, sand fiddlers, blue crabs, oysters, and a variety of clams, while

73. *See id.* at 5.

74. *See* ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 131.

75. *See* ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 35, 37 fig.9, 38.

76. *Id.* at 28-29.

77. *Id.* The largest Atlantic sturgeon on record was 14 feet long. *Id.* at 28. Sturgeons spend the first five years of their lives up the rivers, where they spawn, and then slowly move down the rivers to live in the ocean. *Id.*

78. One Englishman noted in 1612, for example, that the shad that were caught in the Powhatans' waters were "a Yard long." *Id.* at 29. Today, on the other hand, shad are considered large if they are 18 inches long. *See id.*

79. POTTER, *supra* note 36, at 41-42.

80. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 145.

81. WHITE, *supra* note 50, ch. XIII.

82. *See* ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 24-25.

freshwater marshes were the habitat of mussels.⁸³ Fish, crabs, and oysters were consumed fresh, and also (in the case of fish and oysters) smoked and dried for later consumption.⁸⁴

Mattaponi tribal members continue to rely on fish as an important source of sustenance and income. They regularly fish in the region's rivers, and their treaty-protected right to do so is recognized by Virginia law.⁸⁵ Moreover, through the operation of their fish hatchery, they commit their labor and money to undoing some of the damage done to the region's waters by non-Indian activity.⁸⁶ It is hoped that, someday, Virginia's current shad-fishing moratorium⁸⁷ will end. The realization of this hope was, however, imperiled by the proposed King William Reservoir project.

In summary, the waters of coastal Virginia – including the river and wetlands threatened by the King William Reservoir project – sustained the Mattaponi and other Powhatan tribes since before the English settlement of Jamestown. Moreover, the species of fish most at risk from the project (such as shad) played an important role in the Powhatan tribes' diet then, as they do today.

3. Land

*The greatest labor they take, is in planting their corn They make a hole in the earth with a stick, and into it they put four grains of wheat [corn] and two of beans [A]lso amongst their corn they plant pumpkins, and a fruit like unto a muskmelon . . . also maracocks [squash] [T]his is done by their women and children*⁸⁸

The reservoir will flood over 89 sites that may be eligible for listing in the National Register of Historic Places. . . . The places have tremendous emotional and symbolic significance for the tribe, not only have they been important to us for centuries,

83. *Id.* The large oyster and clam shell middens that archaeologists have found in the region attest to the extensive consumption of shellfish. *See id.* at 38.

84. POTTER, *supra* note 36, at 41 (noting descriptions of these activities by John Smith and other Englishmen).

85. *See* VA. CODE ANN. § 29.1-301(I) (2011) (exemption from state license requirement to hunt, trap, or fish); *id.* § 29.1-521(B) (exemption from permit requirement for and restrictions on hunting, trapping, possessing, and selling wild birds and animals).

86. *See infra* notes 400-03 and accompanying text (discussing the fish hatchery and threats to its operations).

87. *See* Custalow Remarks, *supra* note 32, at 6.

88. CAPTAIN JOHN SMITH'S AMERICA, *supra* note 17, at 15-17.

*but also because they represent some of the last remaining physical links we have with our ancestors. Other sites have already been wiped out by development from hundreds of years of encroachment. If the King William reservoir is built, we will lose an historic and culture heritage that these sites represent.*⁸⁹

The English colonists were not the first settlers of Virginia. By at least 1000 A.D., Native peoples practiced settled agriculture in what is today known as Virginia.⁹⁰ Early English accounts of life in Virginia describe the location of Indian fields (along the rivers) and how new fields were prepared for planting.⁹¹ Observers reported fields as large as 100 acres, sloping down to the rivers.⁹² Lacking plows or any kind of metal tools,⁹³ the Powhatans dug planting holes, into which corn and bean seeds were dropped together.⁹⁴ Several varieties of squash were later planted in between the corn and bean plants.⁹⁵ Weeding was done frequently, and soil was piled around the cornstalks' bases to preserve moisture.⁹⁶ Aside from some of the work of clearing fields, farming was women's work.⁹⁷ Women

89. Custalow Remarks, *supra* note 32, at 8-9.

90. See generally Karl W. Butzer, *The Indian Legacy in the American Landscape*, in *THE MAKING OF THE AMERICAN LANDSCAPE* 27-37 (M.P. Conzen ed., 1990).

91. See POTTER, *supra* note 36, at 33. New fields were prepared by first girdling and burning trees. The Powhatans then cut down some trees, while leaving others standing, to retard erosion and provide protection from the sun for growing plants. The decaying burned stumps and roots replenished nutrients in the soil. See *id.*

92. See Maurice A. Mook, *Virginia Ethnology from an Early Relation*, WM. & MARY QUARTERLY, Apr. 1943, at 101, 113 ("The platt of grownd is bare without wood some 100 acres . . .").

93. See ROUNTREE, *THE POWHATAN INDIANS*, *supra* note 19, at 32. In fact, the Powhatans also had to cope with a shortage of even stone for tools. They were a "'Stone Age' people in a region where stone [was] not plentiful." *Id.*

94. *Id.* at 47. The growing corn provided a living stake around which the beans could twine, while the beans replenished the nitrogen content of the soil, which was depleted by continuous planting of corn. *Id.*; see also POTTER, *supra* note 36, at 33. Combining corn and beans in the diet also provided nutritional benefits. See R. DOUGLAS HURT, *INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT* 7 (1987) (explaining that beans complement corn by adding two amino acids to corn's amino acid, forming "a protein of high nutritional value").

95. ROUNTREE, *THE POWHATAN INDIANS*, *supra* note 19, at 47.

96. *Id.* at 49; CAPTAIN JOHN SMITH'S AMERICA, *supra* note 17, at 15 ("[T]heir women and children do continually keep it with weeding, and when it is grown middle high, they hill it about like a hop yard.").

97. See ROUNTREE, *THE POWHATAN INDIANS*, *supra* note 19, at 44, 88.

were also responsible for gathering the crops, preparing them for storage in houses and storage pits, and using them in cooking.⁹⁸

Many of the region's deciduous trees bear nuts (such as beech, chestnut, chinquapin, hickory, oak, and walnut trees), while berry bushes and persimmon trees provide a variety of fruit.⁹⁹ The mildness of the eastern Virginia climate ensures that nuts, berries, and fruits are available for about seven months of the year.¹⁰⁰ The Powhatans gathered, prepared, and ate a number of roots, such as tuckahoe,¹⁰¹ the significance of which is indicated by its inclusion in the Treaty at Middle Plantation.¹⁰² Aside from medicinal plants, which were gathered by men, women were in charge of harvesting wild plants and plant products for food and other uses, a responsibility that necessitated a detailed working knowledge of the plant resources of Powhatan territory.¹⁰³

Thus, like other Indian peoples who developed successful farming techniques millennia before the arrival of Europeans in the eastern United States, the Powhatans learned to clear land for farming in the best manner that their technology made possible. They did so by planting the crops that would yield the maximum harvest in their particular soil and climatic conditions, and harvesting, preparing, and storing crops and other plants and plant products for future use.¹⁰⁴ For the most part, this was the work of Powhatan women.¹⁰⁵ To the extent that white colonists were interested in learning about the Powhatans' agricultural know-how, it was the knowledge of Indian women that was transmitted.¹⁰⁶

98. *Id.* at 49, 88-89; *see also id.* at 51-52 (discussing the cooking and storage of corn, beans, and squash).

99. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 5; *see also* POTTER, *supra* note 36, at 41-42. Smith and others recorded the consumption of strawberries, raspberries, blackberries, huckleberries, and mulberries. *See* POTTER, *supra* note 36, at 41-42. Acorns, chestnuts, chinquapins, and walnuts were dried and used as winter and spring staples. *See id.*

100. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 4.

101. *See* ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 52-53 (identifying tuckahoe, or wild potatoes, as arum).

102. *See infra* note 183 and accompanying text.

103. ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 44 (noting the need for a "detailed knowledge of which parts of which plants could be used for what purposes, in what season the plants ripened or reached their peak of usefulness, and where each species grew locally").

104. HURT, *supra* note 94, at 24.

105. *See* ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 44.

106. HURT, *supra* note 94, at 25.

The Powhatans' land was also rich in wildlife. Along with fishing, hunting was an important occupation for men,¹⁰⁷ who hunted near the towns and villages year-round, and participated in large communal hunts in the fall.¹⁰⁸ Venison, in particular, was an important part of the diet.¹⁰⁹ English observers were struck by the Powhatan hunters' knowledge of their environment and their consequent hunting prowess.¹¹⁰

Today, the reservation land available for agricultural and hunting purposes to the descendants of the colonial-era Powhatans who are current members of the Mattaponi Tribe is small in size, totaling approximately 150 acres.¹¹¹ The Tribe's attachment to the land extends, however, beyond the borders of the reservation, as guaranteed under the 1677 Treaty, which recognized the existence of rights to resources beyond Powhatan reserved lands.¹¹² The challenge for today's Mattaponis is to determine how to protect their rights not only with respect to reservation land, but also with respect to off-reservation lands and waterways that are subject to a treaty.

In sum, the Powhatans' homeland, blessed with a temperate climate and sufficient rainfall, was (and still is) very good for farming, harvesting a variety of wild plants and plant products, and hunting and fishing. In the words of one commentator, the Powhatan tribes developed "a detailed and precise knowledge of the fauna and flora of their own environment" and possessed "the kind of empirical, factual knowledge upon which their lives and our modern natural sciences" depended.¹¹³ Powhatan territory was able to support a substantial number of people when the English colonists began to arrive.¹¹⁴ As the Jamestown settlement developed, however, a crucial question arose: *which* people would be supported henceforth by the region's bounty – the English, the Powhatans, or both?

B. Dispossessing the Powhatan Tribes

[W]ee shall enjoy their cultivated places, turning the laborious Mattocke into the victorious Sword . . . and possessing the fruits of others labours. Now their cleared grounds in all their

107. ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 38.

108. *See id.* at 40-41.

109. *Id.* at 50-51.

110. *See* CAPTAIN JOHN SMITH'S AMERICA, *supra* note 17, at 22.

111. *Mattaponi Tribe*, VIRGINIA COUNCIL ON INDIANS, <http://indians.vipnet.org/tribes/mattaponi.cfm> (last modified Apr. 29, 2010).

112. *See infra* note 183 and accompanying text.

113. Mook, *supra* note 92, at 118.

114. *See* ROUNTREE, THE POWHATAN INDIANS, *supra* note 19, at 29.

*villages (which are situate in the fruitfulest places of the land)
shall be inhabited by us*¹¹⁵

Dispossession was the purpose and the result of the colonial project. Virginia's residents were to be deprived, by the English colonists and their descendants, of their land and other resources – and at times of their very freedom.¹¹⁶ Some lost even more, their lives taken by disease or violence.¹¹⁷ Despite their many losses, however, the Mattaponi Tribe and other Powhatan tribes survived.¹¹⁸

Recalling the history of dispossession demonstrates how much the Powhatans lost and how these losses occurred. At the same time, understanding how Powhatan tribes survived despite these losses and what the 1677 Treaty guarantees to the Mattaponi Tribe and other Powhatan tribes is essential to a proper analysis of the Mattaponi Tribe's claims and rights today. Ultimately, what is most striking about this history is that the Mattaponi Tribe and a core part of its land along the Mattaponi River did remain intact, as did the Tribe's rights under the Treaty.

1. Claims to Land, Maize, and People

The driving force behind the Virginia colony was the Virginia Company of London, a group that might be characterized as the venture capitalists of their day. First chartered by King James I in 1606 with the purpose of establishing profit-making colonial settlements, the Company spawned a primary labor force for the colonies, consisting of individuals who would work for the Company for seven years in exchange for transportation to Virginia, food, protection, and land.¹¹⁹

When the first installment of would-be colonists arrived in the Powhatan tribes' territory in April 1607,¹²⁰ they entered a region subject to the paramount chiefdom of Wahunsunacock, who came to be known by the

115. See FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 80 (1975) (quoting EDWARD WATERHOUSE, *A DECLARATION OF THE STATE OF THE COLONY AND AFFAIRES IN VIRGINIA* (1622), in 3 *RECORDS OF THE VIRGINIA COMPANY OF LONDON* 556-57 (Susan M. Kingsbury ed., 1906) (emphasis omitted)).

116. See *id.* at 78.

117. See *id.* at 315 & n.10.

118. CUSTALOW & DANIEL, *supra* note 29, at 1.

119. See Edmund S. Morgan, *The Labor Problem at Jamestown, 1607-18*, 76 *AM. HIST. REV.* 595, 600-04 (1971).

120. See CAPTAIN JOHN SMITH'S *AMERICA*, *supra* note 17, ch. XVI. These colonists were dispatched from England in December of 1606. *Id.* ch. XV.

name of his natal village: Powhatan.¹²¹ Powhatan's status as *mamanatowick*, or paramount chief,¹²² came to him through his mother (in keeping with his people's matrilineal descent system), from whom he inherited the Mattaponi and other chiefdoms.¹²³ Each of the chiefdoms (or tribes) within Powhatan's dominion was headed by a subsidiary leader, given the title *weroance* (male) or *wereoansqua* (female).¹²⁴

That the poorly provisioned English chose Jamestown Island as a settlement site may well have surprised the Powhatans, whose intimate familiarity with their environment included knowledge that the site lacked ready access to good drinking water (the river water was brackish and unhealthy to drink, particularly in the summer) and that it was near a mosquito-infested marsh.¹²⁵ The English, though, valued the site for its favorable military position,¹²⁶ and looked to Powhatan lands, labor, and other resources as the means for their survival, and as the source of salable products from which the Virginia Company and its investors hoped to make their fortunes.¹²⁷ Historian April Hatfield argued that in doing so, the

121. HELEN C. ROUNTREE & E. RANDOLPH TURNER III, *BEFORE AND AFTER JAMESTOWN: VIRGINIA'S POWHATAN AND THEIR PREDECESSORS* 36-37 (2002). Powhatan's original name is also spelled as Wahunsenaca. See CUSTALOW & DANIEL, *supra* note 29, at 5.

122. See ROUNTREE, *THE POWHATAN INDIANS*, *supra* note 19, at 16 (noting that the word means literally "great King").

123. See ROUNTREE & TURNER, *supra* note 121, at 37 ("[I]n a matrilineal system, his predecessor would therefore have been his mother or a sibling of his mother."). His status began with his inheriting the Pamunkey, Mattaponi, and Youghtanund chiefdoms, along with three other chiefdoms based near the James River's falls. The Pamunkey, Mattaponi, and Youghtanund chiefdoms lay in the upper York River drainage, with the falls of the James River being the home of the Powhatan, Arrohatock, and Appamattuck chiefdoms. See ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 25. Over time, Powhatan extended his authority over other chiefdoms, until, by 1607, he claimed all of the tribes of the coastal plain, except the Chickahominies. *Id.*

124. See ROUNTREE, *THE POWHATAN INDIANS*, *supra* note 19, at 103. The term means "commander," or person in charge. *Id.*

125. ROUNTREE & TURNER, *supra* note 121, at 140. Archeological excavations of the site have indicated that it was not a site of Indian settlements. *Id.*

126. *Id.*

127. See *id.* at 142 (noting that early English accounts are full of lists of commodities available in Virginia that the English planned to sell); Mook, *supra* note 92, at 104 (noting that many of the early English accounts of Virginia focused on commodities and other salable resources).

English were hoping to follow the model provided by Spanish colonial ventures.¹²⁸

Jamestown's earliest years showed the English propensity for aggressively demanding the Powhatan resources that interested them, while at the same time failing to take advantage of other, intangible Powhatan resources from which they also would benefit (and possibly less disruptively), such as knowledge of the environment. The colonists failed to "realize that successful colonization necessitated an adjustment to a new environment and that the problems of adaptation could be made easier by learning some of the pre-existing native techniques for living in that environment."¹²⁹ In the summer of 1607, when a drought delayed the Powhatans' corn crop and made the James River's water even more unsafe to drink than usual, the English endured a "starving time," during which they suffered from typhoid, dysentery, and salt poisoning.¹³⁰ Had they sought the Powhatans' advice, they could have learned of the danger of drinking the water and of the availability of wild, drought-resistant edible plants and plant products to tide them over until the corn harvest.¹³¹ Once corn was available, the English traded aggressively for it, adopting a high-handed attitude that antagonized many area tribes and ultimately led to the capture of John Smith in December 1607.¹³² Although Smith managed to negotiate with Powhatan himself for his release (his story of being saved by the intervention of Powhatan's daughter Pocahontas may well be an invention of the 1620s),¹³³ he did not use his freedom as an opportunity to

128. See generally April Lee Hatfield, *Spanish Colonization Literature, Powhatan Geographies, and English Perceptions of Tsenacommacah/Virginia*, 69 J. S. HIST. 245 (2003).

129. Mook, *supra* note 92, at 103.

130. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 34-35.

131. ROUNTREE & TURNER, *supra* note 121, at 142.

132. *Id.* at 142-43. Archaeologists have documented the shift from exchange to taking thorough examination of excavated Indian pots. See *id.* at 130-33.

133. *Id.* at 143; see also ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 38. Some scholars today question the authenticity of the Pocahontas rescue story. The story was not included in Smith's early accounts of his experiences and first appeared only in his 1624 account. This account describes the Virginia Indians as being prone to outbreaks of sudden violence and presents Pocahontas (who would be familiar to his readers because of the visit that she made to England in 1617-1618) as an admirable exception to the Indians' supposedly savage behavior. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 38. None of Smith's contemporaries mentioned Pocahontas saving his life (an incident that they probably would mention in their accounts had it actually occurred). *Id.* Smith's reliability is also undermined by the fact that his 1624 account included descriptions of two incidents that definitely did not happen. *Id.*

improve relations with the Powhatans, but instead tried to make Powhatan accept the status of a vassal of the English king.¹³⁴ While some English observing the ceremony intended to accomplish this feat believed that Powhatan was reluctant to kneel and accept a crown because of his ignorance toward the ceremony's significance,¹³⁵ it seems more likely that the astute Powhatan fully understood English intentions and was unwilling to subjugate himself and his people to the Crown.

By the fall of 1608, the Powhatans were no longer willing to sell corn to the colonists, and the latter seized Powhatan corn when their own supplies ran out.¹³⁶ The increasing English hostility prompted Powhatan to abandon his capital town on the York River, Werowocomoco, and re-establish his capital far up the Pamunkey River.¹³⁷ Rather than provide for their needs by planting corn the next summer, the English spent their time building more forts, and once again faced starvation in the coming winter¹³⁸ (leading to some incidents of cannibalism).¹³⁹ As more colonists and their new leaders (who were better organized) arrived,¹⁴⁰ they seized Powhatan farmlands along the James River and attacked a number of Powhatan towns, killing their occupants, burning the towns, and cutting down corn in the fields.¹⁴¹

In 1613, 17-year-old Pocahontas was held captive for ransom, a crime that ultimately led to her marriage to Englishman John Rolfe.¹⁴² The marriage, which brought temporary peace to the region, was short-lived.

134. ROUNTREE & TURNER, *supra* note 121, at 143.

135. See DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 83 (5th ed. 2005).

136. ROUNTREE & TURNER, *supra* note 121, at 143.

137. See *id.* Werowocomoco's site was located by archaeologists and is the site of an ongoing excavation. See *Background*, WEROWOCOMOCO RESEARCH PROJECT, <http://powhatan.wm.edu/aboutProject/index.htm> (last visited Apr. 23, 2012).

138. ROUNTREE & TURNER, *supra* note 121, at 143. During the winter, five-sixths of the colonists died. *Id.*

139. ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 53. One man, for example, was executed for murdering his wife and then eating part of her body. *Id.* at 295 n.170.

140. ROUNTREE & TURNER, *supra* note 121, at 145.

141. *Id.*; ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 55. In the Fall of 1609, John Smith left Jamestown, never to return. ROUNTREE & TURNER, *supra* note 121, at 143. In August 1610, the English killed over 50 people in the Paspaheghs' capital town, and then torched the town and chopped down growing corn. ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 54-55.

142. ROUNTREE & TURNER, *supra* note 121, at 145. Pocahontas was baptized and given the name "Rebecca" before the marriage. ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 60.

After traveling to England with her husband and son (where she was displayed as an example of a “savage” who had supposedly recognized the superiority of the English and their God), Pocahontas died, at the age of about 21¹⁴³ – a fact that is not part of the Disney-told story of her life.

In addition to bringing death to Pocahontas, John Rolfe introduced Virginia to a plant whose popularity as a cash crop ultimately led to death for many other Powhatans: tobacco.¹⁴⁴ The tobacco-obsessed colonists, who planted even the streets of Jamestown with the plant (while neglecting food-crop cultivation), were consequently forced to turn to the Powhatans to purchase food and even water, having allowed their wells to become contaminated.¹⁴⁵

By the time of Powhatan’s death in 1618, the English already occupied large stretches of the James River’s shores.¹⁴⁶ In addition to losing their prime farmland, the Powhatan tribes along the James River faced the loss of the link between their hunting lands further inland and the plant-gathering areas on the river banks because the English claiming ownership of the farmlands objected to Indians crossing them.¹⁴⁷ Demand for Powhatan land continued to escalate as the Virginia Company’s headright system promised (Powhatan) land to Englishmen who paid to transport themselves and others to Virginia.¹⁴⁸

The increasing demand for Indian land led, unsurprisingly, to growing tensions. Despite the resulting Powhatan uprisings in defense of their

143. See ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 62-64. She died in March 1617, at the beginning of a planned trip back to Virginia, and was buried in Gravesend, England. *Id.* at 64. Her son, Thomas, was also ill, and was left in England while his father continued the journey. *Id.* Thomas returned to Virginia in 1635 and established himself as a planter. *Id.* at 84. The cause of Pocahontas’s death is not known; she may have contracted a pulmonary disease from the English. *Id.* at 63-64. A recently published book sets out an account from Mattaponi oral history that Pocahontas died from being poisoned. See CUSTALOW & DANIEL, *supra* note 29, at 83-88.

144. ROUNTREE & TURNER, *supra* note 121, at 148-49. Rolfe introduced Orinoco tobacco to the colony. *Id.* The Virginia Indians used another species of tobacco, which was stronger and could only be smoked in small quantities. *Id.* at 149; see also HURT, *supra* note 94, at 31 (noting that the Virginia Algonquians raised a tobacco species called *Nicotiana rustica*, as opposed to a milder variety, *Nicotiana tobacum*, that John Rolfe introduced).

145. ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 64.

146. See *id.* at 65-66. By 1622, the English claimed almost all of the river’s banks. *Id.*

147. *Id.* at 67.

148. *Id.* at 68-69. The system was introduced in 1619 and was later extended to provide additional land for bringing others to the colony as well. See *id.* at 69, 301 n.22.

territory,¹⁴⁹ the English remained determined to force the Powhatans to make room for them, even identifying violent conflicts as a convenient excuse for seizing cultivated Indian lands.¹⁵⁰ In English eyes, there was only space for those Powhatans who were willing to adopt the English lifestyle and a subordinate role in the colonial society and economy.¹⁵¹ Thus, in the “Commonwealth” of Virginia, the colonists sought to share in common with the Indians the Indians’ own resources, with the expectation that, over time, the Indians’ share of the region’s wealth would become increasingly smaller.

Continued expansion of English settlement areas did not result in a corresponding increase in English self-sufficiency¹⁵² because of the colonists’ continuing focus on growing soil-depleting tobacco.¹⁵³ Instead, the English increased their demands for corn from the Powhatans, who were pressured to grow extra food on their ever-shrinking lands.¹⁵⁴ With their location in the York River area spared (for a time), the Mattaponi and Pamunkey tribes shouldered the greatest burden of English demands for land and corn, which had fallen most heavily on the tribes of the James River area.¹⁵⁵

Finally, because the colonists needed more laborers than were available from immigration and from English births in Virginia, they also sought the labor of Virginia Indians as both indentured servants and slaves.¹⁵⁶ The expansion of tobacco-growing, in particular, led to a great demand for labor, which prompted the Virginia House of Burgesses to enact a law to encourage Indians to work on English plantations.¹⁵⁷ With the eventual

149. *See id.* at 71. During an uprising in 1622, colonists and their livestock were killed, and colonists’ houses were burned. *Id.* at 74. The 1622 uprising followed several years of occasional violent episodes. *See id.* at 71.

150. *See* JENNINGS, *supra* note 115, at 80.

151. *See* ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 75.

152. *See id.* at 76-77. The expansion was accompanied by occasional attacks on the Powhatans. *See id.* at 75-83 (describing events from the 1622 uprising until the early 1640s). The English population reached about 2,600 by 1629 and about 8,100 in 1640. *Id.* at 78-79. Land transfers during these years are difficult to reconstruct because of lost records. *See id.* at 79.

153. *See id.* at 81.

154. *Id.* The colonists also purchased food from the Dutch. *Id.*

155. *See id.* at 76.

156. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 329 (2003)

157. ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 70. The Indians were to stay in segregated housing at night. *Id.* The Virginia Company urged colonists to take Indian children into their homes to rear them, as part of the program of “civilizing” the Indians. *Id.*

influx of Africans held as slaves, demand for Indian labor declined, along with a decline in the Indian population.¹⁵⁸ Although, over time, Virginia colonial legislation limited enslavement of Indians,¹⁵⁹ it took time for the actual practice to match up with the limitations on the books.¹⁶⁰

English colonists' efforts to deprive Virginia Indians of control over their own resources (and thus over their very way of life) have a certain ring of irony when considered in the broader context of the colony's history. Virginia furnished the statesmen who would later provide the rhetoric of revolution and right to self-determination in such documents as the Declaration of Independence. Where Indian rights and resources were concerned, however, colonial leaders demonstrated a different attitude toward the right to self-determination by claiming for themselves the right to determine the fate of the local native peoples and their property.

2. *Treaties and Reservations*

The extent and location of remaining Powhatan territories was also shaped by treaties. In October of 1646, following a Powhatan uprising and subsequent retaliatory actions (including enslavement),¹⁶¹ the Powhatan

at 69. Powhatan parents, unaccustomed to the English practice of sending children away to be raised by others and fearing mistreatment of their children, were (unsurprisingly) not enthusiastic about delivering their children to colonists. *See id.* at 69-70. This policy foreshadowed the United States' efforts to "civilize" Indians by taking their children to off-reservation boarding schools. *See generally* Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819 (2001).

158. *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 616-17 (2009) (discussing the decline in Indian slavery and the preference for African slaves); ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 127 (noting the decrease in the Indian population over the course of the seventeenth century).

159. *See* ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 138 (discussing an act of the Assembly of 1670, which provided that Indian and other non-white servants who arrived in Virginia by land, as opposed to sea, were not to be slaves); C.S. Everett, "They Shalbe Slaves for Their Lives", in INDIAN SLAVERY IN COLONIAL AMERICA 67 (Alan Gally ed., 2009) (providing further discussion of Indian slavery in Virginia).

160. *See* ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 139. Even though a 1691 statute arguably prohibited all Indian slavery, in reality, Virginians still held Indians as slaves. *Id.* at 140. Professor Berger has noted that "through 1748, Indians were explicitly included in Virginia laws regarding the property status, restrictions on, and punishments for, slaves." Berger, *supra* note 158, at 614; *see also* Gregory v. Baugh, 25 Va. (4 Rand.) 611, 627 (1827) (opinion of Green, J.) (stating after the passage of a 1705 statute that "no American Indian could be enslaved").

161. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 84-86. In April of 1644, the Powhatans, led by Opechancanough, began an uprising. The uprising led to English

leader Necotowance signed a treaty with the English.¹⁶² The treaty assured to the Powhatans the right to reside and hunt on the north side of the York River “without any interruption from the English,” while the Powhatans agreed to “leave free . . . to the English to inhabitt on” the land of the Lower Peninsula between the James and York rivers.¹⁶³ The area that includes the Mattaponi Reservation of today was thus set aside to be secure from non-Indian interference. The Powhatans were to be protected “against any rebels or other enemies” and, “as an acknowledgment and tribute for such protection,” the Powhatans agreed to pay to the Governor “twenty beaver skins att the going away of Geese yearly”¹⁶⁴ (a provision that resulted in the signatory tribes and their members being referred to as the “tributary tribes” and “tributary Indians”).

A 1650 statute provided that all *veroances* were to receive patents for lands (the size of which were inadequate for Powhatan needs), which were to serve as reservations and were made inalienable to individual settlers by a 1656 statute.¹⁶⁵ Some settlers ignored the 1656 statute and obtained Indian lands by trickery and by squatting, shooting Indians who protested the destruction of their crops by English livestock.¹⁶⁶ This misconduct led to a reenactment of the alienation prohibition, with an additional requirement that the settlers help Powhatans build protective fences around their fields.¹⁶⁷ By a 1658 act, the Virginia General Assembly affirmed the

retaliatory actions against the tribes that participated, during which Indians who were not killed were taken prisoner and subsequently sold as slaves or servants. *Id.* at 84-85.

162. Treaty with Necotowance, Oct. 5, 1646, *reprinted in* 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 322-26 (1823) [hereinafter Treaty of 1646]. The land left free to the English was described as “that tract of land between Yorke river and James river, from the falls of both the rivers to Kequotan . . .” *Id.* at 324. Necotowance (apparently a Pamunkey) replaced Opechancanough, who, after being taken prisoner, was shot by a colonist, at the age of almost 100. ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 86-87.

163. Treaty of 1646, *supra* note 162, at 323-24. The Indians were not to enter the lands left to the English, unless those Indians were messengers of Necotowance, who were to wear striped coats to indicate that they were carrying messages, and were to enter the area only through an English fort. *Id.* at 324-25.

164. *Id.* at 323. The Powhatans agreed to turn over any English prisoners and all “negroes and guns which are yet remaining” in their possession. *Id.* at 325.

165. ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 91-92.

166. *Id.* at 94. Some Englishmen obtained Indian land through the use of corrupt interpreters, who led the Indians to believe that the document they were signing was a confirmation of their possession, rather than a document to convey title. *Id.*

167. *See id.* at 94.

Mattaponi Reservation, thus confirming rights to land long held by the Tribe.¹⁶⁸

It was Pocahontas, as an admirable female representative of the Powhatans, that captured the American imagination. But it was another Powhatan woman, Cockacoeske (dubbed “the Queen of Pamunkey” by the English), who negotiated to protect the Powhatan tribes’ interests in the second half of the seventeenth century.¹⁶⁹ By the late 1660s, the English population had grown to about 30,000, while the Powhatan population had decreased to about 3,000.¹⁷⁰ In 1676, during the so-called “Bacon’s rebellion” and in defiance of the promises of protection in the 1646 Treaty, a terrorist group led by colonist Nathaniel Bacon gratuitously attacked Powhatans and plundered their lands.¹⁷¹ Bacon and his supporters briefly took over the government and enacted a series of laws aimed at undermining Powhatan rights. In the wake of Bacon’s Rebellion, Cockacoeske (in her capacity as the Chief of the Pamunkeys and allied tribes, including the Mattaponi Tribe), along with other tribal leaders, signed the Treaty at Middle Plantation (known today as Williamsburg) with the English Crown.¹⁷² This 1677 treaty was at the heart of the Mattaponi Tribe’s opposition to the reservoir project.

The 1677 agreement was termed a “treaty,” as befits an agreement between nations, rather than private individuals. The Treaty’s stated purpose was to establish a “good and just Peace” that would be “Secure and Lasting,” as it would confirm to the Indians “their just Rights” and provide

168. *Mattaponi Tribe*, *supra* note 111.

169. See Martha W. McCartney, *Cockacoeske, Queen of Pamunkey: Diplomat and Suzeraine*, in *POWHATAN’S MANTLE: INDIANS IN THE COLONIAL SOUTHEAST 176-77* (Peter H. Wood et al. eds., 1989). In 1649, Tottopotompoy, a successor of Powhatan, received recognition of a reservation of 5,000 acres for his people. ROUNTREE, *POCAHONTAS’S PEOPLE*, *supra* note 1, at 110. Following his death (while fighting for the English in fulfillment of treaty provisions) in 1656, he was succeeded by his widow, Cockacoeske, who was herself a descendant of Powhatan’s brother, Opechancanough. *Id.* Cockacoeske lived until 1686 and was succeeded by her niece. *Id.* at 112. See generally McCartney, *supra*, at 173.

170. ROUNTREE, *POCAHONTAS’S PEOPLE*, *supra* note 1, at 96.

171. See *id.* at 96-99. The excuse employed by Bacon and his fellow vigilantes was the killing of one English settler by Doeg Tribe members during a dispute over money. The Indians who suffered during the rebellion were not connected to the precipitating grievance. *Id.* at 96-97.

172. *Id.* at 100-01. Follow-up legislation in 1677 provided for the restoration of plundered Indian goods, and allowed for gathering of bark for houses and for hunting on additional land. *Id.* at 103.

“Redress of their Wrongs and Injuries.”¹⁷³ Thus, the stated aims of the Treaty were to recognize and protect the tribes’ legal rights, and to ensure that there was a remedy available to them for the wrongs that they suffered. The Treaty was presented as a document of sacred significance, as it appealed to “the great God who is god of peace and Lover of Justice,” to “uphold and prosper” the alliance between, and friendship of, the treaty parties.¹⁷⁴ Viewing treaties as documents that created sacred obligations was traditionally part of the diplomacy of many tribes, as well as European nations.

The first article of the Treaty referred to the tribes’ “Dependency” on the Crown, foreshadowing Chief Justice Marshall’s “domestic dependent nations” language from 1831’s *Cherokee Nation v. Georgia*.¹⁷⁵ At the same time, a number of treaty provisions recognized tribal sovereignty, and foreclosed the application of British civil and criminal law within certain areas. Moreover, the Treaty acknowledged the existing political statuses and interrelations of the signatory tribes, recognizing that (like her predecessor Powhatan at the time that Jamestown was founded) the “Queen of Pamunkey” had a higher status than other tribal leaders.¹⁷⁶

Significantly (and crucially, given recent events in Virginia), five articles in the Treaty focused on securing tribal rights to important resources. Articles II and III guaranteed land rights. The Indians would hold their lands “in as free and firm manner” as the king’s subjects enjoyed their lands and possessions, and were not required to pay a standard quitrent, but instead “three Indian Arrows” annually.¹⁷⁷ All friendly Indians who did not have sufficient land on which to plant were to be allocated land without the risk of disruption or seizure.¹⁷⁸

Article IV acknowledged the disturbances of the peace that resulted in “violent intrusions of divers English” onto Indian lands, and established a three-mile buffer zone around each Indian town.¹⁷⁹ In this area, the Englishmen were not to “Seat or Plant.”¹⁸⁰ Anyone who encroached on the

173. Treaty at Middle Plantation, *supra* note 2, at 82 (pmb1).

174. *Id.*

175. 30 U.S. (5 Pet.) 1, 17 (1831); Treaty at Middle Plantation, *supra* note 2, at 82 (art. I).

176. Treaty at Middle Plantation, *supra* note 2, at 83 (art. XII).

177. *Id.* (art. II) (emphasis omitted).

178. *Id.* (art. III).

179. *Id.* (art. IV) (emphasis omitted).

180. *Id.* (stating that “no English shall Seat or Plant nearer then Three miles of any Indian town; and whosoever hath made, or shall make any Incroachment upon their Lands, shall be removed from thence and proceeded against . . .”) (emphasis omitted).

tribes' lands would be removed and prosecuted. Indians and their goods and properties would be protected "against all hurts and injuries."¹⁸¹ If any violation occurred, the Indians could seek relief from the Governor, who would punish the infringers as English law prescribes, just as if an Englishman had been wronged.¹⁸² Finally, Article VII recognized off-reservation rights by confirming the Indians' right to harvest oysters and fish and to gather important plants and plant products on English land.¹⁸³ The tribes were thus assured the right to engage in aboriginal practices, such as fishing and gathering plant products, while agreeing not to interfere with the colonists' fishing and gathering activities.

Indians were also guaranteed personal protection in articles providing that Indians could not be held as servants for a longer term than an Englishman of the same age, and also, that they could not be sold as slaves.¹⁸⁴ Indian leaders who came to the Governor's Council of Assembly would be treated in a manner that indicated sufficient respect for their station.¹⁸⁵ They would be housed and fed at public expense, and would not be abused or wronged in any way.¹⁸⁶ Finally, Indians would not be imprisoned without legal process.¹⁸⁷

Because this was a treaty of friendship and alliance, several provisions related to mutual military assistance. The tribes would alert the English militia as to the march of any "strange Indians" near English lands.¹⁸⁸ The militia would aid the signatory tribes against any "Foreign Attempt, Incursion or Depredation upon the Indian Towns."¹⁸⁹ Finally, signatory tribes' members would be given "Powder and Shot" as the Governor saw

181. *Id.* at 83-84 (art. V).

182. *Id.*

183. *Id.* at 84 (art. VII). The Treaty recognized the Powhatans' right to "have and enjoy their wonted conveniences of Oystering, Fishing, and gathering" important food plants and other plants (namely, "Tuchahoe, Curtenemons, Wild Oats, Rushes, Puckoone") on "the English Dividends," (in other words, on non-Indian land). *Id.* (emphasis omitted). Indian requests to harvest these important products would not be refused. *See id.* The Indians were to report their plans to a public magistrate prior to exercise of their rights under this Article. *See id.*

184. *Id.* at 85 (art. XV). Under Article XIII, Indians could not be kept "as servant or otherwise" without a license from the Governor. *Id.* (art. XIII).

185. *See id.* at 85-86 (art. XVII).

186. *Id.*

187. *See id.* at 84 (art. VI).

188. *Id.* (art. IX) (emphasis omitted).

189. *Id.* (art. X) (emphasis omitted).

fit, and would be ready to “March against the Enemy” with the English forces.¹⁹⁰

The Governor, in his capacity as representative and agent of the national government (in other words, the Crown), was assigned an important role in connection with a number of provisions of the Treaty, in addition to those mentioned above. It was to the Governor that the tribes would deliver a “Tribute of Twenty Beaver Skins” each year¹⁹¹ and would apply for settlement of any disputes with the colonists.¹⁹² The references in the Treaty to “his Majesties Governor”¹⁹³ indicate that the Governor’s role was not based on his personal political status or leadership role among the colonists, but rather on his role as Crown representative.

Although the Treaty at Middle Plantation purported to guarantee important rights for the signatory Powhatan tribes, the size of the land available to the Powhatans continued to shrink. Even reservation land was reduced to the point that it became insufficient to support Powhatans in the traditional way of life, in which women farmed and men hunted and fished.¹⁹⁴ Pamunkey Neck, the area in which the Mattaponi Reservation is located, was opened to settlement in 1699, which led to settlers claiming and eventually receiving patents to much of the land guaranteed to the Pamunkeys under the 1677 Treaty.¹⁹⁵ When Powhatans exercised their off-reservation treaty hunting and fishing rights, they periodically had to seek

190. *Id.* (art. XI). The Indians acting in this capacity would be paid “for their good Services.” *Id.*

191. *Id.* at 85 (art. XVI). Leaders of the Mattaponi and Pamunkey tribes continue to fulfill this obligation by presenting the treaty tribute to the Governor each year. In recent years, the tribes presented game as a substitute for the increasingly rare beaver pelts. See Jim Nolan, *Tribes Look Ahead at Tribute: At Ritual Marking Treaty, Virginia Indians Sense Federal Recognition Near*, RICHMOND TIMES-DISPATCH, Nov. 27, 2009, at B1 (describing the 2008 ceremony). For further discussion of the annual tribute ceremony, see *Annual Treaty Ceremony*, POWHATAN MUSEUM OF INDIGENOUS ARTS & CULTURE, http://www.powhatanmuseum.com/Annual_Treaty_Ceremony.html (last visited Apr. 23, 2012).

192. Treaty at Middle Plantation, *supra* note 2, at 86 (art. XVIII).

193. See, e.g., *id.* (art. XVIII).

194. ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 113.

195. *Id.* In 1701, a formal cession of rights to over 5,000 acres was made. *Id.* Among the colonists receiving patents to land in Pamunkey Neck was Robert Napier (an ancestor of the author), who, in 1704, received a grant of land that was “part of the land laid out according to the Articles of Peace for the Pamunkey Indians.” Va. Colonial Land Office Patent to Robert Napier (Oct. 20, 1704), available at http://image.lva.virginia.gov/cgi-bin/GetLONN.pl?first=614&last=&g_p=P9&collection=LO (from Land Office Patents No. 9, 1697-1706 (vols. 1 & 2)).

assistance from the Governor because of colonists' resistance to these activities.¹⁹⁶

Along with threats to the land and resource rights guaranteed by treaty, the Powhatans also endured assaults on their civil rights. Laws were passed limiting Indians' right to bear arms, to sue and testify in court, and to marry whomever they choose.¹⁹⁷ Restrictions on appearances in court meant that Indians were limited in their ability to sue whites illegally occupying Indian land. Despite these considerable challenges and the shrunken land base experienced by the Powhatans in general over the course of the seventeenth century, the Mattaponi and the Pamunkey tribes nonetheless managed to remain in their Pamunkey Neck homeland (albeit on reduced land holdings).¹⁹⁸

C. Perseverance, Adaptation, and Survival

*[T]he Powhatan descendants persist within the confines of their ancient territory despite the efforts to crush them that began in 1608, and which, after reaching a climax during Bacon's Rebellion in 1676, have continued to menace them, though with declining force, until the present time.*¹⁹⁹

1. The Eighteenth Century: Treaty Rights and Trustees

Over the course of the next century, the Powhatans continued to face daunting demands on their resources, but still held on to portions of their homelands and continued to assert rights guaranteed by the 1677 Treaty. The Powhatan tribes' attachment to their traditional way of life and their off-reservation hunting and gathering rights preserved them from complete

196. See ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 113.

197. *Id.* at 133-34, 142. The treaties of 1646 and 1677 provided that the tributary Indians would receive justice "as though they were Englishmen," which recognized that they had the same rights to sue and testify in court as did the colonists. *Id.* at 134. In 1705, new legislation (which constituted Virginia's first "black code" and applied to Indians and other non-whites) provided that "Indian servants" and non-Christians could not appear in court as witnesses. *Id.* at 142. As a result, Indian servants could not bring suit if their employers tried to hold them beyond the time contracted for, and reservation residents could not sue whites who were illegally occupying Indian land, such as lessees who overstayed their lease term. *Id.* A 1691 statute forbade whites from marrying "Negroes, Mulattoes, and Indians," but did not define "Indians." *Id.* at 141-42. The 1705 "black code" provided that ministers could not perform marriages between whites and non-whites, and that marriage by whites to non-whites was punishable by a fine and six months imprisonment. *Id.* at 142.

198. *Id.* at 110.

199. Frank G. Speck, *Chapters on the Ethnology of the Powhatan Tribes of Virginia*, in 1 INDIAN NOTES AND MONOGRAPHS 225, 236-37 (F.W. Hodge ed., 1928).

impoverishment, as well as from losing the ability to maintain their separate existence as tribes.

While Powhatan women continued to farm without substantial disruption, men found hunting and fishing more difficult. As English settlements closed in and the settlers resisted the tribes' exercise of off-reservation hunting rights, tribal members were forced on a number of occasions to seek state reaffirmation of these rights.²⁰⁰ Powhatan men also provided support for their families through performing tasks for the English, such as killing wolves for bounty money, working as guides and trackers, and building fishing nets and canoes.²⁰¹ Despite many challenges, key elements of the Powhatans' culture survived.²⁰²

The eighteenth century brought the application of a trusteeship concept to some Powhatan lands. In the 1740s, three white trustees (the first in a series of trustees) were appointed to oversee the sale of 88 acres of Pamunkey land.²⁰³ The trustees eventually shifted from a role as a legal go-between, acting on the Tribe's behalf with respect to land, to a more extensive advisory role.²⁰⁴ New trustees were approved by a majority vote

200. ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 129-30. The 1677 Treaty set out the right to hunt and gather on unpatented lands and unfenced patented lands. *Id.* at 129. The Powhatans also faced crop damage caused by free-roaming English swine. *See id.* at 128-29.

201. *Id.* at 130-31.

202. *See id.* at 144. Thus, men hunted and fished, women farmed and gathered, and both sexes produced goods for trade with the colonists. *Id.* at 145, 175. Housing styles continued much the same, although some Virginia tribes gathered in fortified villages for greater safety. *Id.* at 146. Native languages were still used in everyday life, although the need for official interpreters diminished over the course of the century, as increasing numbers of Indians spoke English. *Id.* at 154. Women's status appears to have remained high. *Id.* at 150. The role of priests and important religious practices remained largely intact. *Id.* at 151-54. By the end of the eighteenth century, however, the tribes, beginning with the Pamunkeys, converted to Christianity. *Id.* at 175.

203. *Id.* at 164. The original trustees were appointed to oversee the sale of the land (which the Pamunkey Tribe was believed not to be using), receive the proceeds of the sale, and use the proceeds to pay Pamunkey debts. *Id.* The trustees also acted with respect to the lease of Pamunkey land, such as by pursuing lawsuits against defaulting white lessees during the time that Indians were prohibited from testifying in court against them. *Id.* at 165. The trustees were subsequently empowered to settle boundary disputes among reservation residents. *Id.*

204. *Id.* at 168. For example, they were legally empowered to settle disputes among tribal members in 1769, and were permitted, under Virginia legislation, to draft tribal bylaws for the Tribe's approval. *Id.*

of adult male tribal members, a provision that reflected white Virginian society's according of lesser status to women.²⁰⁵

When the eighteenth century ended, the Mattaponi and the Pamunkey managed to hold on to the reservation lands that allowed them to maintain identities separate from their white neighbors. The new Commonwealth of Virginia, as part of the developing United States during and after the American Revolution, observed the guarantees that these tribes received in the 1677 Treaty. The principle of protection for the reservation land, for example, was reflected in a 1792 law that stated that the lands of tributary Indians (in other words, the tribes that paid tribute each year in fulfillment of the 1677 Treaty obligations) were inalienable, as under the treaties entered into with the British Crown. The law also stated that the Indians and their property would still be protected.²⁰⁶ This provision echoed the federal Indian Trade and Intercourse Act of 1790, which prohibited the sale of any lands by Indians or tribes without federal approval.²⁰⁷

2. *The Nineteenth Century: Resisting Termination and Confronting Jim Crow*

The nineteenth century presented new threats, including the threat of official termination by the state government. Although 1813 legislation²⁰⁸ provided for the termination of the Gingaskin (Accomac) Tribe,²⁰⁹ the Mattaponi and Pamunkey tribes were not subject to this method of formal absorption into the non-Indian population. Nonetheless, the tribes had to contend with white Virginians' desire for the remaining Powhatan tribes' members to merge with other non-white people in Virginia's bottom social strata (collectively referred to as "persons of color").²¹⁰ The Mattaponi and Pamunkey tribes, along with other Powhatan tribes, were determined to thwart this ambition. As anthropologist Helen Rountree explained, "while Virginia whites emphatically wanted the Powhatans to assimilate with 'other' persons of color, the Powhatans became even more anxious to

205. *See id.*

206. *Id.* at 165. In June 1776, "Indian lands were declared inalienable except through the Virginia General Assembly." *Id.* A 1779 statute provided that "only the Assembly had the right to purchase Indian land." *Id.*

207. Indian Trade and Intercourse Act, 25 U.S.C. § 177 (2006) (current codification); *see also infra* notes 672-73 and accompanying text.

208. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 183 (citing 1813 Va. Acts 117-18).

209. *Id.* at 124, 183 (noting that, in 1641, the Accomacs became known as the Gingaskins).

210. *Id.* at 187.

separate themselves from ‘any’ persons of color,” in hopes of escaping “the whites’ increasing intolerance toward all people with real or presumed African ancestry.”²¹¹

Tribal members continued to live on the Mattaponi and Pamunkey reservations, where they farmed, hunted, fished, and governed themselves through tribal councils.²¹² They self-identified (and were identified by others) as Indians, and considered the possession of their reservations (which were formally separated from each other for state administrative purposes by 1894 legislation) as the cornerstone of their identity.²¹³

The nineteenth century was also marked by a continued hardening of white Virginians’ racist attitudes. Indians were seen as obstacles to progress and suspected of being in sympathy with free African Americans, whose very existence was considered “threatening to a white power structure whose economy was based on slave labor” because they represented the potential that all African Americans might one day be free.²¹⁴ Fearing loss of their income base and privileged status, white Virginians sought to “heighten the barrier between themselves and all non-whites.”²¹⁵ As early as 1802, free non-whites were required to carry county-issued certificates of birth or manumission, without which they could be jailed and possibly sold into slavery.²¹⁶ In the 1830s, the Virginia Assembly enacted a number of restrictive provisions targeting free African Americans and Indians.²¹⁷ Non-whites were prohibited from preaching at meetings – or from even attending meetings unless they were conducted by whites; unlawful assemblies by non-whites were prosecuted as though the organizers were slaves; and free non-whites were denied jury trials, and

211. *Id.*

212. *Id.* at 188-89 (discussing the way of life on the Pamunkey and Mattaponi reservations, as well as each tribal council’s role). The Pamunkeys continued to govern their reservation through a tribal council. *Id.* at 188. Professor Rountree sees the Mattaponi and Pamunkey reservations as essentially operating together through much of the nineteenth century. *See id.* at 186, 189. Her description of life on the Pamunkey Reservation therefore generally applies equally to the Mattaponi Reservation. Reconstructing a more detailed picture of life on the reservations during the nineteenth century using official records is difficult because many were destroyed in an 1885 courthouse fire in their county (King William County). *See id.* at 187-88.

213. *Id.* at 189.

214. *Id.* at 191.

215. *Id.*

216. *Id.* at 192, 343 n.39 (citing VA. CODE § 1:438-439 (1819); MATTHEWS DIGEST § 1:207-208 (1856-57)). Non-whites could be jailed if found without proof of their freedom and could be sold into slavery if no one came forward to testify for them. *Id.*

217. *See id.*

were instead, like slaves, tried by justices of oyer and terminer.²¹⁸ Although the reservations served as legal refuges, outside reservation boundaries, the Mattaponi and other Virginia Indians were subjected to these laws, and responded by obtaining certificates of freedom to prove their status as “persons of mixed blood, not being free negroes or mulattoes.”²¹⁹

While white Virginians looked at Indians' status in racial terms, the Mattaponi, Pamunkey, and other tribes continued to assert their status in political terms by relying on the rights guaranteed to the tribes as sovereign entities through the 1677 Treaty and other legal measures.²²⁰ In the 1840s, the General Assembly rejected a petition seeking the sale of the Pamunkey and Mattaponi reservations, after receiving two counter-petitions from the tribes and a letter from the Pamunkey trustees opposing the sale.²²¹ While white Virginians viewed non-whites, like the Mattaponi and Pamunkeys, as a threat to a slave-owning community, and preferred that the tribes be removed from Virginia in their entirety,²²² the Mattaponi and Pamunkey were not going anywhere. They persevered on their reservations, even through the difficult years of the Civil War and Reconstruction. Although a few tribal members joined the Union Army during the war, most Mattaponi and Pamunkey (who refused to enlist in the Confederate Army) remained neutral.²²³

218. *Id.* (citing 1832 Va. Acts 20-22).

219. *See id.* at 193. Under an 1833 statute, individuals with Indian and English ancestry could obtain certificates indicating that they were “persons of mixed blood, not being free negroes or mulattoes.” *Id.* (citing 1833 Va. Acts 51). Members of some non-reservation tribes obtained certificates indicating that they were “persons of mixed blood” or were Indian, while others simply obtained certificates of free birth. *See id.* at 193, 343 nn.43-44. A 1785 statute provided that “every person whose grandfathers or grandmothers or any one is, or shall have been, a negro, although all his other progenitors, except that descending from the negro, shall have been white persons, shall be deemed a mulatto; and so every person who shall have one-fourth part or more of negro blood, shall, in like manner, be deemed a mulatto.” Treaty of 1646, *supra* note 162, at 184.

220. *See* ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 193. For example, in the 1830s, after a Nottoway was convicted of a crime in a court of oyer and terminer, the Governor granted him a pardon. *Id.* As an Indian with treaty status, he had the right to receive justice as though he were white (in other words, in a jury trial). *Id.*

221. *Id.* at 193-95. The Governor also took action during this period to counter white attacks on Pamunkey and Mattaponi rights. When their white neighbors seized their weapons in 1857, he intervened to protect tribal members' right to bear arms. *See id.* at 197-98.

222. *See id.* at 194.

223. *Id.* at 198.

After the Civil War, Virginia instituted segregation policies that ultimately took the form of Jim Crow laws, which separated public facilities and records into two categories – “white” and “colored.”²²⁴ When white Virginians established schools to separate their children from non-white children, they closed these schools to Pamunkey and Mattaponi children. The conflation of Indian identity with that of black Virginians in the educational setting was unacceptable to tribal members, who sought an alternative to enrollment in the black schools.²²⁵ When King William County school board members refused to support a third set of schools for Indians, the Pamunkey Tribe established an on-reservation school for Pamunkey and Mattaponi children.²²⁶

The Pamunkeys’ operation of a school on their treaty-guaranteed reservation symbolized their continuing, separate existence as a tribe.²²⁷ The Mattaponi solidified their formal legal identity and sovereignty with the adoption of bylaws in the 1890s, and eventually founded their own school.²²⁸ State trustees had been acting on behalf of both tribes, but, at this time, the State appointed separate trustees for the Mattaponi,²²⁹ in recognition not only of their separate identity from non-Indians, but also their separate status from the Pamunkey Tribe. Thus, the distinct political status of these tribes, not only relative to other Virginians, but also relative to other tribes, remained apparent.

3. The Twentieth Century: Maintaining Tribal Identity and Avoiding Bureaucratic Genocide

Despite the pressures of expanding white settlement and the consequent demand for Indian land and resources, the Mattaponi and Pamunkey tribes, drawing upon a common Powhatan ancestry and way of life, survived on the reservations guaranteed to them as Indian islands in the midst of a sea of increasingly hostile non-Indian settlement. Reservation visitors documented the tribes’ continued existence, not only as social groupings, but also as political entities, and publicized what was clear to the tribes themselves: despite centuries of efforts to strip all of the Powhatan tribes of their identity, their land, and their connection to the water and fish of their homeland, the Mattaponi and Pamunkey tribes persevered. Their cultures

224. *Id.* at 200, 211.

225. *See id.* at 200.

226. *See id.* at 200-01.

227. *See id.*

228. *See id.* at 211, 215.

229. *See id.* at 211.

adapted (as all cultures do) to changing times, while retaining key elements of the tribes originating before the first colonists arrived at Jamestown.

a) Frank Speck's Documentation of Powhatan Persistence

Anthropologists visiting the Pamunkey and Mattaponi reservations and other areas of concentrated Indian settlement in the late nineteenth and early twentieth centuries were impressed by the extent to which Indians maintained an identity separate from both white and black Virginians.²³⁰ Published accounts of their findings noted the persistence of various aspects of Powhatan culture, including housing patterns²³¹ and occupations,²³² as well as land-use and land-holding patterns.²³³ These visitors also commented on the political and legal aspects of reservation life. They noted, for example, that a chief and four councilmen (who dealt with civil offenses on the Pamunkey Reservation) were elected every four years.²³⁴ The Pamunkey Tribe paid the annual treaty tribute to the Governor, rather than paying taxes.²³⁵ The Mattaponis, for their part, had their own chief on their reservation.²³⁶

These visitors recorded a number of Pamunkey laws aimed at preserving the Indian status of the reservation's population. Pamunkey law (presumably based on an awareness of the adverse consequences flowing from being identified as black in Virginia) prohibited marriage with anyone who was not white or Indian.²³⁷ Outsiders were only allowed to live on the

230. In the 1890s, Albert Gatschet (a Smithsonian anthropologist), John Garland Powell (a politician who subsequently became Governor of Virginia), and James Mooney (of the Smithsonian's Bureau of American Ethnology) visited the Pamunkey Reservation. See ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 203, 345 nn.101-02 (noting Mooney's affiliation, the visits of the three men, and Gatschet and Pollard's professions).

231. *See id.* at 203. The reservation's housing patterns resembled those of the early seventeenth century, with the houses scattered about the fields, rather than clustered together. *Id.*

232. *See id.* For example, men still worked as hunters, fishermen, and trappers, along with serving as guides for visiting white hunters. *Id.*

233. *See id.* The Pamunkeys planted mostly corn on the land farmed by each family. The extensive wooded parts of the reservation were kept as a communal game preserve, rather than being subdivided. *Id.* Both the Pamunkeys and the Mattaponis maintained grassy areas that were used as common pastures. *See id.* at 205-06.

234. *Id.* at 203-04. The Pamunkeys used dried corn kernels and beans for balloting. *Id.*

235. *See id.* at 203.

236. *See id.* at 205.

237. *See id.* at 204; Speck, *supra* note 199, at 309 ("No member of the Pamunkey Indian Tribe shall intermarry with any Nation except White or Indian under penalty of forfeiting

reservation for limited periods of time.²³⁸ Judging by the visiting anthropologists' view of tribal members, efforts to maintain a separate Indian community were successful. Anthropologist James Mooney, for example, wrote that he was "surprised to find them so *Indian*, the Indian blood being probably near 3/4."²³⁹

Anthropologist Frank Speck, who established a long-term relationship with the Mattaponi and Pamunkey tribes, beginning with initial visits in 1919, provided extensive observations of Mattaponi and Pamunkey life in the first half of the twentieth century from an outsider's perspective.²⁴⁰ Describing his visits, Speck noted that "each season creates a deeper feeling of respect for their loyal tenacity to their Indian traditions," which "is responsible for the survival of many desirable facts hidden away in memory's closets."²⁴¹ Included among the evidence of the tribes' cultural and political continuity was the retention of "their internal government, their social tradition and their geographical position as the people of Powhatan,"²⁴² as well as tribal members' continued participation in some of the same crafts and other activities that impressed early English observers.²⁴³ Because Speck viewed the Mattaponi Tribe and its reservation as having considerable ties with and similarities to the Pamunkey Tribe and its reservation, his observations of Pamunkey life were generally equally applicable to Mattaponi life.²⁴⁴

their rights in Town.") (quoting JNO. G. POLLARD, *THE PAMUNKEY INDIANS OF VIRGINIA* 16 (1894) (Bulletin 17, U.S. Bureau of Ethnology, Smithsonian Institution)).

238. See ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 204-05.

239. *Id.* at 205 (quoting Correspondence, Letter of Oct. 22, 1899). Mooney speculated that the tribal members' other ancestry quantum was "white, with a strain of negro." *Id.*

240. In 1928, his written observations were published as *Chapters on the Ethnology of the Powhatan Tribes of Virginia* in the *Indian Notes and Monographs* series of the Heye Foundation's Museum of the American Indian. See generally Speck, *supra* note 199.

241. *Id.* at 232. Speck noted that it was "inevitable that a people who have held their own territory for three centuries through three wars with Europeans covering at least thirty-two almost continuous years of that period, then subdued but not obliterated, should have something concerning their old life to offer to the interested and sympathetic investigator." *Id.*

242. *Id.* at 237.

243. For example, he commented on clay pottery- and pipe-making, and on textile weaving with turkey feathers. *Id.* at 394-418 (discussing pottery); *id.* at 418-32 (discussing clay pipes); *id.* at 433-43 (discussing textiles). John Smith's 1612 account also referred to "mantels made of Turkey patterns, so prettily wrought and woven with tweeds that nothing could be discerned but the feathers." *Id.* at 441.

244. See *id.* at 249 (noting that "no differences in community life can be observed between them"). He noted that the residents of the Mattaponi Reservation "appear to have

Hunting and fishing still played important roles in the reservations' economies. Speck noted that tribal members still "haul seine and trawl lines, and pursue deer, raccoons, and wild turkeys and other wild fowl on their famous river, and maintain their hunting territories for the taking of fur and meat in the primeval swamp forming part of their reservation."²⁴⁵ He observed the similarities between contemporary hunting, trapping, and fishing customs and practices, and those recorded by early English observers.²⁴⁶ Speck also commented on the Pamunkey Tribe's forethought in selecting its reservation land.²⁴⁷ Traditional snares and heavily constructed log-and-stake dead-fall traps were still used for trapping in preference to modern steel traps.²⁴⁸ In the game-rich tribal lands,²⁴⁹ hunting and trapping territories continued to be recognized using unmarked, but geographically identifiable, boundaries that tribal records indicate date back

been closely affiliated with the Pamunkey, and the recent history of the two bands has been practically identical." *Id.* Speck also visited and wrote about other Virginia Indian tribes and communities. *See, e.g., id.* at 263-67 (discussing the Upper Mattaponis); *id.* at 267-78 (discussing the Chickahomyns); *id.* at 278-80 (discussing the Nansamonds); *id.* at 280-82 (discussing the Rappahannocks); *id.* at 282-84 (discussing the Potomacs).

245. *Id.* at 253; *see also id.* at 312-30 (discussing the persistence and use of hunting and trapping territories); *id.* at 330-59 (describing hunting customs); *id.* at 359-74 (describing fishing customs). The hunting territories discussion, in particular, provides interesting evidence of the long-term persistence of practices on the reservations.

246. *See, e.g., id.* at 321-22 (discussing writings of John Smith that indicate an understanding of the tribes' territorial hunting limits and hunting grounds); *id.* at 339-40 (quoting John Smith, *Description of Virginia and Proceedings of the Colonie, in NARRATIVES OF EARLY VIRGINIA: 1606-1625*, AT 104 (Lyon Gardiner Tyler ed., 1907)) (discussing John Smith's observations on a tribal deer drive, which still takes place annually to secure deer to present as treaty tribute).

247. *See id.* at 314. Speck commented that "[w]hen the ancestors of the Pamunkey . . . chose . . . their final domain, it must have been with a clear vision of their future need of a territory where natural inaccessibility would provide a haven for game . . . and, [from] the agencies . . ." *Id.*

248. *Id.* at 343. Instead of using steel spring-traps, tribal members continued to use "the old-fashioned Indian deadfall" trap, "which does not rust, which costs nothing, and which kills and holds the animal without tearing its hide or allowing it a chance to gnaw off its foot and escape." *Id.*

249. *Id.* at 330. Speck described the topography of the area, as well as the advantages that it provided for game animals and thus for the people who hunted them: The marsh and swamp area of tidewater Virginia is extensive. For many miles both banks of the rivers are bordered by lowlands, which are inundated by the tides . . . The swamps provide cover for considerable game, and it is in these fastnesses that the Pamunkey of today, as they did of old, pass much of the time in gaining a livelihood. *Id.*

as far as the early part of the nineteenth century.²⁵⁰ Fishermen still used some old fishing equipment, methods, and skills, such as net-making techniques.²⁵¹ These age-old activities – hunting, trapping, and fishing, along with growing corn – still sustain the tribes economically²⁵² and continue to be essential for the Mattaponi and Pamunkey tribes’ as-yet-unbroken fulfillment of their 1677 Treaty tribute obligations.²⁵³ The rivers, in particular, continue to play a crucial role, providing the tribes with the food needed to survive for almost the entire year, as a Mattaponi saying makes clear: “The river is the Indian’s smoke-house; it is open all the time except for a short period in winter.”²⁵⁴ Shad fishing provided one of the tribes’ “principal harvests,”²⁵⁵ and, consequently, at the height of the shad season, fishermen camped on the river banks and manned drift seines around the clock.²⁵⁶

Speck documented additional evidence of the preservation of Powhatan lifeways, including tribal members’ use of bones, fossils, and other natural materials as charms;²⁵⁷ the use of stones as tools;²⁵⁸ the manufacture of

250. *See id.* at 317 (noting that the “creeks dividing the plots are so well known that almost any boy of Pamunkey town can name and locate them”); *id.* at 329 (noting that tribal records “show decisively that the assignment of hunting plots, the same in boundaries as those now recognized, goes back as far as the early part of the last century”). The chief and tribal council disposed of the hunting grounds each year by lease to selected applicants. *Id.* at 317. Leaseholders had the exclusive right to hunt and trap (using the stationery dead-fall traps) within their assigned tracts. *Id.* at 314, 317.

251. *See id.* at 367. Speck also wrote that some Pamunkey women preferred to scale shad with a stone scraper (rather than a metal knife), which allowed them to remove the scales without cutting the fish or their fingers. *Id.* at 371-72. One woman used a stone scraper from an old house site, thus utilizing a tangible link between past and present tribal members. *Id.*

252. *See, e.g., id.* at 316 (noting that the holders of hunting territory rights supported their families entirely by fishing, hunting, and trapping, along with raising corn); *id.* at 330 (noting that “the Pamunkey of today, much as they did of old, spend much of their time “gaining a livelihood”). Deer was the area’s last surviving big game animal. *Id.* at 330-31. Corn was also planted. *Id.* at 382.

253. *See id.* at 300 n.1, 339 (noting the tribes’ pride “that they have performed this duty without a break since the adoption of the treaty between them and the General Assembly”).

254. *Id.* at 372. The period of time in the winter during which the “smoke-house” is closed is when the river is frozen. *See id.* The Pamunkeys had a similar expression. *See id.* at 372-73.

255. *Id.* at 361.

256. *Id.* at 362.

257. *See, e.g., id.* at 345 fig.55 (“[D]ried fungus growth kept in the cabin by the Mattaponi as a charm.”); *id.* at 346 fig.56 (describing the captions of the pictures: “Pamunkey dog tooth charm worn by teething children”; “Muskrat scapulae used by the

pottery²⁵⁹ and clay pipes,²⁶⁰ and household use of natural materials, such as dried gourds.²⁶¹ He was particularly impressed by the survival of a painstaking technique for weaving feathers into textiles.²⁶²

In a postscript to an account of his visits, Speck noted that despite the influences to which each tribe was subject over the previous centuries, “something more than moral and social tradition survives to continue the group as a unit under its old name.”²⁶³ The Powhatan tribes “organized into corporate associations and proceeded along modern lines to carry on a social program for consolidation of their forces,” a development which “opens another phase of their history, hopeful in certain aspects, though impeded by recollections of recent social oppression, poverty, [and] slander,” and demonstrates “[t]heir desire to exist as smaller nationalities . . .”²⁶⁴ Speck saw the tribes as “at a climax and turning point in their history,”²⁶⁵ and he encouraged them to organize themselves into formal social and political structures with which outsiders would be familiar – advice later taken by several of the non-reservation tribes.²⁶⁶

Mattaponi as a charm”; “Animal tooth used by the Pamunkey as a charm”; “Fossil shark’s tooth used as a charm by the Mattaponi”; “Metacarpal of a deer used by the Mattaponi as a charm” and “Hog’s tooth used as a health charm by the Mattaponi”).

258. *See id.* at 372 (describing a stone scraper for scaling fish); *id.* at 400 fig.103 (discussing the stones used for pounding clay and shells to make pottery); *id.* at 406 fig.106 (providing a photograph of pottery smoothing stones). Stone arrowheads were sometimes found and attached to shafts with cords or bark wrappings for re-use “in a way that [could not] much differ from the method of several centuries ago.” *Id.* at 349.

259. *See id.* at 409-11. Speck was able to obtain detailed accounts of the process of making pottery. *Id.*

260. *See id.* at 424-25, 427. Men and women continued to make clay pipes resembling ones described by early English visitors. *Id.* Clay was still obtained from traditional clay-holes on river banks. *Id.* at 401 fig.104 (illustrating men digging clay).

261. *Id.* at 385, 387-90. Speck observed that, like their ancestors, some tribal members still used dried gourds as containers, used turtle shells to scoop up turtle stew, and used fossil scallop shells as platters and spoons.

262. *See id.* at 433. He wrote that “art so ancient and so elaborate can hardly be expected to have persisted from colonial times down to the present day . . . [b]ut . . . the Virginia Indians have not entirely forgotten, nor even lost, the art of weaving feathers into the foundation of textile fabrics.” *Id.*

263. *Id.* at 451.

264. *Id.* at 452.

265. *Id.* at 453.

266. *See id.* at 286. In 1921, the Rappahannock organized formally as a tribe, and in 1923 and 1925, respectively, the Upper Mattaponi and a subdivision of the Chickahominy Tribe followed suit. The Chickahominy Tribe organized in 1908, prior to Speck’s recommendation. *Id.*

At times, however, the Mattaponi and Pamunkey tribes still needed to remind state and local government officials of their members' and their reservations' special political status. For example, tribal members paid no state taxes while residing on their reservations, and their personal property held on the reservation was not subject to county tax – a status that the State Attorney General confirmed in 1917.²⁶⁷ During World War I, the Attorney General ruled that Pamunkeys and Mattaponis were not draftable; however, tribal members nonetheless continued to serve in the armed forces on a voluntary basis.²⁶⁸

b) Walter Plecker's Attempt at Bureaucratic Genocide

In the first few decades of the twentieth century, while anthropologists were documenting the cultural and political survival of the Mattaponi and Pamunkey tribes and the Virginia government's acknowledgment of their treaty rights, a new threat arose in Walter Ashby Plecker, the first registrar of Virginia's Bureau of Vital Statistics.²⁶⁹ From 1912 to 1946, as he oversaw the Bureau's work of recording births, marriages, and deaths, Plecker tirelessly pursued his goal of "purifying the white race" in Virginia by collectively categorizing Indians and all other non-whites as "colored."²⁷⁰ Once classified as colored people, Indians could be excluded from the public facilities that were open only to white people, and instead be relegated to the inferior colored facilities.²⁷¹ Plecker's efforts amounted

267. ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 214-15. In 1917, the Mattaponi Tribe received a ruling from the State Attorney General confirming that the county could not tax its members for personal property held on the reservation. *Id.* Also, in 1916, the two tribes raised the argument that their treaty status exempted them from the state's hunting license requirement. They argued this point repeatedly (and usually successfully) with game wardens, until a 1962 statute expressly exempted them from hunting- and fishing-license requirements. *See id.* at 213.

268. *Id.* Members of the non-reservation Powhatan tribes, on the other hand, were deemed draft-eligible. *See id.*

269. *Id.* at 219.

270. *See id.* at 219-25.

271. *See id.* at 211-12. Virginia's "Jim Crow" laws separated white and colored Virginians for the purposes of public records, such as land and personal property records, and in public facilities, such as waiting rooms, railroad cars, and steamboats. *Id.* at 211, 348 n.167. At the very least, tribes could be relegated to colored facilities if they did not put up a fight (as did the Pamunkeys, after being excluded from white railroad cars). *See id.* at 212. In 1900, a railroad official ruled that Pamunkeys were not colored and could ride in the white cars. *Id.*

to an attempt at what some commentators have called “bureaucratic genocide.”²⁷²

In 1924, the Virginia General Assembly’s enactment of the Racial Integrity Act (“RIA”) gave Plecker’s campaign for “racial purity” a considerable boost.²⁷³ To be considered “white persons” under the RIA, individuals could have “no trace whatever of any blood other than Caucasian.”²⁷⁴ Persons with “one-sixteenth or less” American Indian blood of and “no other non-Caucasic blood” were deemed to be white persons.²⁷⁵ This so-called “Pocahontas exception” preserved white status for elite Virginians who proudly claimed descent from Pocahontas and John Rolfe, this being the only socially acceptable form of non-white ancestry.²⁷⁶ Amid the quest for “racial purity,” this one instance of “race mixing” was a source of pride for these Virginians, but they nonetheless wished to ensure that it did not prevent them from enjoying the privileges of white status. The RIA provided for registration (with a racial identification) of all Virginians,²⁷⁷ declared all marriages between white and colored persons void,²⁷⁸ and made it unlawful for a white person to marry anyone except “a white person, or a person with no other admixture of blood other than white and American

272. E.g., Warren Fiske, *The Black-and-White World of Walter Ashby Plecker: How an Obscure Bureaucrat Tried to Eradicate Virginia’s “Third Race”*, VIRGINIAN-PILOT (Norfolk, Va.), Aug. 18, 2004, at A1.

273. See An Act to Preserve Racial Integrity, 1924 Va. Acts 534-35, *invalidated by* *Loving v. Virginia*, 388 U.S. 1 (1967). The anti-miscegenation provisions of the statute were struck down in *Loving v. Virginia*. J. Douglas Smith, *The Campaign for Racial Purity and the Erosion of Paternalism in Virginia, 1922-1930: “Nominally White, Biologically Mixed, and Legally Negro”*, 68 J. S. HIST. 65, 65-66 (2002). The passage of the Racial Integrity Act was followed in 1926 by the passage of the Public Assemblages Act. Act of 1926, 1926 Va. Acts 945, *invalidated by* *Brown v. City of Richmond*, 132 S.E.2d 495 (Va. 1963). This Act required “the separation of white and colored person at public halls, theaters, opera houses, motion picture shows and places of public entertainment and public assemblages.” *Id.* at 495. In 1963, the Virginia Supreme Court of Appeals struck down the Act in *Brown v. City of Richmond*, 132 S.E.2d 495, 501 (Va. 1963).

274. *Loving*, 388 U.S. at 5 n.4 (quoting VA. CODE ANN. § 20-54 (1960)).

275. *Id.* The original bill indicated a lower allowable Indian blood quantum for white-person status – one sixty-fourth. See Smith, *supra* note 273, at 78.

276. *Id.* For an analysis of the “Pocahontas exception,” see Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351 (2007).

277. Smith, *supra* note 273, at 78. The original bill made registration mandatory, but some legislators considered this an insult to white Virginians, so the final Act allowed for voluntary registration. *Id.* at 80.

278. *Loving*, 388 U.S. at 5 n.3 (quoting VA. CODE ANN. § 20-57 (1960)).

Indian.²⁷⁹ Racial labels were now to be included for all people on birth and death certificates, in marriage registers, and in other public records, such as tax and voter registration records.²⁸⁰

The RIA's racial definitions were certainly not the first statutory definitions pertaining to Indians. An 1866 statute, for example, provided that "[e]very person having one-fourth or more of negro blood shall be deemed a colored person, and every person not a colored person having one-fourth or more of Indian blood shall be deemed an Indian."²⁸¹ In 1910, the Virginia legislature refined the implicit statutory definition of white person so that "anyone with one-sixteenth or more African ancestry was a 'colored person,' and could not be either a white person or an Indian."²⁸² In 1930, the statutory definitions for non-whites were brought into accord with the RIA. Thereafter, any person "in whom there is ascertainable any Negro blood" was designated a "colored person," in keeping with the so-called "one-drop rule."²⁸³ As to Indians, the 1930 Act provided that "every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian"²⁸⁴ An exception to the Indian definition, however, allowed tribal members with at least one-fourth Indian

279. *Id.* The RIA also prohibited lying about one's race on a registration or birth certificate. See Smith, *supra* note 273, at 78.

280. See ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 212; Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202 & n.93 (1966).

281. See ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 200, 345 n.88 (quoting 1866 Va. Acts 84-85).

282. See *id.* at 211, 348 n.168 (citing 1910 Va. Acts 581).

283. See *id.* at 221, 351 n.15 (citing 1930 Va. Acts 96-97). Prior to the 1930 Act, there was a loophole in the RIA. The RIA defined a white person as an individual with no non-Caucasian blood (aside from Indian ancestry that was permissible under the Pocahontas exception) and did not define colored person. The RIA did not amend the 1910 Act, which defined colored persons as individuals with one-sixteenth or more Negro blood. As a result, individuals with less than one-sixteenth Negro blood could not be considered Negro and could not be barred from white schools. Smith, *supra* note 273, at 100. At the time that *Loving* struck down the anti-miscegenation provisions of the RIA, the Virginia Code provided that "[e]very person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian." An exception to this section provided that "members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians." *Loving*, 388 U.S. at 5 n.3 (quoting VA. CODE ANN. § 1-14 (1960)).

284. See ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 221, 351 n.15 (citing 1930 Va. Acts 96-97).

blood who were residing on state reservations to be classified as Indians (even if they had some African ancestry, so long as their African ancestry was under one-sixteenth).²⁸⁵

Claiming that “Indians are springing up all over the state as if by spontaneous generation,”²⁸⁶ Plecker suspected that individuals who reported themselves as Indian were in fact of predominantly African ancestry and claimed to be Indian to avoid being recorded as colored.²⁸⁷ He sent instructions to county and city registrars, as well as to health professionals, emphasizing the importance of accurately recording the racial composition of both parents of individuals whose records they prepared.²⁸⁸ He urged teachers and school officials to prevent children with even a trace of African ancestry from attending white schools.²⁸⁹

Plecker examined old birth and marriage records held by the Bureau of Vital Statistics for evidence of African ancestry, despite the questionable reliability of these records, which were not kept continuously or carefully, and which showed inconsistent use of terms and classifications of particular individuals.²⁹⁰ That there had been no consistent definition of “Indian” throughout the nineteenth century (due, in part, to the loss, by fire or otherwise, of those records in counties with large Indian populations) made documentation of Indian ancestry in such records particularly challenging.²⁹¹ Plecker accepted oral testimony as to racial status only from white individuals, whom he questioned as to the presence of Indians in their counties.²⁹² Members of the Mattaponi and Pamunkey tribes were more

285. *See id.* (“[M]embers of Indian tribes living on reservations allotted them by the Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians so long as they are domiciled on such reservations.”).

286. Smith, *supra* note 273, at 84 (quoting John Powell as quoted in J. DAVID SMITH, *THE EUGENIC ASSAULT ON AMERICA: SCENES IN RED, WHITE, AND BLACK* 74 (1993)).

287. *See id.* at 84-85. Plecker erroneously assumed that all Virginians of Indian descent also had African ancestry. *Id.* at 85.

288. *Id.* at 81.

289. *See id.*

290. *See id.* at 84. As an example of inconsistent classification, some nineteenth century record keepers recorded both African Americans and Indians in the same category – “colored.” *Id.* at 82. Record keepers also may have ignored statements of Indian ancestry made by those whom they were enumerating, preferring to instead rely on their own personal impressions. ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 190.

291. Smith, *supra* note 273, at 83 n.34; *see also* ROUNTREE, *POCAHONTAS'S PEOPLE*, *supra* note 1, at 189 (listing the names of the counties and tribes affected by destruction of records).

292. *See* Smith, *supra* note 273, at 85-86.

difficult for Plecker to define out of existence. Because (in keeping with their treaty and reservation status) the Mattaponi and Pamunkey tribes were not taxed, the usual records were not always kept for them, leaving Plecker with a lack of evidence to “prove” that they were of African descent.²⁹³ Despite Plecker’s instructions to record those claiming Indian status as “colored” and either to change or mark old records that listed individuals as Indians, county clerks in King William County recorded as “Indian” any Pamunkeys and Mattaponis who appeared in their records.²⁹⁴

Where birth certificates were concerned, however, Plecker had greater authority, and, consequently, birth certificates issued for Indians after 1924 listed them as “colored.”²⁹⁵ Plecker waged a public-relations campaign against the Virginia Indians using his pamphlet, *Eugenics in Relation to the New Family*, in which he claimed that all Virginia Indians had some African ancestry and that, therefore, none were “true” Indians.²⁹⁶ Finally, in 1943, he sent a list of surnames, including names common among Virginia Indians, to local officials, claiming that these were surnames of “mixed negroid Virginia families striving to pass as ‘Indian’ or white.”²⁹⁷ Individuals with these surnames could not register as white, marry whites, or attend white schools or other white facilities.²⁹⁸ Plecker warned that “[o]ne hundred and fifty thousand other mulattoes in Virginia are watching eagerly the attempt of their pseudo-Indian brethren, ready to follow in a rush when the first have made a break in the dike.”²⁹⁹ In his so-called “Racial Integrity File,” he included copies of documents allegedly proving the African ancestry of Virginia Indians and other Virginians.³⁰⁰ In an

293. See *id.* at 86.

294. See ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 222-23. Members of the Upper Mattaponi Tribe were also recorded as Indian. *Id.* at 223. In Charles City and New Kent Counties, where the clerks followed Plecker’s directive, new records labeled Indians as “colored.” *Id.*

295. See *id.* Between 1912 and 1924, birth certificates issued for Indian babies said “Indian.” *Id.*

296. See *id.* The pamphlet accompanied each birth certificate. *Id.*

297. Letter from W.A. Plecker, State Registrar of Vital Statistics, to Local Registrars, Physicians, Health Officers, Nurses, School Superintendents, and Clerks of the Courts (Jan. 1943), available at http://www2.vcdh.virginia.edu/encounter/projects/monacans/Contemporary_Monacans/letter.html.

298. See *id.* Plecker noted that all birth certificates of members of these families showing them as “white” or “Indian” would be rejected and returned to the midwife or physician. *Id.*

299. *Id.*

300. See ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 222. The file contained copies of county and federal census records, along with “testimony” from Virginians about the ancestry of other Virginians. *Id.*

effort to suppress evidence that put the lie to his beliefs, Plecker sought to ban Frank Speck's books documenting the survival of the Virginia tribes from the state's public libraries.³⁰¹

Professor Rountree observed that Plecker, viewing Indians as a threat to his racial integrity principle and believing that they wished to "pass" as white, exhibited a fundamental misunderstanding of Indian concerns and motivations. Tribal members sought to preserve recognition of their Indian status and, accordingly, simply sought access to the superior facilities that were available to whites, rather than to *be* white.³⁰² They expected the children of Indians who married whites to be *Indians*, who would remain within the Indian communities that they sought to preserve.³⁰³

By trying to change the birth certificates of individuals classified as Indian prior to the RIA's passage, Plecker exceeded his authority under the RIA.³⁰⁴ He initially added his own racial classifications to pre-1924 Indian birth certificates, and later attached "warning" statements to the certificates.³⁰⁵ He pressured school superintendents to remove Indian children from white schools,³⁰⁶ and attempted (usually without success) to move Indian patients from "white" to "colored" hospitals and sanatoriums.³⁰⁷ In the case of one patient, following protests by the Mattaponi and Pamunkey tribes, the State Attorney General expressly confirmed that reservation Indians were entitled to "white" privileges, on the basis of their treaties.³⁰⁸

Plecker's attempt at bureaucratic genocide extended to matters of federal law as well, such as the census and the military draft. In advance of the 1930 federal census, Plecker requested federal officials to adopt his

301. *See id.* at 224. Speck returned to Virginia during Plecker's time in office, where he and his graduate students published a number of articles on Virginia tribes, and supported several of the tribes in efforts to achieve formal federal recognition and to work together on matters of common concern. *See id.* at 229-30.

302. *See id.* at 222.

303. *See id.*

304. *See id.* at 232.

305. *See id.* Initially, Plecker wrote his own racial classifications on the backs of the pre-1924 Indian birth certificates in the Bureau's files, and then issued copies of both the fronts and backs when birth certificates were requested. Later, he attached lengthy printed "warning" statements to the backs of Virginia Indians' birth certificates, indicating that anyone claiming to be "Indian" or "Mixed Indian" had Negro ancestry and should be considered "colored." *See id.* at 232-33.

306. *See, e.g., id.* at 224.

307. *See id.* at 224-25.

308. *See id.*

conviction that no Virginians should be recorded as Indians.³⁰⁹ Although he eventually grudgingly conceded that Mattaponi and Pamunkey reservations' residents might have to be enumerated as Indians, he insisted that all other Virginians claiming to be Indian should not be recorded as such.³¹⁰ The 1930 census listed a number of Mattaponi and Pamunkey tribal members as "Indians," including Mattaponi Chief George Custalow, whose tribal office is indicated in his census entry.³¹¹ While Plecker's efforts in connection with the 1930 census failed, he had greater success with the 1940 census, and managed to prevent some Virginia Indian families from being enumerated as such.³¹² During World War II, Plecker tried to ensure (with only limited success) that Virginia Indians were inducted into colored units, rather than serving in white units.³¹³ Most of the members of Virginia tribes who served in World War II were inducted with and served with whites.³¹⁴ Pamunkey and Mattaponi men, twenty-four of whom fought in World War II, were inducted on a special "Indian

309. See Smith, *supra* note 273, at 86.

310. See ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 226. Census Bureau officials decided that enumerators would record Virginia residents' race on the basis of the enumerators' observations of and conversations with them, rather than on the basis of (mis)information provided by Plecker. See *id.* at 227. The Bureau put an asterisk next to the names of some Indians whom Plecker claimed were not in fact Indians, with a footnote indicating that their Indian status had been questioned. *Id.* at 228.

311. 32 U.S. BUREAU OF CENSUS, POPULATION 1930: VIRGINIA 8B (n.d.) (volume for Lancaster County and Loudoun County), *microformed on* 1930 U.S. Fed. Census, West Point, King William Co., Va., E.D. 7, Roll 2448, at 8B (Chief George F. Custalow)

312. See ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 230. When the 1940 census was enumerated, Census Bureau officials who read Plecker's materials were more willing to accept Plecker's views on the racial status of various Indian families. See *id.*

313. See *id.* at 231. When Virginia Indians first volunteered for service, they were inducted with whites, but uncertainty over whether this practice would continue led the State to contact the federal government for clarification. See *id.* at 230-31. The Mattaponi and Pamunkey became U.S. citizens under the 1924 Indian Citizenship Act and, therefore, were subject to draft, along with non-reservation Indians. See *id.* at 231. The Selective Service ruled that those prospective inductees who had "not lived in association with negroes and . . . that . . . were considered Indians by their neighbors" could be classified as Indians by local draft boards. *Id.*

314. See *id.* at 233 (noting that Western and Eastern Chickahominy inductees were initially classified as "colored," but were eventually reclassified and served with whites, while Rappahannocks were inducted into colored units). Four Rappahannocks were prosecuted for refusing induction into colored units, but were ultimately treated as "conscientious objectors" (their refusal to serve being based on the conscientious belief that they were Indians). They served in hospitals with other conscientious objectors. See *id.* at 233-34.

day.”³¹⁵ Among those who registered was George Farris Custalow, Jr., whose draft registration card indicates that he was an Indian who was born and resided on the Mattaponi Indian Reservation.³¹⁶

Plecker retired in 1946 at age 85,³¹⁷ but the RIA was not repealed until 1975.³¹⁸ Since the Act's repeal, the state government tried to undo some of the results of Plecker's attempt to classify Virginia Indians out of existence. In 1954, the statutory definition of “Indian” was amended, in effect, to partially recognize the Indian identity of members of non-reservation tribes.³¹⁹ The new definition provided that “members of Indian tribes . . . having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians.”³²⁰ In addition, after a 1954 amendment to the poll tax law, Indians could be designated as such in the poll tax records, upon presentation of a membership affidavit from a chief.³²¹

By statute in 1983, Virginia officially recognized the Chickahominy Tribe, the Chickahominy Tribe – Eastern Division, the Upper Mattaponi Tribal Association, and the United Rappahannock Tribe.³²² At this time, a state “Commission on Indians” (later called the Council on Indians) was established with Indian and non-Indian members.³²³ In 1985 and 1989, respectively, Virginia recognized the Nansemond Indian Tribal Association³²⁴ and the Monacan Nation,³²⁵ thereby expanding the number

315. *Id.* at 233.

316. *See infra* note 699 and accompanying text (discussing Custalow's draft registration card).

317. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 237.

318. *See id.* at 249. In addition, a 1972 law provided that any information written on the back of birth certificates should not be copied and included with certified copies of birth certificates issued before July 1, 1960. *Id.*

319. *Id.* at 239.

320. *Id.* (quoting 1954 Va. Acts 905).

321. *Id.* (citing 1954 Va. Acts 703). The affidavit was to be “‘made by the Chief of any Indian tribe existing in this State, that such person is a member of such tribe and . . . to the best knowledge and belief of the Chief is a tribal Indian as defined’ in the Code of Virginia” Indian definition. *Id.* (quoting 1954 Va. Acts 703).

322. 1983 Va. Acts 54; *see also* ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 253 (citing 1983 Va. Acts 31-32). Although the original joint resolution recognizing these tribes included the Mattaponi and Pamunkey tribes, their names were subsequently deleted because they already had state recognition. *See id.* at 253 n.62.

323. ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 253 (citing 1983 Va. Acts 31-32); *see also* VA. CODE ANN. § 2.2-2629 (2011) (current membership).

324. 1985 Va. Acts 205; *see also* ROUNTREE, POCAHONTAS'S PEOPLE, *supra* note 1, at 267.

of State-recognized tribes to eight. In 1997, the Governor simplified procedures for people to correct inaccurate birth records, paving the way for Virginia Indians to be designated as such on their birth certificates and other state records.³²⁶

Virginia law recognizes the Mattaponi Tribe's entitlement to a number of benefits, including exemption from license requirements for hunting, trapping, and fishing,³²⁷ as well as exemption from motor-vehicle-sales-and-use tax.³²⁸ Pursuant to the guardian-ward relationship between the State and the Tribe, the State holds title to the Tribe's reservation in trust for the Tribe's use and occupancy.³²⁹ Under federal law, however, none of the Virginia tribes are as yet formally recognized through the federal acknowledgment process. Were the Mattaponi Tribe to proceed with a petition seeking federal acknowledgment, Plecker's work could negatively impact the Tribe's chances of receiving recognition. The applicable federal regulations require, for example, that petitioners submit evidence demonstrating their continuity as a distinct community and their descent from an historical tribe.³³⁰ Plecker, through his bureaucratic efforts to purge Indians from Virginia records and thereby mask their tribal ancestry and identity, potentially made the task of compiling the requisite proof more challenging.

Legislation to recognize a number of the Virginia tribes has been introduced in Congress several times, most recently in 2011.³³¹ The

325. 1989 Va. Acts 390.

326. See Fiske, *supra* note 272, at A6.

327. VA. CODE ANN. § 29.1-301(I) (2010); see also VA. CODE ANN. § 29.1-521(B) (2011) (exemption from permit requirement and restrictions on hunting, trapping, possessing, and selling wild birds and animals).

328. VA. CODE ANN. § 58.1-2403(4) (2011).

329. 1976-77 Op. Va. Att'y Gen. 107, 107-09; 1917-18 Op. Va. Att'y Gen. 160, 160.

330. See 25 C.F.R. § 83.7(b) (1994). The regulations require that a tribe petitioning for recognition establish that it "has been identified as an American Indian entity on a substantially continuous basis since 1900"; that a predominant proportion of its members comprise "a distinct community and ha[ve] existed as a community from historical times until the present"; that it "has maintained political influence or authority over its members as an autonomous entity from historical times until the present"; and that its "membership consists of individuals who descend from a historical Indian tribe." *Id.* § 83.7(a)-(c), (e).

331. The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2011, H.R. 783, 112th Cong. (2011); The Indian Tribes of Virginia Federal Recognition Act of 2011, S. 379, 112th Cong. (2011). House Bill 783 would extend federal recognition to the six non-reservation Virginia tribes already recognized by the state government: the Chickahominy Indian Tribe, the Chickahominy Indian Tribe – Eastern Division, the Upper Mattaponi Tribe, the Rappahannock Tribe, the Monacan Indian Nation, and the Nansmond

Mattaponi and Pamunkey tribes were part of earlier joint efforts to seek formal federal recognition and were among the eight tribes included in the initial House of Representatives federal recognition bill.³³² Mattaponi Chief Carl Custalow commented in 2007, however, that the Tribe was not sure that inclusion in a recognition bill was the “best route” for the Tribe, noting that it already had a reservation and a land base.³³³ Press accounts suggest that the Mattaponi and Pamunkey tribes are not interested in congressional recognition bills because they believe that they are able to present sufficient evidence to meet the criteria of the current federal acknowledgment regulations – an interpretation that is supported by the Pamunkey Tribe’s decision to submit a petition for federal acknowledgment in October 2010.³³⁴ In June 2009, an earlier bill extending federal

Indian Tribe. H.R. 783. The substantive provisions of the bill extend federal recognition to each tribe, state that the tribes are eligible for federal services and benefits, and explain how the membership, governing documents, and governing body of each tribe shall be identified. H.R. 783, Title I (Chickahominy); Title II (Chickahominy – Eastern Division); Title III (Upper Mattaponi); Title IV (Rappahannock); Title V (Monacan); and Title VI (Nansemond). Additional sections provide a mechanism for land to be taken into trust for a tribe by the Secretary of the Interior and to be considered part of its reservation. H.R. 783 §§ 106(a), 206(a), 306(a), 406(a), 506(a), & 606(a). The bill provides that the statute’s enactment would not affect tribal hunting, fishing, trapping, gathering, and water rights. H.R. 783 §§ 107, 207, 307, 407, 507, & 607. The bill limits economic development, as well as tribal sovereignty, by providing that the tribes “may not conduct gaming activities” either “as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act.” H.R. 783 §§ 106(d), 206(d), 306(d), 406(d), 506(d), & 606(d). Finally, the bill provides that Virginia will have “jurisdiction over all criminal offenses committed on, and all civil actions that arise on land located within the State that is owned by, or held in trust by the United States for, the Tribe,” but also provides a mechanism for tribes to reassume jurisdiction. H.R. 783 §§ 108, 208, 308, 408, 508, & 608.

332. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2000, H.R. 5073, 106th Cong. (2000).

333. Peter Hardin, *Virginia Indians One Step Closer: Tribal Leaders Give Up Gambling Rights to Get Closer to Sovereignty*, RICHMOND TIMES-DISPATCH, Apr. 26, 2007, at A1.

334. The Mattaponi Tribe submitted a petition indicating its intent to submit a formal recognition petition in 1995, but the petition has not yet been completed and submitted. Receipt of Petition for Federal Acknowledgment of Existence as an Indian Tribe, 60 Fed. Reg. 26,808 (May 18, 1995); *List of Petitioners by State*, Office of Fed. Acknowledgment, U.S. Dep’t of the Interior, 48 (Apr. 29, 2011), <http://www.bia.gov/idc/groups/xofa/documents/text/idc013623.pdf>. The Pamunkey Tribe filed a petition with the Office of Federal Acknowledgment (“OFA”) on October 14, 2010. Gale Courey Toensing, *Pamunkey Indian Tribe Files for Federal Acknowledgment*, INDIAN COUNTRY TODAY, Nov. 3, 2010, available at 2010 WLNR 22056865. The Tribe received a Letter of Technical Assistance from the OFA in April, 2011 and is working on its response. *Current Cases & Projects: Pamunkey*

recognition to the six Virginia State-recognized, non-reservation tribes passed in the House; the companion Senate bill was not passed.³³⁵ Although the Mattaponi Tribe is not yet officially recognized by the federal government, the Tribe participates in some federal Indian programs and, in a number of contexts, is treated as if it were a federally recognized tribe.³³⁶

As the discussion above shows, from before the first English arrivals trespassed on Powhatan territory, to the present day, the Mattaponi Tribe has persevered. Despite the challenges posed by English encroachment on its territory, demands on its resources, violence, enslavement, and efforts to deny the Tribe's identity and political status, the Tribe survived on its reservation. Its members continued to sustain themselves on the natural resources of their homeland, exercising rights guaranteed by the 1677 Treaty at Middle Plantation. Beginning in the 1990s, however, the Tribe's existence was threatened yet again – this time, by the proponents of the King William Reservoir project. This new threat necessitated legal action before state and federal administrative agencies and courts in an effort to avert treaty violations and protect the Mattaponi homeland from resource depletion for the benefit of non-Indians.

III. Sacred Sites and Shad: The Threat Posed by the King William Reservoir Project

*The risk to the environment, the risk to an entire watershed, and the risk to the continued way of life of Native Americans in the Pamunkey Neck area, especially the Mattaponi Tribe, are too great when weighed against the unjustified need.*³³⁷

A. The Targeting of Mattaponi Resources and the State's Acquiescence

1. Newport News Water Demands

In 1987, York County, Virginia and the cities of Newport News and Williamsburg created the Regional Raw Water Study Group ("Study

Tribe of Virginia, NATIVE AM. RIGHTS FUND, <http://www.narf.org/cases/pamunkey.html> (last visited Apr. 23, 2012).

335. House Bill 1385 passed in the House in June 2009. The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009, H.R. 1385, 111th Cong., 155 Cong. Rec. H6101 (June 3, 2009). The companion Senate bill was introduced in June 2009, and was reported out of the Committee on Indian Affairs and placed on the Senate calendar in December 2009. The Indian Tribes of Virginia Federal Recognition Act of 2009, S. 1178, 111th Cong. (2009); S. REP. NO. 111-113 (2009).

336. See *infra* Part V.A.2.

337. ACE DISTRICT DECISION, *supra* note 14, at 337.

Group”) to address projected water shortages and the perceived need to locate additional water sources for the region.³³⁸ After considering a number of alternatives for obtaining additional raw water, the Study Group chose an option involving the Mattaponi River,³³⁹ deeming it preferable to sacrifice Mattaponi rights, rather than to pursue alternative proposals.³⁴⁰ Like the seventeenth century colonists who stole corn from the Virginia tribes to feed themselves while profligately growing tobacco,³⁴¹ contemporary residents of York County sought access to Indian resources. Rather than devoting their energy to improving water conservation, reducing use, and developing less damaging water sources, the reservoir project proponents instead turned to Mattaponi resources, despite the proposed project’s infringement on treaty rights.

The proposed project included a water intake and pumping station to be located in King William County at Scotland Landing on the Mattaponi River, from which up to 75 million gallons of water would be withdrawn per day. The project would be located within three miles of the Mattaponi Reservation. A 1,700-foot-long, 78-foot-high dam would be built on Cohoke Mill Creek (a tributary of the Pamunkey River located between the Pamunkey and Mattaponi rivers) to create a reservoir impoundment. Damming the creek would cause the inundation of 403 acres of freshwater wetlands and 21 miles (encompassing 34 acres) of streams. The project would also affect 875 acres of upland wildlife habitat and 105 acres of downstream wetlands. The project’s completion would result in the greatest permitted destruction of wetlands in the mid-Atlantic area since the enactment of the Clean Water Act. Two pipelines would be built, one to convey the extracted water 1.5 miles to a new reservoir (to be called the King William Reservoir) and one to take water 11.7 miles from the new reservoir to a tributary of an existing Newport News reservoir in New Kent County.³⁴²

338. *Mattaponi IV*, 601 S.E.2d 667, 670 (Va. Ct. App. 2004).

339. *Id.*

340. Some of the alternative proposals were rejected because of problems created by already-escalating water demands. For example, two of the alternatives involved the Pamunkey River, but these were rejected because of concerns over draining additional water from the already-taxed river. *Id.*

341. See ROUNTREE, POCAHONTAS’S PEOPLE, *supra* note 1, at 64.

342. This description of the project’s expected impact is taken from *Mattaponi IV*, *Mattaponi II*, and from the Virginia Supreme Court’s 2001 opinion. See *Mattaponi III*, 541 S.E.2d 920, 922 (Va. 2001). Some additional details were extracted from the ACE North Atlantic Division 2005 Record of Decision Memorandum. ACE N.A. DIVISION DECISION, *supra* note 8.

Several state and federal agency approvals were required for the project to move forward. Under the Virginia Water Control Law, a water protection permit was required to extract water from the Mattaponi River.³⁴³ And because of the anticipated effects on wetlands, a federal permit, issued by the U.S. Army Corps of Engineers (“Corps”), was required under Section 404 of the Clean Water Act (“CWA”).³⁴⁴ Under CWA Section 401, the grant of a Section 404 permit is contingent upon state certification that the project’s proposed discharge would not violate specified water-quality standards. In Virginia, the State Water Control Board (“SWCB”) and the Water Division of the Department of Environmental Quality (“DEQ”) can implement CWA Section 401 under the state’s 1989 Water Protection Permit law.³⁴⁵ Also required were a permit from the Virginia Marine Resources Commission (“VMRC”) for the water intake structure and DEQ review for compliance with the state’s coastal resources management regime.³⁴⁶ The efforts to obtain these approvals, and the attempt of the Mattaponi Tribe and its allies to protect the threatened land and waterways against these efforts, are discussed below.

2. *The State Water Control Board Water Protection Permit*

In 1993, Newport News, acting as lead municipality, applied to the SWCB for the required state water protection permit (“SWP permit”).³⁴⁷

343. See VA. CODE ANN. §§ 62.1-258 (2011).

344. Clean Water Act § 404(a), 33 U.S.C. § 1344(a) (2006) (requiring a construction permit from the Corps because of the manner in which the dam would be constructed).

345. See ACE DISTRICT DECISION, *supra* note 14, at 4 (citing VA. CODE ANN. § 62.1-44.15:5(1989)). Section 401(a) provides that federal agencies may not issue permits for activities like those involved in the reservoir project unless “a certification from the State in which the discharge originates or will originate” is provided to the Corps. 33 U.S.C. § 1341(a) (2006). Section 62.1-44.15:20(D) of the Virginia Code in turn provides that “issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401” of the CWA. State law also provides that the SWCB shall issue such a water permit for an activity requiring Section 401 certification “if it has determined that the proposed activity is consistent with the provisions of the [CWA] and will protect instream beneficial uses.” VA. CODE ANN. § 62.1-44.15:20(B) (2011). The statute further states that the “preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural and aesthetic values is a beneficial use of Virginia’s waters.” *Id.* Consequently, the water permit application was filed pursuant to section 62.1-44.15:20 of the Virginia Code, part of the State Water Control Law, found in sections 62.1-44.2 through 44.34:28.

346. See *infra* notes 354, 362 and accompanying text.

347. *Mattaponi IV*, 601 S.E.2d 667, 694 (Va. Ct. App. 2004).

After Newport News filed its application, the Mattaponi Tribe explained that the proposal implicated provisions of the 1677 Treaty at Middle Plantation, which the SWCB was bound to enforce.³⁴⁸ The Tribe first made this point to the State Attorney General, who opined that the Tribe had no enforceable treaty-based rights that would preclude the proposed project, based on his belief that the Treaty's relevant provisions had been "abrogated by implication" – a standard that conflicts with the U.S. Supreme Court's clear-and-plain-intent-to-abrogate test developed in litigation over Indian treaties.³⁴⁹ Although it did receive evidence with respect to tribal traditions and cultural interests (including traditional fishing and gathering activities, religious practices, and archaeological sites), the SWCB refused to address the treaty issue.³⁵⁰ In December 1997, the SWCB issued an SWP permit to Newport News,³⁵¹ authorizing the withdrawal of up to 75 million gallons of water per day from the Mattaponi River.³⁵² As discussed below,³⁵³ the Tribe, along with several environmental groups, challenged the permit in state court.

3. *The Virginia Marine Resources Commission Permit*

The Virginia Wetlands Act required Newport News to obtain a permit from the VMRC for construction of the Mattaponi River intake structure

348. *Id.* at 671.

349. *Id.*

350. *Id.*

351. *Id.* at 670-71.

352. *Alliance to Save the Mattaponi v. Virginia ex rel. State Water Control Bd. (Mattaponi I)*, 519 S.E.2d 413, 415 (Va. Ct. App. 1999), *rev'd sub nom. Mattaponi III*, 541 S.E.2d 920 (Va. 2001). The Board approved a significant modification of the water protection permit in December 2002. See ACE N.A. DIVISION DECISION, *supra* note 8, at 16.

353. See *infra* notes 498-500 and accompanying text. Newport News also filed suit against the SWCB and the DEQ because of its dissatisfaction with certain restrictions imposed in the permit, but the restrictions were upheld by the Newport News Circuit Court. More specifically, the permit imposed a higher minimum instream flow for the Mattaponi River than Newport News proposed, set a higher minimum downstream release from the proposed dam into Cohoke Creek, and imposed maximum limits on interbasin transfers from the proposed reservoir to the existing Newport News reservoirs. ACE DISTRICT DECISION, *supra* note 14, at 4. The Newport News Circuit Court upheld the restrictions. Rather than appeal the circuit court's decision, Newport News decided to seek changes to the permit when it was eligible for reissuance. *Id.* at 5. The SWCB rejected a later request for a five-year extension on the permit, an action that would require the City to re-apply for the permit, opening the project to public scrutiny. As discussed below, this victory for tribal and environmental advocates was short-lived.

and the pipeline and discharge structures.³⁵⁴ In 2002, the Virginia Institute of Marine Sciences (“VIMS”), which is charged with advising the VMRC, concluded that the intake structure would negatively impact fish, especially the American shad.³⁵⁵ In particular, the VIMS expressed concern about the risk posed to juvenile fish by the location of the intake structure in tidal water.³⁵⁶ Following two lengthy public meetings, the VMRC voted in 2003 to deny the permit request.³⁵⁷ The next year, however, after being sued by the City, the VMRC agreed to hold an unprecedented second hearing (albeit limited, at the City’s insistence, to the issue of the impact of the project on shad).³⁵⁸ Following the hearing, the VMRC voted to issue the permit,³⁵⁹ despite the alarms that the VIMS continued to sound about the project and the VIMS’ recommendation that a monitoring program be completed *before*

354. See ACE DISTRICT DECISION, *supra* note 14, at 5 (citing VA. CODE ANN. § 28.2-1300 (2011)). The Virginia Wetlands Act provides that either the VMRC or the relevant local Wetlands Board must grant a permit for any submerged land owned by the state or any tidal wetland area in the Tideland region. *Id.* The dam itself did not require a VMRC permit because it was authorized under section 28.2-1203 of the Virginia Code. *Id.*

355. Letter from Roger L. Mann, Dir. for Research and Advisory Servs., Va. Inst. of Marine Sci., to William A. Pruitt, Comm’r, Va. Marine Res. Comm’n, 6 (June 25, 2004), available at <http://www.savethemattaponi.org/Documents/VIMSKWRReport6-25-04.pdf> [hereinafter Pruitt-Mann Letter].

356. *Id.* VIMS expressed concern about the risk of early life stages of fish being exposed multiple times to the intake structure because it would be located in tidal water, and about the lack of sufficient information regarding the effectiveness of establishing a proposed protective pumping hiatus during certain times of the year. *Id.*

357. Minutes of Meeting of Virginia Marine Resources Commission, 12401 (May 14, 2003), available at http://www.mrc.virginia.gov/commission_minutes/vmrc_final_minutes_05-14-03.pdf (indicating that the motion to deny the permit was approved by a vote of 6-2). The May 14, 2003 meeting was the continuation of a meeting held on April 22, 2003. Minutes of Meeting of Virginia Marine Resources Commission, 12383 (Apr. 22, 2003), available at http://www.mrc.virginia.gov/commission_minutes/vmrc_final_minutes_04-22-03.pdf.

358. The decision to hold a new hearing with a limited agenda was included in an agreement between the City and the VMRC to settle their suit. See Agreement for Supplemental Hearing in Settlement of Litigation, Between the City of Newport News, Virginia and the Virginia Marine Resources Commission (n.d.), available at http://www.mrc.state.va.us/pdf/supp_hearing.pdf.

359. Minutes of Meeting of Virginia Marine Resources Commission at 12889 (Aug. 11-12, 2004), available at http://www.mrc.virginia.gov/commission_minutes/vmrc_final_minutes_08-11-04.pdf [hereinafter Virginia Marine Resources Commission Minutes] (indicating that the motion to approve the permit was approved by a vote of 5-3). The permit was issued on August 12, 2004. See Commonwealth of Va., Marine Resources Commission Permit #93-0902, Granted to City of Newport News (Aug. 12, 2004), available at http://www.kwreservoir.com/pdf_files/VMRC_93-0902.pdf [hereinafter VMRC Permit].

any final permit decision was made.³⁶⁰ The VMRC imposed a seasonal pumping hiatus from March 1 through July 31 to provide at least some protection for early life stages of the American shad.³⁶¹

4. The Department of Environmental Quality Coastal Resources Management Plan Review

A final required state approval signified the DEQ's concurrence that the reservoir proposal was consistent with the Virginia Coastal Resources Management Program.³⁶² Under the provisions of the federal Coastal Zone Management Act of 1972, states with federally approved Coastal Zone Management Programs have the authority to review federal license or permit applications for consistency with the states' programs.³⁶³ The DEQ issued its concurrence in December 2004,³⁶⁴ thereby providing the final state approval needed for the project.

B. Heeding Tribal Concerns: The Initial Federal Clean Water Act Permit Denial

Because the reservoir project would involve the discharge of dredged or fill material into U.S. waters, including wetlands, CWA Section 404 required Newport News to obtain a permit from the U.S. Army Corps of Engineers.³⁶⁵ The Corps must conduct a review in which it considers the probable impact of the proposed project on the public interest, and balance the expected benefits of the project against its reasonably foreseeable detriments.³⁶⁶ In considering permit applications, the Corps must evaluate them for compliance with Section 404 guidelines developed by the Environmental Protection Agency ("EPA"), and deny a permit if the project

360. See Pruitt-Mann Letter, *supra* note 355.

361. Virginia Marine Resources Commission Minutes, *supra* note 359, at 12888.

362. See ACE N.A. DIVISION DECISION, *supra* note 8, at 4 (citing 33 U.S.C. § 1456 (2006)). As noted above, this concurrence was a prerequisite to the issuance of the Section 404 permit. See ACE DISTRICT DECISION, *supra* note 14, at 5 (noting that the proposed project must be constructed and operated in a manner that is consistent with the Virginia Coastal Resources Management Program).

363. Coastal Zone Management Act § 307(c)(3)(A), 16 U.S.C. § 1456(c)(3)(A) (2006). The state review process begins when the permit applicant certifies to the state that the proposed project is consistent with the relevant state's program. The state may concur with the applicant's certification, or, in the alternative, object to it, in effect vetoing the application.

364. ACE N.A. DIVISION DECISION, *supra* note 8, at 4.

365. 33 U.S.C. § 1433 (2006); see also *supra* note 344 and accompanying text.

366. 33 C.F.R. § 320.4(a)(1) (2010).

would not comply with the guidelines.³⁶⁷ The EPA has power to “veto” any permit issued by the Corps.³⁶⁸

In evaluating a permit request, the Corps, as a federal permitting agency, is required by the terms of the National Environmental Policy Act of 1969 (“NEPA”) to consider the effects of granting a permit for the proposed project on the quality of the human environment, and to prepare an environmental impact statement (“EIS”) if a significant effect is found.³⁶⁹ The EIS discusses the environmental consequences of the proposed project and compares it to “all reasonable alternatives.”³⁷⁰ The EIS for the reservoir project was issued in January 1997.³⁷¹

The Corps must also take into account Section 7 of the Endangered Species Act, which requires that the Corps ensure that its action is not likely to jeopardize any endangered or threatened species’ continued existence, or to destroy or adversely modify any critical habitat.³⁷² In carrying out this responsibility, the Corps consults with and is assisted by the Secretary of the Interior.³⁷³ The U.S. Fish and Wildlife Service is instrumental in this regard, as it provides a biological opinion to the Corps and the permit applicant that expresses its view regarding the effects of the proposed action on listed species and critical habitat.³⁷⁴

Finally, under the terms of Section 106 of the National Historic Preservation Act (“NHPA”), the Corps is required to “take into account the effect of the [proposed] undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register” of Historic Places, and to “afford the Advisory Council on Historic

367. EPA’s Section 404(b)(1) Guidelines, 45 Fed. Reg. 85,344 (Dec. 24, 1980).

368. See 33 U.S.C. § 1344(c) (2006).

369. National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006); see also 33 C.F.R. § 235 app. B (2010) (NEPA procedures and documentation).

370. 40 C.F.R. § 1502.14 (2008); see also 46 Fed. Reg. 18,026 (Mar. 23, 1981).

371. ACE N.A. DIVISION DECISION, *supra* note 8, at 11. Notice of the issuance of the EIS was published on January 24, 1997. A draft EIS was issued on February 4, 1994, and a supplemental draft EIS was issued on December 29, 1995. *Id.* at 10-11.

372. 16 U.S.C. § 1536(a)(2) (2006).

373. *Id.*

374. See *id.* § 1536(b)(3)(A); 50 C.F.R. § 402.14(e) (2010). The opinion must include a “detailed discussion of the effects of the action on listed species or critical habitat.” 50 C.F.R. § 402.14(h)(2) (2010). It must also provide “[t]he Service’s opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of a critical habitat.” *Id.* § 402.14(h)(3). After the Service issues its biological opinion, the permitting agency then decides “whether and in what manner to proceed with the action in light of its [Endangered Species Act] section 7 obligations and the Service’s biological opinion.” *Id.* § 402.15(a).

Preservation ('ACHP') . . . a reasonable opportunity to comment with regard to such undertaking."³⁷⁵ The ACHP's regulations establish a study-and-consultation process for fulfilling this duty, and allow the relevant permitting agency to enter into a Memorandum of Agreement with the State Historic Preservation Officer and the ACHP that specifies appropriate preservation measures for the affected district or site.³⁷⁶ The proposal implicated several executive orders, including a 1994 executive order on environmental justice and a 1996 executive order addressing Indian sacred sites.³⁷⁷

Although the Mattaponi Tribe and other affected tribes are not formally recognized as tribes by the federal government, the District determined that it was appropriate to treat the Mattaponi and Pamunkey tribes as if they were federally recognized.³⁷⁸ The District kept the tribes informed while the permit application was being processed and sought their input.³⁷⁹ The Mattaponi Tribe noted that the proposed reservoir would encroach within the three-mile buffer zone established by the 1677 Treaty, and summarized additional concerns about the project in a letter to the Corps:

- the excavation of vital archaeological resources would result in an unacceptable and irretrievable loss to the Tribe;

375. 16 U.S.C. § 470(f) (2006).

376. See 36 C.F.R. § 800 (2010). The first step, prior to the possible signing of an MOA, is to identify any "historic properties" in the area and determine whether the proposed undertaking will have an adverse effect on them. If adverse effects are found, the relevant agency official must notify the ACHP and consult with the SHPO "to seek ways to avoid, minimize, or mitigate the adverse effects" on historic properties. *Id.* § 800.6(b)(2). Under Section 106 of the Act, after determining who are the appropriate consulting parties, the agency must consult with the affected parties. See *id.* § 800.2(c).

377. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 29, 1996) (Indian Sacred Sites).

378. ACE DISTRICT DECISION, *supra* note 14, at 220. This decision, made on March 7, 1997, is memorialized in a February 25, 1998 Memorandum for the Record. *Id.* This decision was in keeping with a 1996 report, entitled *Native American Affairs and the Department of Defense*, which was prepared for the Secretary of the Defense under the sponsorship of the National Defense Research Institute. The report suggested that it would be advisable, in certain circumstances, for the Department of Defense to consult with tribes that are not federally recognized, either because a federal statute or a policy consideration made such consultation appropriate or because it was in the Department's interest to do so. See DONALD MITCHELL & DAVID RUBENSON, NAT'L DEFENSE RESEARCH INST., NATIVE AMERICAN AFFAIRS AND THE DEP'T OF DEFENSE (1996), available at <http://www.itslt.org/NativeAmericanAffairs-DoD.pdf>.

379. ACE DISTRICT DECISION, *supra* note 14, at 220.

- there was a strong likelihood that the project would negatively impact the shad population;
- traditional hunting and gathering practices would be severely impacted;
- traditional religious practices and traditional ways of life would be compromised; and
- there would be disproportionate impacts to Native Americans resulting from the project location.³⁸⁰

In July 2001, after reviewing voluminous information, the Norfolk District Commander, Colonel Allan B. Carroll, published a final record of decision, over 350 pages in length, recommending denial of the permit.³⁸¹ The District Commander's record of decision ("District ROD") evidenced a willingness to gain an understanding of the Tribe's concerns and rights, and to take those concerns and rights seriously. Norfolk District staff members and the District Commander himself visited the Mattaponi Reservation to speak with tribal members and to acquaint themselves with the landscape that the reservoir project would damage.³⁸² These areas of concern, and the District Commander's views on them, are discussed below.

1. Loss of Archaeological Resources

As noted above, Section 106 of the NHPA requires federal agencies to take into account the effects of agency undertakings on properties that are either included in or eligible for inclusion in the National Register of Historic Places. The relevant agency must identify and assess the effects on historic properties, and is directed to try "to avoid, minimize, or mitigate [any] adverse effects" on the properties.³⁸³ Historic properties include

380. *Id.* at 197 (list of concerns expressed in letter); *id.* at 285 (encroachment within buffer zone).

381. *See id.* The Norfolk District Commander reached a preliminary decision to deny the permit in May 1999. *Id.* at 13. Following review of comments and additional information presented by Newport News and others, the District Commander decided that none of the submitted material warranted changing his preliminary position of denial. *Id.* at 14. The District's Recommended Record of Decision was published on March 20, 2001, beginning a 45-day comment period. Prior to publishing the Final Recommended Record of Decision on July 2, 2001, the District Commander reviewed and considered the comments submitted by the permit applicant, by non-governmental organizations, by the general public, and by local, state, and federal agencies. *Id.* at 16.

382. *Id.* at 189.

383. 36 C.F.R. § 800.6 (2010).

archaeological sites, historic structures, and “properties of traditional religious and cultural importance.”³⁸⁴

A preliminary cultural resource survey of the area³⁸⁵ identified over 150 archaeological sites, most of which were Native American sites, and determined that over 70 of them were potentially eligible for inclusion in the National Register.³⁸⁶ The Mattaponi and Pamunkey tribes were particularly concerned about the fate of burials that might be disturbed during any archaeological work.³⁸⁷ The Mattaponi Tribe maintained that it could not accept any proposed plans that could disturb ancestors’ “sacred resting sites,”³⁸⁸ and that the project design must be changed to avoid such disturbances.³⁸⁹ To the tribes, the archaeological sites have an importance beyond what archaeologists might learn from their excavation, as they provide “a centuries deep connection to the prehistoric occupation of the region.”³⁹⁰ Guidelines published by the ACHP indicated that, in this case, data recovery (archaeologists’ usual approach to sites) might not be the appropriate course of action for sites within the reservoir.³⁹¹ Thus, if the project proceeded, this issue would require further discussion with the tribes.³⁹²

384. *Id.* § 800.16(1)(1).

385. A firm hired by the Study Group performed the preliminary cultural resource survey as part of the review required by NEPA. ACE DISTRICT DECISION, *supra* note 14, at 186. A “Phase 1A” cultural resource survey was performed in 1993, followed by a “Phase 1B” intensive, systematic field survey in 1994. *Id.* at 186-87.

386. *Id.* at 187. Most of the sites were in the area of the proposed reservoir impoundment; others were located at the site of the pump station and intake pipeline, and along the route of the outfall pipeline. *Id.* Newport News refused to conduct a Phase II study to evaluate the significance of the archaeological sites prior to a decision by the ACE on its permit application, so a Memorandum of Agreement (“MOA”) was developed to specify measures to avoid, reduce, or mitigate adverse effects on the identified historic properties eligible for the National Register. *Id.* at 190.

387. *Id.* at 190-91. No remains were located during the Phase I investigation, but it was understood that more extensive Phase II excavations might reveal remains. *Id.* at 190.

388. *Id.* at 200 (quoting a letter from the Mattaponi Tribe, dated July 25, 1997).

389. *Id.* at 191.

390. *Id.* at 193 (quoting the TCP Report).

391. *Id.* at 200. The guidelines indicated that for data recovery to be pursued, “the archaeological site should not be likely to contain human remains, . . . the archaeological site should not have long-term preservation value, such as traditional cultural and religious importance to an Indian Tribe, . . . [and there should be] no unresolved issues concerning the recovery of significant information with any Indian tribe that may attach religious and cultural significance to the affected property.” *Id.*; see also 64 Fed. Reg. 27,085 (May 18, 1999).

392. ACE DISTRICT DECISION, *supra* note 14, at 200.

2. Negative Impacts on Shad and Subsistence Fishing

As discussed above, the Mattaponi Tribe and other area tribes fished for native species on the Mattaponi River since time immemorial, and their fishing rights were guaranteed by the 1677 Treaty. Many Mattaponi still “depend on fish from the Mattaponi River for both their subsistence and as a source of income.”³⁹³ A substantial portion of the Tribe’s food supply comes from fishing, and many reservation residents make their livings from the river and the surrounding land.³⁹⁴ Moreover, shad fishing, in particular, is a significant traditional tribal activity and an important part of Mattaponi identity.³⁹⁵ The project thus threatened both a resource and an activity with great historical and contemporary importance.

The District ROD noted a general decline in anadromous fish in all Virginia rivers as a result of over-fishing and the construction of barriers to upstream migration, but the American shad was of particular concern because of the shad population’s marked decline over the last 100 years.³⁹⁶ “The Mattaponi River currently provides spawning habitat for [shad and other] anadromous fish species along its entire length.”³⁹⁷ Because of depletion caused by over-fishing and habitat degradation, state law bans taking shad from Virginia rivers. But the Mattaponi Tribe, as a holder of tribal fishing rights, is exempt from the ban.³⁹⁸

The Tribe was also concerned about the expected increase in recreational boating on the Mattaponi River following completion of the reservoir project. Increased “recreational boating would disrupt their subsistence fishing and other traditional uses of the river.”³⁹⁹ Moreover, the Tribe expressed concern over the project’s impact on the Tribe’s fish hatchery, which was at the center of the Tribe’s considerable efforts to restore the shad population. The tribal fish hatchery introduced between 6 million to 10 million shad fry into the river each year.⁴⁰⁰ The Tribe was concerned that shad habitat would be destroyed, spawning behavior would be disrupted, and egg, larvae, and juvenile viability and survivability would be adversely affected by the upstream intrusion of brackish water into the

393. *Id.* at 172.

394. *Id.* at 214.

395. *Id.*

396. *Id.* at 172.

397. *Id.* at 185.

398. *Id.* at 172. This was also true for the Pamunkey Tribe. *Id.*

399. *Id.* at 213. Recreational boaters were already negatively impacting the catch by ripping tribal drift nets. *Id.*

400. *Id.* at 173.

river's tidal freshwater areas – a concern that the U.S. Fish and Wildlife Service (“USFWS”) shared.⁴⁰¹ In addition, the withdrawal of large amounts of water might raise water temperatures and reduce oxygen levels in the summer, which could harm shad nursery areas.⁴⁰² Finally, the project's intake facility would be located in the prime shad spawning area and might harm eggs and juveniles, remove the food supply, and concentrate predatory fish.⁴⁰³

Construction of the dam on Cohoke Creek and inundation of the area that was to become part of the reservoir would adversely affect other fish habitats.⁴⁰⁴ While Newport News claimed that the reservoir would create an enormous freshwater fishery that would “more than compensate for the project's impact to resident fisheries,”⁴⁰⁵ the USFWS did not view the expected replacement of native fish species by game species as the true form of “resources enhancement” that Newport News claimed.⁴⁰⁶ Moreover, the non-native fish that would be stocked in the reservoir would likely eventually become established in the connected Mattaponi River,

401. *Id.* Recent studies suggested that adult shad would be sufficiently tolerant of salinity changes caused by the withdrawal of water from the river, but that salinity changes caused by water withdrawals could affect where and when the fish spawned. *Id.* at 174. In addition, shad do not have fully developed salinity tolerance in their early life stages, and, therefore, there was “potential for a reduction in the survival, development and growth of early life stages of shad as a result of salinity changes” in the river. *Id.* at 175. The viability of shad fry released by the tribal fish hatchery could be negatively affected, as they are released before the stage at which they have developed full salinity tolerance. *Id.*

402. *Id.* at 173.

403. *Id.* An intake facility can result in fish mortality from entrainment (being sucked into the intake facility through the facility's mesh screens) and impingement (becoming stuck to the screens) of fish eggs and larvae. *Id.* at 182. Also, eggs and juveniles of some fish species and small food particles could be pulled through the intake screens, which would reduce the food supply for juvenile shad and other anadromous species. *Id.* at 174.

404. *Id.* at 178. The State Department of Game and Inland Fisheries and the U.S. Fish and Wildlife Service agreed that “the transformation of Cohoke Creek from a lotic [i.e., flowing-water] and shallow lentic [i.e., still water] habitat to deepwater lentic habitat would have a significant impact on the composition of the fish assemblage.” *Id.* In addition, “[c]onstruction of the dam and inundation of the pool area would impact fish species within the reservoir pool area through increased levels of suspended sediment and the elimination of benthic [i.e., bottom and shore area] food organisms and vegetation for spawning, nursery and shelter.” *Id.*

405. *Id.*

406. *Id.* at 179. More specifically, the Service did not believe that the replacement of a native fish species in a lotic habitat with a lentic game species would result in a resources enhancement. *Id.*

where they would prey upon and compete with native species.⁴⁰⁷ Finally, construction of the reservoir would permanently block the potential passage of anadromous and catadromous fish into the upper reaches of Cohoke Creek, precluding the future restoration of spawning grounds,⁴⁰⁸ and thereby violating the 1987 Chesapeake Bay Agreement's intent to improve the status of anadromous fish.⁴⁰⁹

The District Commander determined that there was a need for monitoring to identify the potential negative impacts of the proposed impoundment, the intake structure, and the large-scale withdrawal of water, as well as to formulate plans for ameliorating the negative impacts if a permit were ultimately issued.⁴¹⁰ An interagency task force performed some work on this issue, but further work would be necessary if a permit were issued.⁴¹¹

3. Threats to Hunting and Gathering Activities

The District ROD acknowledged that the Mattaponi and Pamunkey tribes have lived on the Mattaponi and Pamunkey rivers and in the Pamunkey Neck area for thousands of years, depending for their survival on hunting, trapping, fishing, and gathering.⁴¹² Many reservation residents still depend on the natural ecosystem of the area, as they make their livings from the rivers and surrounding land, and rely for their subsistence on gathering of fish, other animals, and plants.⁴¹³ A substantial portion of their food comes from game, such as deer, wild turkey, ducks, geese, and rabbits, but also from fish.⁴¹⁴ Mattaponis still gather about 60 wild plants (found on

407. *Id.*

408. *Id.* The existing 100-year-old Cohoke Millpond dam currently blocks anadromous fish passage. Both the State Department of Game and Inland Fisheries and the USFWS believed that the reaches of Cohoke Creek above the Millpond dam are a potential spawning area for anadromous and semi-anadromous fish. *Id.* at 179-80.

409. *See id.* at 179. The Agreement "placed a special emphasis on the removal of blockages to anadromous fish and on restoring historic spawning grounds," and "the restoration of depleted anadromous fish stocks within the watersheds of the York River basin has been identified as a priority action" of the Agreement. *Id.* The Agreement's provisions were reaffirmed in the Chesapeake 2000 Agreement between the Chesapeake Bay Commission, the United States, the District of Columbia, and Virginia, Maryland, and Pennsylvania. CHESAPEAKE 2000: THE RENEWED BAY AGREEMENT, http://dnrweb.dnr.state.md.us/bay/res_protect/c2k/index.asp (last visited Apr. 23, 2012).

410. ACE DISTRICT DECISION, *supra* note 14, at 181.

411. *See id.* at 181-84.

412. *Id.* at 214.

413. *Id.*

414. *Id.*

their reservation or in the surrounding area) for food, as well as for medicinal, ceremonial, and ritual purposes.⁴¹⁵ Among the plants still gathered for food are tuckahoe tubers,⁴¹⁶ gathering rights for which are guaranteed by the Treaty at Middle Plantation.⁴¹⁷

The District Commander noted the Mattaponi Tribe's concern over the threat that a massive reservoir project so close to its reservation (along with the increased property development that the project would ultimately bring to this rural area) posed to the continuation of hunting and gathering practices. The project would allow residential development even in the proposed watershed protection area around the reservoir, while allowing mixed residential and light commercial development in the periphery.⁴¹⁸ This development would alter the area's rural and agricultural character, and would decrease the habitat that supports hunting and gathering. Moreover, the project and accompanying development represented a further trespass on the Tribe's historical lands, and would interfere with plans to expand the reservation through land purchases. The expected impacts from development would, it was feared, disrupt the Tribe's hunting and gathering activities, alter its way of life, and ultimately cause the end of its existence as a tribe.⁴¹⁹

4. Adverse Effects on Traditional Religious Practices and Ways of Life

While state agencies and environmental groups alike identified the Mattaponi River as a rare and important American resource,⁴²⁰ the District ROD acknowledged that the Mattaponi Tribe has a "unique cultural perspective" on the Mattaponi River:

415. *Id.* at 181-84.

416. *Id.* at 214. Other plants gathered for food include a local species of wild cactus, wild rice, and yucca, while myrtle leaves, flag root, and foxglove are among the plants gathered for medicinal purposes. *Id.*

417. *See supra* note 183 and accompanying text.

418. ACE DISTRICT DECISION, *supra* note 14, at 215.

419. *Id.* at 215. Land purchases would enable more tribal members to return to the reservation. *Id.* Residential and commercial developers were expected to compete with the Tribe to buy land in the affected area, and might thereby drive real estate prices high enough to be out of the practical reach of the Tribe. The development potential of the "lake"-front property, in particular, was expected to increase its value. *Id.*

420. The VIMS, for example, identified the Mattaponi as one of the East Coast's most pristine rivers, and the Nature Conservancy described the Mattaponi River (together with the Pamunkey River and some other area water resources) as "the heart of the most pristine freshwater complex on the Atlantic Coast." *Id.* at 184-85.

The Mattaponi people believe that the Mattaponi River . . . is a spiritual place that unites tribal members through baptism and other religious ceremonies. . . . [A]lterations to the natural state of the river would compromise the sanctity of these religious ceremonies. They believe that the river is a gift from the Great Spirit that provides and completes the circle of life. . . . [T]o defile the Mattaponi River would be to dishonor the Tribe's ancestors and Mother Earth.⁴²¹

Even if tribal access to locations of traditional activities were unaffected, the spiritual and religious significance of the river to the Tribe would be.⁴²² The District ROD noted that, for the Tribe, the religious aspects of the river are "a vital cultural value which may not be fully appreciated by non-native people," but the "lack of appreciation by non-Indians does not depreciate or invalidate this value to the Tribes."⁴²³

The threat posed to a sacred site located in the Cohoke Creek valley also implicated tribal spiritual concerns. Because of the belief that such sites and their locations should not be discussed with outsiders, the Tribe did not disclose the site's existence until it appeared there was no other choice.⁴²⁴ Although Newport News questioned the validity of the site, historical records validated its potential existence.⁴²⁵ Newport News, apparently following a divide-and-conquer strategy, claimed that the Pamunkey Tribe was more likely than the Mattaponi Tribe to have ties to any such sacred

421. *Id.* at 185.

422. *See id.* at 231.

423. *Id.* at 232.

424. *Id.* at 195; *see also id.* at 197 (quoting a letter submitted by the Institute for Public Representation ("IPR") as counsel for the Tribe) (noting that the Tribe agreed to reveal the existence of the sacred site "when faced with the untenable choice of either disclosing the site's identity and risk its desecration by pothunters or failing to mention it and risk its loss"). National Register Bulletin 38 commented on the need for secrecy surrounding many Indian sites, stating that "[t]he need to reveal information about something that one's cultural system demands be kept secret can present agonizing problems for traditional groups and individuals." *Id.* at 197-98 (quoting P.L. Parker & T.F. King, Nat'l Park Service, U.S. Dept. of Interior, Nat'l Register Bulletin No. 38, Guidelines for Evaluating & Documenting Traditional Cultural Properties (1998)). Because of the Tribe's request for confidentiality with respect to the site, in keeping with NHPA Section 304, the District Commander did not provide a detailed discussion about the specifics of the site in the District ROD. *Id.* at 196.

425. *Id.* at 196. The District ROD also noted that both the VDHR and the ACHP indicated that "oral history in the American Indian culture is very reliable." *Id.* Also, the authors of the TCP Report described below had heard of the site from more than one tribal member. The TCP Report authors honored tribal requests not to include any information on religious practices in the report. *Id.*

site, and that, at any rate, the site should simply be relocated.⁴²⁶ The Mattaponi Tribe explained that relocation was simply impossible.⁴²⁷ The District Commander found no reason to reject the Tribe's information about the site,⁴²⁸ and concluded that the site would be considered a Traditional Cultural Property under the NHPA.⁴²⁹

5. Traditional Cultural Properties and the Question of "Mitigation"

An EPA-funded study was conducted to assess the potential impacts of the project on Traditional Cultural Properties ("TCPs"),⁴³⁰ meaning "historic properties that are eligible for inclusion in the National Register because of their association with cultural practices or beliefs of a living community that are rooted in that community's history, and are important in maintaining the continuing cultural identity of the community."⁴³¹ Drawing on information gathered from surveys of the interested tribes' members, the resulting TCP Report⁴³² identified five TCPs, including the Mattaponi River and its wetlands, as well as the Mattaponi Reservation (including the tribal shad hatchery).⁴³³ The Mattaponi River was identified as vital to the

426. *Id.* at 198.

427. *Id.* The Tribe explained that relocating the proposed project location "is wholly inconsistent with the Tribe's spiritual practices and traditional beliefs, would destroy the spiritual integrity of the site, and would undercut the cultural identity of the tribe itself." *Id.* (quoting a letter from the IPR).

428. *Id.* at 198.

429. *See id.* at 196. Because of the relatively late disclosure of the sacred site's existence, however, it did not play a role in the decision to recommend denial of the permit. *See id.* The District Commander also stated that the Indian sacred sites Executive Order did not apply because the sacred site was not located on federal land. *Id.* at 209.

430. *Id.* at 190.

431. *Id.* at 186 (explaining that National Register Bulletin Number 38 defines "Traditional Cultural Properties").

432. The TCP Report was entitled "'Powhatans Legacy': Traditional Cultural Property Study for the Proposed Regional Raw Water Study Group's Water Supply Reservoir, King William County, Virginia." *Id.* at 191. The principal investigator for the report was cultural anthropologist Dr. Kathleen Bragdon of the College of William and Mary. *Id.* at 190. A draft was submitted to the District in August 1998, with copies sent to the Mattaponi, Pamunkey, and Upper Mattaponi tribes, and made available to other interested parties for their review. *Id.* at 191. The final report incorporated various parties' comments on the draft report. *See id.* at 193.

433. *Id.* at 193. The other TCPs identified are also part of the larger ethnographic landscape of the Pamunkey Neck: the Pamunkey River and its wetlands; the Pamunkey Reservation (including the tribal shad hatchery); and "all potentially National Register-eligible archaeological sites within the project area associated with the Powhatan peoples." *Id.* As noted above, the Mattaponi Tribe also eventually disclosed a sacred site.

Mattaponi Tribe for subsistence, as essential to its historical and cultural identity, and as the “lifeblood” of the community, while the Mattaponi Reservation was valued for its historic and cultural associations, and as the center of Indian life for the Tribe.⁴³⁴ The Tribe’s connection to the Pamunkey Neck’s land and rivers functioned as a bridge across time, linking the Tribe to both its ancestors and its descendants.⁴³⁵

The TCP Report indicated that the proposed project would affect the tribes, their reservations, and the surrounding buffer area in a number of ways, including: irreversible direct changes in the Mattaponi River and its wetlands that would affect the tribes’ plants and animals and the people that depend on them; further isolation of the two reservations because of the barrier created by the reservoir; a potential impact on tribal plans to expand the tribal land base to further shore up tribal heritage; and damage (through excavation and/or inundation) to prehistoric archaeological sites “which have great emotional and symbolic significance to the Tribes[,] causing significant disturbance in the Indian community and possibly impacting their quest for federal recognition.”⁴³⁶ The report concluded that the project would have harmful effects on Indians and their culture, and noted that “[a]ll Indian people we have consulted and surveyed insist that this project should not be undertaken.”⁴³⁷

Asked by the Norfolk District Commander to compile a list of possible mitigation measures to protect these resources, the Mattaponi Tribe submitted a mitigation proposal, but reiterated its position that no measures could fully mitigate the reservoir’s adverse effects on the Tribe’s historical and cultural resources. The Tribe provided mitigation suggestions only out of fear that if it did not do so, it ran “the risk that the reservoir would be built without any compensatory mitigation.”⁴³⁸

434. *Id.* A similar conclusion was reached for the Pamunkey Tribe, River, and Reservation. *Id.*

435. *Id.*

436. *Id.* Other effects identified included the negative impact on “the morale and status of the Indian community of Virginia as a whole.” *See id.*

437. *Id.* (quoting the TCP Report).

438. *Id.* at 194. The Pamunkey Tribe’s mitigation proposal also emphasized the Tribe’s continued opposition to the project. *See id.* Newport News had previously met with the three tribes individually – perhaps pursuing the government’s age-old divide-and-conquer strategy in dealing with – to seek their agreement to withdraw their objections in exchange for monetary compensation, but to no avail. *See id.*

6. Impact on Environmental Justice Goals

Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, requires federal agencies to consider disproportionately high and adverse environmental impacts on minority communities, including American Indians, and to provide access to information and opportunities for input into federal agency decision-making.⁴³⁹ The District and the EPA consequently consulted as to the project's environmental justice implications.⁴⁴⁰

The District followed the EPA's guidance that decision-makers must be careful to avoid overlooking a project's disproportionate impacts on an isolated minority group representing a very small percentage of the affected population. Such a group may "experience a disproportionately high and adverse effect . . . due to the group's use of, or dependence on, potentially affected natural resources . . . [and/or] particular cultural practices . . ." ⁴⁴¹ This was the case with the reservoir project's effects on the tribes because many would "result from impacts to their cultural resources, as well as to natural resources they use in a manner that differs from the general population of the area." ⁴⁴²

The disproportionate impacts identified included cultural, social, economic, and ecological impacts interrelated with the project's negative impacts on the natural and physical environment. Cultural impacts included the impact on possible burial sites in the area and on the specific sacred site, spiritual impacts from the defiling of the Mattaponi River, impacts on archaeological sites, and increased isolation of the Mattaponi and Pamunkey tribes from each other as a result of the physical barrier created between their reservations.⁴⁴³ Socioeconomic impacts included adverse effects on the shad population and tribal fishing activities, as well

439. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994). The provision requiring agencies to identify and address disproportionate impacts is in Section 1-1 of the Executive Order. The public participation and access to information provisions are in Section 5-5 of the Order.

440. ACE DISTRICT DECISION, *supra* note 14, at 218. The Decision also noted that the Department of Defense has directed that the National Environmental Policy Act be used as the primary approach to implement the order. *Id.*

441. *Id.* at 221 (quoting U.S. ENVTL. PROT. AGENCY (EPA), FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS (Apr. 1998), available at http://www.epa.gov/environmentaljustice/resources/policy/ej_guidance_nepa_epa0498.pdf).

442. *Id.*

443. *See id.* at 222-24.

as on other subsistence activities from the destruction of animal and plant habitats.⁴⁴⁴ Some of the impacts also had political implications. For example, the tribes were concerned that damage to or loss of artifacts in the process of archaeological site excavation could adversely affect the tribes' ability to obtain federal recognition because such artifacts might help to demonstrate that the tribes are "culturally identifiable entities with continued occupation of the area."⁴⁴⁵ Also among the adverse impacts were increased land prices, which could hinder efforts to enlarge tribal holdings through land purchase.⁴⁴⁶ These tribal holdings form the base for tribal governmental authority, as well as the locus for residential opportunities for tribal members.

In light of the foregoing, the District Commander concluded: that the construction of the reservoir project would have a significant and adverse impact on the natural and physical environment of the region, particularly for the tribes; that these adverse impacts were interrelated to adverse cultural, social, economic, and ecological impacts; and that the potential adverse impact on the tribes from the project's environmental effects "appreciably exceeds or would likely appreciably exceed the effects on the general population."⁴⁴⁷ In response to Newport News's claim that these effects were not real and were only "perceived" by the tribes, the District Commander noted that non-Native Americans' inability to perceive these effects did not lessen the impacts felt by the affected tribes. Rather, this difference in perception "highlights the disproportionate nature of such impacts."⁴⁴⁸ The District Commander concluded that the precise magnitude of the adverse effects was unknown and could not be accurately predicted,⁴⁴⁹ and that "the potential socioeconomic, cultural, and spiritual losses that the Tribes would suffer . . . could not be adequately compensated."⁴⁵⁰

444. *See id.* at 223-24.

445. *Id.* at 222.

446. *Id.* at 224-25.

447. *Id.* at 222.

448. *Id.*; *see also id.* at 230 ("[T]he spiritual and religious importance of the River and the surrounding land is a vital cultural value which may be difficult for non-native people to understand. However, lack of understanding of this value by non-Indians does not invalidate it. Rather, it emphasizes the disproportionate nature of effects on the value.").

449. *Id.* at 226. No studies focused on the cumulative and indirect effects of the changes that would result from the project. The City's studies focused on evaluating single effects of the project, rather than on "cumulative and indirect adverse impacts that would occur from the additive effects of these changes." *Id.*

450. *Id.* at 226.

7. *The Norfolk District Commander's Decision*

The District Commander thoroughly reviewed the evidence regarding the need for the reservoir, including the Army Corps of Engineers' Institute of Water Resources study concluding that Newport News would actually need less than half of the water that the City predicted it would need.⁴⁵¹ In light of the study's finding that the need for an additional water supply was "neither immediate nor certain,"⁴⁵² and having balanced the benefits that could reasonably be expected to accrue from the proposed project against its reasonably foreseeable detriments, the District Commander and his staff concluded that issuance of the permit would be contrary to the public interest.⁴⁵³ The District Commander recommended that the application for the permit be denied,⁴⁵⁴ stating that "[t]he risk to the environment, the risk to an entire watershed and the risk to the continued way of life of Native Americans in the Pamunkey Neck area, especially the Mattaponi Tribe, are too great when weighed against the unjustified need."⁴⁵⁵

Although he rendered a decision that respected the Tribe's concerns, the District Commander did not wholly agree with the Tribe's claims. The Tribe asserted that the 1677 Treaty had the status of a "federal treaty," and that the project would violate the Tribe's rights under the both the 1646 and 1677 treaties.⁴⁵⁶ With the adoption of the Constitution, the Tribe explained, the federal government assumed the responsibility to enforce the Treaty's provisions, such as the guarantee of a three-mile buffer zone around the reservation.⁴⁵⁷ The District Commander rejected the Tribe's argument, stating that the 1677 Treaty was "held by" Virginia, not the federal government, and "therefore, any Corps permit decision could not violate the Treaty."⁴⁵⁸

451. *Id.* at 20. The Institute's analysis of the need for additional water in the area to be served by the project indicated that "unless the region suffers a drought more severe than any recorded in the twentieth century," there would be "minimal risk of shortage through about 2020." *Id.* at 212. This risk of shortage did not "translate into a risk to human health and safety," but rather "required implementation of drought curtailment measures (water use reductions)." *Id.*

452. *Id.* at 341.

453. *See id.* at 338-40.

454. *Id.* at 341.

455. *Id.* at 337.

456. *Id.* at 189.

457. *See id.*

458. *Id.* at 220.

The District Commander's recommendation was supported by the Virginia Council of Indians,⁴⁵⁹ the USFWS,⁴⁶⁰ and the EPA.⁴⁶¹ Commenting specifically on the project's impact on the tribes, the EPA informed the District Commander that the importance of the affected natural resources to the tribes in the area "makes the impacts related to the . . . project take on a larger significance" and that "the impacts to Traditional Cultural Properties and the cultural and spiritual integrity of the Tribes are unacceptable because they are avoidable."⁴⁶² It appeared, at this point, that the Tribe had succeeded in making the case that the project should not proceed, and that the Corps had fulfilled its statutory responsibility to halt proposals such as the reservoir project. The District Commander did not, however, have the last word on this issue.

C. Bowing to State Demands: The North Atlantic Division's Permit Decision

Just four days after the announcement of the Norfolk District's preliminary conclusion that the Section 404 permit should not be issued, the Governor of Virginia, James S. Gilmore III, requested referral of the decision to the Corps's North Atlantic Division.⁴⁶³ The Governor's objection to the Norfolk District's recommendation that the permit should not be issued proved to be a significant development because it led to the Division's rejection of the Norfolk District's recommendation and to the issuance of the Section 404 permit.⁴⁶⁴ The Division Engineer's

459. *See id.* at 202.

460. *See id.* at 252.

461. *See id.* at 253, 256.

462. *See id.* at 255 (quoting a letter, dated May 1, 2001, commenting on the District's Recommended Record of Decision). The EPA also noted that it was reserving its authority pursuant to Section 404(c) of the Clean Water Act. *See id.* at 256.

463. *See* ACE N.A. DIVISION DECISION, *supra* note 8, at 3; 33 C.F.R. § 325.8(b)(2) (2010) (providing that a district engineer, who ordinarily has authority to issue or deny a permit, will refer a permit application to the division engineer for resolution "[w]hen the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed").

464. *See* DEP'T OF THE ARMY, NORFOLK DIST. PERMIT NO. 93-0902-12 (Nov. 10, 2005), available at <http://www.nad.usace.army.mil/kwr/KWR%20Permit%20Nov%2015%20Copy.pdf>. An interim decision memorandum was issued in September 2002. *See* N. ATLANTIC DIV., ACE, NORFOLK DIST. APPLICATION NO. 93-0902-12, DECISION MEMORANDUM FOR KING WILLIAM RESERVOIR PROJECT (Sept. 30, 2002), available at http://www.nad.usace.army.mil/kwr/Div_Commander_Decision.pdf. The interim memorandum indicated that the Division favored issuing the permit, but that a few additional steps (the Virginia DEQ's concurrence that the reservoir proposal was consistent with the Virginia Coastal Resources

memorandum discussing the decision revealed the key guiding principle in his analysis: the views of state and local officials were to be given “great weight” in evaluating the project in terms of the public interest.⁴⁶⁵ After the views of tribal officials were correspondingly discounted, the tribes faced an uphill battle in trying to convince the Division that tribal views mattered. A review of the North Atlantic Division Engineer General Meredith W.B. Temple’s decision memorandum demonstrates how glibly the Division Engineer downplayed the concerns of the tribes, the EPA, and the USFWS, and how he failed to respect the tribes’ rights, values, and priorities. His treatment of these concerns in his decision memorandum, described below, reads as an administrative, “So what?”

1. Impact on Archaeological Sites and Traditional Cultural Properties

The Division Engineer discounted tribal concerns regarding the project’s impact on archaeological and historical sites. The Division Engineer noted that a Memorandum of Agreement (referred to as the “Programmatic Agreement”) entered into between the North Atlantic Division, Newport News, the ACHP, and the Virginia Department of Historic Resources for the identification and treatment of traditional cultural properties and other cultural and historic resources⁴⁶⁶ “contains stipulations for identification and treatment of archaeological sites, historic buildings, structures and

Management Plan, the completion of the NHPA Section 106 consultation process, and the permit applicant’s submission of a mitigation plan) were required before a final decision could be made. See ACE N.A. DIVISION DECISION, *supra* note 8, at 4. In 2005, once these additional steps were complete, the North Atlantic Division was able to formally grant the permit. See *id.* In July 2005, the Division Engineer announced his intention to grant the permit, but he was still unable to formally grant it at that time because the USFWS reserved its right to seek elevation of the permit decision to the Assistant Secretary of the Army for Civil Works. The USFWS initially recommended that the Secretary of the Interior request elevation of the permit decision, but following discussions between officials of the USFWS and the Corps, the USFWS decided that it would not request review of the decision by the Assistant Secretary. See Newport News Waterworks, Update, Future Water Supply for the Lower Virginia Peninsula 1, 6 (Summer 2005).

465. See ACE N.A. DIVISION DECISION, *supra* note 8, at 15. Title 33, Section 320.4(j)(4) of the Code of Federal Regulations provides that “[i]n the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination.” 33 C.F.R. § 320.4(j)(4) (2010). Overriding issues of national importance “include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs.” *Id.* § 320.4(j)(2).

466. See ACE N.A. DIVISION DECISION, *supra* note 8, at 4.

landscapes, including Traditional Cultural Properties[,] in the area of potential effect,”⁴⁶⁷ and provides “satisfactory mitigation” for adverse impacts on the affected tribes.⁴⁶⁸ While the tribes might not receive full compensation for the losses to their spiritual connections, culture, and traditional practices, the Division Engineer maintained that such compensation is not required.⁴⁶⁹ The Division Engineer viewed the signing of the Agreement as the satisfactory conclusion of the required NHPA Section 106 consultation process,⁴⁷⁰ without acknowledging that the Mattaponi Tribe, which is not a signatory to the Agreement, might well be unsatisfied with the results of the consultation discussions. Similarly, while the Division Engineer treated the reduction of the originally proposed size of the reservoir in a way that would cause the inundation of fewer archaeological sites as evidence of mitigation efforts,⁴⁷¹ this view ignores the fact that, to the Tribe, the loss of any archaeological site is an unacceptable tragedy. In short, for the Mattaponi Tribe – the party whose interests were most threatened by the project – there was simply no “satisfactory mitigation.”

2. *Impact on Tribal Rights and Fishing*

Without addressing the Mattaponi Tribe’s property and other rights under the 1677 Treaty, the Division Engineer claimed that the reservoir project would not encroach on reservation lands “or any other tribal property.”⁴⁷² Moreover, the Division Engineer did not consider that adverse impacts on the Mattaponi River could affect shad, whose very existence is attributable to the financial and labor investments of the Mattaponi Tribe.⁴⁷³ Presumably, the Tribe expected eventually to reclaim at least some of the fish through the exercise of treaty-guaranteed and state-supported fishing activities. From this perspective, the Tribe could view the project’s adverse impact on river quality as an interference with both its fish and its fishing rights. The Division Engineer’s claim that no tribal

467. *See id.* at 47.

468. *See id.* at 62.

469. *See id.* at 46.

470. *See id.* at 47.

471. *See id.*

472. *See id.* at 45.

473. Lee Graves, *Mattaponi and Pamunkey Tribes Keep Fish in River, Food on Table*, MANATAKA AMERICAN INDIAN COUNCIL, <http://www.manataka.org/page1344.html> (last visited Apr. 23, 2012) (discussing how the Mattaponi and Pamunkey tribes operate shad hatcheries to maintain the fish population).

property interests were affected by the reservoir project is difficult to fathom.

As for tribal concerns about the impacts on subsistence fishing from salinity changes caused by water withdrawals from the river, the Division Engineer acknowledged that the shad population was “critically important to the Mattaponi Tribe as a source of both food and income, and a resource of cultural and religious significance.”⁴⁷⁴ The Division Engineer also recognized that the USFWS and the EPA expressed a number of concerns about the project’s impact on fish and wildlife,⁴⁷⁵ and, in particular, about the impact of water-quality changes on the shad population.⁴⁷⁶ The USFWS consequently supported the Norfolk District Engineer’s recommendation to deny the project permit.⁴⁷⁷ Similarly, the National Marine Fisheries Service stated that such significant impacts to the Mattaponi River’s anadromous and semi-anadromous fish populations would be unacceptable.⁴⁷⁸ The Division Engineer claimed, however, that information included in the Virginia-issued Section 401 Certificate and the EIS showed that the anticipated salinity change in the river “would be minor and within natural variability.”⁴⁷⁹

The Division Engineer also claimed that the expected negative individual and cumulative effects on fish and wildlife would be offset by expected benefits,⁴⁸⁰ apparently believing that the damage done by the transformation of a stream-valley wetland complex into an open-water area could properly be balanced against the increased opportunities for swimming and recreational fishing and boating.⁴⁸¹ It is difficult, however, to construe the sharing of increased recreational opportunities with the public at large as an

474. See ACE N.A. DIVISION DECISION, *supra* note 8, at 55.

475. See *id.* at 47.

476. See *id.* at 55.

477. See *id.* at 47. The support was based on the “substantial and unacceptable impacts to aquatic resources of national importance” that were expected to result from the project. See *id.*

478. See *id.* at 48. The National Marine Fisheries Service, housed within the Department of Commerce’s National Oceanic and Atmospheric Administration, is “responsible for the stewardship of the nation’s living marine resources and their habitat” and “the management, conservation and protection of living marine resources within the United States’ Exclusive Economic Zone (water three to 200 mile offshore).” See *About National Marine Fisheries Service*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., <http://www.nmfs.noaa.gov/aboutus.htm> (last visited Apr. 23, 2012).

479. See ACE N.A. DIVISION DECISION, *supra* note 8, at 46.

480. See *id.* at 48. In addition to its impact on fishing, the project was expected to adversely affect hunting by reducing the area available for it. See *id.* at 50.

481. See *id.* at 50.

adequate trade-off for the adverse impact on subsistence activities like fishing and hunting. Moreover, the Division Engineer's balancing of the loss of certain streams and wetlands against the potential gains from the planned restoration of other streams and wetlands⁴⁸² reveals a perspective in which land and water resources are essentially fungible. From this perspective, the loss of one area can be compensated by the gain of another. This view, however, is flawed. If a tribe's treaty-protected area is damaged, then conservation measures aimed at improving the state of land in another area do nothing to compensate a tribe for the adverse impact on its treaty rights. More broadly, viewing various areas of land as fungible is at odds with the view of land shared among many indigenous peoples, in which different areas have their own unique significance and are irreplaceable – a perspective that the Mattaponi Tribe voiced to the Corps and that Colonel Carroll took seriously.⁴⁸³

There was one water-quality and fish-related concern that the Division Engineer found more difficult to discount: the potential contamination of fish resulting from the formation of methyl mercury in the newly flooded reservoir, a concern raised in a letter from the USFWS.⁴⁸⁴ The likelihood that mercury would become a problem in fish is increased by “mobilization of mercury in soils in newly flooded reservoirs or constructed wetlands.”⁴⁸⁵ If mercury contamination did occur, Virginia would require the permit applicant to take unspecified “appropriate measures” to address the problem.⁴⁸⁶

If mercury contamination eventually affected fish on which tribal members depended for subsistence, the tribal members' experience would not be a new one. Members of other tribes continue to suffer adverse health effects from the contamination of fish on which they depend for subsistence and which account for a greater part of their diet than that of their non-Indian neighbors.⁴⁸⁷ Undoubtedly, that other tribes share this experience would be of no comfort to the affected members of the Mattaponi Tribe.

482. *See id.* at 48.

483. *See supra* notes 385-455 and accompanying text.

484. *See* ACE N.A. DIVISION DECISION, *supra* note 8, at 56.

485. *See id.* According to experts, flooding of wetlands should be reduced as much as possible “to minimize production of methyl mercury, since wetlands contain larger quantities of organic carbon than uplands.” *Id.*

486. *See id.* at 57.

487. *See, e.g.,* Kari Lydersen, *Mercury Warnings a New Part of Tribe's Tradition*, WASH. POST, June 12, 2006, at A2; *see also* Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 CLEV. ST. L. REV. 273, 277-96 (2010) (analyzing tribal participation in litigation to overturn inadequate EPA

3. Impact on Religious Practices and Beliefs and on Environmental Justice

While the Division Engineer acknowledged the project's potential to harm the sacred uses of the Mattaponi River and to dishonor the tribes' ancestors, he also noted that the river and its flow were already disrupted elsewhere.⁴⁸⁸ Rather than view the existing disruptions to the river (already identified as one of the most threatened rivers in the state) as an indication that it should not be subject to additional disruptions, the Division Engineer apparently reasoned that because the river was already disrupted by non-Indian activity elsewhere, there could be no legitimate objection to adding another source of degradation.

The Division Engineer discounted the environmental justice concerns discussed by the District Engineer in his decision memorandum. Without discussing any supporting evidence, the Division Engineer simply stated his belief that "[t]he undertaking of the proposed project is *not expected* to discriminate on the basis of race, color, or national origin, nor will it have a disproportionate effect on minority and low-income communities."⁴⁸⁹

4. Privileging Non-Indian Water Demands

In announcing his decision, the Division Engineer acknowledged the magnitude of the damage that the completed King William Reservoir project would cause. It would be responsible for "a major, long-term adverse impact," and its "ecological impacts and losses would be of a magnitude not previously permitted in the Mid-Atlantic Chesapeake Bay region under the Clean Water Act."⁴⁹⁰ Moreover, the project "*may* also result in adverse impacts to three Native American tribes['] use of the area."⁴⁹¹ Nonetheless, the Division Engineer believed that the project would provide a "substantial benefit"⁴⁹² and that "it would not be contrary to the public interest" to issue a permit for the project.⁴⁹³ The Division Engineer was, in essence, balancing the benefits to one interested party (the

mercury regulations, which allowed continuing mercury emissions to affect tribes' treaty-based fishing rights).

488. See ACE N.A. DIVISION DECISION, *supra* note 8, at 46. Ongoing disruptions included an existing intake structure, two existing reservoirs, diversion of water for agricultural irrigation, and the dumping of industrially used groundwater. *Id.*

489. See *id.* at 7-8 (emphasis added).

490. See *id.* at 61.

491. See *id.* at 62 (emphasis added).

492. See *id.* at 61.

493. See *id.* at 62.

permit applicant and other expected beneficiaries of the proposed project) against the detriments to another interested party that would not benefit from the project (the Mattaponi Tribe), and deciding that the Tribe's detriment was of less significance than the benefits to the permit applicant. In short, the Division Engineer struck the balance struck so many times before: tribal interests in and rights to natural resources were subordinated to non-Indian demands for them. The "public need" – meaning non-Indian "need" – trumped tribal treaty rights and tribal needs. The Tribe was simply directed to look to the Programmatic Agreement (to which the Tribe was not even a party) for the "satisfactory mitigation" that it provided to the Tribe for the adverse impacts it would suffer.⁴⁹⁴

One can discern additional historical parallels in the Division Engineer's decision and analysis. As in the past, an expected increase in the non-Indian population was driving the governmental response to the demand for infringement of tribal rights and resources. In colonial Virginia, the growing English population fueled the demand for Indian land, and led to the loss of tribal land and of access to subsistence resources. In 2006, projected population growth in Virginia's Lower Peninsula was accepted as justification for a project that would impose a substantial environmental cost on the Mattaponi Tribe's homeland and treaty-protected activities. Moreover, while government officials are not using as direct an incentive as the colonial headright system to increase migration to the area,⁴⁹⁵ it is clear that today's state and local officials support migration to the area because of commercial interests.⁴⁹⁶ As the Division Engineer put it, "a risk of water supply deficits would render the Lower Virginia Peninsula area as being potentially an unattractive locale for [non-Indian] habitation and for continued siting and potential relocation of businesses."⁴⁹⁷ In short, area commercial interests, much like those of the Virginia Company centuries before, were promoted and supported at the expense of the Mattaponi Tribe and other area tribes.

In summary, the decision to issue a CWA Section 404 permit for the King William Reservoir project amounted to a rejection of the concerns that Colonel Carroll found so compelling. The contrast between Colonel Carroll's careful and respectful consideration of the Mattaponi Tribe's

494. *See id.*

495. *See supra* note 148 and accompanying text.

496. *See, e.g.,* ACE DISTRICT DECISION, *supra* note 14, at 290 (noting the comments of the Newport News Industrial Development Authority/Economic Development Authority in support of the project).

497. *See* ACE N.A. DIVISION DECISION, *supra* note 8, at 61.

rights and concerns, and the Division Engineer's cavalier treatment of them, is striking. Ultimately, the Army Corps of Engineers, like the state permit-issuing entities, privileged the water demands of Newport News over treaty rights and environmental protection.

IV. Defending Treaty Rights and the Environment

As the Mattaponi Tribe confronted repeated failures in its efforts to defend treaty rights and protect the Mattaponi River in both state and federal administrative proceedings, the Tribe and its allies turned to the courts for redress. In this setting, they pursued a two-pronged strategy, bringing suit at both the state and federal levels.

A. Challenging the Virginia Water Protection Permit in State Court

1. Claiming the Right to Be Heard

The Mattaponi Tribe's initial foray into state court challenged the SWCB's issuance of the SWP permit for extraction of water from the Mattaponi River. The Tribe, accompanied by the Alliance to Save the Mattaponi,⁴⁹⁸ appealed the SWCB's decision under the Virginia Administrative Procedures Act ("VAPA"), while also making a claim under the 1677 Treaty.⁴⁹⁹ The Tribe's experience in bringing suit in the Newport News Circuit Court bore a disturbing resemblance to the Tribe's experiences in the first half of the twentieth century, when Walter Plecker attempted bureaucratically to erase the Virginia tribes' existence. Virginia's judicial system initially treated the Mattaponi Tribe as lacking a

498. The Alliance is a grassroots organization focused on protecting the Mattaponi River. See *Why We Oppose the Reservoir*, ALLIANCE TO SAVE THE MATTAPONI, <http://www.savethemattaponi.org/why.htm> (last visited Apr. 23, 2012). The organization's members oppose the reservoir because they believe that there are less destructive alternatives to meeting increased water needs, that the damage to the environment cannot be properly mitigated, and that the project will harm Native American rights. See *id.* Several other organizations (the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, and the Sierra Club) joined in the petition to the circuit court, as did two individuals. See *Mattaponi I*, 519 S.E.2d 413, 415 (Va. Ct. App. 1999), *rev'd sub nom. Mattaponi III*, 541 S.E.2d 920 (Va. 2001). The plaintiff organizations and the two individual plaintiffs are referred to herein collectively as "the Alliance."

499. See *Mattaponi IV*, 601 S.E.2d 667, 671 (Va. Ct. App. 2004). Additional claims were made under Title VI of the Civil Rights Act of 1964 and the federal Trade and Nonintercourse Acts of 1790 and 1834. See *id.*

legally sufficient status for its claim to be heard⁵⁰⁰ – in short, it was as if the Tribe did not exist.

While couched in the terminology of standing, the SWCB's response to the Tribe's suit was, in essence, that the Tribe could, and should, be ignored in decision-making for the reservoir project. In other words, the SWCB argued that the Tribe's views on the project were irrelevant and that the Tribe had nothing at stake, even though the water to fill the reservoir would be extracted from its river. The SWCB's argument echoed the claims that state and colonial officials made periodically for several hundred years: non-Indians had the power to make decisions that adversely affected tribes and their lands and resources – and even to seize tribal resources – and the Virginia tribes were powerless to challenge these decisions or prevent the seizures. Only now, it was Mattaponi water and fish that were directly at stake, as opposed to Powhatan corn, land, and labor. The circuit court sided with the SWCB, holding that the Tribe and its ally, the Alliance, lacked standing to challenge the permit decision.⁵⁰¹

The Virginia Supreme Court,⁵⁰² however, saw things differently, noting the Tribe's allegations that the proposed project will directly injure the Tribe "by substantially interfering with the Tribe's capacity to continue to exist as a tribe as it has from since before recorded history, will interfere with the Mattaponi's traditional way of life, and will prevent the Tribe from maintaining its cultural and spiritual connections to the Mattaponi River, Cohoke Mill Creek, together with its adjacent wetlands and adjacent

500. See *Mattaponi I*, 519 S.E.2d at 414.

501. See *Mattaponi IV*, 601 S.E.2d at 671. The decision was based on the court's application of the VAPA's Article III-based standing test. The court also held that the Tribe's non-VAPA claims were improperly pled in a VAPA proceeding. The court, however, rejected the SWCB's argument that the suits were barred by sovereign immunity. See *id.* at 670. The Tribe encountered similar resistance to its claims that it was an interested party when it sought to intervene in the City's challenge to the VMRC's decision to deny a permit for the construction of the intake structure and pipeline and discharge structures. The Tribe sought to intervene in support of the decision, but the circuit court denied the Tribe's motion to intervene, a denial which both the City and the VMRC supported. *Mattaponi Indian Tribe v. Va. Marine Res. Comm'n*, 609 S.E.2d 619, 620-21 (Va. Ct. App. 2005). The Tribe appealed the decision, but the appeal was moot after the City and the VMRC settled the case. *Id.* at 622.

502. The plaintiffs appealed to the Virginia Supreme Court after the Virginia Court of Appeals affirmed the circuit court's decision. See *Mattaponi I*, 519 S.E.2d at 419; *Mattaponi Indian Tribe v. Va. Dep't of Env'tl. Quality ex rel. State Water Control Bd. (Mattaponi II)*, 524 S.E.2d 167, 170 (Va. Ct. App. 2000).

archaeological sites, and Cohoke Mill Creek Valley.”⁵⁰³ Once the case returned to the circuit court, however, the result was the same: the circuit court sided with the SWCB and dismissed the claims, this time on the merits. The circuit court dismissed the Tribe’s treaty-based claim on the basis that the Treaty required all treaty-based disputes to be submitted to the Governor, and that the court did not have jurisdiction to review the Governor’s treaty-related decisions.⁵⁰⁴ The court also rejected the Tribe’s argument that the SWCB “failed to protect the Tribe’s cultural values in its traditional fishing, gathering, and religious practices and likewise failed to protect tribal archeological sites.”⁵⁰⁵

The court separately addressed another treaty-based claim made by the Tribe, which, the Tribe explained, was based on federal law. The Tribe requested that the circuit court void the permit for violating the 1677 Treaty, and enjoin further treaty violations.⁵⁰⁶ The circuit court rejected the

503. *Mattaponi III*, 541 S.E.2d 920, 923 (Va. 2001). The Virginia Supreme Court concluded that the Tribe had standing to pursue its claims, as there was an imminent injury to the Tribe, the injury was traceable to the action of the SWCB, and the injury would likely be addressed by a favorable decision of the SWCB. *See id.* at 925-26. The court reached the same conclusion as to the Alliance. *See id.* In addition, the Tribe alleged that the proposed Mattaponi River water intake pipe and structure would “desecrate and insult the Mattaponi culture, dishonor the Tribe’s ancestors, jeopardize the Tribe’s historic dependence on the river for hunting and fishing, and impair the river’s cultural and spiritual resources.” *Id.* at 923. The Tribe asserted that in issuing the water permit, the SWCB “failed to consider and evaluate certain treaty rights, cultural values and resources of the Mattaponi River and Cohoke Mill Creek, together with its associated wetlands and adjacent archaeological sites, in violation of Virginia State Water Law.” *Id.* (internal quotation marks omitted). The plaintiffs appealed to the Virginia Supreme Court after the Virginia Court of Appeals affirmed the circuit court’s decision. *See Mattaponi I*, 519 S.E.2d at 419; *Mattaponi II*, 524 S.E.2d at 170.

504. *See Mattaponi IV*, 601 S.E.2d at 673. As to the Tribe’s claim that the permit issuance violated the Water Control Law, the court held that the SCWB complied with the legal standards for permit issuance and “rested its decision on a showing of substantial evidence.” *Id.* The court also dismissed the Tribe’s Title VI claim. *See id.* Reviewing this decision on appeal, the court of appeals agreed with the circuit court that the SWCB only has authority to issue or deny a water permit, and has no power to adjudicate the Tribe’s claim of legal rights stemming from the 1677 Treaty. *See id.* at 676. Consequently, the circuit court also lacked authority to adjudicate the Tribe’s treaty claims in its review of the permit decision under the VAPA. *See id.*

505. *Id.* at 678 (internal quotation marks omitted). The court concluded that the Tribe failed to demonstrate that there was a lack of substantial evidence in the record to support the SWCB’s decision, or that the SWCB’s decision was arbitrary and capricious. *See id.* at 679.

506. *See id.* at 672.

Tribe's contention that federal law governed the Treaty and dismissed the Tribe's claim.⁵⁰⁷ The court held that the Treaty (as the court interpreted it) gave the Governor exclusive power over treaty-based disputes.⁵⁰⁸ On appeal, the court of appeals declined to address the Tribe's challenge to the circuit court's dismissal of this treaty claim, and transferred this part of the Tribe's appeal to the Virginia Supreme Court for review.⁵⁰⁹

2. *Challenging the State's Violation of Treaty Rights and State Water Law*

The Tribe and the Alliance appeared once again before the Virginia Supreme Court in their challenge to the SWCB's issuance of the SWP permit,⁵¹⁰ arguing that the permit decision violated the Water Control Law by failing adequately to protect instream beneficial uses,⁵¹¹ by failing to protect existing uses against proposed uses, and by allowing the construction of a project that would detrimentally affect an existing use of state waters.⁵¹² The court interpreted the relevant statutory provisions as requiring the SWCB to balance existing and proposed uses, both instream and offstream, and viewed the requirement that the SWCB "protect" existing instream uses in light of the balancing requirement.⁵¹³ Further, the court maintained that cities have a duty to protect their water supplies, and

507. *See id.* at 677.

508. *See id.*

509. *Id.*

510. Alliance to Save the Mattaponi v. Virginia Dep't of Env'tl. Quality *ex rel.* State Water Control Bd. (*Mattaponi V*), 621 S.E.2d 78, 86 (Va. 2005).

511. *Id.* at 88. The State Water Control Law authorizes the Board to issue a permit if the proposed activity "will protect instream beneficial uses," defined to include, among other uses, "the protection of fish and wildlife habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values." VA. CODE ANN. § 62.1-44:15:5(B) (2011) (authorizing the Board to "issue a [permit] if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and State Water Control Law and will protect instream beneficial uses"); *id.* § 62.1-10(b) (providing a non-exclusive definition of instream beneficial uses). The statute also refers to "the need for balancing instream uses with offstream uses," and defines the latter to include, among other uses, "domestic (including public water supply), agricultural, electric power generation, commercial and industrial uses." *Id.* § 62.1-44:15:5(F) (requiring consultation with other state agencies regarding the need for balancing instream and offstream uses); *id.* § 62.1-10(b) (providing a non-exclusive definition of offstream beneficial uses). Finally, the section dealing specifically with the issuance of water protection permits provides that existing beneficial uses are considered "the highest priority use." *Id.* § 62.1-44:15:5(C).

512. *Mattaponi V*, 621 S.E.2d at 88.

513. *See id.* at 89.

that state policy encourages reasonable actions related to the fulfillment of this duty.⁵¹⁴ Without addressing whether it was appropriate for a city to carry out this duty at the expense of other communities located elsewhere in the state, the court concluded that the SWCB properly applied the statutory directive with respect to instream beneficial uses.⁵¹⁵

The Tribe also challenged the SWCB's decision on the basis of the 1677 Treaty and cultural protection considerations, first asserting that the SWCB has a duty to uphold the State's obligations under the 1677 Treaty and that its decision violated the trust relationship between the State and the Tribe.⁵¹⁶ The court rejected this argument, holding that the SWCB lacked authority to consider the treaty rights because the SWCB's authorizing statute does not provide for it to determine any private rights.⁵¹⁷ Second, the court rejected the Tribe's argument that the SWCB failed to consider and protect the archaeological sites that the project would flood. Although the Water Control Law treats cultural and aesthetic values as beneficial uses of state waters,⁵¹⁸ the court interpreted the relevant statutory language as being focused on current uses related to state waters, including fish and wildlife resources, and not as encompassing archaeological sites.⁵¹⁹ The court also maintained that the SWCB nonetheless *did* actually consider the site's cultural value, but determined that it could not both protect the site and satisfy the project's water-supply demands,⁵²⁰ and chose to sacrifice archaeological sites (and the cultural values with which they were imbued) in favor of the water-supply demands.

Finally, the Tribe faulted the SWCB for failing to take into account the cultural benefits that the Tribe derived from use of the river for gathering, religious, and fishing activities.⁵²¹ More specifically, the Tribe argued, the SWCB neglected to consider the Tribe's unique cultural uses of the river, or its fishing at particular sites on the river, in imposing permit conditions.⁵²² The court rejected as insufficiently specific the Tribe's evidence of how its gathering and religious uses and its fishing sites would be adversely

514. *Id.*

515. *Id.* The court also addressed and rejected several VAPA claims made by the Alliance. *Id.* at 89-91.

516. *Id.* at 91.

517. *Id.* at 92.

518. *Id.* (citing VA. CODE ANN. § 62.1-44.15:5(C) (2005)).

519. *Id.*

520. *See id.*

521. *Id.*

522. *Id.* at 92-93.

affected by the project,⁵²³ and concluded that it was permissible for the SWCB to rely on evidence suggesting that the adverse effects on fishing practices would be minimal (as opposed to other available evidence indicating more substantial effects).⁵²⁴ Again, the court saw no basis for interfering with the decision to address tribal concerns that might stand in the way of satisfying Newport News's water demands.

The final portion of the Virginia Supreme Court's opinion addressed an important issue related to the status of the 1677 Treaty: whether the treaty claims are governed by federal or Virginia law. The Tribe argued that the treaty claims are governed by federal law because *Worcester v. Georgia*⁵²⁵ established that the federal government is "the exclusive arbiter of all Indian affairs" and that the Constitution gives only the federal government treaty-making authority, as well as general authority over Indian affairs.⁵²⁶ Moreover, the Constitution's Supremacy Clause adopts treaties made between Indian tribes and Great Britain as federal law.⁵²⁷ Consequently, the Tribe argued, the Treaty's provisions are enforceable as a matter of federal law.⁵²⁸ The State, on the other hand, conceded the validity of the Treaty, but argued that the Supremacy Clause did not apply to the 1677 Treaty, and that the 1677 Treaty-based rights and obligations passed directly to Virginia after it declared independence.⁵²⁹

The court sided with the State on this point, maintaining that the Supremacy Clause's reference to treaties made "under the Authority of the United States" being "the supreme Law of the Land" only encompassed treaties formally entered into under the Articles of Confederation or the Constitution.⁵³⁰ The court thus viewed the Supremacy Clause's use of the term "United States" as referring to a single entity, rather than to a collectivity of states (reflected in the pre-Civil War use of "United States" as a plural noun), some of which may have been parties to pre-

523. *Id.* at 93. Similarly, the court was not convinced that the Tribe's evidence established that "any particular fishing location reflects the Tribe's 'unique cultural dependence' on fishing in the River." *Id.*

524. *Id.*

525. 31 U.S. (6 Pet.) 515 (1832).

526. *Mattaponi V*, 621 S.E.2d at 93.

527. *Id.*

528. *Id.* at 94.

529. *Id.*

530. *See id.* The court also noted that although the Nonintercourse Act provides protection "to all Indian tribes," the Tribe was not asserting a claim under the Nonintercourse Act at this stage of the litigation (although it had originally done so). *Id.* at 95.

Revolutionary War treaties still observed when the Constitution was drafted and that imposed responsibilities (and conferred rights) on the United States when it succeeded to Great Britain's interests after independence.

The court also rejected the federal government's authority over Indian affairs under the Constitution's Indian Commerce Clause as a basis for the Treaty being federal law.⁵³¹ The court noted that the Mattaponi Tribe was not federally recognized, and that the Tribe failed to show that it was otherwise extended federal protection on the basis of a federal-guardian relationship.⁵³² Finally, the court dismissed as dicta the U.S. Supreme Court's statement in *Worcester v. Georgia* that the United States acquired all territorial and political claims of Great Britain, and discounted the *Worcester* Court's statement that the United States has, by the Supremacy Clause, "adopted and sanctioned the previous treaties with the Indian nations."⁵³³

While concluding that the 1677 Treaty is not federal law, the court recognized that the circuit court's holding that Virginia law governs treaty-based claims amounted to an implicit holding that the Treaty was valid and enforceable (albeit under Virginia law), a finding not challenged by the State or the City.⁵³⁴ The court held that the Treaty's enforceability was limited, however, by the state common law doctrine of sovereign immunity, which rendered the State immune from suits based on treaty-based claims.⁵³⁵ Moreover, the holding that the Treaty was not a matter of federal

531. See *id.* at 94-95. The court noted that the Indian Commerce Clause provides the foundation for a guardian-ward relationship between the United States and Indian tribes. *Id.*

532. *Id.* at 95.

533. *Id.* (quoting *Worcester*, 31 U.S. at 559). The court stated that the language related to the adoption of previous treaties by the United States referred to treaties made after the colonies declared independence. *Id.* The court also dismissed the other cases on which the Tribe relied as failing to establish that Indian treaties with Great Britain are federal law. *Id.*

534. *Id.* at 95-96. The court noted that it did not need to decide whether the Treaty was valid and enforceable Virginia law because neither the State nor the City challenged this holding by the circuit court. *Id.* at 96.

535. *Id.* The State argued that it had not waived its sovereign immunity as to suits based on the Treaty, while the Tribe, though not directly responding to the State's argument, argued that because it was seeking injunctive relief against the SWCB's executive secretary, a suit against him was allowed under the *Ex parte Young* doctrine. See generally *Ex parte Young*, 209 U.S. 123 (1908) (allowing suits against government officials despite the doctrine of sovereign immunity where said officials act unconstitutionally). As noted below, the court relied on its characterization of the Treaty as the basis for holding that *Ex parte Young* was inapplicable, stating that the case was based on the principle that state officials cannot act in violation of federal law, and the court had already concluded that the Treaty was not federal law. *Mattaponi V*, 621 S.E.2d at 96-97.

law not only protected the State from suit (under the sovereign immunity principle), but also immunized state officials from suit.⁵³⁶ The Tribe's claim against the City for breach of the Treaty was not, however, barred by sovereign immunity, and the court consequently remanded this claim for further proceedings.⁵³⁷

3. *The Unsuccessful Quest for U.S. Supreme Court Review*

While the Tribe continued in state court to pursue its challenge to the SWP permit's issuance, its attorneys also sought U.S. Supreme Court review of the Virginia Supreme Court's holding on the state law status of the Treaty at Middle Plantation.⁵³⁸ The Tribe's petition for a writ of certiorari highlighted the significance of the decision: for the first time, a state supreme court held that an Indian treaty is *state* law and is unenforceable as *federal* law under the Supremacy Clause, thereby departing from the basic constitutional principle that states cannot be parties to treaties.⁵³⁹ Moreover, the decision dangerously opened the door "for other state courts to hold that all Indian treaties with prior sovereigns are unenforceable as matters of federal law and to interpret those treaties according to the idiosyncrasies of their own laws."⁵⁴⁰ The Virginia decision deprived the tribes, whose leaders had signed one of the nation's oldest

536. *Mattaponi V*, 621 S.E.2d at 96-97. The court declined to apply the *Ex parte Young* doctrine, reasoning that *Ex parte Young* was based on the principle that state officials cannot act in violation of federal law, and was thus inapplicable once the court concluded that the Treaty was not federal law. *Id.*

537. *See id.* at 97-98. Although the Treaty provided that the signatory tribes should go to the Governor (rather than the courts) for redress for treaty violations, the court explained that this provision had to be considered in its historical context. In 1677, there was no separate judicial branch, as the Governor and his council exercised judicial, as well as executive and legislative, powers. As a result, the treaty provision was "simply a command that they seek a peaceful solution under the law for any breach of their rights under the Treaty." *Id.* Moreover, the Treaty's language "guaranteed to the Indians the right to obtain full relief as permitted under the law." *Id.* at 98. The focus of the Treaty was thus on guaranteeing that the signatory tribes had legal recourse "as if such hurt or injury had been done to any *Englishman*," rather than on restricting the Tribe's recourse. *Id.* (quoting article V of the Treaty).

538. Petition for Writ of Certiorari at i, *Mattaponi Indian Tribe v. Virginia*, 547 U.S. 1192 (2006) (No. 05-1141) [hereinafter *Mattaponi Cert. Petition*]. The Tribe asked the Court to consider the question of "[w]hether the obligations imposed by an Indian treaty with a prior sovereign should be enforceable as a matter of federal law under the Supremacy Clause." *Id.*

539. *Id.* at 1-2.

540. *Id.* at 11.

treaties, of “the benevolent protection of two hundred years of a carefully developed uniform body of federal Indian jurisprudence.”⁵⁴¹

The Tribe pointed out that the Virginia decision created an “anomalous category of Indian treaties that are governed solely by state law.”⁵⁴² Because the Constitution explicitly vests the power to make treaties in the federal executive and states that “[n]o state shall enter into any Treaty, alliance, or Confederation,” the U.S. governmental structure lacks a place for a state treaty.⁵⁴³ Moreover, the Virginia decision conflicted with the Supreme Court-endorsed principle of universal succession, according to which the United States acquired all of Great Britain’s treaty rights and obligations relating to U.S. territory.⁵⁴⁴ The universal succession principle, coupled with the Constitution’s structure, point toward the United States’ inheritance of Great Britain’s 1677 Treaty obligations, which should be enforceable under the Supremacy Clause as federal law.⁵⁴⁵

The Virginia Supreme Court’s holding that an Indian treaty arises under state law conflicts with U.S. Supreme Court precedent establishing that, under the Supremacy Clause, *all* treaties are superior to any inconsistent state constitution, statute, or common law.⁵⁴⁶ By applying the sovereign immunity doctrine in Virginia’s favor to nullify the Treaty’s enforcement provision, the Virginia decisions elevated state common law over the 1677 Treaty’s provisions.⁵⁴⁷ The application of the sovereign immunity doctrine afforded the Treaty “less force than a common contract,” and violated the

541. *Id.*; see also *id.* at 2 (noting that the decision undermined “the legal tradition of interpreting Indian treaties according to a uniform body of federal law that takes into account the special status of Indian tribes”).

542. *Id.* at 13. The status of post-Constitution treaties is settled by the language of the Supremacy Clause itself. See *id.* at 12. The Supreme Court has determined that treaties signed during the Confederation period are also enforceable under the Supremacy Clause. See *id.* at 13 (citing *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832)).

543. *Id.* at 14.

544. See *id.* (citing THE FEDERALIST NO. 84 (Alexander Hamilton); *Worcester*, 31 U.S. (6 Pet.) at 544; *Holden v. Joy*, 84 U.S. 211, 244 (1872)) (noting that the doctrine was supported by the Framers and was followed by the Supreme Court); *id.* at 2 (noting that under the universal succession doctrine, a successor sovereign will not transgress the property rights guaranteed by a prior sovereign).

545. *Id.* at 15.

546. See *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (holding that U.S. treaties are superior to state law).

547. *Mattaponi Cert. Petition*, *supra* note 538, at 15.

Indian law canons of construction and other protective principles established by the Court.⁵⁴⁸

Finally, the holding that an Indian treaty is not enforceable as a matter of federal law under the Supremacy Clause conflicts with the longstanding, Constitution-endorsed tradition of central government authority over Indian affairs.⁵⁴⁹ The Virginia decision ignores the federal government's special role in this area.⁵⁵⁰ The Tribe's petition urged the Court to grant certiorari to right the wrong done in this particular case, and also in recognition of the likely recurrence of issues surrounding the status of pre-Revolutionary treaties.⁵⁵¹

Virginia's brief in response derisively characterized the treaty upon which Indian and non-Indian residents of Virginia have relied since 1677 as "[a]t most . . . a contract between Virginia and a group of people living in Virginia."⁵⁵² Although State Attorney General opinions and state court decisions refer to the 1677 Treaty by its proper name,⁵⁵³ the brief referred to the Treaty as the "1677 Agreement."⁵⁵⁴ In addition to this dismissive treatment of the 1677 Treaty, the State cast aspersions on the Tribe's identity. Virginia's brief stated that the Tribe and its Assistant Chief "*claim* that they are descendants of those Native Americans who entered into the 1677 Agreement over 300 years ago," but that "the determination of

548. *Id.* at 15-16. The canons of construction require, for example, that courts interpret the words of Indian treaties in the sense that the Indians would have understood them at the time the treaties were written and resolve any ambiguities in favor of the Indians. *Commonwealth v. Maxim*, 695 N.E.2d 212, 213 (Mass. App. Ct. 1998).

549. *Mattaponi Cert. Petition*, *supra* note 538, at 17. Great Britain affirmed this principle in the Proclamation of 1763 and the United States adopted it in the Articles of Confederation. *See id.* at 17-18.

550. *See id.* at 19.

551. *See id.* at 19 & n.12. The petition noted that approximately 175 pre-Revolutionary treaties were negotiated. The question of their enforceability as a matter of federal law is thus of "vital importance" to many tribes, and the treaties should not be interpreted without "the uniform principles of federal law." *Id.* at 20.

552. Brief of the State Respondents in Opposition to the Petition for a Writ of Certiorari at 2, *Mattaponi Indian Tribe v. Virginia*, 547 U.S. 1192 (2005) (No. 05-1141), 2006 WL 1306795 [hereinafter *State Cert. Brief*].

553. *See, e.g.*, *Auth. of King William County Sheriff's Office*, Op. Va. Att'y Gen. (Sept. 28, 2001), 2001 WL 1265220 (opining on the authority of the King William County sheriff's office over the Mattaponi and Pamunkey Indian reservations and referring to the "Indian Treaty of 1677").

554. *See State Cert. Brief*, *supra* note 552, at 1. Throughout the brief, the State referred to the Tribe as "the Mattaponi" rather than as "the Tribe," a further indication of its desire to denigrate the Tribe's status before the Supreme Court.

whether the Mattaponi are, in fact, the descendents [sic] of the Native Americans who entered into the 1677 Agreement is an issue for the National Government,” on which the State takes no position.⁵⁵⁵ While Virginia conceded that it does recognize the Mattaponi as a tribe “for purposes of state law,” confers certain benefits on the Mattaponi, has a guardian-ward relationship with the Mattaponi, and holds title to the Mattaponi Reservation in trust for the Mattaponi,⁵⁵⁶ it emphasized that the federal government “has *never* declared that the Mattaponi are a federally recognized Indian Tribe.”⁵⁵⁷ The State insisted that there was no need for the Supreme Court to address the status of a “pre-Independence agreement” involving a non-recognized group of Native Americans.⁵⁵⁸

The Supreme Court declined to express its views on the arguments made by the Tribe and the State as to the status of the 1677 Treaty, denying the petition for writ of certiorari.⁵⁵⁹ Like the Cherokee Nation before it, whose 1831 suit seeking protection from state violations of treaty rights was rejected by the Supreme Court on jurisdictional grounds,⁵⁶⁰ the Mattaponi Tribe found the Supreme Court’s doors closed to its plea for vindication of its treaty rights.

4. Back to the Circuit Court

The Tribe’s return to the circuit court to pursue its claims against Newport News and allied localities resulted in a significant opinion, addressing an issue not addressed in prior proceedings. The Tribe argued that construction of the reservoir would violate not only the Tribe’s fishing rights under the 1677 Treaty, but also its rights in and to the waters of the Mattaponi River under the tribal reserved water rights doctrine.⁵⁶¹ The defendants denied that the King William Reservoir would infringe on treaty

555. *Id.* at 2 & n.4 (emphasis added).

556. *Id.*

557. *Id.* at 3.

558. *Id.*

559. *See generally* Mattaponi Indian Tribe v. Virginia, 547 U.S. 1192 (2006).

560. In *Cherokee Nation v. Georgia*, the Court declined to hear the Cherokee Nation’s claim that recently enacted Georgia statutes violated its treaty rights, on the grounds that the claim did not fit within the Court’s Article III jurisdiction over controversies between states and foreign states. While the Cherokee Nation was properly characterized as a state, a majority of the Court concluded that it was not a “foreign state.” 30 U.S. (5 Pet.) 1, 20 (1831). The Court considered the treaty-rights-violation claim the following year in a challenge to the Georgia statutes by Christian missionaries. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).

561. *See* Mattaponi Indian Tribe v. Virginia (*Mattaponi VI*), 72 Va. Cir. 444, 445 (2007).

rights, and argued that the reserved water rights doctrine did not apply in eastern states like Virginia.⁵⁶² The circuit court rejected the defendants' summary judgment motions regarding both the Treaty and the reserved water rights claims,⁵⁶³ raising the possibility of a new avenue of relief for the Mattaponi and other Virginia tribes' water-related rights violations.

The court noted at the outset that the Treaty "is not a document of mere historical interest" and that it "provides a legally cognizable basis for relief under Virginia law."⁵⁶⁴ The Tribe asserted that Article VII of the 1677 Treaty clearly protected its fishing rights, providing "[t]hat the said Indians have and enjoy their wonted conveniences of Oystering, fishing, and gathering Tuccahoe, Curtenemmons, wild oats, rushes, Puckoone, or any thing else for their natural Support not usefull to the English, upon the English Devidends."⁵⁶⁵ The Tribe also asserted that the proposed reservoir would have "adverse and severe" effects on the exercise of these treaty-protected rights.⁵⁶⁶ While the treaty language might be read as also recognizing some English (and now, state) rights to fish, hunt, and gather, construction of the reservoir would not be within the scope of such rights.⁵⁶⁷ The defendants, in response, argued that the Article VII language reading "not useful to the English, upon the English Devidends [sic]" meant that the state had the "predominant right" to use the land as it saw fit, such as by building the reservoir.⁵⁶⁸

The court noted that the three-centuries-old treaty contains some language that is "archaic and perhaps attributes meanings to words that are defined differently in today's understanding of the English language."⁵⁶⁹ The parties each presented support for viable alternative interpretations of the language which indicates a "latent ambiguity," making summary

562. *Id.* at 446.

563. *Id.* at 449 (denying motion re: treaty rights); *id.* at 462 (denying motion re: reserved water rights).

564. *Id.* at 448. The defendants included Newport News and other localities with an interest in the project. *See id.* at 445.

565. *Id.* at 447 (quoting Treaty at Middle Plantation, *supra* note 2, at 83).

566. *See id.*

567. *See id.* at 448.

568. *See id.* The court noted that "the Defendants place substantial emphasis on the language 'English Devidends [sic]' as giving the settlers, and by succession the Commonwealth, the predominant right to make use of the land as they see fit, without concern for any interests of the Tribe." *Id.*

569. *Id.*

judgment on the Article VII claim inappropriate.⁵⁷⁰ The court agreed with the Tribe that it might be able to assert reserved water rights pursuant to the *Winters* doctrine.⁵⁷¹ Although the reserved water rights doctrine had, to date, been applied only in the federal context (and only in jurisdictions that base water rights on the prior appropriation system, rather than on the riparian rights principles adopted by Virginia), the court rejected the defendants' argument that the reserved water rights doctrine and its application to tribes were "unique and exclusive to the federal context."⁵⁷²

The court explained the two systems and the Tribe's claims with respect to each of them. The riparian rights system, prevalent in the water-rich eastern United States, provides that owners of land located along a water source have "the right to reasonable use of the water, and thus may not use the water in any manner that is unreasonably harmful to another riparian owner."⁵⁷³ Reasonable use of water involves concern for not just the *quantity* but also the *quality* of the water affected by the use. The Tribe argued that the proposed Mattaponi River water withdrawals would have a detrimental impact on water quality, thereby infringing upon the riparian rights attached to the Mattaponi Reservation. The defendants, however, claimed that the River's tidal action would ensure that both water quantity and quality remain constant.⁵⁷⁴

The western prior appropriation system, on the other hand, is based on a "first in time, first in right" principle: the "one who first diverts water for a beneficial purpose will have a fixed quantity of water for such purpose so long as it remains beneficial."⁵⁷⁵ It was within the western context that the U.S. Supreme Court created the *Winters* doctrine, providing that "the creation of . . . Indian reservation[s] necessarily implie[s] that water was reserved for the Indian reservation's use, in an amount sufficient to achieve

570. *See id.* Moreover, even if the parties agreed to the definitions of the relevant words and phrases, there would still be factual issues related to the meaning and intent of the Treaty's provisions. *See id.* The court also noted that treaty interpretation "is typically finalized only after trial or a thoroughly developed record on summary judgment." *Id.*

571. *See id.* at 456.

572. *Id.*

573. *Id.* at 450. The riparian rights system is today subject to provisions of supplemental legislation, such as the Virginia statutory provisions designed to protect "beneficial instream uses" by requiring permits in certain circumstances in which these beneficial uses might be without protection under a pure riparian rights system. *See id.* at 453.

574. *See id.* at 451-52. The defendants argued that because the river is tidal, "the natural ebb and flow of the tide will compensate for any water withdrawn by the Reservoir." *Id.*

575. *Id.* at 453.

the primary purposes of the Indian reservation.”⁵⁷⁶ If a proposed reservation lacked sufficient water, its creation would not fulfill “the government’s purpose of transforming the tribe into an organized society” and could jeopardize the tribe’s aboriginal fishing and hunting practices.⁵⁷⁷ Because the doctrine is based on necessity, the court stated, it “preempts state water law *only when necessary*, and only by impliedly reserving that quantity of water necessary to fulfill” the government’s purpose.⁵⁷⁸

The court rejected the defendants’ argument that the absence of federal recognition precluded the Tribe from invoking the reserved water rights doctrine, explaining that the reasoning that formed the basis for the *Winters* doctrine could potentially have force in the state context.⁵⁷⁹ The court focused on the element of necessity underlying the *Winters* doctrine: water is impliedly reserved to an Indian tribe and its guardian when necessary for reservation viability and protection of aboriginal practices.⁵⁸⁰ The *Winters* Court reasoned that the United States, acting as guardian, would have reserved sufficient water for tribes when it created reservations, and that the tribes would not have bargained for reservations (and agreed to give up ceded land) without believing that they would have sufficient water to sustain themselves on their reservations.⁵⁸¹ By the same token, if a state government formally recognized land as a reservation that would help a tribe protect its aboriginal practices, then the State would also intend for adequate water to be available.⁵⁸² Indeed, in appointing trustees for the Mattaponi Tribe, Virginia even followed the United States’ example of acting as a guardian.⁵⁸³ Moreover, the *Winters* reasoning also made “it

576. *Id.* at 459 (citing *Winters v. United States*, 207 U.S. 564, 576 (1908)).

577. *Id.*

578. *Id.*

579. *See id.* at 456-57. The court agreed with the defendants that the *Winters* doctrine’s “preemptive force” arises from the Constitution’s Supremacy Clause, which “serves to ensure that state water laws do not unduly interfere with federal functions stemming from its plenary power relating to Indian tribes.” *Id.* at 456. The court believed that because the Tribe was not federally recognized, it could not rely on the Supremacy Clause’s preemptive force to supersede Virginia’s riparian law, but that this did not mean that reserved water rights are unique and exclusive to the federal system. *See id.* at 456-57. Thus, while the Tribe could not rely on the *Winters* doctrine itself, its underlying logic might still be the basis for reserved water rights for the tribes. *See id.* at 459.

580. *Id.* at 457.

581. *See id.* at 457.

582. *See id.* at 459.

583. *See id.* at 458 (citing 1896 Va. Acts ch. 843; 1976-77 Op. Va. Att’y Gen. 107, 1977 WL 27313; 1917-18 Op. Va. Att’y Gen. 160); *id.* (“Mattaponi Indians of Virginia, are wards

difficult to believe that an Indian tribe would negotiate for or acquiesce in the creation of an Indian reservation if that reservation could not sustain the tribe.”⁵⁸⁴ In sum, it could be asserted compatibly with *Winters* that sufficient water to carry out the purposes of the Mattaponi Reservation was impliedly reserved, and that the Mattaponi Tribe, in the 1677 Treaty, negotiated to set aside water to sustain its reservation and protect its traditional practices.⁵⁸⁵

The court did sound a cautionary note regarding the likelihood of a successful assertion of a reserved water rights claim in riparian rights states.⁵⁸⁶ Because riparian rights are intended to provide each riparian owner with reasonable use of water flowing through or adjacent to the owner’s land, a tribe’s riparian rights should adequately protect its “ability to sustain itself and protect its aboriginal practices”⁵⁸⁷ without any need to invoke the *Winters* doctrine.⁵⁸⁸ It was possible, though, that even in a riparian rights jurisdiction, it would be “necessary to imply reserved water pursuant to an Indian reservation or treaty-granted right”⁵⁸⁹ because a riparian rights system might not guarantee that a riparian owner has a *sufficient quantity or quality* of water to achieve a particular purpose. A riparian owner seeking to use land for a particular purpose might find that riparian law considered the quantity of water sufficient for that purpose unreasonable, or an upstream owner might make a new but reasonable use of water that creates a water quantity or quality deficiency for a

of the State, just as the Indians under the guardianship of the United States are wards of the nation.”) (quoting 1917-18 Op. Va. Att’y Gen. 160).

584. *Id.* at 459. The court noted that “*Winters* contains strong language indicating that the tribe itself reserved water through the treaty and creation of the Indian reservation, apart from any reserved water imputed to the tribe through its relationship with the United States[.] . . . [and] there is no reason why state recognized Indian tribes would not have similarly bargained to reserve water for their own sustenance.” *Id.* The court noted that the *Winters* doctrine so far had only been applied in the federal context “because of the rarity of state-maintained Indian reservations for tribes that are not federally recognized.” *Id.*

585. *See id.*

586. *Id.* at 460.

587. *Id.* at 461.

588. Regarding the necessity element, the court explained that the *Winters* doctrine recognized that “it was *necessary* to preempt state prior appropriation law and reserve the quantity of water needed to ensure that the tribes could sustain themselves and their reservations.” *Id.* at 460 (citing *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982)).

589. *Id.* at 461.

downstream user.⁵⁹⁰ For example, riparian law does not guarantee the necessary quantity or quality of water to satisfy the purposes for which the Mattaponi Reservation was created, or to protect the Tribe's treaty rights, including tribal aboriginal practices.⁵⁹¹ The Tribe, therefore, might be able to successfully assert reserved water rights. Although the Tribe's pleadings stated that the Tribe reserved a sufficient quantity and quality of water at the time it signed the 1677 Treaty, "as well as from 'time immemorial' by way of its aboriginal practices," the court believed that the Tribe had not yet sufficiently pled the element of necessity to satisfy the court that reserved water rights existed.⁵⁹² The court granted the Tribe leave to amend its pleadings to address the necessity element of a reserved water rights claim.⁵⁹³

Ultimately, the Tribe decided not to pursue the reserved water rights and treaty rights arguments at that point and, while continuing to oppose the project, agreed to dismiss the suit against Newport News and the other defendants.⁵⁹⁴ An agreement between the Tribe and the City committed the parties to working together to resolve their areas of disagreement, and provided for a cash payment to support the work of the tribal government.⁵⁹⁵ In discussing the Tribe's decision, the Tribe's attorney

590. *See id.* The affected downstream owner then "may not be able to sustain the gainful activity he enjoyed before the upstream owner's new use." *Id.*

591. *See id.* That state water law might not ensure to the Tribe "the quantity or quality of water sufficient to sustain its Indian reservation, protect other rights granted through government action, or preserve its aboriginal practices" provided a basis for invoking the necessity-based *Winters* doctrine. *Id.*

592. *See id.* at 463. The Tribe did not adequately plead the necessity element of a reserved water rights claim by "demonstrat[ing] that Virginia's riparian rights system would not adequately protect its rights claimed under the Treaty and through its aboriginal practices." *Id.*

593. *See id.*

594. Bobbie Whitehead, *Mattaponi Agree to Drop Lawsuit Over Reservoir*, INDIAN COUNTRY TODAY, Apr. 13, 2007, available at <http://indiancountrytodaymedianetwork.com/ictarchives/2007/04/13/mattaponi-agree-to-drop-lawsuit-over-reservoir-90617>. The decision was made in April 2007, two months before the Tribe's suit was scheduled to go to trial. *See id.*

595. *See id.* As described by City Manager Hildebrandt, the "settlement . . . establishes a process for us to resolve future disagreements with aspects of the project that might come up without resorting to litigation. . . . We would rather invest this money by providing resources for the tribe to pursue their goals as a tribal council, rather than just spending this money on litigation." *Id.* The promised settlement payment was \$650,000. *See id.* The Tribe retained the right to challenge the Section 404 permit in federal court, reserved the right to participate in further project-related administrative proceedings, and remained free to challenge the

explained that the Tribe believed that “the treaty belongs to all of the Virginia tribes, not just the Mattaponi, and they were afraid the lawsuit would affect the treaty adversely.”⁵⁹⁶ Continuation of the suit carried the risk that judicial interpretation of the Treaty could limit its protections; the Tribe “wanted to make sure that the treaty remained protected and intact.”⁵⁹⁷

B. Challenging the Clean Water Act Section 404 Permit in Federal Court

While the litigation addressing the Tribe’s challenge to the SWP permit issuance was still ongoing, the Alliance to Save the Mattaponi, the Virginia Chapter of the Sierra Club, and the Chesapeake Bay Foundation filed suit against the Army Corps of Engineers in the U.S. District Court for the District of Columbia. The federal suit challenged the North Atlantic Division of the Corps’s decision to ignore the Corps’s Norfolk District’s recommendation and issue the CWA Section 404 permit for the reservoir project.⁵⁹⁸ The Tribe intervened in the suit as a plaintiff and added the EPA as an additional defendant, based on the EPA’s decision to reverse its position on the project and not veto the permit’s issuance.⁵⁹⁹ In making the case for its right to intervene, the Tribe highlighted the threats posed by the proposed reservoir: the Tribe’s reservation on the Mattaponi River, on which it operates a shad hatchery – the primary source of jobs and income on the reservation – is only three miles from the planned intake structure; the intake structure would be “located in the Tribe’s most important fishing grounds”; river water withdrawals threatened American shad spawning grounds; and the reservoir would flood hundreds of acres of ancestral land and damage or destroy archaeological sites.⁶⁰⁰ Even before the Tribe joined the suit, the original plaintiffs noted the negative impact that the project’s completion would have on local tribes, as well as the politics at play. According to Michael Town, the Executive Director of the Sierra Club’s Virginia Chapter, “[a]gencies have twice denied Newport News permits to

project in court if the project were changed. *See id.* The City promised to notify the Tribe about any changes in the project that would alter the existing permits. *See id.*

596. *Id.* (quoting Emma Garrison of the Institute for Public Representation).

597. *Id.*

598. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 1, 1 (D.D.C. 2007).

599. *See id.* at 3-4.

600. *See Memorandum of Points and Authorities in Support of Unopposed Motion to Intervene as Plaintiffs at 2, 3 Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 1 (2006) (D.D.C. 2007) (No. 06-01268), 2006 WL 5954422 [hereinafter *Memo on Motion to Intervene*].

allow this project to move forward . . . and both times politicians pressured those agencies to change their decisions. Now, we must rely on the courts to fix those wrongs and bring justice to the Mattaponi.”⁶⁰¹ The Tribe was, of course, best suited to represent its interests in “preserving its own culture, traditions, and spiritual wellbeing.”⁶⁰²

The plaintiffs argued that the grant of the Section 404 permit (and the EPA’s failure to veto it) violated the CWA because the project would cause significant degradation of wetlands⁶⁰³ and was unjustified, given that less damaging practicable alternatives exist.⁶⁰⁴ The Corps’s decision to issue the permit also violated NEPA, as it was based on a faulty⁶⁰⁵ and outdated⁶⁰⁶ EIS. Finally, in addition to violating the CWA and NEPA, the plaintiffs alleged that the Corps and the EPA violated the no-net-loss-of-wetlands policy included in the Chesapeake 2000 Agreement⁶⁰⁷ by allowing a project that will cause “a net loss of wetlands functions, values, and

601. Press Release, S. Envtl. Law Ctr., Group Sues Army Corps to Stop Reservoir Project in Coastal Virginia (July 17, 2006) (on file with author).

602. See Memo on Motion to Intervene, *supra* note 600, at 7-8.

603. See First Amended Complaint at 3, 4, *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 1 (2007) (D.D.C. 2007) (No. 06-01268), 2007 WL 811357 [hereinafter First Amended Complaint]. The Code of Federal Regulations provides that the Corps is not to issue a permit for a discharge of fill material that will “cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c) (1980). “Waters of the United States” included wetlands. 40 C.F.R. § 232.2(3) (1988).

604. See First Amended Complaint, *supra* note 603, ¶¶ 107-15. Under the Code of Federal Regulation, a permit is not to be issued if there is a “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem,” such as additional groundwater desalination facilities, increased use of existing reservoirs, and stronger conservation and reuse measures. 40 C.F.R. §230.10(a) (2010); see also First Amended Complaint, *supra* note 603, ¶ 112. The complaint also claimed that issuance violated public interest review requirements, as well as the requirement that a permit not be issued unless potential adverse impacts on the aquatic ecosystem are minimized. See First Amended Complaint, *supra* note 603, ¶¶ 116-23.

605. See First Amended Complaint, *supra* note 603, ¶¶ 132-36. The EIS failed to examine alternatives to the reservoir that would meet the true demand for water (as opposed to the inflated projected water demand claimed by Newport News), and failed to adequately analyze the direct, indirect, and cumulative environmental impacts of the project. See *id.*

606. See *id.* ¶¶ 137-41. The Corps failed to prepare a supplemental EIS, despite substantial changes in the project and significant new circumstances since the Final EIS. See *id.* ¶ 139.

607. See *id.* ¶¶ 142-44. One of the goals of the Chesapeake 2000 Agreement was to “[a]chieve a non-net loss of existing wetlands acreage and function.” *Id.* ¶ 144 (quoting the Chesapeake 2000 Agreement, *supra* note 45).

acreage.”⁶⁰⁸ The plaintiffs sought revocation of the permit or, in the alternative, an injunction requiring the Corps to withdraw the permit and prepare a revised or supplemental EIS before issuing any new permit for the project.⁶⁰⁹

In March 2009, the district court granted the Mattaponi Tribe and its allies a long-hoped-for victory, holding that both the Corps and the EPA acted arbitrarily and capriciously in issuing and failing to veto the project's Section 404 permit.⁶¹⁰ After reviewing the evidence in the administrative record,⁶¹¹ the court agreed with almost all of the plaintiffs' claims regarding the Corps's and the EPA's conduct in connection with the permit's issuance. First, the court agreed that the Corps acted arbitrarily and capriciously in concluding that the project was the least damaging practicable alternative.⁶¹² The Corps improperly reached this conclusion on the basis of the alternatives included in the final EIS, despite the occurrence of several important changes since the EIS was completed in 1997, such as a decrease in the projected water needs.⁶¹³ The court noted that “[b]efore determining that a Project that would flood 403 acres of functioning wetlands is the least-damaging practicable alternative, the Corps must do more than give vague explanations about the potential adverse effects of or potential political opposition to other alternatives.”⁶¹⁴

The court also agreed that the Corps's determination that the project would not significantly degrade waters was arbitrary and capricious.⁶¹⁵ The Corps failed to explain how the wetlands mitigation plan, on which it had relied in concluding that the project would not cause significant degradation, would “adequately compensate for lost wetland functions and

608. *Id.* ¶ 146; *see also id.* ¶¶ 74-78 (discussing the inadequacy of the wetlands mitigation plan).

609. *Id.* at 62-63 (prayer for relief from the First Amended Complaint).

610. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 141 (D.D.C. 2009).

611. *Id.* at 128 (noting that it considered “whether the evidence in the administrative record permitted the Corps to issue the permit to Newport News and the EPA to not veto the permit”).

612. *Id.* at 128-30.

613. *Id.* at 129-30. There had been a substantial decrease in the projected water needs and an increase in the cost of the project (coupled with a decrease in the amount of water that the project would produce), but the Corps decided to rely on the final EIS, without explaining why the EIS remained sufficient despite these changes. *Id.*

614. *Id.* at 130.

615. *Id.* at 131-36.

values such that it results in no net loss of wetland functions and values.”⁶¹⁶ The Corps simply ignored concerns about the mitigation plan raised by the Corps’s Norfolk District and by the U.S. Fish and Wildlife Service, which had repeatedly expressed “strong opposition”⁶¹⁷ to the permit’s issuance because the project “constitutes a net loss of wetlands and aquatic habitats, and will result in significant degradation of the aquatic ecosystem.”⁶¹⁸ In addition, the Corps failed to adequately address concerns over the effects of increased salinity on aquatic species, and consequently acted arbitrarily and capriciously in deciding that salinity changes would not have a significant adverse effect.⁶¹⁹ Because both the determination that the project would not significantly degrade waters and that the project was the least damaging practicable alternative were arbitrary and capricious, the decision that the project permit’s issuance was in the public interest (a prerequisite for issuance of a Section 404 permit) was also arbitrary and capricious.⁶²⁰ The court accordingly granted summary judgment to the plaintiffs on these three claims.⁶²¹

The court also granted summary judgment to the plaintiffs on a final element of their complaint: the claim that the EPA, by relying on factors other than an analysis of the project’s environmental effects, acted arbitrarily and capriciously in deciding not to veto the permit.⁶²² The CWA authorizes the EPA Administrator to veto a permit when the discharge that the permit would authorize would “have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”⁶²³ The record showed, the plaintiffs argued, that the Administrator indeed *had*

616. *Id.* at 132. The Norfolk District “seriously critiqued” the techniques and procedures on which Newport News based its wetlands functional assessments, but the Corps did not address these concerns. *See id.* at 133.

617. *Id.* at 132 (quoting a 2004 letter from the FWS).

618. *Id.* (quoting a February 2005 letter from the FWS).

619. *Id.* at 136.

620. *See id.* A permit is not to be issued if the “district engineer determines that it would be contrary to the public interest.” 33 C.F.R. § 320.4(a) (2010). A permit must be denied if the discharge that it would authorize would not comply with EPA’s Section 404(b)(1) guidelines. *See id.* Because the court found the Corps’s conclusion that issuance of the permit complied with the guidelines arbitrary and capricious, it followed that the Corps’s determination that the permit’s issuance complies with the public interest requirement was also arbitrary and capricious. *Alliance to Save the Mattaponi*, 606 F. Supp. 2d at 136.

621. *Alliance to Save the Mattaponi*, 606 F. Supp. 2d at 136.

622. *See id.* at 141.

623. 33 U.S.C. § 1344(c) (2006).

determined that issuance of the permit would have unacceptable adverse effects, and yet nonetheless decided, on the basis of unrelated factors, not to veto the permit.⁶²⁴ The court noted that while the Administrator has some discretion as to the veto decision, the discretion “is not a roving license to ignore the statutory text.”⁶²⁵ Instead, the exercise of discretion must relate to whether the permit will have the prescribed unacceptable adverse effects. But the Administrator’s decision was based “on a whole range of other reasons completely divorced from the statutory text,” such as his determination that “there was a water supply shortfall that needed to be addressed”⁶²⁶ In other words, the Administrator, like so many government officials before him, decided that non-Indian demands trumped Indian rights and interests. The court concluded that because the Administrator relied on factors other than those that Congress intended him to consider, the decision not to veto the permit was arbitrary and capricious.⁶²⁷

In summary, the court concluded that the Corps acted arbitrarily and capriciously in determining that the project was the least damaging practicable alternative, that it would not cause significant degradation to waters, and that the permit’s issuance was in the public interest. The EPA, in turn, acted arbitrarily and capriciously in deciding not to veto the permit. All of the court’s conclusions were based, however, on considerations of environmental principles in general, rather than on considerations unique to the Mattaponi Tribe, such as the threat that the project presented to its cultural, spiritual, and archaeological values. Nor did the court address the threat posed to fulfillment of treaty rights. The court’s review of the complaint, which embodied the joint efforts of the environmental plaintiffs and the Tribe, did not focus on tribal concerns.

624. *See Alliance to Save the Mattaponi*, 606 F. Supp. 2d at 139.

625. *Id.* at 140 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)).

626. *Id.*

The Regional Administrator (who, by regulation, must first recommend that the Administrator deny a permit, *see* C.F.R. § 231.1) based his decision [not to recommend a veto on the determination] that engaging in the required notice and comment proceedings would divert resources; that given the extensive public process provided by the Corps, another such process would be unlikely to add any new information; that there was a water supply shortfall that needed to be addressed; and that the permit would likely be subject to litigation in any event, among other things.

Id. None of these factors had “anything to do with whether granting the permit would have an unacceptable adverse effect.” *Id.*

627. *Id.* at 141.

In June 2009, the U.S. Department of Justice announced that it would not appeal the district court's decision.⁶²⁸ In the wake of this announcement, Newport News decided that the project had "no future"⁶²⁹ and switched gears to focus on unwinding work done in connection with the project, such as land acquisitions and existing mitigation work.⁶³⁰ The project had already cost Newport News over \$50 million.⁶³¹ The City Council, recognizing that it had to go back to the drawing board to satisfy its residents' water demands, formally decided to terminate the project in September 2009.⁶³² The district court decision also prompted the Corps to suspend the project's Section 404 permit.⁶³³

While the court's decision brought much consternation to Newport News and the other cities that looked to the Mattaponi River to satisfy their water demands, for the Mattaponi Tribe, it amounted to a victory in spite of what seemed to be insurmountable odds. After years of efforts challenging the project before state and federal governmental agencies and in state and federal courts, the Tribe and its allies succeeded in protecting the land and waters of Pocahontas's (and generations of other Powhatan tribe members') homeland from the reservoir project's threat of destruction. By displaying persistence akin to their ancestors' resistance to white Virginian efforts to erase the Tribe from Virginia's geographical, social, cultural, and political landscape, the Tribe was able to successfully defend the rights and resources that those ancestors themselves struggled to preserve.

V. Reflections on Questions Raised (and Not Definitively Answered)

The ultimate federal judicial decision that derailed the King William Reservoir project did not rely on all of the Mattaponi Tribe's objections to the project. The federal district court's focus was on the Clean Water Act – not on the Tribe's treaty rights, reserved water rights, or entitlement to protection for its land and resources under Indian law principles. Thus, the court did not address the relevant Indian law-specific (as opposed to general

628. Sabine Hirschauer, *Reservoir Ruling Won't Be Appealed*, DAILY PRESS (Newport News, Va.), June 26, 2009, at A1.

629. *Id.* (quoting Newport News Mayor, Joe S. Frank). Mayor Frank stated that "[t]he ability to move forward no longer exists. . . . As far as I am concerned, this project has no future." *Id.*

630. *See id.*

631. *Id.*

632. *See* Cathy Grimes, *Tap is Finally Turned Off for King William Reservoir*, DAILY PRESS (Newport News, Va.), Sep. 23, 2009, at A4.

633. *See* Hirschauer, *supra* note 628, at A1.

environmental law) issues. Although the state courts addressing the Tribe's challenge to the SWP permit's issuance did address some of the Indian law issues, the results were not all positive from the Tribe's perspective. The Newport News Circuit Court raised the possibility that the Tribe was entitled to reserved water rights, but the Virginia Supreme Court concluded that the 1677 Treaty was a matter of state law, rather than federal law⁶³⁴ – a striking conclusion that the U.S. Supreme Court declined to review.⁶³⁵

The Indian law-related conclusions that state and federal courts and agency officials reached and failed to reach are discussed below. These conclusions warrant examination because of their potential significance not just for the Mattaponi, but for other tribes who may learn lessons from the Tribe's experiences that will assist them in defending their own land, resources, and rights against projects that threaten their treaty rights and the integrity of their homelands.

A. The Relationship Between the Mattaponi Tribe and the United States

1. The Status of Pre-Revolutionary War Treaties

The Tribe asserted 1677 Treaty-based rights in the state permitting process, but to no avail.⁶³⁶ The Tribe also asserted to the Corps that the project would violate the 1677 Treaty,⁶³⁷ and that with the adoption of the Constitution, the federal government assumed the responsibility to enforce the Treaty's provisions, such as the three-mile buffer zone around the reservation.⁶³⁸ The Corps's Norfolk District rejected the Tribe's argument, opining that the treaty obligations passed to Virginia and could not be violated by the permit decision.⁶³⁹ The District Commander did not consider whether the United States could be bound by the Treaty without having signed it, such as under the doctrine of universal succession.⁶⁴⁰ His failure to consider this possibility or to devote more attention to the issue may be attributable to the fact that (as he noted) treaty obligations were

634. *Mattaponi V*, 621 S.E.2d 78, 95 (Va. 2005).

635. *See generally* *Mattaponi Indian Tribe v. Virginia*, 547 U.S. 1192 (2006).

636. As discussed above, the State Attorney General opined that relevant provisions of the Treaty had been "impliedly abrogated" and therefore did not present an obstacle to the project. *See Mattaponi IV*, 601 S.E.2d 667, 671 (Va. Ct. App. 2004).

637. *See* ACE DISTRICT DECISION, *supra* note 14, at 189.

638. *See id.* at 297.

639. *See id.* at 220 (holding that the Treaty was "held by" Virginia, not the federal government, and "therefore, any Corps permit decision would not violate the Treaty"); *id.* at 297 (commenting that obligations under the Treaty passed to Virginia).

640. *See id.* at 54-226.

ultimately not implicated because of his decision to recommend the permit's denial.⁶⁴¹ The federal district court did not address the treaty-rights issue at all, a neglect reinforced by the Supreme Court's rejection of the Tribe's petition for certiorari. Consequently, the federal judiciary left unanswered important questions about the status of the Treaty, which are explored below.

a) The United States as Successor to Great Britain

The 1677 Treaty provided the foundation for land ownership in much of eastern Virginia. It was the clear intent of the signatories that the Treaty be between the governments of nations, rather than between Indian nations and a local government.⁶⁴² The Mattaponi Tribe has continued to carry out its commitments under the Treaty by allowing nonmembers of the Tribe to reside on Mattaponi land ceded by the Treaty, and by providing the prescribed annual tribute. The United States and Virginia (as a component part of the United States) continue to benefit from the provisions of the Treaty. The conduct of the United States, Virginia, and the Mattaponi Tribe is thus consistent with the Treaty's continued force – the Tribe continues to make land claims to its reservation, the reservation continues to be treated as trust land, and the Tribe continues to enjoy hunting and fishing rights, tax exemptions, and other benefits stemming from the Treaty.

Although treaties, with basic principles similar to the provisions of the 1677 Treaty, were signed repeatedly by the United States after its formation, the United States has not signed a treaty with the Mattaponi Tribe.⁶⁴³ This fact is hardly surprising, though, given the status of the Tribe, its land, and its legal rights when the United States took shape as an independent nation. Having already agreed to friendship and alliance with non-Indian settlers by treaty, the Tribe was living in peace on land guaranteed to it by a then-century-old treaty. Unlike some other tribes, the Mattaponi Tribe did not fight against the United States in the latter's war for independence. Finally, the Tribe's sovereignty – its political status as an entity with authority over a designated reserved area – was already

641. *Id.* at 297. For an examination of the succession question by a student author, see Adam F. Kinney, Note, *The Tribe, The Empire, and The Nation: Enforceability of Pre-Revolutionary Treaties with Native American Tribes*, 39 CASE W. RES. J. INT'L L. 897 (2007-08).

642. *See supra* note 172 and accompanying text (indicating that the 1677 Treaty was signed between the allied tribes and the English Crown, not the Virginia colony).

643. *See* Kinney, *supra* note 641, at 913-14.

acknowledged. As a result, the purposes for which the United States and tribal nations entered into treaties in the years following American independence had already been satisfied, obviating the need for a treaty to be executed.

Professor David Wilkins observed that in these “formative and fragile years,” the central government of the fledgling United States “was most keenly interested in establishing and maintaining peace with tribal nations, in clarifying its title to land actually occupied, and in providing assurances to tribes that their territorial rights and boundaries would be respected, lest the tribes be drawn to align with Spain or Great Britain.”⁶⁴⁴ Where the Mattaponi Tribe was concerned, peace and boundaries had already long been established, and there was no threat of the Tribe continuing a relationship with Great Britain, let alone seeking one with Spain. From the Tribe’s perspective, too, the goals toward which tribes worked in these years had been accomplished: maintaining a fixed boundary between their lands and those of the people now known as Americans, securing formal acknowledgment of their tribal status and of their right to control disposition of their aboriginal land, and having access to non-Indian goods via trade.⁶⁴⁵ The Mattaponi Tribe already had a boundary line between its reserved land and Americans’ land, its status as a tribal nation was recognized and reaffirmed in continued dealings with non-Indian government officials, and it engaged in commercial dealings with the surrounding non-Indian community. This is not to suggest that the situation was perfect from the Tribe’s standpoint or that the extent of the reservation land was satisfactory. The key point is that, regardless of the specifics of the 1677 Treaty, the Tribe then, as now, was already a party to a treaty that settled the kinds of questions at the heart of United States-tribal diplomacy at the time. In short, from the perspective of both sides, it was unnecessary to negotiate a new treaty in the years following American independence.

Moreover, from the perspective of the United States, the settled nature of the treaty-based relations between the coastal Virginia tribes and their non-Indian neighbors was of considerable benefit during and after the war. This situation made it possible for the new government, acting at first on behalf of the “united colonies”⁶⁴⁶ and later on behalf of the United States, to focus

644. David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 297 (1998).

645. *Id.*

646. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 27 (1994) (quoting 2 *JOURNALS OF THE CONTINENTAL CONGRESS* 174-77, 183, 192, 194 (Library of Congress 1905)) (noting that Congress appointed

its diplomatic attention on tribes who actively resisted non-Indian encroachment (like those located in Virginia's Kentucky district) and who demonstrated sympathies with Great Britain (like the tribes of the Six Nations).⁶⁴⁷ In its dealings with larger, formidable tribes (such as the Six Nations, for example), the new government endeavored to convince the tribes that provisions in agreements with Great Britain (such as the boundary line established by the 1768 Treaty of Fort Stanwix) would be honored.⁶⁴⁸

The lack of a new treaty between the Powhatan tribes and the newly independent nation is also understandable in light of contemporary legal theory on succession to treaties when sovereignty passes from one nation to another. Under the doctrine of universal succession (recognized prior to the development of the "clean slate" doctrine in the late nineteenth century),⁶⁴⁹ "the rights and obligations of the predecessor State, relating to the territory transferred, are transmitted to the successor State."⁶⁵⁰ Consequently, "the successor State inherits the treaty rights and obligations of the predecessor State relating to the territory transferred."⁶⁵¹ Treaties creating rights and obligations with respect to a territory (such as boundary treaties, in particular) are regarded as passing rights and obligations to a successor State.⁶⁵² Subsequent to the development of the clean slate doctrine, "even newly independent States which favored [the latter doctrine] tended to accept territorial treaties, and particular boundary treaties, concluded on their behalf by former colonial powers."⁶⁵³ Such treaties are understood as attaching to a territory, and are thereby transmitted along with the territory when it is transferred by one State to another.⁶⁵⁴ Because the United States

commissioners of Indian affairs to engage in treaty discussions with tribes "in the name, and on behalf of the united colonies").

647. *See id.* at 26.

648. *See id.* at 28.

649. *See* C. Emanuelli, *State Succession, Then and Now, with Special Reference to the Louisiana Purchase (1803)*, 63 LA. L. REV. 1277, 1280 (2003). The clean slate doctrine holds, as its name suggests, that "the rights and obligations of the predecessor State relating to the territory transferred cannot be considered to automatically pass to the successor State." *Id.*

650. *Id.* at 1279. The doctrine was developed as early as the seventeenth century. *See id.* at 1280.

651. *Id.* at 1279. The public property and debts of the predecessor State also passed to the successor State. *See id.*

652. *See id.* at 1283-84.

653. *Id.* at 1284.

654. *Id.* at 1283-84.

(as the united colonies came to be known) stepped into Great Britain's shoes after achieving independence, a new treaty was unnecessary.⁶⁵⁵ The United States, which embraced the colonies and provided the national government previously provided by the Crown,⁶⁵⁶ succeeded to the 1677 Treaty's rights and obligations with respect to the Powhatan tribes' territory. The United States certainly had no interest in trying to repudiate the land cessions and other rights Great Britain gained through treaty-making with the Powhatan tribes. Rather, it had every reason to be content with the Treaty, and gave no indication that it considered the Treaty or the rights and relationship that it recognized to be a nullity.

The U.S. Supreme Court and lower federal courts have made statements supporting the United States' succession to Great Britain's claims and obligations. In the foundational Indian law case *Worcester v. Georgia*, the Supreme Court, in an opinion by Chief Justice Marshall, explained that prior to the Revolution, "all intercourse" with the tribes resided in the Crown, but that during the Revolutionary War, Congress – first in the name of the united colonies and subsequently in the name of the United States – assumed this power and responsibility.⁶⁵⁷ The Constitution vests the power in the federal government exclusively, and "by declaring treaties already made, as well as those to be made, to be the supreme law of the land, [] adopted and sanctioned the previous treaties with the Indian nations"⁶⁵⁸

"The United States succeeded to all the claims of Great Britain, both territorial and political"⁶⁵⁹ If the United States succeeded to Great Britain's claims, then logically, it would also succeed to its obligations, including obligations under treaties entered into with tribal nations. In a more recent case involving the Catawba Indian Tribe's claim that the United States breached its fiduciary duties to the Tribe, the Court of Claims noted that Great Britain negotiated treaties with the Tribe in 1760 and 1763, and stated that "when the United States achieved independence from Great

655. See Wilkins, *supra* note 644, at 310.

656. See Victoria Sutton, *American Indian Law – Elucidating Constitutional Law*, 37 TULSA L. REV. 539, 545 (2001) (noting the question of whether the United States still recognizes pre-1776 treaties and stating that "[p]re-Constitutional treaties are recognized with successor-in-interest logic . . .").

657. *Worcester v. Georgia*, 31 U.S. (6.Pet.) 515, 557-58 (1832).

658. *Id.* at 559. In *Worcester v. Georgia*, the Court held that Georgia law had no force in Cherokee Nation territory within the state's boundaries, and that the statutes by which Georgia purported to extend its law over Cherokee land were "repugnant to the constitution, laws, and treaties of the United States." *Id.* at 561.

659. *Id.* at 544.

Britain, it became invested with all of the former sovereign's rights and obligations under the 1760 and 1763 treaties."⁶⁶⁰

Once Great Britain's successor came into being as a separate nation, Virginia residents continued to live under and rely on the terms of the 1677 Treaty as American citizens, just as they had previously as British subjects. They continued to live on the land ceded by the tribes prior to the Revolution, and continued to recognize the reservations that stemmed from the Treaty. Under the terms of the Treaty, the Governor continued to receive the annual tribute of the signatory tribes, not in his capacity as a state official, but rather as the local designee of the national government.⁶⁶¹

Ultimately, that the tribes entered the 1677 Treaty early enough that it was signed with Great Britain rather than the United States is simply an historical accident.⁶⁶² Because the Tribe's peaceful relations with Americans obviated the need for a new treaty, regarding the Mattaponi Tribe as without a treaty with the United States seems particularly unjust. To treat the Mattaponi Tribe as having fewer federal rights than tribes whose belligerence necessitated a post-independence treaty with the United States seems absurd.

Finally, the United States' failure to honor the 1677 Treaty would be inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples, which provides that indigenous peoples have the right to have their treaties recognized, observed, and enforced.⁶⁶³ While the United States initially voted against the Declaration's adoption by the General Assembly, it did so as one of just four States standing against the opinion of the rest of the world,⁶⁶⁴ and subsequently changed its position.⁶⁶⁵

660. *Catawba Indian Tribe v. United States*, 24 Cl. Ct. 24, 26 (1991), *aff'd*, 982 F.2d 1564 (Fed. Cir. 1993).

661. *Mattaponi Cert. Petition*, *supra* note 538, at 5.

662. *See id.* at 2.

663. United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/61/L.67 (Sept. 12, 2007). Article 37(1) provides as follows: "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements." *Id.* art. 37(1).

664. *See* Gale Courey Toensing, *Declaration Adoption Marks the End of the First Step*, INDIAN COUNTRY TODAY, Sept. 26, 2007, at A1 (noting that the Declaration was adopted on September 13, 2007, and that the United States, Australia, Canada, and New Zealand voted against its adoption).

665. *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE (Dec. 16, 2010), <http://www.state.gov/r/pa/prs/ps/2010/12/153027.htm>.

b) The Treaty as Federal Law

The King William Reservoir project litigation did not settle the question of whether the 1677 Treaty is properly regarded as a matter of federal law (as the Tribe argued) or state law (as Virginia and the Army Corps of Engineers maintained). Because the Supreme Court denied the Tribe's petition for certiorari to review the Virginia Supreme Court's holding on the Treaty's state law status,⁶⁶⁶ the issue of whether the Treaty is enforceable as a matter of state law was not addressed definitively.⁶⁶⁷ The Virginia Supreme Court's creation of a category of state law Indian treaties – a concept that has no place in the Constitution – was left to stand.

The National Congress of American Indians ("NCAI"), acting as amicus curiae in support of the Tribe's certiorari petition, submitted a brief that provides insight into this issue. The NCAI emphasized the continuing significance of pre-Revolutionary War treaties for many East Coast tribes⁶⁶⁸ and noted that cases touching upon these treaties arose as early as 1812.⁶⁶⁹ In recent years, courts deciding several of these cases proceeded on the assumption that these treaties are a matter of federal law. For example, in a 2005 case involving the Unalachtigo Band of the Nanticoke-Lenni Lenape Nation, the Appellate Division of the New Jersey Superior Court considered the Tribe's demand for specific performance under a 1758 treaty.⁶⁷⁰ The Tribe, which is not federally recognized but had indicated its intent to seek formal recognition,⁶⁷¹ argued that a subsequent sale of land guaranteed under the treaty, without federal approval, was void under the federal Indian Trade and Nonintercourse Act.⁶⁷² The Nonintercourse Act

666. Mattaponi Cert. Petition, *supra* note 538, at i. The Tribe's petition for a writ of certiorari asked the Court to consider the question of "[w]hether the obligations imposed by an Indian treaty with a prior sovereign should be enforceable as a matter of federal law under the Supremacy Clause." *Id.*

667. See Brief of the National Congress of American Indians as Amicus Curiae Supporting Petitioners at 5, *Mattaponi Indian Tribe v. Virginia*, 547 U.S. 1192 (2006) (No. 05-1141), 2006 WL 1316560 [hereinafter NCAI Amicus Brief] (explaining that these tribes' rights and obligations "are defined in whole or in part by pre-Revolutionary treaties, patents and Parliamentary acts").

668. *Id.* at 5.

669. See *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 165 (1812) (discussing a 1758 treaty), *cited in* NCAI Amicus Brief, *supra* note 667, at 5-6.

670. See *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. State*, 867 A.2d 1222, 1223 (N.J. Super. Ct. App. Div. 2005), *cited in* NCAI Amicus Brief, *supra* note 667, at 6.

671. *Id.* at 1226.

672. *Id.* at 1227. As the superior court judge who dismissed the Tribe's claim explained, the Tribe's claim was that the State's purchase of treaty-recognized tribal land was void

declares void conveyances of interests in Indian land without federal approval.⁶⁷³ Because only Congress has authority to regulate commerce with the Indians, the *Unalachtigo Band* court determined that New Jersey courts lacked jurisdiction over the Tribe's claim.⁶⁷⁴ The court relied on statements by the Supreme Court in *Oneida Nation v. County of Oneida*⁶⁷⁵ that "tribal rights to Indian lands" are "the exclusive province of the federal law," and that Congress "asserted the primacy of federal law" through the Nonintercourse Act.⁶⁷⁶ Thus, the New Jersey court took a different view than did the Virginia Supreme Court in the King William Reservoir project litigation of the relationship between states and tribes, and of the role of state law when tribal land-related claims are at stake.⁶⁷⁷

The NCAI amicus brief also noted that in *Catawba Indian Tribe of South Carolina v. South Carolina*, a 1989 Fourth Circuit decision where the tribe claimed a right of occupancy under treaties made with Great Britain, the court concluded that actions involving the tribes arise "under the Constitution, laws, or treaties of the United States."⁶⁷⁸ *Cayuga Indian Nation of New York v. Cuomo*⁶⁷⁹ set out similar assertions of federal law's supremacy over Indian lands. Although the land at issue in the latter case was protected by a treaty entered into with the United States, the court's language was broad enough to bring other tribal lands within the reach of

because "the treaty could only be overcome with consent of the United States." *Id.* at 1226 (quoting the trial court judge). The Tribe's claim thus ultimately centered on an alleged violation of the Nonintercourse Act.

673. See 25 U.S.C. § 177 (2006) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

674. See *Unalachtigo Band*, 867 A.2d at 1227. The Unalachtigo Band pursued its Nonintercourse Act claim in federal court. The district court dismissed the Band's complaint on the grounds that the Band failed to show that it was the successor in interest to the tribe from whom the land at issue was reserved in 1758, and, therefore, the Band lacked standing. *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. New Jersey*, No. 05-5710, 2008 WL 2165191 (D.N.J. May 20, 2008). The Band appealed the decision, but its appeal was dismissed after it was unable to obtain counsel. *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. Corzine*, 606 F.3d 126, 128-29 (3d Cir. 2010).

675. 414 U.S. 661 (1974).

676. *Unalachtigo Band*, 867 A.2d at 1227-28 (quoting *Oneida Nation*, 414 U.S. at 667).

677. See NCAI Amicus Brief, *supra* note 667, at 7-8 (noting that the disparity between this decision and the Virginia decision indicates the unsettled nature of this matter).

678. See *id.* at 7 n.9 (citing *Catawba Indian Tribe of South Carolina v. South Carolina*, 865 F.2d 1444, 1456 (4th Cir. 1989)).

679. *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991).

federal law. The court stated that after the Constitution was ratified, “relations with Indian tribes and authority over Indian lands fell under the exclusive province of federal law” and, therefore, solely federal law governed the conditions under which New York could exercise its limited rights with respect to Indian land.⁶⁸⁰

As the NCAI explained in its brief, to regard the 1677 Treaty and others like it as matters of state law creates the risk that judicial decisions will abrogate tribal rights under treaties that (like the 1677 Treaty) have been observed for centuries, and also creates a conflicting “patchwork” of rules for treaty rights.⁶⁸¹ The NCAI urged the Court to recognize the United States’ pre-Revolutionary treaties and to remain consistent with its own precedents, such as *Worcester v. Georgia*.⁶⁸² The Supreme Court has reiterated the federalism principles at the heart of *Worcester* in subsequent cases establishing that powers of external sovereignty, like the treaty-making power, reside only in the federal government.⁶⁸³ When the colonies, acting as a unit, separated from Great Britain, “the powers of external sovereignty passed from the Crown . . . to the colonies in their collective and corporate capacity as the United States of America.”⁶⁸⁴ Consequently, power over relations with Indian tribes under treaties signed both before, as well as after, the Revolution must belong to the federal government, rendering such treaties’ interpretation, effect, and enforceability matters of federal law.⁶⁸⁵ As the NCAI Brief explained, this conclusion conforms to the Founders’ vision of federal law playing a pervasive role in matters of Indian rights, and their recognition that state

680. *Id.* at 116. The court also noted that New York’s interest in the land was not a property right, but rather, “at most, a right of preemption – the right to purchase the property if and when the plaintiffs’ title to the land was extinguished.” *Id.*

681. See NCAI Amicus Brief, *supra* note 667, at 8-9 (noting that courts applying state law could afford less protection to tribal rights than federal law would require and, therefore, potentially create a conflicting “patchwork” of rules).

682. See *id.* at 9.

683. See *id.* at 13 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936)). In *Curtiss-Wright*, the Court held that “powers of external sovereignty,” such as powers to make treaties and maintain diplomatic relations with other sovereignties, exist only in the federal government. See *id.*

684. See NCAI Amicus Brief, *supra* note 667, at 13 (quoting *Curtiss-Wright*, 299 U.S. at 316). While *Curtiss-Wright* did not deal with Indian treaties, such treaties were also matters of “external sovereignty” when the 1677 Treaty was signed and at the time of the Revolution. See *id.* Moreover, even if these powers had not been addressed by the Constitution, they would belong to the federal government as “necessary concomitants of nationality.” See *id.* (quoting *Curtiss-Wright*, 299 U.S. at 318).

685. See *id.* at 13-14.

governments are ill-suited to handle relations with tribes.⁶⁸⁶ In short, the concept of a state treaty with Indians does not fit within the constitutional framework. The Virginia Supreme Court's conclusion to the contrary cannot be the last word on this issue.

2. Federal Recognition (or the Lack Thereof)

Yet another question that the federal district court left unaddressed in the reservoir litigation was whether the Corps was required to consider the project's impact on the reservation of a tribe without formal federal recognition. The Norfolk District Commander consulted with the Mattaponi Tribe and visited its reservation,⁶⁸⁷ but claimed that the Corps was not legally obligated to do so.⁶⁸⁸ This treatment demonstrates a challenge that the Mattaponi Tribe and a number of other tribes face. The Mattaponis have existed in their homeland as a tribe – a political and social entity – since time immemorial. Although the Tribe does not enjoy formal federal acknowledgement of this reality, the State of Virginia continues to recognize the Mattaponis' distinct social and political existence as a tribe.

In the Unalachtigo Band's Nonintercourse Act claim, the state court did not reject the Band's claim because of a lack of federal recognition, but rather because the court lacked jurisdiction to hear cases involving tribal land claims, which are governed by federal law.⁶⁸⁹ Similarly, the federal district court subsequently hearing the case did not reject the claim because the Unalachtigo Band was not federally (or even state) recognized,⁶⁹⁰ but rather because protection under the Act required a plaintiff to show that "it is or represents an Indian tribe," as determined under the test set out in *Montoya v. United States*.⁶⁹¹ The court did not address whether the Tribe satisfied the test because it concluded that the Tribe lacked sufficient evidence to show that it was the successor in interest to the tribe for which

686. *See id.* at 14-15.

687. *See supra* note 382 and accompanying text.

688. ACE DISTRICT DECISION, *supra* note 14, at 297 (indicating that the Tribe's lack of federal recognition supported this position and noting that "the federal government has not recognized the Mattaponi Tribe as it has other tribes with whom it has treaties").

689. Unalachtigo Band of Nanticoke-Lenni Nation v. State, 867 A.2d 1222, 1223 (N.J. Super. Ct. App. Div. 2005).

690. Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. New Jersey, No. 05-5710, 2008 WL 2165191, at *1 (D.N.J. May 20, 2008).

691. *Id.* at *15 (citing *Montoya v. United States*, 180 U.S. 261 (1901)). *Montoya* defined a tribe as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya*, 180 U.S. at 266.

the land at issue was reserved in the 1758 treaty.⁶⁹² While the focus in the case was a Nonintercourse Act claim, rather than a challenge to an administrative action, the case illustrates the principle that lack of federal recognition does not automatically foreclose the protection of federal law or absolve the United States of all responsibilities toward a tribe.

The Mattaponi Tribe's lack of formal federal acknowledgment does not alter the fact that the federal government has recognized its existence and that of other Virginia tribes in a number of ways. The Tribe already participates in a number of federal Indian programs and is otherwise treated by federal government agency employees as a recognized tribe. For example, Virginia tribes have benefitted from federal funds under the Indian Self-Determination and Educational Assistance Act.⁶⁹³ The Mattaponi and Pamunkey tribes received job training program funding from the Department of Labor through a consortium established by the tribes and the Monacan Tribe in 1981.⁶⁹⁴ The Mattaponi and Pamunkey tribes are also included in repatriation-related activities under the Native American Graves Protection and Repatriation Act.⁶⁹⁵

692. *Unalachtigo Band*, 2008 WL 2165191, at *15-16. The court noted that it is not enough for the Band to show that it is *an* Indian tribe – it must be *the* Indian tribe (in other words, the one whose lands were protected by the 1758 treaty). *See id.* at *15.

693. The Chickahominy Tribe, for example, was the beneficiary of ISDEA funding beginning in the 1970s, when the Charles City County School board began receiving funds under the ISDEA on behalf of Chickahominy students in the county's schools. *See* S. 1178, 111th Cong. § 101, ¶ 27 (2009).

694. *See, e.g.*, Indian and Native American Employment and Training Programs; Solicitation for Grant Applications and Announcement of Competition Waivers for Program Years 2008 and 2009, 73 Fed. Reg. 883, 892 (Jan. 4, 2008) (including the Mattaponi Pamunkey Monacan Consortium on the list of grantees); Job Training Partnership Act: Indian and Native American Employment and Training Programs; List of Grantees Receiving Waivers of Competition for Program Year 1999, 63 Fed. Reg. 64,525, 64,525 (Nov. 20, 1998) (including the Mattaponi-Pamunkey-Monacan Consortium on the list of grantees); *see also* MATTAPONI-PAMUNKEY-MONACAN, INC., <http://www.mpmjobs.org/AboutUs.htm> (last visited Apr. 23, 2012) (a "Native American employment and training program funded by the Work Force Investment Act through the U.S. Department of Labor"); Employment and Training Administration Program Year (PY) 2011 Allotments for the Workforce Investment Act (WIA), Section 166, Indian and Native American Program, 76 Fed. Reg. 33,367, 33,372 (June 8, 2011) (including the Mattaponi Pamunkey Monacan Consortium on the list of grantees).

695. *See, e.g.*, Notice of Inventory Completion: Virginia Department of Conservation and Recreation, Division of State Parks, Richmond, VA and Southwest Virginia Museum Historical State Park, Big Stone Gap, VA, 74 Fed. Reg. 21,389 (May 7, 2009) (noting that the Mattaponi Tribe was consulted in connection with an inventory of human remains and

In a number of other ways in the past and in the present, federal government employees recognize that these tribes do, in fact, exist as distinct social and political entities. For example, anthropologist James Mooney, in his capacity as a Smithsonian employee, documented the continued existence of Virginia tribes.⁶⁹⁶ More recently, Colonel Carroll consulted with the Mattaponi Tribe in considering the reservoir project's permit request, an act that indicates recognition (albeit not formal administrative acknowledgment) of the Tribe's existence as a political entity.⁶⁹⁷ In the 1930 Federal Census, two Virginia tribal members were enumerated as chiefs, with their tribal affiliations (Mattaponi and Pamunkey, respectively) noted.⁶⁹⁸ Census enumerators, acting as agents of the federal government, thereby acknowledged Mattaponi and Pamunkey tribal governmental positions within a federal document. The federal government also recognized the special status of Mattaponi and Pamunkey tribe members during the Second World War, inducting the tribes' members (whose military service registration cards acknowledged their reservation residence) on a special day.⁶⁹⁹

At the observances of the Jamestown settlement's 400th anniversary, members of the Mattaponi Tribe and other Powhatan tribes were very much in evidence. Queen Elizabeth II and President George Bush, representatives of the original signatory of the 1677 Treaty and its successor, attended anniversary festivities.⁷⁰⁰ On this occasion of national self-congratulation, government officials were eager to acknowledge the continued presence of the tribes that sustained the colonists in their early

associated funerary objects found in Virginia, and would be notified of the repatriation decision).

696. See *supra* notes 230, 239 and accompanying text.

697. See *supra* notes 378-82 and accompanying text.

698. 32 U.S. BUREAU OF CENSUS, POPULATION 1930: VIRGINIA 8B (n.d.) (volume for Lancaster County and Loudoun County), *microformed on* 1930 U.S. Fed. Census, West Point, King William Co., Va., E.D. 7, Roll 2448, at 8B (Chief George F. Custalow).

699. *E.g.*, Registration Card of George Farris Custalow, Jr. (Apr. 27, 1942) (U.S. National Archives and Records Administration, Selective Service System, Selective Service Registration Cards, World War II: Fourth Registration) (on file with author) (indicating that he was born and resided at Sweet Hall, King William Co., Va., on the Mattaponi Indian Reservation); see also *supra* note 315 and accompanying text (discussing the induction day).

700. See, *e.g.*, Bobbie Whitehead, *Inclusion of Virginia Indians in Jamestown Anniversary Makes History*, INDIAN COUNTRY TODAY, May 30, 2007, at A4 (describing Queen Elizabeth's visit and meeting with tribal representatives); Press Release, President George Bush, President Bush Celebrates at America's 400th Anniversary in Jamestown (May 13, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070513.html> [hereinafter Bush Jamestown Remarks].

years, and similarly eager to be photographed with the tribes' members. It seems disingenuous (to say the least) for the government then to deny the Mattaponi Tribe's existence in other contexts.

Finally, it is worth emphasizing that the Mattaponi Tribe has long been recognized by Virginia, which has established guidelines for tribal recognition⁷⁰¹ resembling those used by the federal government.⁷⁰² This state recognition suggests that the formal federal recognition process would not be an insurmountable hurdle for the Mattaponi Tribe, were it inclined to follow up on its earlier indication of an interest in seeking formal federal acknowledgment. Moreover, the House of Representatives passed recognition legislation for other Virginia tribes that do not have reservations or such an extensively documented history of relations with non-Indian government officials as does the Mattaponi Tribe. The recognition legislation's passage by the House indicates that members of at least one branch of the federal government is willing to formally recognize that some of the Powhatan tribes continue to exist in twenty-first century Virginia.

3. Federal Trusteeship Responsibilities

In the litigation over the Section 404 permit's issuance, the federal district court also left unaddressed the existence and extent of the trusteeship obligations that the federal government owes to the Mattaponi Tribe in the context of the permit process. In response to the Tribe's assertion that the permit's issuance would violate the Corps's trust responsibilities to the Tribe,⁷⁰³ the Norfolk District stated (erroneously) that "the federal trust responsibility to Native American tribes applies only to federally recognized tribes," but nonetheless decided to treat the Mattaponi Tribe, "to the extent possible and appropriate," as though it were federally recognized.⁷⁰⁴

Historically, the federal government has generally neglected the Virginia Indians. That the United States has, in the past, neglected the responsibilities it owes to the Mattaponi Tribe does not, however, absolve the national government of the obligation to recognize and honor them now. The United States already learned this lesson in a Nonintercourse Act case

701. See *Virginia Council on Indians: State Recognition of Indian Tribes*, VIRGINIA COUNCIL ON INDIANS, <http://www.indians.vipnet.org/stateRecognition.cfm> (last modified May 4, 2009) (describing Virginian requirements).

702. See *supra* note 330 and accompanying text (summarizing the federal requirements).

703. See ACE DISTRICT DECISION, *supra* note 14, at 189. The Tribe also raised the Treaty of 1646 as an obstacle to the permit's issuance. *Id.*

704. See *id.* at 220.

involving a tribe in Maine (which was part of Massachusetts before achieving separate statehood). In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*,⁷⁰⁵ the First Circuit held that the United States continued to enjoy a trust relationship with the Passamaquoddy Tribe,⁷⁰⁶ even though, for many years, the Tribe had an active relationship with the Massachusetts and Maine state governments, but not the national government.⁷⁰⁷ The court found that the policy reflected in the Nonintercourse Act was to protect Indian tribes' right of occupancy, even when no treaty recognized that right, and that there is nothing in the Act to indicate that it should "be read to exclude a bona fide tribe not otherwise federally recognized."⁷⁰⁸ State assistance, the court explained, is "not necessarily inconsistent with federal protection," and the state's assumption of obligations toward a tribe does "not cut off whatever federal duties existed."⁷⁰⁹ The court found that the federal government's inactivity in relation to the Tribe, as well as its refusal, on several occasions, of tribal requests for assistance, did not sever the trust relationship that existed between the government and the Tribe.⁷¹⁰ In short, the United States government cannot be confident that it can ignore with impunity responsibilities toward the Mattaponi Tribe and other pre-constitutional sovereigns.

More recent cases also recognized that a trust relationship can exist despite federal neglect of the responsibilities that inhere in that relationship. In *Golden Hill Paugussett Tribe of Indians v. Weicker*,⁷¹¹ for example, the Second Circuit noted that the Nonintercourse Act creates "a trust relationship between the federal government and American Indian tribes with respect to tribal lands covered by the Act."⁷¹²

Finally, the federal government's awareness of potential trust responsibilities toward Virginia tribes and of the tribes' continued existence was apparent in Congress's participation in a 1980 settlement of the Pamunkey Tribe's claim against a railway that was trespassing on its reservation. The railway built a railroad right-of-way across the reservation in 1855 without the consent of the United States or Virginia, let alone the

705. 528 F.2d 370 (1st Cir. 1975).

706. *Id.* at 380.

707. *Id.* at 374.

708. *Id.* at 377.

709. *Id.* at 378.

710. *See id.* at 380.

711. 39 F.3d 51 (2d Cir. 1994).

712. *Id.* at 56; *see also* *Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. State*, 867 A.2d 1222, 1226 (N.J. Super. Ct. App. Div. 2005) (noting the trust relationship arising from the Act and citing *Golden Hill*).

Tribe.⁷¹³ Citing the *Passamaquoddy Tribe* decision, the House report accompanying a bill to approve the settlement noted that the Nonintercourse Act, through which “the United States has exercised its guardianship” over tribes, “has been construed to apply to all Indian tribes in the United States regardless of whether the United States has otherwise recognized the tribe or whether the State has also assumed certain obligations toward the tribe.”⁷¹⁴ The report recognized that federal law prohibits the acquisition of interests in Pamunkey tribal land without federal government consent.⁷¹⁵ At the request of the Department of the Interior, the settlement arrangement included a tribal waiver of claims against the United States for breach of trust with respect to the lands subject to the agreement,⁷¹⁶ reflecting the Department’s awareness that the Tribe might have a valid claim against the government for its failure to fulfill its trust responsibilities to the Tribe. The Department of the Interior reiterated its refusal to acknowledge trust responsibilities toward the Tribe,⁷¹⁷ while concluding that it was appropriate to support federal legislation ratifying a land claim settlement “which involves little or no cost to the United States.”⁷¹⁸ Clearly, the government’s key concern was to avoid any expenses that might arise from admitting that trust responsibilities existed, rather than to deny that the Pamunkey Tribe was in fact a tribe. As *Passamaquoddy Tribe* and subsequent cases show, however, federal eagerness to shirk trust responsibilities does not make them disappear.

713. H.R. REP. NO. 96-1144 (1980) (to accompany H.R. 7212, 96th Cong. (1980)) (ratifying a settlement agreement in a land dispute between the Pamunkey Indian Tribe and the Southern Railway).

714. *Id.* at 3. The report cited *Joint Tribal Council of Passamaquoddy Tribe v. Morton and Oneida Indian Nation of New York v. County of Oneida* as support for the application of the Nonintercourse Act. *See generally* *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974).

715. H.R. REP. NO. 96-1144, at 3 (1980).

716. *See id.* at 2 (setting out waiver language, in section 5 of the bill); *id.* at 8-9 (noting Department of Interior waiver request); *id.* at 11 (setting out waiver signed by Tecumseh Deerfoot Cook, Chief, Pamunkey Tribe).

717. *See id.* at 9 (stating that “the United States does not acknowledge a trust responsibility to them [i.e., the Tribe] and the Bureau of Indian Affairs, consequently, does not provide services to the Pamunkeys with respect to administrative approval of leases and rights-of-way”).

718. *Id.* at 8.

B. The Mattaponi Tribe's Potential Reserved Water Rights Claim

The circuit court recognized that the Mattaponi Tribe might be able to successfully claim reserved tribal water rights under principles analogous to the *Winters* doctrine.⁷¹⁹ While the court expressed skepticism about the Tribe's ability to establish such rights, that the court recognized the possibility was significant, not just for the Mattaponi Tribe. In a 2000 article, Professor Judith Royster argued that reserved water rights doctrines should apply in the eastern United States and should serve as the basis for water rights claims by eastern tribes.⁷²⁰ She outlined four basic principles underlying the Indian reserved water rights doctrine, each of which matches up well with the Mattaponi Tribe's circumstances. First, when land is set aside for a tribe, this action "implicitly reserves for the use of the tribe that amount of water that is needed to fulfill the purposes for which the land was set aside."⁷²¹ Applying the *Winters* doctrine, when land was set aside for the Powhatan tribes (now reduced to the Mattaponi and Pamunkey reservations), water sufficient to fulfill the intended purposes (here, to provide a base for the tribes to sustain themselves through their agricultural practices, supplemented by hunting and fishing) was implicitly reserved.⁷²² The tribes' and Crown's intent likely was not to reserve land without enough water for the tribes to continue these activities in the reserved area.⁷²³ Furthermore, the reservation established a base for the tribes to enjoy some measure of autonomy and self-government under the leadership (as recognized in the 1677 Treaty) of the Pamunkey leader, Cockacoeske, and other chiefs.⁷²⁴ Control over the use of the land and resources of the reserved territory would be subject to the authority of these leaders, rather than in the hands of non-Indians.

Second, when the tribes reserved the right to continue to engage in aboriginal practices such as hunting, fishing, harvesting natural products (like the tuckahoe mentioned in the 1677 Treaty),⁷²⁵ and agriculture on the reserved land and beyond it, the water necessary to support these practices was implicitly reserved.⁷²⁶ Thus, both reserving land and reserving the right

719. See *Mattaponi VI*, 72 Va. Cir. 444, 459 (2007).

720. See generally Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 169 (2000).

721. *Id.* at 174.

722. See *Mattaponi VI*, 72 Va. Cir. at 462.

723. See Royster, *supra* note 720, at 174-75.

724. See *supra* note 172 and accompanying text.

725. See *supra* note 183 and accompanying text.

726. Royster, *supra* note 720, at 176.

to engage in activities implicitly reserved related water rights.⁷²⁷ The King William Reservoir project threatened both the quantity and the quality of the water required for the survival of the resources that were the focus of such aboriginal activities.

The third principle underlying Indian water rights, that such rights are “protected against interference by subsequent non-Indian uses of water,”⁷²⁸ is based on the trust responsibility owed to the tribes by the government of the “discovering” nation and its successor in interest,⁷²⁹ and on the government’s power to set aside water for tribal use.⁷³⁰ In the Mattaponi Tribe’s case, the Crown had the power to sign the Treaty guaranteeing tribal and resource rights (and implicitly reserved water rights) and, through various Treaty provisions, affirmed the protective relationship with the signatory tribes.⁷³¹ This relationship is reflected in the continuing trust status of Mattaponi reservation land. The United States, as successor to the Crown, also has power, under the Constitution, to protect land and water for tribal use, as well as the responsibility to do so where existing treaty rights are threatened by non-Indian activities.⁷³² If reserved water rights were found to attach to the Mattaponi Reservation, they would continue to exist unless the reservation is terminated.⁷³³ Existing uses reserved by the 1677 Treaty similarly would be reserved forever, unless the Treaty is abrogated.⁷³⁴ Under the reserved water rights doctrine, the Mattaponi Tribe’s water rights would be paramount over subsequent state-law-based water rights.⁷³⁵

Finally, the fourth basic principle of the Indian reserved water rights doctrine (that tribal reserved water rights are not lost or abandoned by non-use)⁷³⁶ is not, strictly speaking, necessary to protect Mattaponi rights because the Tribe clearly continues to utilize its rights. By continuing to fish on the Mattaponi River, as well as by operating the tribal fish hatchery, the Tribe

727. *Id.* at 177.

728. *Id.* at 179.

729. *See id.* at 173.

730. *See id.* at 174.

731. *See generally* Mattaponi VI, 72 Va. Cir. 444 (2007).

732. *See* Royster, *supra* note 720, at 179-82 (exploring the constitutional foundations of the federal government’s authority over Indian affairs).

733. *See id.* at 182. *See generally* Mattaponi VI, 72 Va. Cir. 444 (discussing the Mattaponi and water rights).

734. *See* Royster, *supra* note 720, at 182.

735. *See id.* *See generally* Mattaponi VI, 72 Va. Cir. 444 (discussing the Mattaponi and water rights).

736. *See* Royster, *supra* note 720, at 182.

has demonstrated its continued use of the area's water resources, as protected pursuant to the 1677 Treaty.

Thus, the reserved water rights doctrine should provide the basis for reserved water rights for the Mattaponi Tribe. The quantification of such rights would be based on the purpose for which the water was reserved.⁷³⁷ In the case of the Mattaponi, the applicable treaty reserved buffer zones around "Indian townes" in which non-Indians could not "Seat or Plant."⁷³⁸ The Treaty prohibited non-Indian settlement to ensure the availability of land for Indian agricultural and other activities, and, consequently, the Tribe should be entitled to claim the water necessary to farm this land.⁷³⁹ As to reserved water rights based on aboriginal practices, the quantity of reserved water would likely "be determined by the specific circumstances of the practice and the watercourse."⁷⁴⁰ For the Mattaponi Tribe, with fishing, hunting, oystering, and plant harvesting rights under the 1677 Treaty,⁷⁴¹ water sufficient to preserve the existence of the relevant resources must be reserved. In the King William Reservoir project litigation, the Tribe's fishing rights were the greatest concern because of the potential impact on the salinity and, consequently, on the fish of the planned water extraction.⁷⁴² To protect aboriginal uses, quantification of Mattaponi water rights (and the corresponding availability of permits for other users) must take into account factors like salinity. A helpful precedent is *United States v. Anderson*, in which the tribe's fisheries right was quantified as the "amount of water necessary to keep the stream at 68 degrees or less" and to maintain a prescribed "minimum flow."⁷⁴³

In summary, a claim for reserved water rights by the Mattaponi Tribe would fit well within the guidelines Professor Royster identified for establishing reserved Indian water rights. As Professor Royster notes, and as the circuit court observed, the same purposes for which reserved Indian water rights exist in the West – ensuring that tribes can continue aboriginal practices (particularly essential food harvesting practices) and that the

737. *See id.*

738. *See supra* note 2 and accompanying text.

739. The quantity of water required under rights arising from reserving land would probably be based on practicably irrigable acreage: "that amount of water needed to make the land productive for agricultural purposes." Royster, *supra* note 720, at 196.

740. *Id.*

741. *See supra* note 183 and accompanying text.

742. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 136 (D.D.C. 2009).

743. *United States v. Anderson*, 6 INDIAN L. REP. F-129, F-130 (E.D. Wash. 1979), *cited in* Royster, *supra* note 720, at 196 n.124.

purposes for which land was reserved can be accomplished – exist in the East as well.⁷⁴⁴

Although Professor Royster did not focus on tribes that are not federally recognized, the same underlying principles support reserved water rights for both federally recognized and non-federally recognized tribes, such as the Mattaponi Tribe.⁷⁴⁵ A 2006 article by Professor Hope Babcock explored the federal law basis for these rights,⁷⁴⁶ as well as the question of whether non-federally recognized eastern tribes can claim reserved tribal water rights. She concluded that such a claim is supported not only by legal doctrine,⁷⁴⁷ but also by normative⁷⁴⁸ and utilitarian⁷⁴⁹ concerns. Professor Babcock explained that neither lack of federally reserved land, nor lack of formal federal recognition should stand as barriers to the assertion of reserved water rights.⁷⁵⁰ Reserved water rights should arise whenever land is set aside for a tribe to enable it to survive, whether by the federal government or by a state or colonial government.⁷⁵¹ Similarly, the doctrine is not, by its terms, restricted to tribes that have been extended federal recognition, “a bureaucratic artifact designed to limit the number of tribes entitled to receive federal largess” which “does not constrain the existence of an Indian tribe.”⁷⁵² Moreover, water rights can also arise from aboriginal uses, separate and apart from reservation of land for a tribe, for eastern tribes just as for western tribes.⁷⁵³

744. Royster, *supra* note 720, at 196.

745. *See id.* at 174 n.18; *Mattaponi VI*, 72 Va. Cir. 444, 459 (2007) (noting that federal recognition is not necessary for application of the *Winters* doctrine).

746. *See generally* Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 CORNELL L. REV. 1203 (2006).

747. *See id.* at 1234-39.

748. *See id.* at 1240-46 (focusing on historical redress for injuries done to Indians, distributive equity, and the federal government’s fiduciary obligations).

749. *See id.* at 1247.

750. *Id.* at 1256.

751. *Id.*

752. *Id.*

753. *See id.* at 1257-58. Professor Babcock noted that tribes that ceded some of their land did not thereby “cede the aboriginal rights that attached to the land the tribes retained, including the right to sufficient water to support their activities,” and that the rights “continue in force” as long as the tribes “continue to occupy their traditional homelands.” *Id.* at 1258.

Professor Babcock's article illustrates a number of these points by referencing the Mattaponi Tribe,⁷⁵⁴ with whose circumstances she was very familiar as a director of the Institute for Public Representation, which served as the Tribe's counsel.⁷⁵⁵ The circuit court judge considering the Tribe's reserved water rights claims cited Professor Babcock's article⁷⁵⁶ in recognizing that "the reasoning behind the *Winters* doctrine is as equally applicable to state Indian tribes as it is to federally recognized tribes" and that "the Mattaponi Tribe can attempt to assert reserved water rights pursuant to both the negotiated rights of the 1677 Treaty at Middle Plantation and its aboriginal rights."⁷⁵⁷ By rejecting the argument that the reserved water rights doctrine has no application in Virginia, and recognizing, for the first time, that a tribe might be able to establish reserved water rights, the circuit court took an important step toward respecting the Tribe's water-connected rights.

The judge expressed skepticism about the Tribe's ability to demonstrate that recognition of reserved rights was necessary to protect its ability to enjoy its reservation and exercise its fishing rights,⁷⁵⁸ which seems surprising in light of the Tribe's experience in challenging the reservoir project's permits. After all, the state permits required for the project were granted by bodies that were part of the state's water-rights system, which, so far, had failed to protect the Tribe's rights. The permits issued by the state threatened the Tribe's treaty rights and rights to engage in aboriginal practices, which indicates that reserved water rights are indeed necessary to ensure the quantity and quality of water required by the Tribe. At any rate, the settlement of the project's litigation left questions surrounding the Virginia tribes' potential success in asserting reserved water rights for another day.

VI. Conclusion

*To be a Mattaponi is a very special thing. If Bill Gates came to me and said he'd give me all his money if I could find a way to convert him to Mattaponi and take my place, I'd say "No way."*⁷⁵⁹

754. See, e.g., *id.* at 1258 (noting that the Mattaponi Tribe continues to occupy its traditional homelands, which supports the existence of water rights based on aboriginal use).

755. *Id.* at 1207 n.16.

756. *Mattaponi VI*, 72 Va. Cir. 444, 453 (2007).

757. *Id.* at 459.

758. See *supra* notes 586-92 and accompanying text.

759. Lawrence Latané III, *Another Legacy of Jamestown: For Indians, the Struggle Continues 400 Years Later*, RICHMOND TIMES-DISPATCH, May 6, 2007, at A1 (quoting Kenneth Custalow).

*Looking back, 400 years later, it is easy to forget how close Jamestown came to failure [but] Jamestown survived. It became a testament to the power of perseverance and determination. . . . From these humble beginnings, the pillars of a free society began to take hold. . . . Not all people shared in these blessings. The expansion of Jamestown came at a terrible cost to the native tribes of the region. . . . Their story is a part of the story of Jamestown.*⁷⁶⁰

This article shows how the Mattaponi Tribe's story is indeed a part of the story of Jamestown, and should be regarded as a part of the story of Virginia and of the United States. The Tribe's story, even more than that of Jamestown, testifies to "the power of perseverance and determination." Determined to survive in its homeland, the Tribe persevered in the face of repeated threats to its aboriginal and treaty rights, and in the face of challenges to its very existence as a tribe.

Through its resistance to the King William Reservoir project, the Tribe achieved a noteworthy victory. The Tribe's success, however, did not rest on the explicit basis of its rights under the treaty that shaped the creation of Virginia, despite the Tribe's strong 1677 Treaty claims. Rather, the Tribe achieved victory on the basis of principles of federal administrative and environmental law.

State and federal governments must do more to fully live up to the provisions of the 1677 Treaty and its determination to establish "a good and just Peace" that is secure, lasting, and committed to fulfillment of the Tribe's "just Rights." The Tribe's treaty rights should be recognized as imposing obligations on both Virginia and the United States as they make decisions that affect the Tribe, its land, and its resources. These governments should recognize the Tribe's possession of reserved water rights based on land reservation and aboriginal practices. Finally, the United States should recognize the continued existence of the Tribe as a sovereign entity. While the Tribe has certainly demonstrated a tremendous amount of patience and perseverance, it should not have to rely forever on these qualities. Acknowledging, at long last, the rights and status of the Mattaponi Tribe would go a long way toward justifying American pride in "who and what we are as a people and as a nation."⁷⁶¹

760. Bush Jamestown Remarks, *supra* note 700.

761. *Historic Jamestowne: History & Culture*, NAT'L PARK SERVICE, U.S. DEP'T OF THE INTERIOR, <http://www.nps.gov/jame/historyculture/index.htm> (last updated July 28, 2010).

