September 10, 2010

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

Allison M Dussias, New England School of Law

Available at: https://works.bepress.com/allison_dussias/2/
Abstract: PROTECTING POCAHONTAS’S WORLD: THE MATTAPONI TRIBE’S STRUGGLE AGAINST VIRGINIA’S KING WILLIAM RESERVOIR PROJECT

Professor Allison M. Dussias

This Article examines the efforts of a Virginia tribal nation, the Mattaponi Tribe, to combat an environmentally destructive reservoir project. The Tribe’s ancestral members and territory formed a part of the seventeenth century paramount chiefdom of Powhatan, whose dealings with Captain John Smith were recently commemorated in celebrations marking Jamestown’s four hundredth anniversary. The King William Reservoir project, as proposed by coastal Virginia cities eager to extract water from the Mattaponi River, would flood sacred and archaeological sites and threaten the existence of fish species upon which the Tribe has historically depended. Moreover, the project would infringe on the Tribe’s rights under the 1677 Treaty at Middle Plantation and cause the greatest destruction of wetlands in the mid-Atlantic region since the Clean Water Act’s enactment. The Tribe participated in litigation challenging the issuance of the required state and federal permits for the project, after the failure of efforts to persuade the permitting agencies to reject the permit applications. The Tribe’s struggle to protect its land and waters from the latest demands of the descendants of the Jamestown colonists can be understood as a repetition and continuation of the experiences of the past, in which the Tribe has faced threats to its existence as a tribe, to its treaty rights, and to the preservation of its resources and culture. The dispute over the King William Reservoir highlights the kinds of difficulties that tribes throughout the United States continue to 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 environment.

Part I 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 resources and at denying its continued existence. Part II focuses on the reservoir project and the regulatory process that led to its ultimate approval by federal and state officials. Part III follows the path taken by the Tribe as it participated in ultimately successful litigation challenging the permits for the project. Part IV analyzes important issues that were raised, but not definitively resolved, during the litigation, such as the nature of the relationship between the Tribe and the United States and the Tribe’s potential claim to reserved water rights. Part V offers concluding thoughts on the Mattaponi Tribe’s struggle to protect its homeland from the reservoir project.

This article is part of a broader project on indigenous cultural preservation and the law. In previous articles, I have examined legal mechanisms that foster, or act as barriers to, preservation of a number of aspects of the cultures of Native American tribes, such as religion (Stanford Law Review); attitudes toward gender and property (North Carolina Law Review); language (Ohio State Law Journal); and education (Arizona Law Review). The article also ties into other articles that I have written examining the links between cultural preservation and environmental protection, including a forthcoming article on protection of tribal subsistence rights.
PROTECTING POCAHONTAS’S WORLD: THE MATTAPONI TRIBE’S STRUGGLE AGAINST VIRGINIA’S KING WILLIAM RESERVOIR PROJECT

Allison M. Dussias
Professor of Law, New England School of Law
J.D., University of Michigan; A.B., Georgetown University

I. THE PAST IS ALWAYS WITH US: MATTAPONI DISPOSSESSION AND PERSISTENCE
   A. Envisioning Pocahontas’s World
      1. Water
      2. Fish
      3. Land
   B. Dispossessing the Powhatan Tribes
      1. Claims to Land, Maize, and People
      2. Treaties and Reservations
   C. Perseverance, Adaptation, and Survival
      1. The Eighteenth Century: Treaty Rights and Trustees
      2. The Nineteenth Century: Resisting Termination and Confronting Jim Crow
      3. The Twentieth Century: Maintaining Tribal Identity and Resisting Bureaucratic Genocide
         a. Frank Speck’s Documentation of Powhatan Persistence
         b. Walter Plecker’s Attempt at Bureaucratic Genocide

II. SACRED SITES AND SHAD: THE THREAT POSED BY THE KING WILLIAM RESERVOIR PROJECT
   A. The Targeting of Mattaponi Resources and the State’s Acquiescence
      1. Newport News Water Demands
      2. The State Water Control Board Water Protection Permit
      3. The Virginia Marine Resources Commission Permit
      4. The Department of Environmental Quality Coastal Resources Management Plan Review
   B. Heeding Tribal Concerns: The Initial Federal Clean Water Act Permit Denial
      1. Loss of Archaeological Resources
      2. Negative Impacts on Shad and Subsistence Fishing
      3. Threats to Hunting and Gathering Activities
      4. Adverse Effects on Traditional Religious Practices and Way of Life
      5. Traditional Cultural Properties and the Question of “Mitigation”
      6. Impact on Environmental Justice Goals
      7. The Norfolk District Commander’s Decision
   C. Bowing to State Demands: The North Atlantic Division Permit Decision
      1. Impact on Archaeological Sites and Traditional Cultural Properties
      2. Impact on Tribal Rights and Fishing
      3. Impact on Religious Practices and Beliefs and on Environmental Justice
      4. Privileging Non-Indian water Demands

III. DEFENDING TREATY RIGHTS AND THE ENVIRONMENT
   A. Challenging the Virginia Water Protection Permit in State Court
1. Claiming the Right to be Heard
2. Challenging the State’s Violation of Treaty Rights and State Water Law
3. The Unsuccessful Quest for U.S. Supreme Court Review
4. Back to the Circuit Court

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

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

A. The Relationship between the Mattaponi Tribe and the United States
   1. The Status of Pre-Revolutionary War Treaties
      a. The United States as Successor to Great Britain
      b. The Treaty as Federal Law
   2. Federal Recognition (or the Lack Thereof)
   3. Federal Trusteeship Responsibilities

B. The Mattaponi Tribe’s Potential Reserved Water Rights Claim

V. Conclusion
PROTECTING POCAHONTAS’S WORLD: THE MATTAPONI TRIBE’S STRUGGLE AGAINST VIRGINIA’S KING WILLIAM RESERVOIR PROJECT

Allison M. Dussias

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 here caused to be drawne up these ensuing Articles . . . for the firme 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 Reciprocall Justice by confirming to them their just Rights . . . [N]oe English, shall seate or plant nearer then three miles of any Indian towne . . . ²

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

In 2007, the Commonwealth of Virginia celebrated the four hundredth 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 saving of Captain John Smith by the “Indian princess” Pocahontas -- looms large in the national historical imagination. The Pocahontas story has been immortalized in the minds of American children through the 1995 Disney animated film Pocahontas,⁴ along with whatever they may learn about colonial Virginia through formal education. The dubious rescue story has been brought to the screen for adult audiences most recently in The New World, which was 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

---

¹HELEN C. ROUNTREE, POCAHONTAS’S PEOPLE: THE Powhatan Indians of Virginia Through Four Centuries 29 (1990) [hereinafter ROUNTREE, POCAHONTAS’S PEOPLE].
³Homepage of Historic Jamestowne (2006), http://www.historicjamestowne.org/index.php. 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…..” See http://www.apva.org/apva/pressroom_apva_fact_sheet.php.
⁶The National Park Service’s Jamestown website, for example, issues a rousing invitation along these lines: “Join us to explore America’s English colonial beginnings. Travel back in time and imagine walking these hallowed grounds with Captain John Smith, George Percy, Pocahontas and John Rolfe. The adventure you are about to begin represents the foundations of who and what we are as a people and as a nation. HISTORIC JAMESTOWNE, THE BEGINNING OF
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 look back to the experiences of their ancestors. It also provided an opportunity to focus public attention on their own experiences in the present. From this perspective, the settlement of Jamestown does indeed teach important lessons about “who and what we are as a people and as a nation,” but not the tourism-promoters’ tale 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, the lessons to be learned about who Americans are as a people and a nation are lessons of dispossession and denial -- dispossession of Indian land and other resources and denial of tribal legal rights and, at times, of the very existence of the Virginia tribes.

This Article examines the efforts of the Mattaponi Tribe of Virginia to combat the latest threat posed to its land, waterways, and continued existence by the descendants of the Jamestown colonists – the King William Reservoir Project. This examination reveals how this threat can be understood as a repetition and continuation of the experiences of the past, which have been dominated by seemingly never-ending non-Indian demands for tribal resources and skeptical treatment of tribal claims of 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, has engaged in litigation aimed at preventing the creation of a 12.2 billion-gallon water reservoir, filled with water pumped from the Mattaponi River, for the benefit of coastal Virginia cities. The proposed King William Reservoir project would flood sacred and archaeological sites and 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 on rights that were guaranteed to the Tribe by the Treaty at Middle Plantation of 1677 and cause the greatest destruction of wetlands in the mid-Atlantic region since the Clean Water Act’s enactment.

As the Mattaponi Tribe has struggled to protect its land and waters from the resource demands of outsiders and to preserve and defend its existence as a tribe, age-old issues of Indian identity and tribal status have emerged. In the seventeenth century, as English settlement expanded in Virginia, the Tribe and other coastal Virginia tribes began to face pressure to abandon their way 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,” in denial of the continued existence of Indians in Virginia. Virginia tribes must contend with the continuing effects of this repudiated policy today, as they consider seeking 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 exploration of these issues.

Finally, 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 environment. The Mattaponi Tribe’s struggle provides just one example of the issues faced by tribes throughout the United States with respect to the environment, as well as of the pressures brought to bear by non-Indian interests on 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 should provide insight into the willingness of government officials to respect the rule of law as embodied in treaty and common law rights and to honor different views as to the proper use of land and water resources.

Part I of this Article draws upon the work of ethnohistorians, archaeologists, and anthropologists, as well as 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 II analyzes the King William Reservoir project and the regulatory process that led to its ultimate approval by federal and state officials. Part III follows the path taken by the Tribe as it participated in the litigation that culminated in the project’s derailment. Part IV concludes the Article with an analysis of issues that were raised, but not definitively answered, during the litigation surrounding the project.

I. THE PAST IS ALWAYS WITH US: MATTAPONI DISPOSSESSION AND PERSISTENCE

The 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. In addition, 875 acres of upland wildlife habitat were to be inundated and another 105 acres of wetlands located downstream of the dam were to be adversely impacted. Over 150 archaeological sites, most of which are Indian sites, have been located in the area. Up to 75 million gallons of water per day were to be extracted each day from the Mattaponi River, which flows along the border of the Mattaponi Indian Reservation, by a water intake and pumping station. Such withdrawals would threaten prime shad spawning grounds and possibly alter salinity patterns in a way that affects other aquatic animal and plant species as well. The project was to be located within three miles of the Mattaponi Reservation.8 In short, this was a major project, the significance of which for the land, water, people (both living and dead), flora, and fauna of the area would, it seems, 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 that would be done to archaeological and sacred sites; the strong likelihood of a negative impact on the shad population; the severe impact on the Tribe’s treaty-protected hunting and gathering practices;

8See infra note 315 and accompanying text (describing the project).
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.9

At the center of the Mattaponi Tribe’s legal struggle to protect the Mattaponi River and its homeland is an agreement, dating to 1677, that was intended to create an enduring peace between the Virginia colonists and the tribes on whose land they had settled. The Treaty at Middle Plantation, entered into between “severall Indian Kings and Queens” and Charles II, on which the United States relied after achieving independence, reflected the historical and contemporary relations between the Virginia colonists and the signatory tribes. The treaty recognized the importance, and the justness, of protecting the land and other resources of the tribes from non-Indian interference. In order to understand the significance of the reservoir project to the Mattaponi Tribe today, and to explore the proper resolution of the conflict between tribal rights and the water demands of Newport News and its partner cities, it is necessary to examine the significance of the threatened resources to the coastal Virginia tribes and 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.10

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.11

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.12 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 perspective and 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

---

9See infra note 348 and accompanying text.
12See, e.g., Virginia’s tourism website: “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 . . . .” http://www.virginia.org/site/content.asp?MGrp=1&MCat=2&Rgn=10000.
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, referred to collectively by historians and anthropologists as the “Powhatans” or “Powhatan Indians,” totaling at least 14,000 people. The Powhatans inhabited a six thousand 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. Their lands extended northward to the Potomac River and southward to roughly the border between Virginia and North Carolina. The Powhatans spoke an Algonquian language like many other tribes of the East Coast, including another tribe that experienced early colonization, the Wampanoags of Massachusetts. 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, in order to understand its significance to the 1677 Treaty and contemporary legal issues, is a challenging task. Written records are limited to those left by Englishmen who themselves lived in Virginia, who communicated with those who had lived in Virginia, or who met and spoke with Indians who had traveled to England. 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. 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 they recorded reflected this agenda. As Professor Helen Rountree has explained, writers of the late seventeenth century saw the Indians as the losers in the contest over the control of Virginia, and their perception of the Indians as conquered peoples influenced their accounts. 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 can provide information about the human inhabitants, both Indian and non-Indian, of Virginia, as well as about the flora, fauna, and other aspects of the environment in which they lived. The Powhatans themselves did not leave written records until considerably later.

The evidence from these sources cannot, however, be viewed in isolation. This evidence

---

13 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. 14The territory included both the eastern shore of Chesapeake Bay (an area often called the “Eastern Shore”) and the western shore of the Bay. See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 3. 15See id. at 3-4. The northern boundary of their lands on the Eastern Shore was approximately the Virginia-Maryland line. See id. at 4. 16See id. at 3. 17See, e.g., Kathleen J. Bragdon, The Northeast Culture Area, in NATIVE NORTH AMERICANS: AN ETHNOHISTORICAL PERSPECTIVE (Daniel L. Boxberger, ed.) 91, 118 (discussing coastal Algonquians). 18See ROUNTREE, THE POWHATAN INDIANS, supra note 13, at 3. 19See id. (discussing the limitations of the sources for seventeenth century Virginia). For descriptions of the early and later seventeenth century Englishmen who wrote about Virginia, see id. at 3-6. 20See id. at 3.
must be combined with contemporary Virginia Indians’ knowledge of their ancestors’ lifeways in order to construct a more complete understanding of Powhatan life in the seventeenth century and beyond. A recent book on the life of Pocahontas, *The True Story of Pocahontas,*\(^{21}\) for example, demonstrates this approach by drawing on orally transmitted Mattaponi history. In addition, uses of the land and water today that continue those of the past can help shed light on the world in which the 1677 Treaty was signed and on the understandings and intentions of those who signed it.\(^{22}\)

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 to them which was posed by English settlement are discussed below. These same components were threatened by the King William Reservoir project. Only a careful examination of the past and continuing present significance of the water, fish, and land of the region can demonstrate 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 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 diligently with fresh brooks and springs, no less commodious than delightsome. By the rivers are many plain marshes . . . .*\(^{23}\)

*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.*\(^{24}\)

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. Every year, these rivers (listed from south to north, the James, York, Rappahannock, and Potomac) carry countless gallons of fresh water from the Appalachian Mountains and Virginia’s piedmont region into the Chesapeake Bay. The four rivers become estuaries (coastal bodies of water in which sea water mixes with fresh water) in their eastern reaches. Consequently, their water transitions from freshwater, to brackish, to saltwater as they approach the Bay.\(^{25}\) As they flow from the mountains, the rivers form a series of cataracts, called the

---


\(^{23}\)John Smith (1624), quoted in Smith’s America, *supra* note 11, at 4-5.


“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 has led to the region being termed “tidewater Virginia” or the “tidewater.” Each of the rivers has its own large tributaries, and some of them in turn have large tributaries, with smaller branches or swamps at their heads. The proposed water source for the King William Reservoir project, the Mattaponi River, joins with the Pamunkey River to form the York River. The land between the Mattaponi and Pamunkey Rivers is known as “Pamunkey Neck.”

The Chesapeake Bay, the largest estuary in the United States, has a watershed covering over 74,000 square miles 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. For the Powhatans of colonial times, the Bay was the source of quahog, conch, and whelk shells, which were used for bead making. Today, the water of the Bay and the life that it supports is gravely threatened, a fact that led to a 2000 inter-state agreement for its protection and to new EPA efforts to prevent further degradation.

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

The Powhatans’ enjoyment of the rivers was readily apparent to early English observers. Accounts by late sixteenth century visitor John White, 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

---

26 See POTTER, supra note 25, at 8.
27 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 4.
28 See ROUNTREE, THE Powhatan INDIANS, supra note 13, at 18.
29 See POTTER, supra note 25, 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. See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 4; POTTER, supra note 25, at 7 (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”).
30 See POTTER, supra note 25, at 7.
31 See id. It is thirty miles wide at its widest point, with a total shoreline of over 8,000 miles. See id.
32 See ROUNTREE, THE Powhatan INDIANS, supra note 13, at 56 & 71-73.
34 See Timothy B. Wheeler, EPA Sets Tough New Chesapeake Pollution Caps; Bay ‘Pollution Diet’ Likely to Require More Sewage Upgrades, Curbs on Runoff from Urban and Farm Land, BALTIMORE SUN, July 01, 2010.
35 John Smith and other Englishmen recorded the local consumption of fish and shellfish and of waterfowl, including swans, cranes, geese, and mallards. See POTTER, supra note 25, at 41-42.
36 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 5, 6.
37 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 http://www.nps.gov/fora/jwhite.htm.
catchinge of fische."

The Powhatans’ aesthetic sense was stimulated not only by beauty of the watercourses but also by one of their products, pearls, which were worn by both men and women. The extensive, connected waterways of the region also played a key role in transportation, making it possible for the Powhatans to get almost anywhere they needed to travel by water. Consequently, most of their traveling was done by canoes, 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. . . .” John Smith also described the making of dugout canoes, which the Powhatans were able to “row faster than our barges.”

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. Towns and villages were built on both sides of waterways that were a mile or less wide. The Pamunkey Tribe, for example, was settled on both sides of the river that bears the Tribe’s name. In both major towns and small villages, houses were located fairly close to the key waterway’s shore, in places that provided a good view of the waterway and any travelers on it. Houses were dispersed along the waterway, such that a small village might extend along it for a mile. Waterways thus unified, rather than dividing, Powhatan communities.

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

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 siting of towns and villages, as the summertime increased brackishness and sluggishness of the rivers made drinking the river water.

---

39 See id. (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 armes of pearles”). See also ROUNTREE, THE POWHATAN INDIANS, supra note 13, at 70–71 (discussing the use of pearls).
40 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 4.
41 WHITE, TRUE PICTURES, supra note 38.
42 SMITH’S AMERICA, supra note 11, at 21.
43 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 6. 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 that was located along their lower stretches would have been exposed to storms, wind, and colder winter temperatures. See POTTER, supra note 25, at 29.
44 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 6 & n.33.
46 See id.
47 See 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. See id.
48 See id. at 59. They also washed their hands in streams before and after eating. See id. at 54.
49 Id.
unhealthful (a fact that the English learned the hard way).\textsuperscript{50} 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. Then as now, Indian water use patterns required a smaller fresh water supply than non-Indian water use patterns demanded.\textsuperscript{51}

In summary, the Powhatans’ homeland was rich in water and in 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 the largest by far of the Algonquian chiefdoms of the Atlantic coast.\textsuperscript{52} Today, these waters continue to be a dominant feature of the region and to play a central role in the lives of members of the Mattaponi Tribe, but they are overtaxed and were threatened with further damage by the King William Reservoir project. Moreover, their interconnectedness 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.\textsuperscript{53}

2. \textit{Fish}

\begin{quote}
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.\textsuperscript{54}
\end{quote}

\textit{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.\textsuperscript{55}}

Fish played an important role in the Powhatans’ diet and in the work lives of Powhatan men, who fished by methods that included angling, netting, shooting, and trapping in fish weirs.\textsuperscript{56} Powhatan men were skilled at the art of making weirs, as the English who hired them recognized.\textsuperscript{57} Powhatan men have continued the use of fishing weirs to the present day.\textsuperscript{58}

Because of the number of different environments found in the waters of coastal Virginia, 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

\textsuperscript{50}See \textsc{Rountree}, \textit{Pocahontas’s People}, supra note 1, at 34 & n.31.
\textsuperscript{51}See \textsc{Rountree}, \textit{The Powhatan Indians}, supra note 13, at 58.
\textsuperscript{52}See id. at 22.
\textsuperscript{53} See infra notes 363-376 and accompanying text.
\textsuperscript{54}John Smith (1624), \textit{quoted in Smith’s America}, supra note 11, at 14.
\textsuperscript{55}Custalow Remarks, supra note 24, at 6.
\textsuperscript{56}See id. at 34.
\textsuperscript{57}See \textsc{Rountree}, \textit{Pocahontas’s People}, supra note 1, at 131.
\textsuperscript{58}See \textsc{Rountree}, \textit{The Powhatan Indians}, supra note 13, at 35, 37 (illustration), 38.
eeels); and saltwater fish (like bluefish). The largest fish in the rivers were sturgeons, which were big enough to pull fishermen overboard. English observers were understandably impressed by the abundance and size of the fish of the Powhatans’ territory.

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

Harvesting shellfish, such as clams, oysters, and crabs, from wetlands and waterways, was also important work. Saltwater marshes provided periwinkles, sand fiddlers, blue crabs, oysters, and a variety of clams, while freshwater marshes were the habitat of mussels. Fish, crabs, and oysters were consumed fresh and also (in the case of fish and oysters) smoked and dried for later consumption.

Members of the Mattaponi Tribe continue to rely today 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. Moreover, they commit their labor and money to trying to undo some of the damage done by non-Indian activity affecting the region’s waters, through the operation of their fish hatchery. Some day, it is hoped, Virginia’s current shad fishing moratorium 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 that were threatened by the King William Reservoir project -- have sustained the Mattaponi and other Powhatan tribes since the English settlement of Jamestown and before. Moreover, the species of fish that are most at risk from the project, such as shad, played an important role in the Powhatan tribes’ diet then, even 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

---

59See id. at 28-29.
60See id. The largest Atlantic sturgeon on record was fourteen feet long. See id. 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. See id.
61One Englishman noted in 1612, for example, that the shad that were caught in the Powhatans’ waters were “a Yard long.” See id. Today, on the other hand, shad are considered large if they are eighteen inches long. See id.
62See POTTER, supra note 25, at 41.
63See ROUNTREE, POCOHONTAS’S PEOPLE, supra note 1, at 145.
64WHITE, TRUE PICTURES, supra note 38.
65See ROUNTREE, POCOHONTAS’S PEOPLE, supra note 1, at 24-25. 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.
66See POTTER, supra note 25, at 41-42 (noting descriptions of these activities by John Smith and other Englishmen).
67See VA. CODE § 29.1-301(I) (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).
68See infra notes 367-370 and accompanying text (discussing the fish hatchery and threats to its operations).
69See Custalow Remarks, supra note 24, at 6.
muskmelon . . . and maracocks [squash] . . . . [T]his is done by their women and children . . . .

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, 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.

The English colonists were not the first settlers of Virginia. Native peoples practiced settled agriculture in what is today known as Virginia by at least 1000 A.D. Corn in particular made a crucial contribution to the diet of the Powhatans. Observers reported fields as large as 100 acres on land sloping down to the rivers. Lacking plows or any kind of metal tools, the Powhatans dug planting holes, into which corn and bean seeds were dropped together. Several varieties of squash were later planted in between the corn and bean plants. Weeding was done frequently and, to preserve moisture, soil was piled around the bases of the cornstalks. Aside from some of the work of clearing fields, farming was women's work, much to the consternation of English observers. Rather than understanding women's significant role in the Powhatan economy as a basis for an important societal status, the English viewed women's dominance in Indian agriculture as evidence of Indian men's laziness and
Indian women’s oppressed status as “squaw drudges.” Women were also responsible for gathering the crops, preparing them for storage in houses and storage pits, and using them in cooking. Many of the region’s deciduous trees (such as beech, chestnut, chinquapin, hickory, oak, and walnut trees) bear nuts, while a variety of fruit is provided by berry bushes and persimmon trees. The mildness of the eastern Virginia climate ensures that nuts, berries, and fruits are available for about seven months of the year. The Powhatans gathered, prepared, and ate a number of roots, such as tuckahoe, the significance of which is indicated by its inclusion in the Treaty at Middle Plantation. Aside from medicinal plants, which were gathered by men, women were in charge of the harvesting of wild plants and plant products, for food and other uses, a responsibility that necessitated having a detailed working knowledge of the plant resources of Powhatan territory.

Thus, like other Indian peoples, who developed successful farming techniques millennia before the arrival of Europeans in the eastern United States, the Powhatans had learned to clear land for farming in the best manner that their technology made possible, to plant the crops that would yield the maximum harvest in their particular soil and climatic conditions, and to harvest, prepare, and store crops and other plants and plant products for future use. For the most part, this was the work of Powhatan women. 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.

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

Today, the reservation land available to the descendants of the colonial-era Powhatans who are current members of the Mattaponi Tribe for agricultural and hunting purposes is small in size, totaling approximately 150 acres. The Tribe’s attachment to the land extends, however, beyond the

81 For discussion of non-Indian observers’ belief that Indian women were forced to do hard work while men lived a life of leisure, see Allison M. Dussias, Squaw Drudges, Farm Wives, and the Dann Sisters’ Last Stand: American Indian Women’s Resistance to Domestication and the Denial of Their Property Rights, 77 N.C. L. REV. 637 (1999).
82 See ROUNTREE, THE POWHATAN INDIANS, supra note 13, at 49 & 88-89. See also id. at 51-52 (discussing the cooking and storage of corn, bean, and squash).
83 See ROUNTREE, POCOHONTAS’S PEOPLE, supra note 1, at 5; POTTER, supra note 25, at 41-42. Smith and others recorded the consumption of strawberries, raspberries, blackberries, huckleberries, and mulberries. Acorns, chestnuts, chinquapins, and walnuts were dried and used as winter and spring staples. See POTTER, supra note 25, at 41-42.
84 See ROUNTREE, POCOHONTAS’S PEOPLE, supra note 1, at 4.
85 See ROUNTREE, THE POWHATAN INDIANS, supra note 13, at 52-53 (identifying tuckahoe, or wild potatoes, as arum).
86 See infra note 157 and accompanying text.
87 See ROUNTREE, THE POWHATAN INDIANS, supra note 13, 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.”).
88 HURT, supra note 76, at 24.
89 See id. at 25.
90 See ROUNTREE, THE POWHATAN INDIANS, supra note 13, at 38.
91 See id. at 40-41.
92 See id. at 50-51.
93 See SMITH’S AMERICA, supra note 11, at 22.
94 The current Mattaponi Reservation comprises 150 acres. See Mattaponi Indian Reservation, http://sites.communitylink.org/Mattaponi/index.html.
borders of the reservation, as guaranteed under the 1677 Treaty, which recognized the existence of rights to resources beyond Powhatan reserved lands. The challenge for today’s Mattaponis is determining how to achieve protection of rights not only with respect to reservation land, but also with respect to off-reservation lands and waterways that are subject to treaty rights.

In sum, the Powhatans’ homeland, blessed with a temperate climate and sufficient rainfall, was (and is) a very good one for farming, for harvesting a variety of wild plants and plant products, and for hunting and fishing. The Powhatan tribes had developed “a detailed and precise knowledge of the fauna and flora of their own environment” and had possessed “the kind of empirical, factual knowledge upon which their lives and our own modern natural sciences depended,” in the words of one commentator. Powhatan territory was able to support a substantial number of people when the English colonists began to arrive. 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 fields in all their villages (which are situate in the fruitfulllest pieces of the land) shall be inhabited by us . . .

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. Some lost even more, their lives taken by disease or violence. Despite their many losses, however, the Mattaponi Tribe, and other Powhatan tribes, survived.

Recalling the history of dispossession demonstrates how much the Powhatans lost and how these losses occurred. At the same time, understanding how Powhatan tribes have survived despite these losses, and what is guaranteed to the Mattaponi Tribe and other Powhatan tribes by the 1677 Treaty, 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 understood 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

---

95 See infra note 157 and accompanying text.
96 Mook, supra note 74, at 118.
97 See Rountree, The Powhatan Indians, supra note 13, at 29.
seven years, in exchange for transportation to Virginia, food, protection, and land.  

When the first installment of would-be colonists arrived in the Powhatan tribes’ territory in April 1607, they entered a region subject to the paramount chiefdom of Wahunsunacock, who came to be known by the name of his natal village: Powhatan.  

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

That the poorly provisioned English chose Jamestown Island as a settlement site may well have been surprising to 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 was near a mosquito-infested marsh.  

The English, though, valued the site for its favorable military position and planned to look 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.  

In so doing, historian April Hatsfield has argued, they were hoping to follow the model provided by Spanish colonial ventures.  

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, such as knowledge of the environment, from which they would also have benefitted (and possibly less disruptively).  

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

---

99 Getting the colonists to actually work, however, once they arrived was a challenge. For an analysis of why the colonists were so idle, see Edmund S. Morgan, The Labor Problem at Jamestown, 76 Am. Hist. Rev. 595 (1971).
100 These colonists were dispatched from England in December of 1606. See Smith’s America, supra note 11, at xv.
101 Helen Rountree, Before and After Jamestown 36-37 (2002) [hereinafter Rountree, Jamestown]. Powhatan’s original name is also spelled as Wahunsenaca. See Custalow & Daniel, supra note 21, at 5.
102 See Rountree, The Powhatan Indians, supra note 13, at 16 (noting that the word means literally “great king”).
103 See Rountree, Pocahontas’s People, supra note 1, at 25. Under the Powhatans’ system of inheritance, Powhatan’s predecessor would have been his mother or a sibling of his mother, and his own heirs would have been his full or half siblings through his mother, followed by the children of his sisters. See Rountree, Jamestown, supra note 101, at 37. His status began with his inheriting the Pamunkey, Mattaponi, and Youghatanund chiefdoms, along with three other chiefdoms based near the James River’s falls. The Pamunkey, Mattaponi, and Youghatanund chiefdoms lay in the upper York River drainage, with the falls of the James River being the home of the Powhatan, Arrohateck, 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. See id.
104 See Rountree, The Powhatan Indians, supra note 13, at 103. The term means “commander,” or person in charge. See id.
105 Rountree, Jamestown, supra note 101, at 140. Archeological excavations of the site have indicated that it was not a site of Indian settlements. See id.
106 See id. at 140.
107 See id. at 142 (noting that early English accounts are full of lists of commodities available in Virginia that the English planned to sell). See also Mook, supra note 74, at 104 (noting that many of the early English accounts of Virginia focused on commodities and other salable resources).
and cutting down corn in the fields. James River and attacked a number of Powhatan towns, killing their occupants, burning the towns, were better organized, arrived,

I

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. If they had 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. 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. 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 1620’s), he did not use his freedom as an opportunity to improve relations with the Powhatans, but instead tried to make Powhatan accept the status of a vassal of the English king.

While some English observers of the ceremony that was intended to accomplish this feat believed that Powhatan was reluctant to kneel and accept a crown because of his ignorance of the ceremony’s significance, it seems more likely that the astute Powhatan fully understood English intentions and was unwilling to subjugate himself and his people to the Crown.

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

---

109 Mook, supra note 74, at 103.
110 See Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 34-35.
111 See Rountree, JAMESTOWN, supra note 101, at 142.
112 See id. at 142-43. Archaeologists have documented the shift from exchange to taking through examination of excavated Indian pots.
113 See id. at 143. 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 have been 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. See Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 38. None of Smith’s contemporaries mentioned her having saved his life (an incident that they probably would have mentioned in their accounts if it had actually occurred). See id. Smith’s reliability is also undermined by the fact that his 1624 account included descriptions of two incidents that definitely did not happen. See id. at 38-39.
114 See DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW at 83 (5th ed. 2005).
115 See Rountree, JAMESTOWN, supra note 143. Werewocomoco’s site has been located by archaeologists and is the site of an ongoing excavation.
116 One man, for example, was executed for murdering his wife and then eating part of her body. See Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 53 & n.170.
117 See Rountree, JAMESTOWN, supra note 101, at 145. During the winter, 5/6 of the colonists died. See Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 53.
118 See Rountree, JAMESTOWN, supra note 101, at 145.
119 See id. at 145; Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 55. John Smith had left Jamestown, never to
In 1613, seventeen-year-old Pocahontas was taken captive and held for ransom, a crime which ultimately led to her marriage to Englishman John Rolfe. The marriage, which brought temporary peace to the region, was short-lived. After traveling to England with her husband and son, where she was displayed as an example of a “savage” who supposedly had recognized the superiority of the English and their god, Pocahontas died, at the age of about 21 -- a fact that is not part of the Disney telling of her life story.

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

By the time of Powhatan’s death in 1618, the English already occupied large stretches of the James River’s shores. In addition to losing their prime farmland, the Powhatan tribes along the James were threatened with 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 farm lands objected to Indians crossing them. 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.

The increasing demand for Indian land led, unsurprisingly, to growing tensions. Despite the resulting Powhatan uprisings in defense of their territory, 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. In English eyes, space would be left only for those Powhatans who were willing to adopt the English lifestyle and a subordinate role in the colonial return, in the Fall of 1609. See ROUNTREE, JAMESTOWN, supra note 101, at 143. In August 1610, the English killed over 50 people in the Paspacheh’s capital town, and then torched the town and chopped down growing corn. See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 55. Pocahontas was baptized and given the name “Rebecca” before the marriage. See id. at 60.

She died in March 1617, at the beginning of a planned trip back to Virginia, and was buried in Gravesend, England. Her son, Thomas, was also ill and was left in England while his father continued the journey. See id. at 64. Thomas returned to Virginia in 1635 and established himself as a planter. See id. at 84. The cause of Pocahontas’s death is not known; she may have contracted a pulmonary disease from the English. See id. at 63. A recently published book sets out an account from Mattaponi oral history that Pocahontas died from being poisoned. See CUSTALOW & DANIEL, THE TRUE STORY OF POCAHONTAS, supra note 21, at 83-88.

The Virginia Indians used another species of tobacco, which was stronger and could only be smoked in small quantities. See id. at 149. See also HURT, supra note 76, at 31 (noting that the Virginia Algonquians raised a tobacco species called Nicotiana rustica, as opposed to a milder variety, Nicotiana tabacum, that John Rolfe introduced).

During an uprising that occurred in 1622, colonists and their livestock were killed and colonists’ houses were burned. See id. at 73-74. The 1622 uprising followed several years of occasional violent episodes. See id. at 70-72.

See supra note 98 and accompanying text.
Continued expansion of English settlements areas did not result in a corresponding increase in English self-sufficiency, because of the colonists’ continuing focus on growing soil-depleting tobacco. Instead, the English increased their demands for corn from the Powhatans, who were pressured to grow extra food on their ever-shrinking lands. Their location in the York River area spared (for a time) the Mattaponi and Pamunkey Tribes the greatest burden of English demands for land and corn, which fell most heavily on the tribes of the James River area.

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. 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. With the eventual influx of Africans held as slaves, demand for Indian labor declined, along with a decline in the Indian population. Although, over time, Virginia colonial legislation limited enslavement of Indians, it took time for actual practice to match up with limitations on the books. The eventual separation of Indian status from African status in Virginia in connection with slavery ultimately led to court cases in which plaintiffs asserted their right to freedom on the grounds that their Indian maternal lineage established that they should be classified as Indians (and free) rather than as Africans (and enslaved).

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

129 See Rountree, Pocahontas’s People, supra note 1, at 75.
130 The expansion was accompanied by occasional attacks on the Powhatans. See id. at 75-83 (describing events from the 1622 uprising until the early 1640’s). The English population reached about 2,600 by 1629 and about 8,100 in 1640. See id. at 78-79. Land transfers during these years are difficult to reconstruct because of lost records. See id. at 79.
131 See id. at 81. The colonists also purchased food from the Dutch. See id.
132 See id. at 76.
133 See id. The Indians were to stay in segregated housing at night. See 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. 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. 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 AZ. L. REV. 819 (2001).
134 An act of the Assembly of 1670, for example, provided that Indian and other non-white servants who arrived in Virginia by land (as opposed to be sea) were not to be slaves. See Rountree, Pocahontas’s People, supra note 1, at 138. For further discussion of Indian slavery in Virginia, see C.S. Everett. “They shall be slaves for their lives”: Indian Slavery in Colonial Virginia, in INDIAN SLAVERY IN COLONIAL AMERICA 67 (Alan Gallay ed. 2009). For discussion of Indian slavery more generally, see INDIAN SLAVERY IN COLONIAL AMERICA, supra; Bethany Berger, Red: Racism and the American Indian, 56 UCLA L. REV. 591, 611-617 (2009).
135 Even though a 1691 statute arguably prohibited all Indian slavery, in reality Virginians still held Indians as slaves. See Rountree, Pocahontas’s People, supra note 1, 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 134, at 614. See also Gregory v. Baugh, 25 Va. 611 (1827). (after the passage of a 1705 statute, “no American Indian could be enslaved”).
the colony’s history. Virginia was to furnish the statesmen who provided the rhetoric of revolution in such documents as the Declaration of Independence, which trumpeted the colonists’ right to self-determination. Where Indian rights and resources were concerned, however, colonial leaders demonstrated a different attitude toward the right to self-determination, 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 also came to be shaped by treaties. In October of 1646, following a Powhatan uprising and subsequent retaliatory actions, including enslavement, the Powhatan leader Necotowance signed a treaty with the English. 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 inhabit on” the land of the Lower Peninsula between the James and York Rivers. 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 rebells 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 yearely” (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 weroances were to receive patents for lands, which were to serve as reservations and were made inalienable to individual settlers by a 1656 statute, but the size of the lands was inadequate for Powhatan needs. 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. This misconduct led to a reenactment of the alienation prohibition, with an additional requirement that the settlers to help Powhatans build protective fences around their fields. By a 1658 statute, the Virginia General Assembly affirmed the Mattaponi Reservation, thus confirming rights to land long held by the Tribe.

---

137 In April of 1644, the Powhatans, led by Opechancanough, began an uprising, which led to English retaliatory actions against the tribes that participated, during which Indians who were not killed were taken prisoner and subsequently sold as slaves or servants. See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 84-86.

138 William Waller Hening, The Statutes at Large; Being a Collection of all the Law of Virginia from the First Session of the Legislature, in the Year 1619, vol. I, at 323-325 (1823), available at http://vagenweb.rootsweb.com/hening/ [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.” Treaty of 1646, supra, at art. 2. Necotowance (apparently a Pamunkey) had replaced Opechancanough, who had been shot by a colonist after being taken prisoner, at the age of almost 100. See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 86-87.

139 Treaty of 1646, supra note138, at art. 1. The lands that the English were left free to inhabit were not to be entered by Indians except those who were messengers of Necotowance, who were to wear a striped coat to indicate that they were carrying messages and were to enter the area only through an English fort. See id. at art. 3 & 7.

140 Treaty of 1646, supra note 138, at art. 1. The Powhatans agreed to turn over any English prisoners and all “negroes and guns which are yet remaining” in their possession. Id. at art. 9.

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

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

143 See id. at 94.

While it is Pocahontas that has captured the American imagination as an admirable female representative of the Powhatans, it was another Powhatan woman, Cockacoeske, dubbed “the Queen of Pomunky” by the English, who negotiated to protect the Powhatan tribes’ interests in the second half of the seventeenth century. 145 By the late 1660s, the English population had grown to about 30,000, while the Powhatan population had decreased to about 3,000. 146 In defiance of the promises of protection in the 1646 treaty, in 1676, in so-called “Bacon’s Rebellion,” a terrorist group led by colonist Nathaniel Bacon gratuitously attacked Powhatans and plundered their lands. 147 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, and other tribal leaders signed the Treaty at Middle Plantation (known today as Williamsburg) with the English Crown. 148 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 “Redress of their wrongs and injuries.” 149 Thus the stated aims of the treaty were to recognize and protect the legal rights of the tribes and to ensure that there was available to them a remedy 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. 150 Viewing treaties as documents that created sacred obligations was part of the diplomacy of many tribes, as well as, traditionally, European nations.

The first article referred to the “dependancy” of the tribes on the Crown, foreshadowing the “domestic dependent nations” language of Chief Justice Marshall’s 1832 opinion in Worcester v. Georgia. 151 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 existing political statuses and inter-relations of the signatory tribes were also acknowledged, as the “Queen of Pomunky” was recognized as having a higher status than other tribal leaders, 152 like her predecessor Powhatan at the time that Jamestown was founded.

Significantly (and crucially, given recent events in Virginia), five articles focused on securing

145 Tottopottompoy, a successor of Powhatan, received recognition of a reservation of 5,000 acres for his people in 1649. ROUNTREE, POCOHONTAS’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. See id. at 110. Cockacoeske lived until 1686 and was succeeded by her niece. See id. at 112. See also generally Martha W. McCartney, Cockacoeske, Queen of Pamunkey: Diplomat and Suzeraine, in Powhatan’s Mantle: Indians in the Colonial Southeast 173 (Peter H. Wood et al. eds., 1989).
146 See ROUNTREE, POCOHONTAS’S PEOPLE, supra note 1, at 96.
147 See id. at 96-99. The excuse seized upon by Bacon and his fellow vigilantes was the killing of one English settler, during a dispute over money, by Doeg Tribe members. The Indians who suffered during the rebellion were not connected to the precipitating grievance. See id. at 97.
148 See ROUNTREE, POCOHONTAS’S PEOPLE, supra note 1, at 101. 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. See id. at 103.
149 Treaty of 1677, supra note 2, preamble.
150 Id.
151 See id., Article I.
152 See id., Article XII.
tribal rights to important resources. Land rights were guaranteed by Articles II and III. The Indians were to hold their lands “in as free and firme a manner” as the king’s subjects enjoyed their lands and possessions, and were not required to pay a standard quitrent but rather “three Indian Arrowes” annually. All friendly Indians who did not have sufficient land to plant on were to have land laid out for them, without risk of being disturbed or having the land taken.\footnote{\textit{See id.}, Articles II-III.}

Article IV acknowledged the disturbances of the peace resulting in “violent intrusions of divers English” onto Indian lands and established a three-mile buffer zone around each Indian town. In this area, the Englishmen were not to “seate or plant.”\footnote{\textit{The Treaty provided as follows: “noe English, shall seate or plant nearer then three miles of any Indian towne, and whosoever hath made or shall make any encroachment upon their Lands shall be removed from thence and proceeded against.” \textit{Id.}, Article IV.}} Anyone who encroached on the tribes' lands was to be removed and prosecuted. Indians and their goods and properties were to be protected “against all hurts and injuries.”\footnote{\textit{Id.}, Article V.} If any violation occurred the Indians were to seek relief from the Governor, who would punish the infringers as English law prescribes, just as if an Englishman had been wronged.\footnote{\textit{Id.}, Article V.} Finally, Article VII recognized off-reservation rights by confirming the right of the Indians to harvest oysters, fish, and gather important plants and plant products — “Tuccahoe, Puckoone, or anything else for their natural support not useful to the English” — on English land.\footnote{\textit{The Treaty recognized the Powhatans’ right to “have and enjoy therei wonted conveniences of Oystering, fishing, and gathering” important food plants and other plants (namely, “Tuccahoe, Curtenemmons, wild oats, rushes, and Puckoone”) on “the English Devidends,” i.e., on non-Indian land. \textit{Id.}, Article VII. Indian requests to harvest these important products were not to be refused. \textit{See id.} The Indians were to report their plans to a public magistrate prior to exercise of their rights under this article. \textit{See id.}}} 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 protection as to their persons by Articles providing that Indians could not be held as servants for a longer term than an Englishman of the same age could be held, and they could not be sold as slaves.\footnote{\textit{See id.}, Article XV. Under Article XIII, Indians could not be kept “as servant or otherwise” without a license from the governor.} Indian leaders who came to the Governor’s Council of Assembly were to be treated in a manner that indicated sufficient respect for their station. They were to be housed and fed at public expense and were not to be abused or wronged in any way.\footnote{\textit{See id.}, Article XVII.} Finally, Indians were not to be imprisoned without legal process.\footnote{\textit{See id.}, Article VI.}

Because this was a treaty of friendship and alliance, several provisions related to mutual military assistance. The tribes were to alert the English militia as to the march of any “strange Indians” near English lands. The militia would aid the signatory tribes against any “fforeigne Attempt, incursion, or depredation” upon the Indian towns.\footnote{\textit{See id.}, Articles IX-X.} Finally, signatory tribes’ members were to be given powder and shot as the Governor saw fit and were to be ready to “march against the enemy” with the English forces.\footnote{\textit{See id.}, Article XI. The Indians acting in this capacity were to be paid “for their good services.” \textit{See id.}}

The Governor, in his capacity as representative and agent of the national government, i.e., 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 were to deliver a “rent of twenty beaver skins” each year and to apply for settlement of any disputes with the colonists. The references in the Treaty to “his Majesties Governor” 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 Powhatan tribes that signed it, 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. Pamunkey Neck, the area in which the Mattaponi Reservation is located, was opened to settlement in 1699, which led to settlers claiming land and eventually receiving patents to much of the land that was guaranteed to the Pamunkeys under the 1677 Treaty. When Powhatans exercised their off-reservation treaty hunting and fishing rights, they periodically had to seek assistance from the governor because of colonists’ resistance to these activities.

Along with threats to land and resource rights guaranteed by treaty, the Powhatans also endured assaults on their civil rights. Laws were passed to limit Indians’ right to bear arms, to sue and testify in court, and to marry whomever they chose. 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 had managed to remain (albeit on reduced land holdings) in their Pamunkey Neck homeland.

C. Perseverance, Adaptation, and Survival

The Powhatan descendants persist within the confines of their ancient territory.

---

163 See id., Article XVI. Leaders of the Mattaponi and Pamunkey Tribes have continued to fulfill this obligation by presenting the treaty tribute to the governor each year. In recent years game has been presented as a substitute for the increasingly rare beaver pelts.

164 See id., Article XVIII.

165 See, e.g., id., Article XVIII.

166 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 113. Among the colonists receiving patents to land in Pamunkey Neck was Robert Napier (an ancestor of the author), who received a grant in 1704 of land that was “part of the land laid out according to the Articles of Peace for the Pamunkey Indians.”

167 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 113.

168 See id. at 133-34.

169 The treaties of 1646 and 1677 had provided that the tributary Indians were to 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. 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. See id. at 142. As a result, Indian servants could not bring suit if their employer 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 had overstayed their lease term. See id.

170 See id. at 133. A 1691 statute forbade whites from marrying “Negroes, Mulattoes, and Indians,” but did not define “Indians.” See id. at 142. 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. See id.

171 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 110.
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.\textsuperscript{173}

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 onto 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 to their off-reservation hunting and gathering rights preserved them from complete impoverishment and from the loss of their ability to maintain their separate existence as tribes. While Powhatan women continued to farm, men found hunting and fishing more difficult. As English settlements closed in and the settlers resisted the exercise of the tribes’ off-reservation hunting rights,\textsuperscript{174} tribal members had to seek state reaffirmation of these rights on a number of occasions.\textsuperscript{175} Powhatan men also provided support for their families through being hired by the English for tasks such as killing wolves for bounty money; working as guides and trackers; and building fishing nets and canoes.\textsuperscript{176} Despite many challenges, key elements of the Powhatans’ culture survived.\textsuperscript{177}

The eighteenth century also 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 80 acres of Pamunkey land.\textsuperscript{178} The trustees eventually shifted from playing a role as a legal go-between acting on the Tribe’s behalf with respect to land to acting in a more extensive advisory manner.\textsuperscript{179} New trustees were approved by a majority vote of adult male tribal members, a provision that reflected white Virginia society’s according of lesser status to women.\textsuperscript{180}

Limited intermarriage with white Virginians occurred, resulting in the introduction of

\textsuperscript{173} Frank G. Speck, \textit{Chapters on the Ethnology of the Powhatan Tribes of Virginia} 236, in \textit{Indian Notes and Monographs} (F.W. Hodge, ed.) (1928) [hereinafter Speck, \textit{Powhatan Tribes}].
\textsuperscript{174} See id. at 130.
\textsuperscript{175} See id. at 129. The 1677 Treaty set out the right to hunt and gather on unpatented lands and on unfenced patented lands. The Powhatans also had to deal with crop damage caused by free-roaming English swine. See id.
\textsuperscript{176} See id. at 130-31.
\textsuperscript{177} Thus, men were employed in hunting and fishing, women were occupied with farming and gathering, and both sexes produced goods for trade with the colonists. See id. at 145, 175. Housing styles continued much the same, although some Virginia tribes chose to gather in fortified villages for greater safety. See id. at 146. Native languages were still used in every day life, although the need for official interpreters diminished over the course of the century as increasing numbers of Indians spoke English. See id. at 154. Women’s status appears to have remained high. See id. at 150. The role of priests and important religious practices remained largely intact. See id. at 151-54. By the end of the eighteenth century, however, the tribes, beginning with the Pamunkeys, converted to Christianity. See id. at 175.
\textsuperscript{178} See id. at 164. The original trustees were appointed to oversee the sale of the land (which the Pamunkey Tribe was believed to not be using), receive the proceeds of the sale, and use the proceeds to pay Pamunkey debts. See id. The trustees also acted with respect to the lease of Pamunkey land, such as by pursuing law suits against defaulting white lessees during the time that Indians were prohibited from testifying in court against them. See id. at 165. The trustees were subsequently empowered to settle boundary disputes among reservation residents. See id.
\textsuperscript{179} See 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. See id.
\textsuperscript{180} See id. at 168.
surnames that have remained within the tribal membership until the present.\textsuperscript{181} Some Indians attended the Indian school at the College of William and Mary (founded on Pamunkey lands), at which attendance was boosted by a gubernatorial plan that remitted the tribute due from tribes who sent male children to the school.\textsuperscript{182}

When the eighteenth century ended, the Mattaponi, as well as the Pamunkey, had managed to hold on to reservation lands that preserved for them the chance to maintain identities separate from their white neighbors. The guarantees that these tribes had received in the 1677 Treaty were observed by the new Commonwealth of Virginia as part of the developing United States during and after the American Revolution. The principle of protection for the reservation land, for example, was reflected in a 1792 law that stated that the lands of tributary Indians (i.e., the tribes that paid tribute each year in fulfillment of obligations under the 1677 Treaty) were inalienable, as under the treaties entered into with the British Crown, and that they and their property would still be protected.\textsuperscript{183} This provision echoed the federal law protection of the Indian Trade and Intercourse Act of 1790, which prohibited the sale of any lands by Indians or tribes (without federal approval).\textsuperscript{184}

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 legislation\textsuperscript{185} provided for the termination of the Gingaskin (Accomac) Tribe,\textsuperscript{186} the Mattaponi and Pamunkey Tribes were not subjected to this method of formal absorption into the non-Indian population. Nonetheless, the Tribes had to contend with the desire of white Virginians for the remaining Powhatan tribes’ members to merge with other non-white people, referred to collectively as “persons of color,” in Virginia’s bottom social strata.\textsuperscript{187} The Mattaponi and Pamunkey Tribes, along with other Powhatan tribes, were determined to thwart this ambition. As anthropologist Helen Rountree has explained, “while Virginia whites emphatically wanted the Powhatans to assimilate with ‘other’ persons of color,” the Powhatans became even more anxious to separate themselves from ‘any’ persons of color,” in the hope of escaping “the whites’ increasing intolerance toward all people with real or presumed African ancestry.”\textsuperscript{188}

Tribal members continued to live on the Mattaponi and Pamunkey Reservations, where they farmed, hunted, and fished and governed themselves through a tribal council.\textsuperscript{189} They were

\textsuperscript{181}See id. at 170. For example, a number of the surnames that were established in the Pamunkey Tribe in the second half of the eighteenth century are still present on the Pamunkey Reservation today. See id. at 172.

\textsuperscript{182}See id. at 168-70.

\textsuperscript{183}See id. at 165. Indian lands had already been declared inalienable, except through the General Assembly, in June 1776. See id. A 1779 statute provided that only the Assembly had the right to purchase Indian land. See id.

\textsuperscript{184}Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137. See also infra notes 615-616 and accompanying text.

\textsuperscript{185}See id. at 183 (citing Va. Acts of Assembly 1812-1813, pp. 117-18).

\textsuperscript{186}See id. at 124 (noting that the Accomacs became known as the Gingaskins in 1641).

\textsuperscript{187}See id. at 186.

\textsuperscript{188}Id. at 187.

\textsuperscript{189}See id. at 188-89 (discussing the way of life on the Pamunkey and Mattaponi Reservations and the tribal council’s role). The Pamunkeys continued to govern their reservation through a tribal council. See id. at 188. Professor Rountree sees the Mattaponi Reservation and the Pamunkey Reservation 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 on the basis of official records is made difficult by the destruction of records in a courthouse fire in
identified by themselves and by others as Indians and looked to 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.\textsuperscript{190}

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 “threatening to a white power structure whose economy was based on slave labor.”\textsuperscript{191} Fears of loss of their income and their privileged status prompted white Virginians to seek to “heighten the barrier between themselves and all non-whites.”\textsuperscript{192} 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.\textsuperscript{193} In the 1830’s, the Virginia Assembly enacted a number of restrictive provisions targeting free African Americans and Indians.\textsuperscript{194} 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 to be prosecuted as though the organizers were slaves; and free non-whites were denied jury trials and were instead, like slaves, to be tried by justices of oyer and terminer.\textsuperscript{195} Although the reservations served as legal refuges, outside reservation boundaries the Mattaponis 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.’”\textsuperscript{196}

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 by the 1677 Treaty and by other legal measures.\textsuperscript{197} In the 1840’s the General Assembly rejected a petition seeking the sale of the Pamunkey and Mattaponi Reservations, after receiving two counterpetitions from the tribes and a letter opposing the sale from the Pamunkey trustees.\textsuperscript{198} While white Virginians viewed non-whites like the Mattaponis and

\textsuperscript{190}See id. at 189.
\textsuperscript{191} Id. at 191.
\textsuperscript{192}Id. at 191.
\textsuperscript{193}See id. at 192 (citing Code of Va. 1819, 1:438-439; Matthews Digest 1856-1857, 1:207-208). 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. See id.
\textsuperscript{194}Id. at 192.
\textsuperscript{195}See id. at 192 (citing Va. Acts of Assembly 1831-1832, pp. 20-22).
\textsuperscript{196}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.’” See id. at 193 (citing Va. Acts of Assembly 1832-1833, p. 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 186 & nn. 43-44. A 1785 statute provided that “every person whose grandparents 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.” Hening, Statutes at Large, vol. 12, 184.
\textsuperscript{197}For example, in the 1830’s, after a Nottoway was convicted of a crime in a court of oyer and terminer, he was granted a pardon by the governor. As an Indian with treaty status, he had the right to receive justice as though he were white, i.e., in a jury trial. See id. at 193.
\textsuperscript{198}See id. at 194-95. The governor also took action during this period to counter white attacks on Pamunkey and Mattaponi rights. He intervened to protect tribal members’ right to bear arms when their white neighbors seized their weapons in 1857. See id. at 197-98.
Pamunkeys as a threat to a slave-owning community whom they would prefer be removed, in their entirety, from Virginia, the Mattaponi and Pamunkey were going nowhere. 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.

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.” When white Virginians established schools to separate their children from non-white children, they sought to close these schools to Pamunkey and Mattaponi children. This conflation of their identity with that of black Virginians in the educational setting was unacceptable to tribal members, who therefore needed to provide an alternative to enrollment in the black schools. 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.

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

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

Despite the pressures brought to bear upon them by 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. Their continued existence not just as social groupings, but also as political entities, was documented by visitors to their reservations, who publicized what was of course 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 had persevered. Their cultures had adapted, as all cultures do, to changing times, but retained key elements that had sustained the tribes since before the first colonists arrived at Jamestown.

199 See id. at 194.  
200 See id. at 198.  
201 See id. at 200, 211.  
202 See id. at 200.  
203 See id. at 200-01  
204 See id.  
205 See id. at 211.  
206 See id.
a. Frank Speck’s Documentation of Powhatan Persistence

Anthropologists who visited 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 had maintained an identity separate from both white and black Virginians. Their published accounts of their findings noted the persistence of various aspects of Powhatan culture, including housing patterns, occupations, and land use and land holding patterns. These visitors also commented on the political and legal aspects of reservation life. They noted, for example, that a chief and four councilmen were elected every four years and dealt with civil offenses on the Pamunkey Reservation. The Pamunkey Tribe paid the annual treaty tribute to the governor, rather than paying taxes. The Mattaponis, for their part, had their own chief on their reservation.

These visitors recorded a number of Pamunkey laws that were aimed at preserving the Indian status of the Reservation’s population. Pamunkey law, presumably based on an awareness of the adverse consequences that flowed from being identified as black in Virginia, prohibited marriage with anyone who was not white or Indian. Outsiders were only allowed to live on the Reservation for limited periods of time. Judging by the appearance of tribal members in the eyes of visiting anthropologists, the efforts to maintain a separate Indian community had succeeded. Anthropologist James Mooney, for example, wrote that he was “surprised to find them so Indian, the Indian blood being probably near 3/4.”

Extensive observations, from an outsider’s perspective, of Mattaponi and Pamunkey life in the first half of the twentieth century were provided by anthropologist Frank Speck, who established a long-term relationship with the Mattaponi and Pamunkey Tribes that began with initial visits to the Tribes in 1919. Describing his visits, Speck noted that “each season creates a deeper feeling of

207 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 ROUTRE, POCAHONTAS’S PEOPLE, supra note 1, at 202 (noting Mooney’s affiliation), 203 (noting the visits of the three men) & nn. 101 & 102 (noting Gatschet and Pollard’s professions).

208 The Reservation’s housing patterns resembled those of the early seventeenth century, with the houses scattered about the fields rather than being clustered together. See ROUTRE, POCAHONTAS’S PEOPLE, supra note 1, at 203.

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

210 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 divided up. See id. Both the Pamunkeys and the Mattaponis maintained grassy areas that were used as common pastures. See id. at 205 (Pamunkeys) & 206 (Mattaponis).

211 See id. at 204. The Pamunkeys used dried corn kernels and beans for ballotting. See id.

212 See id.

213 See id. at 205.

214 See id. at 204. See also Speck, Powhatan Tribes, supra note 173, at 309, quoting the 1887 Pamunkey laws as transcribed in J.G. Pollard, The Pamunkey Indians of Virginia 15-17, in Bulletin 17, Bur. Amer. Ethnol. (1894) (“No member of the Pamunkey Indian Tribe shall intermarry with any Nation except White or Indian under penalty of forfeiting their rights in Town.”).

215 See ROUTRE, POCAHONTAS’S PEOPLE, supra note 1, at 204-05.

216 See id. at 205 (quoting Correspondence, letter of Oct. 22, 1899) (emphasis in the original). Mooney speculated that the tribal members’ other ancestry quantum was “white, with a strain of negro.” Id.

217 His written observations were published as “Chapters on the Ethnology of the Powhatan Tribes of Virginia” in 1928 in the “Indian Notes and Monographs” series of the Heye Foundation’s Museum of the American Indian. See Speck,
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.”

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” and tribal members’ continued participation in some of the same crafts and other activities that had impressed early English observers. 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 as well.

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.” He observed the similarities between contemporary hunting, trapping, and fishing customs and practices and those recorded by early English observers and commented on the forethought shown by the Pamunkey Tribe in the selection of its Reservation land. Traditional snares and heavily constructed log-and-stake dead-fall traps were still used for trapping in preference to modern steel traps. In the game-rich tribal lands, hunting and trapping territories continued to be recognized, with unmarked but

---

218 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 consecutive 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.

219 See id. at 225, 237.

220 For example, he commented on the making of clay pottery and pipes and the weaving of textiles with turkey feathers. Id. at 394-418 (pottery), 418-32 (clay pipes), 433-43 (textiles). John Smith’s 1612 account referred to seeing “mantels made of Turkey patterns, so prettily wrought and woven with tweeds that nothing could be discerned but the feathers.” See id. at 441.

221 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 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 (Upper Mattaponi), 267-78 (Chickahominy), 278-80 (Nansamond), 280-82 (Rappahannock), & 282-84 (Potomac).

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

223 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) & 339-40 (quoting Smith’s observations on a tribal deer drive, which still takes place annually to secure deer to present as treaty tribute, from L.G. Tyler, NARRATIVES OF EARLY VIRGINIA 104 (1907)).

224 Id. at 314. Speck commented that “[w]hen the ancestors of the Pamunkey, about 1658, chose to reserve this particular tract along the river for 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 more or less permanent and, to the agencies of the day, indestructible.” Id.

225 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.” See id. at 343.

226 Speck described the topography of the area and 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
geographically identifiable boundaries that tribal records documented as dating as far back as the early part of the nineteenth century. Fishermen still used some old fishing equipment, methods, and skills, such as net-making techniques. These age-old activities -- hunting, trapping, and fishing, along with the growing of corn -- still sustained the tribes economically, as well as being essential for the Mattaponi and Pamunkey Tribes' as yet unbroken fulfillment of their tribute obligations under the 1677 Treaty. The rivers in particular continued to play a crucial role, providing the tribes with the food that they needed to survive for almost the entire year, as a Mattaponi saying made clear: “The river is the Indian’s smoke-house; it is open all the time except for a short period in winter.” Shad fishing provided one of the tribes’ “principal harvests,” and consequently at the height of the shad season, fishermen camped on the river banks and manned drift seines around the clock.

Speck documented additional evidence of the preservation of Powhatan lifeways, including tribal members’ use of bones, fossils, and other natural materials as charms; the manufacture of pottery and clay pipes; and household use of natural materials like dried gourds. He was particularly impressed by the survival of a painstaking technique of weaving feathers into textiles.

livelihood.” Id. at 330.

227 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”), 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 hunting grounds were disposed of by lease each year to applicants selected by the chief and tribal council. See id. at 317. Leaseholders had the exclusive right to hunt and trap (using the stationery dead-fall traps) within their assigned tract. See id. at 314 & 317. See id. at 367. Speck also 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. See id. at 372. One used a stone scraper from an old house site, thus utilizing a tangible link between past and present tribal members. See id.

229 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), 330 (noting that “the Pamunkeys 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 in the area. Id. at 330-31. Corn was also being planted. See id. at 382.

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

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

232 See id. at 361.

233 See id. at 362.

234 See, e.g., id. at 345 fig. 55 (“[d]ried fungus growth kept in the cabin by the Mattaponi as a charm”) & 346 fig. 56 (“Pamunkey dog tooth charm worn by teething children,” “Muskat scapulae used by the 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”).

235 See id. at 372 (description of stone scraper for scaling fish), 400 fig. 103 (stones used for pounding clay and shells to make pottery), & 406 fig. 106 (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.” See id. at 349.

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

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

238 Speck observed that 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, as had their ancestors. See id. at 385, 387-90.

239 See id. at 433. He wrote that “[a]n art so ancient and so elaborate can hardly be expected to have persisted from
In a postscript to his account of his visits, Speck noted that despite the influences to which each tribe had been subjected over the previous centuries, “something more than moral and social tradition survives to continue the group as a unit under its own name.”

The Powhatan tribes had “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. . . .” Speck saw the tribes as “at a climax and turning point in their history,” and he encouraged them to organize themselves into the kind of more formal organizations with which outsiders would be familiar – advice which was taken by several of the non-reservation tribes.

The Mattaponi and Pamunkey Tribes at times still did, however, have to remind state and local government officials of the special political status of their reservations and of themselves as tribal members. For example, tribal members paid no taxes to the state 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. During World War I, the attorney general ruled that Pamunkeys and Mattaponis were not draftable; tribal members nonetheless continued to serve in the armed forces on a volunteer basis.

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 tribes’ continued existence and treaty rights were acknowledged by Virginia government officials, a new threat arose in the person of Walter Ashby Plecker, the first registrar of Virginia’s Bureau of Vital Statistics. 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 trying to force Indians and all other nonwhites to be categorized together as “colored.” 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. Plecker’s efforts amounted to an attempt at what

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.”

See id. at 451.

See id. at 452-53.

See id. at 453.

The Rappahannock organized formally as a tribe in 1921 and the Upper Mattaponi and a subdivision of the Chickahominy Tribe followed suit in 1923 and 1925, respectively. See id. at 216-18. The Chickahominy Tribe had already organized, in 1908. See id. at 286.

See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 213. In 1917, the Mattaponi Tribe received a ruling from the state attorney general confirming that the county could not tax them for personal property held on the reservation. 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 exempting them from hunting and fishing license requirements. See id. at 214-15.

See id. at 213. Members of the non-reservation tribes, on the other hand, were deemed draftable. See id.

See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 211. 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. See id. at 211 n.167. At the very least, tribes could be relegated to colored
some commentators have called “bureaucratic genocide.”

The Virginia General Assembly gave a considerable boost to Plecker’s campaign for “racial purity” in 1924 by enacting the Racial Integrity Act (“RIA”). Under the RIA, in order to be considered “white persons,” individuals could have “no trace whatever of any blood other than Caucasian.” Persons who had “one-sixteenth or less of the blood of the American Indian” and had “no other non-Caucasian blood” were deemed to be white persons. 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 nonwhite ancestry. Amid the quest for “racial purity,” this one instance of “race mixing” was a source of pride for these Virginians, but they wanted to be sure 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, declared all marriages between white and colored persons void, 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 Indian.” 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.

The RIA’s racial definitions were certainly not the first statutory definitions pertaining to Indians. An 1866 statute, for example, provided that “Every 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.” In 1910, the implicit statutory definition of white person was tightened up, 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.” In 1930, the statutory definitions of non-whites were brought into line with the RIA. Any person “in whom there

facilities if they did not put up a fight, as did the Pamunkeys, after being excluded from white railroad cars. See id. at 212. A railroad official ruled in 1900 that Pamunkeys were not colored and could ride in the white cars. See id. See, e.g., Warren Fiske, The Black-and-White World of Walter Ashby Plecker: How an Obscure Bureaucrat Tried to Eradicate Virginia’s “Third Race,” THE VIRGINIAN-PILOT, Aug. 18, 2004, at A1.

1924 Va. Acts, pp. 534-35. The anti-miscegenation provisions of the statute were struck down in Loving v. Virginia, 388 U.S. 1 (1967). The passage of the Racial Integrity Act was followed in 1926 by the passage of the Public Assemblies Act. This Act required “the separation of white and colored person at public halls, theaters, opera houses, facilities if they did not put up a fight, as did the Pamunkeys, after being excluded from white railroad cars. See id. at 212. A railroad official ruled in 1900 that Pamunkeys were not colored and could ride in the white cars. See id. See, e.g., Warren Fiske, The Black-and-White World of Walter Ashby Plecker: How an Obscure Bureaucrat Tried to Eradicate Virginia’s “Third Race,” THE VIRGINIAN-PILOT, Aug. 18, 2004, at A1.


Va. CODE ANN. 20-54 (1960) (quoted in Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967)).

Id. The original bill had indicated a lower allowable Indian blood quantum for white person status -- one sixty-fourth. See Smith, supra note 248, at 78.


Smith, supra note 248, 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. See id. at 80.

Va. CODE ANN. 20-57 (1960) (quoted in Loving v. Virginia, 388 U.S. 1, 4 n.3 (1967)).

Va. CODE ANN. 20-54 (1960) (quoted in Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967)). The RIA also prohibited lying about one’s race on a registration or birth certificate. See Smith, supra note248, at 78.

See Rountree, JAMESTOWN, supra note 101, at 212. See also Walter Wadlington, The Loving Case; Virginia’s Anti-Miscegenation Statute in Historical Perspective, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).


is ascertainment any Negro blood” was to be designated a “colored person,” in keeping with the so-called “one-drop rule.”

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.” An exception to the Indian definition, however, allowed tribal members with at least one-fourth Indian blood who were residing on state reservations to be classified as Indians even if they had some African ancestry, as long as their African ancestry was under one-sixteenth.

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

Plecker looked to 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 had not been kept continuously, had not always been carefully kept, and showed inconsistent use of terms and classifications of particular individuals. Documentation of Indian ancestry in such records was made particularly challenging by the fact that there had been no consistent definition of “Indian” throughout the nineteenth century and by the loss, by fire or otherwise, of records in counties with large Indian populations. Plecker accepted oral testimony as to racial status only from white individuals, whom he questioned as to their beliefs about the presence of Indians in their counties.

---

258 See id. at 221 (citing 1929-1930 Va. Acts, p. 96-97). Prior to the 1930 Act, there was a loophole in the 1924 RIA. The RIA had 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. See Smith, supra note 248, at 100. At the time that Loving struck down the anti-miscegenation provisions of the Racial Integrity Act, the Virginia Code provided that “Every person in whom there is ascertainable any Negro blood shall be deemed negro 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.” VA. CODE ANN. 1-14 (1960) (quoted in Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967)).

259 See Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 221 (citing 1929-1930 Va. Acts, p. 96-97). “members 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”.

260 Id. at 84 (quoting Plecker as quoted in J. DAVID SMITH, THE EUGENIC ASSAULT ON AMERICA: SCENES IN RED, WHITE, AND BLACK 74 (1993)).

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

262 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.” See 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. See Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 190.

263 See Smith, supra note 248, at 83 n.34. See also Rountree, POCAHONTAS’S PEOPLE, supra note 1, at 189 (listing the names of the counties and the tribes that were affected by destruction of records).

264 See Smith, supra note 248, at 86.
Members of the Mattaponi and Pamunkey Tribes were more difficult for Plecker to define out of existence. Because (in keeping with their treaty and reservation status) they had not been taxed, the usual records had not always been kept for them, so Plecker lacked evidence “proving” that they were of African descent.\textsuperscript{268} Despite instructions from Plecker to record those claiming Indian status as “colored” and to either 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.\textsuperscript{269}

Where birth certificates were concerned, however, Plecker had greater authority, and consequently birth certificates issued for Indian babies after 1924 listed the babies as “colored.”\textsuperscript{270} Plecker waged a public relations campaign against the Virginia Indians via his pamphlet \textit{Eugenics in Relation to the New Family}, in which he claimed that all Virginia Indians had some African ancestry and therefore none were “true” Indians.\textsuperscript{271} 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.”\textsuperscript{272} Individuals with these surnames were not to be allowed to register as white, marry whites, or attend white schools or other white facilities.\textsuperscript{273} 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.”\textsuperscript{274} He included copies of documents that allegedly proved the African ancestry of Virginia Indians, and other Virginians, in his so-called “Racial Integrity File.”\textsuperscript{275} Seeking to suppress evidence that put the lie to his beliefs, Plecker tried to have Frank Speck’s books documenting the survival of the Virginia tribes banned from the state’s public libraries.\textsuperscript{276}

Professor Rountree has observed that in believing that Indians were a threat to his racial integrity principle because they wished to “pass” as white, Plecker exhibited a fundamental misunderstanding of Indian concerns and motivations. Tribal members sought to preserve recognition of their Indian status and accordingly to have access to the superior facilities that were available to whites, rather than to \textit{be} white. They expected the children of Indians who married whites to be \textit{Indians}, who would remain within the Indian communities that they strove to preserve.\textsuperscript{277}

\textsuperscript{268} See id.
\textsuperscript{269} See \textbf{Rountree, Pocahontas’s People, supra} note 1, at 222-23. Members of the Upper Mattaponi Tribe were also recorded as Indian. \textit{See id.} at 223. In Charles City and New Kent Counties, where the clerks followed Plecker’s directive, new records labeled Indians as “colored.” \textit{See id.}
\textsuperscript{270} See id. at 223. Between 1912 and 1924, birth certificates issued for Indian babies said “Indian.” \textit{See id.}
\textsuperscript{271} See id. The pamphlet accompanied each birth certificate. \textit{See id.}
\textsuperscript{273} See \textit{id.} Plecker noted that all birth certificates of members of these families that showed them as “white” or “Indian” were being rejected and returned to the midwife or physician. \textit{See id.}
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} See \textbf{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. \textit{See id.}
\textsuperscript{276} See \textit{id.} at 224. Speck returned to Virginia during Plecker’s time in office, and 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. \textit{See id.} at 229-30.
\textsuperscript{277} See \textit{id.} at 222.
Plecker exceeded the authority granted to him by the RIA by trying to change the birth certificates of individuals who had been classified as Indian before the RIA’s passage. He initially added his own racial classifications to pre-1924 Indian birth certificates and later attached “warning” statements to the certificates. He pressured school superintendents to remove Indian children from white schools and attempted (usually without success) to have Indian patients moved from “white” to “colored” hospitals and sanatoriums. 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.

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 tried to convinced federal officials to comply with his conviction that no Virginians should be recorded as Indians. Although he eventually grudgingly conceded that Mattaponi and Pamunkey Reservation residents might have to be enumerated as Indians, he insisted that all other Virginians claiming to be Indians should not be recorded as such. The 1930 census listed a number of Mattaponi and Pamunkey tribal members who are identified as Indians, including Mattaponi Chief George Custalow, whose office is indicated in his census entry. While Plecker’s efforts were foiled in connection with the 1930 census, he had greater success with the 1940 census, and managed to have some Virginia Indian families not enumerated as such. 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. Most of the members of Virginia tribes who served in World War II were inducted with and served with whites. Pamunkey and Mattaponi men, 24 of whom fought in World War II, were

---

278 See id. at 232. Initially Plecker wrote his own racial classification on the backs of the pre-1924 Indian birth certificates in the Bureau’s files and then issued copies of both the front and back 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.

279 See, e.g., id. at 224.

280 See id. at 225.

281 See Smith, supra note 248, at 86.

282 See ROUNTREE, POCAHONTAS’S PEOPLE, supra note 1, at 226. Census Bureau officials decided that Virginia residents’ race would be recorded by enumerators on the basis of the enumerators’ observation of and conversations with those being enumerated, rather than on the basis of (mis)information provided by Plecker. See id. at 227. The Bureau put an asterisk next to the name of some Indians whom Plecker claimed were not in fact Indians, with a footnote indicating that their Indian status had been questioned. See id. at 228.


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

285 See id. 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. The Mattaponi and Pamunkey had become U.S. citizens under the 1924 Indian Citizenship Act and therefore were subject to being drafted 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. See id.

286 See id. at 233 (noting that Western and Eastern Chickahominy inductees were initially classified as “colored” but were eventually reclassified and served with whites; Rappahannocks, however, 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 234.
inducted on a special “Indian day.” Among those who registered was George Farris Custalow, Jr., whose draft registration card indicates that he was an Indian who was born on, and resided on, the Mattaponi Indian Reservation.

Plecker retired in 1946 at age 85, but the RIA was not repealed until 1975. Since the Act’s repeal, the state government has tried to undo some of the results of Plecker’s attempt to classify Virginia Indians out of existence. In 1954, the statutory Indian definition was amended to, in effect, partially recognize the Indian identity of members of non-reservation tribes. 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.” 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. In 1957, the state attorney general ruled that members of the Mattaponi and Pamunkey Tribes were exempt from buying county license tags for their cars. Further positive developments included the improvement and expansion of tribal schools, which Mattaponi, Pamunkey, and other Indian students attended until the Virginia public schools became integrated.

In 1983, Virginia officially recognized, by statute, the Chickahominy Tribe, the Chickahominy Tribe-Eastern Division, the Upper Mattaponi Tribal Association, and the United Rappahannock Tribe. A state “Commission on Indians,” later called the Council on Indians, was also established at this time, with Indian and non-Indian members. Virginia recognized the Nansemond Indian Tribal Association in 1985 and the Monacan Nation in 1989, thus expanding the number of tribes recognized by the state to eight. In 1997, the governor simplified procedures for people to correct inaccurate birth records, thus paving the way for Virginia Indians to be designated as such on their birth certificates and other state records.

Virginia law recognizes the Mattaponi Tribe as being entitled to a number of benefits,
including exemption from license requirements for hunting, trapping, and fishing\textsuperscript{300} and from motor vehicle sales and use tax.\textsuperscript{301} Pursuant to the guardian-ward relationship that the state observes with the Tribe, title to the Tribe’s reservation is held in trust by the state for the Tribe’s use and occupancy.\textsuperscript{302} None of the Virginia tribes has yet been formally recognized by the federal government through the federal acknowledgment process. If a tribe were to proceed with a petition seeking federal acknowledgment, Plecker’s work could have a negative impact on the tribe’s chances of receiving recognition. The applicable federal regulations require, for example, submission of evidence of the petitioner’s continuity as a distinct community and of tribal members’ descent from a historical tribe.\textsuperscript{303} Plecker, through his efforts to bureaucratically purge Indians from Virginia records and thus mask their tribal ancestry and identity, has made the task of compiling the requisite proof potentially more challenging, especially for the non-reservation tribes.

Legislation has been introduced in Congress several times to recognize a number of the Virginia tribes, most recently in 2009.\textsuperscript{304} The 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.\textsuperscript{305} Mattaponi Chief Carl Custalow commented in 2007, however, that the Tribe was not sure that inclusion in a recognition bill was the “best route”

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{300} See VA. CODE sec. 29.1-301(1). See also id. sec. 29.1-521(B) (exemption from permit requirement and restrictions on hunting, trapping, possessing, and selling wild birds and animals).
\item \textsuperscript{301} See VA. CODE sec. 58.1-2403(4).
\item \textsuperscript{303} 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”; a predominant proportion of its members comprise “a distinct community and has existed as a community from historical times until the present”; it “has maintained political influence or authority over its members as an autonomous entity from historical times until the present”; and its “membership consists of individuals who descend from a historical Indian tribe.” See 25 C.F.R. sec. 83.7(a)-(c), (e).
\item \textsuperscript{304} H.R. 1385 (The Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2009), 111\textsuperscript{th} Cong., 1\textsuperscript{st} Sess., introduced on March 9, 2009, & S. 1178 (The Indian Tribes of Virginia Federal Recognition Act of 2009), 111\textsuperscript{th} Cong., 1\textsuperscript{st} Sess., introduced on June 3, 2009. H.R. 1385 would extend federal recognition to the six non-reservation Virginia tribes that are 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 Nansemond Indian Tribe. H.R. 1385, 111\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (2009). 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. See H.R. 1385, 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 by the Secretary of the Interior for a tribe and be considered part of its reservation. See H.R. 1385 secs. 106(a), 206(a), 306(a), 406(a), 506(a), & 606(a). Tribal hunting, fishing, trapping, gathering, and water rights would not, the bill provides, be affected by the enactment of the statute. See H.R. 1385 secs. 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 “pursuant to any Federal law, including the Indian Gaming Regulatory Act.” See H.R. 1385, secs. 106(d), 206(d), 306(d), 406(d), 506(d), & 606(d). Finally, the bill provides that Virginia will have “jurisdiction over any criminal offense committed, and any civil actions arising, 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. See H.R. 1385 secs. 108, 208, 308, 408, 508, & 608. H.R. 1385 was reported out of the Committee on Natural Resources in May 2009. See H.R. 111-104, 111\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (May 12, 2009).
\item \textsuperscript{305} H.R. 5073, 106\textsuperscript{th} Cong., 2\textsuperscript{nd} Session. A bill to extend federal recognition to the Chickahominy Tribe, the Chickahominy Tribe – Eastern Division, the Mattaponi Tribe, the Upper Mattaponi Tribe, the Pamunkey Tribe, the Rappahannock Tribe, Inc., the Monacan Tribe, and the Nansemond Tribe (introduced July 7, 2000).
\end{itemize}
\end{footnotesize}
for the Tribe, noting that it already had a reservation and a landbase. Press accounts have suggested that the Mattaponi and Pamunkey Tribes are not interested in being included in congressional recognition bills because they believe that they would be able to present sufficient evidence to meet the criteria of the current federal acknowledgment regulations. A bill extending federal recognition to the six Virginia state-recognized non-reservation tribes was passed by the House in June 2009; the companion Senate bill is pending. Although the federal government has not yet officially acknowledged the Mattaponi Tribe, the Tribe has participated in some federal Indian programs and been treated as if it were a federally recognized tribe in a number of contexts.

As the discussion above has shown, 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 and demands on its resources, and by violence, enslavement, and efforts to deny the tribe’s identity and political status, the Tribe has survived on its reservation. Its members have continued to sustain themselves on the natural resources of their homeland, exercising rights guaranteed by the 1677 Treaty at Middle Plantation. Beginning in the 1990’s, however, the continuation of the Tribe’s existence was threatened yet again – this time, by the proponents of the King William Reservoir project. This new threat necessitated taking action before state and federal administrative agencies and courts to try to avert treaty rights violations and to protect the Mattaponi homeland from the latest efforts to claim Mattaponi resources for the benefit of non-Indians.

II. SACRED SITES AND SHAD: THE THREATPOSED 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.

309 See infra Part IV A 2.
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 (the “Study Group”) to address projected water shortages and the perceived need to find additional water sources for the region. After considering a number of alternatives for obtaining additional raw water, the Study Group chose an option involving the Mattaponi River, deeming it preferable to sacrifice Mattaponi rights rather than pursue alternative proposals. Like the seventeenth century colonists who stole corn from the Virginia tribes to feed themselves while profligately growing tobacco, 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 per day were to be withdrawn. The project would be located within three miles of the Mattaponi Reservation. A 1700-foot long, 78-foot high dam would be built on Cohoke Mill Creek, a tributary of the Pamunkey River that is located between the Pamunkey and Mattaponi Rivers, in order 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. Completion of the project 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.

In order for the project to move forward, several state and federal agency approvals were required. A water protection permit under the Virginia Water Control Law was required to extract water from the Mattaponi River. A federal permit under Section 404 of the Clean Water Act (the “CWA”), issued by the U.S. Army Corps of Engineers (the “Corps”), was required because of the anticipated effects on wetlands. Under CWA Section 401, granting of a Section 404 permit is

---

312 See id.
313 Some of the alternative proposals were rejected because of problems created by already escalating water demands. For example, two of the alternatives had involved the Pamunkey River, but these were rejected because of concerns over draining additional water from the already taxed river. See id. at 670.
314 See supra note 123 and accompanying text.
316 Section 404 of the CWA required a construction permit from the Corps because the dam would be constructed by a
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”) implement CWA Section 401 under the state’s 1989 Water Protection Permit law. 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 were also required. 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”). 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. 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 “clear and plain intent to abrogate” test developed by the U.S. Supreme Court in litigation over Indian treaties. The SWCB refused to address the treaty issue, although it did receive evidence with respect to tribal traditions and cultural interests, including traditional fishing and gathering activities, religious practices, and archaeological sites. In December 1997, the SWCB issued an SWP permit to Newport News, authorizing the withdrawal of up to 75 million gallons of water per day from the Mattaponi River. As discussed below, the Tribe, along with several environmental groups, challenged the permit in state court.

“discharge of dredged or fill material” into Cohoke Mill Creek.

317 See ACE District Decision, supra note 310, at 4 (citing VA. CODE sec. 62.1-44.15:5). Sec. 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. sec. 1341(a). VA. CODE sec. 62.1-44.15:5(A) in turn provides that “issuance of a Virginia Water Protection Permit shall constitute the certification required under sec. 401” of the CWA. State law also provides that the SWCB shall issue such water permit “for an activity requiring sec. 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 sec. 62.1-44.15:5(B). 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 VA. CODE sec. 62.1-44.15:5, part of the State Water Control Law, VA. CODE sec. 62.1-44.2 through 44.34:28.

318 See Mattaponi IV, 601 S.E. 2d at 671.

319 See id.

320 See id.

321 See id.


323 See infra notes 449-550 and accompanying text. Newport News also filed suit against the SWCB and the DEQ because of its dissatisfaction with certain restrictions that were 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 had proposed, set a higher minimum downstream release from the proposed dam
3. The Virginia Marine Resources Commission Permit

Under the Virginia Wetlands Act, Newport News was required to obtain a permit from the VMRC for construction of the Mattaponi River intake structure and the pipeline and discharge structures. 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. The VIMS expressed concern in particular about the risk to juvenile fish posed by the intake structure location in tidal water. Following two lengthy public meetings, the VMRC voted in 2003 to deny the permit request. The next year, however, the VMRC agreed, after being sued by the City, to hold an unprecedented second hearing, limited (at the City’s insistence) to the issue of the impact of the project on shad. Following the hearing, the VMRC voted to issue the permit, despite the alarms that the VIMS continued to sound about the project and the VIMS recommendation that a monitoring program be completed before any final permit decision was made. The VMRC did, however, impose a seasonal pumping hiatus from March 1 through July 1, to provide at least some protection for early life stages of the American shad.

into Cohoke Creek, and imposed maximum limits on interbasin transfers from the proposed reservoir to the existing Newport News reservoirs. See ACE District Decision, supra note 310, at 4. The Newport News Circuit Court upheld the restrictions. Newport News decided to seek changes to the permit when it was eligible for reissuance rather than appealing the circuit court’s decision. See id. at 5. The SWCB rejected a later request for a five-year extension on the permit, an action which would require the City to re-apply for the permit, the opening the project to public scrutiny. This victory for tribal and environmental advocates was, however, short-lived, as discussed below.

See ACE District Decision, supra note 310, at 5 (citing VA. CODE sec. 28.2-1300). 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. See id. The dam itself did not require a VMRC permit because it was authorized under VA. CODE sec. 28.2-1203. See id.

The VIMS expressed concerned about the risk of early life stages of fish being exposed multiple times to the intake structure because it was to be located in tidal water and about the lack of sufficient information about the effectiveness of establishing a proposed protective pumping hiatus during certain times of the year.

 See Minutes of Meeting of Virginia Marine Resources Commission, May 14, 2003, available at http://www.mrc.virginia.gov/commission_minutes/vmrc_final_minutes_05-14-03.pdf (indicating that motion to deny the permit was approved by a vote of 6 to 2). The May 14, 2003 meeting was a continuation of a meeting that was held on April 22, 2003. See Minutes of Meeting of Virginia Marine Resources Commission, May 14, 2003, available at http://www.mrc.virginia.gov/commission_minutes/vmrc_final_minutes_04-22-03.pdf. See also ACE N.A. Division Decision, supra note 315, at 12 (noting that the denial occurred on May 16, 2003).

Holding a new hearing with a limited agenda was included in an agreement between the City and the VMRC to settle the City’s suit against the VMRC. See Agreement for Supplemental Hearing in Settlement of Litigation, between the City of Newport News, Virginia and the Virginia Marine Resources Commission, available at http://www.mrc.state.va.us/pdf/supp_hearing.pdf (dated Feb. 2004, according to http://www.southernenvironment.org/)


See VMRC Permit, supra note 328, at 2.
4. The Department of Environmental Quality Coastal Resources Management Plan Review

A final required state approval was the DEQ’s concurrence that the reservoir proposal was consistent with the Virginia Coastal Resources Management Program. 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 state's program. The DEQ issued its concurrence in December 2004, thus providing the final state approval needed for the project.

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

Newport News was required, under Section 404 of the Clean Water Act, to obtain a permit from the U.S. Army Corps of Engineers because the reservoir project would involve the discharge of dredged or fill material into U.S. waters, which includes wetlands. The Corps must conduct a review in which it considers the probable impact of the proposed project on the public interest and balances the expected benefits of the project against its reasonably foreseeable detriments. 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 would not comply with the guidelines. The EPA has power to “veto” any permit issued by the Corps.

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. The EIS discusses the environmental consequences of the proposed project and compares it to “all reasonable alternatives.” The EIS for the reservoir project was issued in January 1997.

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

---

331 See N.A. Division Decision, supra note 315, at 4 (citing Sec. 307(c) of the Act, 33 U.S.C. sec. 1456). As noted above, this concurrence was a prerequisite for the issuance of the Section 404 permit. See also ACE District Decision, supra note 310, 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).

332 See Coastal Zone Management Act sec. 307(c)(3)(A), codified at 16 U.S.C. sec. 1456(c)(3)(A). 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 object to it, in effect vetoing the application.

333 See N.A. Division Decision, supra note 315, at 4.

334 See supra note 316 and accompanying text.

335 See 33 C.F.R. sec. 320.4(a)(1).


337 See 33 U.S.C. section 404(c).

338 NEPA, 42 U.S.C. sec. 4332 et seq. See also 33 C.F.R. Part 230, Appendix B (NEPA procedures and documentation).


340 See ACE N.A. Division Decision, supra note 315, 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. See id. at 10-11.
species’ continued existence or to destroy or adversely modify any critical habitat.\textsuperscript{341} In carrying out this responsibility, the Corps consults with and is assisted by the Secretary of the Interior. The U.S. Fish & Wildlife Service is instrumental in this regard, as it provides a “biological opinion” to the Corps and the permit applicant that expresses its view as to the effects of the proposed action on listed species and critical habitat.\textsuperscript{342}

Finally, under the terms of Section 106 of the National Historic Preservation Act, 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 Preservation (“ACHP”) a reasonable opportunity to comment with regard to such undertaking.”\textsuperscript{343} 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 (“MOA”) with the State Historic Preservation Officer (“SHPO”) and the ACHP that specifies appropriate preservation measures for the affected district or site.\textsuperscript{344} Several executive orders were also implicated by the proposal, including a 1994 executive order on environmental justice and a 1996 executive order addressing Indian sacred sites.\textsuperscript{345}

Although the Mattaponi Tribe and other affected tribes have not been 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.\textsuperscript{346} The District kept the Tribes informed while the permit application was being processed and sought their input.\textsuperscript{347} The Mattaponi Tribe noted that the proposed reservoir would encroach within the 3-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;

\textsuperscript{341}See 16 U.S.C. sec. 1536(a)(2).
\textsuperscript{342}See 16 U.S.C. sec. 1536(b)(3)(A), 50 C.F.R. sec. 402.14(e). The opinion must include a “detailed discussion of the effects of the action on listed species or critical habitat.” 50 C.F.R. sec. 402.14(h)(2). 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.” 50 C.F.R. sec. 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 section [Endangered Species Act] section 7 obligations and the Service’s biological opinion.” Id. sec. 402.15(a).
\textsuperscript{343}16 U.S.C. sec. 470f.
\textsuperscript{344}See 36 C.F.R. Part 800. 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 or reduce effects on historic properties.” 36 C.F.R. sec. 800.5(e). Under Section 106 of the Act, the agency must consult with the affected parties, after determining who the appropriate consulting parties are. See 36 C.F.R. sec. 800(2)(c).
\textsuperscript{346}See ACE District Decision, supra note 310, at 220. This decision, which was made on March 7, 1997, had been memorialized in a February 25, 1998 Memorandum for the Record. See 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 for the Department of Defense to consult with tribes that are not federally recognized in certain circumstances, 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, Native American Affairs and the Department of Defense (1996), available at https://www.denix.osd.mil/denix/Public/Outreach/Affairs/nat-am-affairs.html.
\textsuperscript{347}See ACE District Decision, supra note 310, 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.  

After reviewing voluminous information, in July 2001, the Norfolk District Commander, Colonel Allan B. Carroll, published a final record of decision, over 350 pages in length, recommending denial of the permit. The District Commander’s record of decision (the “District ROD”) evidenced a willingness to gain an understanding of the Tribe’s concerns and rights and to take them 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 would be damaged by the reservoir project. 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 National Historic Preservation Act 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. Historic properties are to be identified, effects on them are to be assessed, and the relevant agency is directed to try to avoid, minimize, or mitigate any adverse effects on the properties. Historic properties include archaeological sites, historic structures, and “Traditional Cultural Properties.”

A preliminary cultural resource survey of the area identified over 150 archaeological sites, most of which were Native American sites, and determined that over 70 of them were potentially eligible to be included in the National Register. The Mattaponi and Pamunkey Tribes were particularly concerned about the fate of burials that might be located during any archaeological

348 See id. at 197 (list of concerns expressed in letter) & 285 (encroachment within buffer zone).
349 See ACE District Decision, supra note 310. The Norfolk District Commander had reached a preliminary decision to deny the permit in May 1999. See 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. See id. at 14. The District’s Recommended Record of Decision was published on March 20, 2001, which began 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 local, state, and federal agencies; by non-governmental organizations; and by the general public. See id. at 16.
350 See id. at 189.
351 See 36 C.F.R. sec. 800.16(l)(i).
352 The preliminary cultural resource survey was performed by a firm hired by the Study Group, as part of the review required by NEPA. See ACE District Decision, supra note 310, at 186. A “Phase 1A” cultural resource survey was performed in 1993, followed by a “Phase 1B” intensive, systematic field survey in 1994. See id. at 186-87.
353 See 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. See 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 that were eligible for the National Register. See id. at 190.
work.\textsuperscript{354} The Mattaponi Tribe maintained that it could not accept any plans to disturb ancestors’ “sacred resting sites”\textsuperscript{355} and that the project design would need to be changed to avoid such disturbances.\textsuperscript{356} 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.’”\textsuperscript{357} The District ROD noted that guidelines published by the ACHP indicated that data recovery (archaeologists’ usual approach to sites) might not be the appropriate course of action for sites within the reservoir in this case.\textsuperscript{358} Thus, this issue would require further discussion with the Tribes if the project proceeded.\textsuperscript{359}

2. Negative Impacts on Shad and Subsistence Fishing

As discussed above, the Mattaponi Tribe and other area tribes have 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 subsistence and as an income source.\textsuperscript{360} A substantial portion of the Tribe’s food supply comes from fishing and many reservation residents make their living from the river and the surrounding land.\textsuperscript{361} Moreover, shad fishing in particular is a significant traditional tribal activity and an important part of Mattaponi identity.\textsuperscript{362} The project thus threatened a resource and an activity with great historical and contemporary importance.

The District ROD noted that anadromous fish had declined in all Virginia rivers as a result of over-fishing and the construction of barriers to upstream migration, but that the American shad was of particular concern because of the shad population’s decline over the last 100 years.\textsuperscript{363} The Mattaponi River currently provides spawning habitat for shad and other anadromous fish along its entire length.\textsuperscript{364} State law bans the taking of shad in Virginia rivers because of the depletion of stocks caused by over-fishing and habitat degradation, although the Mattaponi Tribe, as a holder of tribal fishing rights, is exempt from the ban.\textsuperscript{365} The Tribe was also concerned about the impact of the expected increase in recreational boating on the Mattaponi River following completion of the reservoir project. Increased recreational boating could disrupt subsistence fishing and other

\begin{itemize}
\item[354]See id. at 190. No remains had been located during the Phase I investigation, but it was understood that a more extensive Phase II excavations might reveal remains. See id.
\item[355]See id. at 200 (quoting a letter from the Mattaponi Tribe, dated July 25, 1997).
\item[356]See id. at 191.
\item[357]See id. at 193, quoting the TCP Report.
\item[358]See ACE District Decision, supra note 310, at 200. The guidelines indicated that for data recovery to be pursued, “the archaeological site should not be likely to obtain 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.” See id. See also 64 Fed. Reg. 27,085 (1999).
\item[359]See ACE District Decision, supra note 310, at 200.
\item[360]See id. at 172.
\item[361]See id. at 214.
\item[362]See id.
\item[363]See id. at 172.
\item[364]See id. at 185.
\item[365]See id. at 172. This was also true for the Pamunkey Tribe. See id.
\end{itemize}
traditional uses of the river.\textsuperscript{366}

The Tribe also expressed concern over the project’s impact on the Tribe’s considerable efforts to restore the shad population through the tribal fish hatchery, which each year has introduced into the river from 6 to 10 million shad fry.\textsuperscript{367} 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 river’s tidal freshwater areas, a concern that the U.S. Fish and Wildlife Service (“USFWS”) shared.\textsuperscript{368} 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.\textsuperscript{369} Finally, the intake facility was to be located in the prime shad spawning area and might harm eggs and juveniles, remove the food supply, and concentrate predatory fish.\textsuperscript{370}

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.\textsuperscript{371} 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,”\textsuperscript{372} the USFWS did not view the expected replacement of native fish species by games species as the kind of “resources enhancement” that Newport News claimed it was.\textsuperscript{373} Moreover, the non-native fish that would be stocked in the reservoir would probably eventually become established in the connected Mattaponi River, where they would prey upon and compete with native species.\textsuperscript{374} Finally, construction of the reservoir would permanently block the potential passage into the upper reaches of Cohoke Creek of anadromous and catadromous fish, precluding the future restoration of spawning grounds\textsuperscript{375} and thus violating the intent of the

\textsuperscript{366} See id. at 213. Recreational boaters were already negatively impacting the catch by ripping tribal drift nets. See id.
\textsuperscript{367} See id. at 173.
\textsuperscript{368} See id. Recent studies had suggested that adult shad would be sufficiently tolerant of salinity changes caused by the withdrawal of water from the river, but salinity changes caused by water withdrawals could affect where and when the fish spawned. See 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. See id. at 175. The viability of shad fry that the tribal fish hatchery releases could be negatively affected, as they are released before the stage at which they have developed full salinity tolerance. See id.
\textsuperscript{369} See id. at 173.
\textsuperscript{370} 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. See id. at 173, 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. See id. at 174.
\textsuperscript{371} See 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 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.
\textsuperscript{372} See id. at 178.
\textsuperscript{373} See id. at 179. More specifically, the Service did not believe that a resources enhancement would result from the replacement of a native fish species in a lotic habitat with a lentic game species. See id.
\textsuperscript{374} See id. at 178.
\textsuperscript{375} See id. at 179. 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. See id. at 179-80.
The District Commander determined that there was a need for monitoring to identify potential negative impacts of the proposed impoundment, of the intake structure, and of the large scale withdrawal of water, and to formulate plans for ameliorating the negative impacts if a permit were ultimately issued. An interagency task force had done some work on this issue but further work would need to be done if a permit were issued.

3. Threats to Hunting and Gathering Activities

The District ROD acknowledged that the Mattaponi Tribe, along with the Pamunkey Tribe, has lived on the Mattaponi and Pamunkey Rivers and in the Pamunkey Neck area for thousands of years, depending on hunting, trapping, fishing, and gathering for their survival. Many reservation residents still depend on the natural ecosystem of the area, as they make their living from the rivers and surrounding land and rely for their subsistence on gathering of fish, other animals, and plants. A substantial portion of their food comes from game such as deer, wild turkey, ducks, geese, and rabbits, along with fish. Mattaponis still gather about 60 wild plants, found on their reservation or in the surrounding area, for food, as well as for medicinal, ceremonial, and ritual purposes. Among the plants still gathered for food are tuckahoe tubers, gathering rights for which are guaranteed by the Treaty at Middle Plantation.

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. Residential development was to be allowed even in the proposed watershed protection area around the reservoir, while mixed residential and light commercial development was to be allowed in the periphery. This development would alter the area’s rural and agricultural character and decrease the habitat that would support 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 their way of life, and ultimately cause the end of their existence as a tribe.

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. See id. at 179. The Agreement’s provisions were reaffirmed in the Chesapeake 2000 Agreement, among the Chesapeake Bay Commission, the United States, the District of Columbia, and Virginia, Maryland, and Pennsylvania. http://dnrweb.dnr.state.md.us/bay/res_protect/c2k/index.asp. See ACE District Decision, supra note 310, at 181.

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. See 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. See id. at 214. See supra note 157 and accompanying text. See ACE District Decision, supra note 310, at 214-15.

Land purchases would enable more tribal members to return to the reservation. Id. Residental and commercial developers were expected to compete with the Tribe to buy land in the affected area and might thus drive real estate prices high enough as to be out of the reach of the Tribe. The development potential of the “lake”-front property in particular was expected to increase its value. See id.
4. Adverse Effects on Traditional Religious Practices and Way of Life

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

The Mattaponi people believe that the Mattaponi River . . . is a spiritual place that unites tribal members through baptism and other religious ceremonies. . . . Alterations 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. . . . To defile the Mattaponi River would be to dishonor the Tribe’s ancestors and Mother Earth.

Even if tribal access to traditional locations of activities were not reduced, the spiritual and religious significance of the river to the Tribe would be. 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 deprecate or invalidate this value to the Tribes.”

Tribal spiritual concerns were also implicated in the threat posed to a sacred site located in the Cohoke Creek valley. Because of the belief that such sites and their location should not be discussed with outsiders, the Tribe did not disclose the site’s existence until it appeared that there was no other choice. Although Newport News questioned the validity of the site, historical records validated its potential existence. Newport News, apparently following a divide and conquer strategy, also claimed that it was the Pamunkey Tribe that would be more likely to have ties to any such sacred site and that, at any rate, the site should simply be relocated. The Tribe explained that such a relocation was simply not possible. The District Commander found no reason to reject

---

384 The VIMS, for example, had identified the Mattaponi as one of the East Coast’s most pristine rivers and the Nature Conservancy had described the Mattaponi (together with the Pamunkey River and some other area water resources) as “‘the heart of the most pristine freshwater complex on the Atlantic Coast.’” See ACE District Decision, supra note 310, at 184-85.
385 Id. at 185.
386 See id. at 231.
387 See id. at 232.
388 See id. at 195. See also id. at 197 (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’) (quoting a letter submitted by the Institute for Public Representation (“IPR”) as counsel for the Tribe). 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.” See id. at 197-98 (quoting National Register Bulletin Number 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties). Because of the Tribe’s request for confidentiality about 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. See id. at 196.
389 See id. at 196. The District ROD also noted that both the VDHR and the ACHP had 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 had honored tribal requests not to include any information on religious practices in the report. See id.
390 See id. at 198. The Tribe explained that relocating the site “‘is wholly inconsistent with the Tribe’s spiritual practices
the Tribe’s information about the site and concluded that the site would be considered a Traditional Cultural Property under the National Historic Preservation Act.

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”), 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.” Drawing on information gathered from surveys of members of the interested Tribes, the resulting TCP Report identified five TCPs, including the Mattaponi River and its wetlands and the Mattaponi Reservation (including the tribal shad hatchery). The Mattaponi River was identified as being vital to the 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. The Tribe’s connection to the Pamunkey Neck’s land and rivers was recognized as functioning as a bridge across time, linking the Tribe to both its ancestors and its descendants.

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 their plants and animals and the people that depend on them; further isolation of the two reservations because of the barrier to be created by the reservoir; a potential impact on future 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 and traditional beliefs, would destroy the spiritual integrity of the site, and would undercut the cultural identity of the tribe itself.” See id. (quoting a letter from the IPR).

391See ACE District Decision, supra note 310, at 198.
392See 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. See id. at 209.
393See id. at 190.
394See id. at 186 (citing National Register Bulletin Number 38).
395The TCP Report was entitled “‘Powhatan’s Legacy’: Traditional Cultural Property Study for the Proposed Regional Raw Water Study Group’s Water Supply Reservoir, King William County, Virginia.” See id. at 191. The principal investigator for the report was cultural anthropologist Dr. Kathleen Bragdon of the College of William and Mary. See id. at 190. A draft was submitted to the District in August 1998, with copies being sent to the Mattaponi, Pamunkey, and Upper Mattaponi Tribes and made available to other interested parties for their review. See id. at 191. The final report incorporated various parties’ comments on the draft report. See id. at 193.
396See 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.” See id. As noted above, the Mattaponi Tribe also eventually disclosed a sacred site.
397See id. at 193. A similar conclusion was reached for the Pamunkey Tribe, River, and Reservation. See id.
398See id.
recognition.” 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.”

Asked by the Norfolk District Commander to compile a list of possible mitigation measures as to these resources, the Mattaponi Tribe submitted a mitigation proposal but reiterated the Tribe’s 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.”

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. The District and the EPA consequently consulted as to the project’s environmental justice implications.

The District followed the guidance provided by the EPA that decision makers must be careful to avoid overlooking a project’s disproportionate impacts on an isolated minority group that represents 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.” This was the case with the reservoir project’s effects on the Tribes, because many of the applicable effects 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.”

The disproportionate impacts identified included cultural, social, economic, and ecological impacts that were interrelated with the project’s negative impacts on the natural and physical environment. Cultural impacts included the impact to possible burial sites in the area and to the specific sacred site, along with adverse spiritual impacts from the defiling of the Mattaponi River; impacts on archaeological sites; and increased isolation of the Mattaponi and Pamunkey Tribes from

399 Id. Other effects identified included the negative impact on “the morale and status of the Indian community of Virginia as a whole.” See id.
400 See id. at 193 (quoting the TCP Report).
401 See 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 “divide and conquer strategy” used by government officials in dealing with tribes in the past – to seek their agreement to withdraw their objections in exchange for monetary compensation, but to no avail. See id.
402 59 Fed. Reg. 7629 (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.
403 ACE District Decision, supra note 310, 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. See id.
404 See id. at 221, quoting EPA’s Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analysis.
405 See id.
each other as a result of the physical barrier that would be created between their reservations. Socioeconomic impacts included adverse effects on the shad population and tribal fishing activities and adverse impacts on other subsistence activities from destruction of animal and plant habitat. 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.” Also, among the adverse impacts were increased land prices, which could hinder efforts to purchase land to enlarge tribal holdings, which 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 an impact on the natural and physical environment that had potential to significantly and adversely affect the Tribes; that these adverse impacts were interrelated to adverse cultural, social, economic, and ecological impacts; and that the potential adverse impact from the environmental effects of the project “appreciably exceeds or would likely appreciably exceed the effects on the general population.” 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.” The District Commander concluded that the precise magnitude of the adverse effects was unknown and could not be accurately predicted and that “the potential socioeconomic, cultural, and spiritual losses that the Tribes would suffer . . . could not be adequately compensated.”

7. The Norfolk District Commander’s Decision

The District Commander thoroughly reviewed the evidence as to the need for the reservoir, including a study by the Army Corps of Engineers’ Institute of Water Resources that had concluded that Newport News would actually need less than half of the water that the city had predicted would be needed. In light of the finding that the need for an additional water supply was “neither

---

406 See id. at 222-24.
407 See id. at 223-24.
408 See id. at 222.
409 See id. at 224-25.
410 See id. at 226.
411 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.”).
412 See id. at 226. No studies had focused on the cumulative and indirect effects of the changes that would result from the project. The City’s studies had 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.
413 Id. at 221.
414 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.” See 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).” See id.
immediate nor certain,” 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 issuance of the permit would be contrary to the public interest. The District Commander recommended that the application for the permit be denied, 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.”

While rendering a decision that respected the Tribe’s concerns, the District Commander was not totally in agreement with the Tribe’s claims. The Tribe had 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. With the adoption of the Constitution, the Tribe explained, the federal government had assumed the responsibility to enforce the Treaty’s provisions, such as the guarantee of a three-mile buffer zone around the Reservation. 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 would not violate the Treaty.”

The District Commander’s recommendation was supported by the Virginia Council of Indians, the USFWS, and the Environmental Protection Agency (“EPA”). Commenting specifically on the impact of the project on the Tribes, 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.” 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. The Governor’s

---

[415] See id. at 341.
[416] See id. at 338-40.
[417] See id.
[418] See id. at 337.
[419] See id. at 189.
[420] See id.
[421] See id. at 220.
[423] See id. at 252.
[424] See id. at 253, 256.
[425] See id. at 255 (quoting a letter, dated May 1, 2001, commenting on the District’s Recommended Record of Decision). EPA also noted that it was reserving its authority pursuant to Section 404(c) of the Clean Water Act. See id. at 256.
[426] See ACE N.A. Division Decision, supra note 315, at 3. See also 33 CFR sec. 325.8(b)(2) (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
objection to the Norfolk District recommendation proved to be a significant development, because it led to the Division’s rejection of the Norfolk District’s recommendation and the issuance the Section 404 permit.\textsuperscript{427} The Division Engineer’s memorandum discussing the decision revealed the key guiding principle in his analysis: the views of state and local officials as to the project were to be given “great weight” in evaluating the project in terms of the interest of the public.\textsuperscript{428} Once the views of tribal officials were correspondingly discounted, the Tribes faced an uphill battle in trying to make the case to the Division that tribal views mattered. A review of the North Atlantic Division Engineer General Meredith W.B. Temple’s decision memorandum (the “Division Memorandum”) demonstrates how glibly the Division Engineer downplayed the concerns of the Tribes, EPA, and the USFWS and how he failed to respect the Tribe’s 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 as to the impact of the project on archaeological and historical sites. The Division Engineer noted that a Memorandum of Agreement (referred to as the “Programmatic Agreement”) for the identification and treatment of traditional cultural properties and other cultural and historic resources, which had been entered into among the North Atlantic Division, Newport News, the ACHP, and the Virginia Department of Human Resources,\textsuperscript{429} “contains stipulations for identification and treatment of archaeological sites, historic buildings, structures, and landscapes, including Traditional Cultural Properties[,] in the area of the work would be performed.”).

\textsuperscript{427}See Department of the Army Permit, Permit No. 93-0902-12 (Norfolk District), dated Nov. 10, 2005, available at http://www.nad.usace.army.mil/kwr/KWR%20Permit%20Nov%202015%20Copy.pdf [hereinafter ACE Permit]. An interim decision memorandum had been issued in September 2002. See ACE, North Atlantic Division, Decision Memorandum for King William Reservoir Project, Norfolk District Application No. 93-0902-12 (Sept. 30, 2002), available at http://www.nad.usace.army.mil/kwr/Div_Commander_Decision.pdf. The interim memorandum, issued in September 2002, indicated that the Division favored issuing the permit, but a few additional steps (the Virginia DEQ’s concurrence that the reservoir proposal was consistent with the Virginia Coastal Resources Management Plan, the completion of the NHPA Section 106 consultation process, and the permit applicant’s submission of a mitigation plan) needed to be taken before a final decision was made. See ACE N.A. Division Decision, supra note 315, at 4. Once these additional steps had been taken, the North Atlantic Division was able to formally grant the permit in 2005. See id. The Division Engineer announced his intention to grant the permit in July 2005, but was still unable to formally grant the permit at that time because the USFWS had reserved its right to seek elevation of the permit decision to the Assistant Secretary of the Army for Civil Works. The USFWS had recommended that elevation of the permit decision be requested by the Secretary of the Interior, 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, Summer 2005, at 1, 6. The EPA had previously decided not to preserve its right to pursue elevation of permit decision. See Peninsula Citizens for Fair Play on Water, Corps of Engineers Announces Intent to Permit Proposed Regional Reservoir, July 25, 2005, http://www.fph2o.org.id36.html.

\textsuperscript{428}See ACE N.A. Division Decision, supra note 315, at 15. 33 C.F.R. sec. 320.4(j)(4) provides that “[i]n the absence of overriding national factors of the public interest which may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination.” 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.” 33 C.F.R. sec. 320.4(j)(2).

\textsuperscript{429}See ACE N.A. Division Decision, supra note 315, at 4.
potential effect" and that it provided “satisfactory mitigation” for adverse impacts on the affected tribes. While the Tribes might not receive full compensation for the losses to their spiritual connections, culture, and traditional practices, such compensation is not required, he maintained. The Division Engineer viewed the signing of the Agreement as the satisfactory conclusion of the required NHPA Section 106 consultation process without acknowledging that the Mattaponi Tribe, which is not a signatory to the Agreement, might well not be satisfied 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, this ignores the fact that to the Tribe, the loss of any archaeological site is an unacceptable tragedy. In short, for the party whose interests were most threatened by the project, the Mattaponi Tribe, there simply was no “satisfactory mitigation.”

2. Impact on Tribal Rights and Fishing

The Division Engineer claimed that the reservoir project would not encroach on reservation lands “or any other tribal property” without addressing the property and other rights of the tribes under the 1677 Treaty. Moreover, the Division Engineer did not take into account the fact that adverse impacts on the Mattaponi River could affect shad whose very existence was attributable to the financial and labor investments of the Mattaponi Tribe. Presumably the Tribe expected to eventually 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 fish that it considered to be its own and as an infringement of its fishing rights. The Division Engineer’s claim that no tribal 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 due to 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” and that the USFWS and EPA had also expressed a number of concerns about the project’s impact on fish and wildlife and about the impact of water quality changes on the shad population in particular. The USFWS consequently had supported the Norfolk District Engineer’s recommendation that the permit for the project be denied. Similarly, the National Marine Fisheries Service had stated that significant impacts to the Mattaponi River’s anadromous and semi-anadromous fish populations would be unacceptable. The Division

430 See id. at 47.
431 See id. at 62.
432 See id. at 46.
433 See id. at 47.
434 See id.
435 See id. at 45.
436 See id. at 45.
437 See id. at 45.
438 See id. at 55.
439 See id. at 47.
440 See id. at 55.
441 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.
442 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
Engineer claimed, however, that the anticipated salinity change in the river “would be minor and within natural variability.”

The Division Engineer also claimed that the expected negative individual and cumulative effects on fish and wildlife would be offset by expected benefits, 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. Recreational uses were deemed at least as valuable as the treaty-guaranteed subsistence uses of tribal members when these uses were balanced against each other in determining the net impact of gains and losses from the project. It is difficult, however, to construe the sharing of increased recreational opportunities with the public at large as an 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 wetlands reveals a perspective in which land and water resources are essentially fungible. From this perspective the loss of one area can be made up for by the gain of another area. This view is, however, 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 by many indigenous peoples, in which different areas have their own unique significance and are irreplaceable, a perspective that the Mattaponi Tribe had voiced to the Corps and which Colonel Carroll had taken seriously.

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 that was raised in a letter from the USFWS. The likelihood that mercury will become a problem in fish has been shown to be increased by “mobilization of mercury in soils in newly flooded reservoirs or constructed wetlands.” If mercury contamination did occur, Virginia would require the permit applicant to take unspecified “appropriate measures” to address the problem.

If tribal members were eventually adversely affected by mercury contamination of fish on which they depended for subsistence, their experience would not be a new one for tribes exercising treaty rights. 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. Undoubtedly, the fact that this experience would

habitats” . . . and “the management, conservation and protection of living marine resources within the United States' Exclusive Economic Zone (water three to 200 mile offshore).” See http://www.nmfs.noaa.gov/aboutus.htm.

441 See ACE N.A. Division Decision, supra note 315, at 46.
442 See id. at 48. In addition to its impact on fishing, the project was expected to adversely affect hunting by reducing the area that was available for hunting. See id. at 50.
443 See id. at 50.
444 See supra notes 351-413 and accompanying text.
445 See ACE N.A. Division Decision, supra note 315, at 56.
446 See id. Flooding of wetlands should be minimized, according to experts, “in order to minimize production of methyl mercury, since wetlands contain larger quantities of organic carbon that uplands.” Id.
447 See id. at 57.
448 See, e.g., Kari Lydersen, Mercury Warnings a New Part of Tribe’s Tradition, WASH. POST, June 12, 2006, at A02. 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 mercury
be shared with other tribes would be of no comfort to the affected members of the Mattaponi Tribe.

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

While the Division Engineer acknowledged the existence of concerns about the harm to the sacred uses of the Mattaponi River and the dishonoring of the tribes’ ancestors that would result from the project, he also noted that the River and its flow were already disrupted elsewhere.\textsuperscript{449} Rather than viewing the existing disruptions of the River, which had already been identified as one of the most threatened rivers in the state, as an indication that it should not be subjected to additional disruptions, the Division Engineer reasoned that if the river was already disrupted by non-Indian activity elsewhere, then there could be no legitimate objection to adding another source of degradation.

The Division Engineer discounted the environmental justice concerns that were discussed by the District Engineer in his decision memorandum. The District Engineer simply stated, without discussing any supporting evidence, his belief that “the undertaking of the proposed project is \textit{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.”\textsuperscript{450}

d. Privileging Non-Indian Water Demands

In announcing his decision, the Division Engineer acknowledged the magnitude of the damage that the King William Reservoir project would cause if it were completed. 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.”\textsuperscript{451} Moreover, the project “\textit{may also result in adverse impacts to three Native American tribes[,] use of the area}.”\textsuperscript{452} Nonetheless, the Division Engineer believed that the project would provide a “\textit{substantial benefit}”\textsuperscript{453} and that “it would not be contrary to the public interest” to issue a permit for the project.\textsuperscript{454} The Division Engineer was in essence balancing the benefits to one interested party (the permit applicant and other expected beneficiaries of the proposed project) against the detriments to be suffered by another interested party (the Mattaponi Tribe), which would not benefit from the project, and deciding that the detriment to be suffered by the Tribe was of less significance than the benefits to be enjoyed by the permit applicant. In short, the Division Engineer struck the balance that had been struck so many times before: tribal interests in and rights to natural resources were to be 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 for the adverse impacts that the Tribe was to suffer.\textsuperscript{455}

\textsuperscript{449} See \textit{ACE N.A. Division Decision}, supra note 315, 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. \textit{Id.}

\textsuperscript{450} See \textit{id.} at 7-8 (emphasis added).

\textsuperscript{451} See \textit{id.} at 40 & 62.

\textsuperscript{452} See \textit{id.} (emphasis added).

\textsuperscript{453} See \textit{id.} at 61.

\textsuperscript{454} See \textit{id.} at 62.

\textsuperscript{455} See \textit{id.}
Additional historical parallels are discernible 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, projections of population growth in Virginia’s Lower Peninsula were accepted as a justification for a project that would impose a substantial environmental cost on the homeland and treaty-protected activities of the Mattaponi Tribe. Moreover, while government officials were not using as direct an incentive as the colonial headright system to increase migration to the area, it is clear that today’s state and local officials support migration to the area because of the expected benefits for the area’s commercial interests. 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.” In short, area commercial interests, much like those of the Virginia Company centuries before, were to be 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 had found to be so compelling. The contrast between Colonel Carroll’s careful and respectful consideration of the Mattaponi Tribe’s 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.

III. 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 as well, they needed to pursue a two-prong 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, appealed the SWCB’s decision under the Virginia Administrative

\[\text{supra note 126 and accompanying text.}\]

\[\text{See, e.g., ACE District Decision, supra note 310, at 290 (noting the comments of the Newport News Industrial Development Authority/Economic Development Authority in support of the project).}\]

\[\text{See ACE N.A. Division Decision, supra note 315, at 61.}\]

\[\text{The Alliance is a grassroots organization focused on protecting the Mattaponi River. See http://www.itsyourenvironment.net/alliance. The organization’s members “oppose the King William Reservoir project on grounds of fiscal and economic prudence, ecological preservation and protection, and environmental justice.” See id. Several other organizations (the Chesapeake Bay Foundation, the Mattaponi and Pamunkey Rivers Association, and the Sierra Club) joined in the petition to the circuit court as did two individuals. See Mattaponi I, 51 S.E.2d at 415. The}\]
Procedures Act (the “VAPA”) while also making a claim under the 1677 Treaty. 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 to bureaucratically erase the existence of the Virginia tribes. Virginia’s judicial system initially treated the Mattaponi Tribe as lacking a legally sufficient status for its claim to be heard – in short, it was if the Tribe did not exist.

While couched in the terminology of the legal concept of standing, the SWCB’s response to the Tribe’s suit was, in essence, that the Tribe could, and should, be ignored in decisionmaking as to the reservoir project. In other words, the SWCB argued that the Tribe had nothing at stake, despite the fact that the water to fill the reservoir was to be extracted from the Mattaponi River, and that the Tribe’s views on the project were irrelevant. The SWCB’s argument echoed the claims that state and colonial officials had made periodically for several hundred years: non-Indians had the power to make decisions that adversely affected tribes and their lands and resources, and to even seize tribal resources, and the Virginia tribes were powerless to challenge these decisions or prevent the seizures. 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.

The Virginia Supreme Court, however, saw things differently, noting that the Tribe had alleged that the proposed project would directly injure the Tribe “by substantially interfering with the Tribe’s capacity to continue to exist as a tribe as it has from since 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 archaeological sites, and Cohoke Mill Creek Valley.”

The plaintiffs had appealed to the Virginia Supreme Court after the Virginia Court of Appeals affirmed the circuit court’s decision. See Mattaponi IV, 601 S.E.2d at 671. 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. 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. 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 rejected, however, 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 had interests that needed to be considered 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. Virginia Marine Resources Commission, 609 S.E. 2d 619, 620-21 (Va. App. 2005). The Tribe appealed the rejection but the appeal was found to be moot after the City and the VMRC settled the case. 609 S.E.2d at 622.

The plaintiffs had appealed to the Virginia Supreme Court after the Virginia Court of Appeals affirmed the circuit court’s decision. See Mattaponi I at 419; Mattaponi Indian Tribe v. Commonwealth of Virginia, Dep’t of Environmental Quality, ex rel. State Water Control Board, 524 S.E.2d 167, 170 (Va. App. 2000) (Mattaponi II). Mattaponi III, 541 S.E.2d at 923. The 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. The Tribe asserted that in issuing the water permit, the SWCB had “‘failed to consider and evaluate the Tribe’s 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. The plaintiffs had appealed to the Virginia
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 of the argument 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.\footnote{464} The court also rejected the Tribe’s argument that the SWCB had “failed to protect the Tribe’s ‘cultural values in its traditional fishing, gathering, and religious practices’ and likewise failed to protect tribal archeological sites.”\footnote{465}

The court separately addressed another treaty-based claim made by the Tribe, which, the Tribe explained, was based on federal law. The Tribe had requested that the circuit court void the permit for violating the 1677 Treaty and enjoin further treaty violations.\footnote{466} The circuit court rejected the Tribe’s contention that federal law governed the Treaty and dismissed the Tribe’s claim. The court held that the Treaty (as the court interpreted it) gave the governor exclusive power over treaty-based disputes.\footnote{467} 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.\footnote{468}

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,\footnote{469} arguing that the permit decision violated the Water Control Law by not adequately protecting instream beneficial uses,\footnote{470} by failing to protect

\begin{quote} 
Supreme Court after the Virginia Court of Appeals affirmed the circuit court’s decision. See Mattaponi I, 51 S.E.2d at 419; Mattaponi II, 524 S.E.2d at 170. 
\end{quote}

\footnote{464}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 had complied with the legal standards for permit issuance and had “rested its decision on a showing of substantial evidence.” Id. at 673. 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.

\footnote{465}Id. at 678. The court concluded that the Tribe had 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.

\footnote{466}See id. at 672.

\footnote{467}See id. at 677.

\footnote{468}See id.

\footnote{469}Alliance to Save the Mattaponi v. Virginia, 621 S.E.2d 78, 86 (Va. 2005) [hereinafter Mattaponi V].

\footnote{470}See 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.” See VA. CODE ANN. § 62.1-44:15.5(B) (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.” See VA. CODE ANN. § 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 to be considered “the highest priority use.” See id. § 62.1-44.15.5(C).
existing uses against proposed uses, and by allowing a project that would detrimentally affect an existing use of state waters.\textsuperscript{471} 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.\textsuperscript{472} Further, the court maintained that cities have a duty to protect their water supplies and state policy encourages reasonable actions related to the fulfillment of this duty.\textsuperscript{473} 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 had properly applied the statutory directive with respect to instream beneficial uses.\textsuperscript{474}

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.\textsuperscript{475} 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.\textsuperscript{476} Secondly, the court rejected the Tribe’s argument that the SWCB had improperly failed to consider and protect the archaeological sites that would be flooded by the project. Although the Water Control Law treats cultural and aesthetic values as beneficial uses of state waters,\textsuperscript{477} the court treated the relevant statutory language as being focused on current uses related to state waters, including fish and wildlife resources, and as not encompassing archaeological sites.\textsuperscript{478} The court also maintained that the SWCB nonetheless did actually consider the sites’ cultural value, but had it just determined that it could not both protect the sites and satisfy the project’s water supply demands\textsuperscript{479} and chose to sacrifice archaeological sites, and the cultural values with which they were imbued, in favor of the latter.

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. More specifically, the Tribe argued, the SWCB had 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.\textsuperscript{480} The court rejected the Tribe’s evidence of how its gathering and religious uses and fishing sites would be adversely affected by the project as insufficiently specific\textsuperscript{481} and concluded that it was permissible for the SWCB to rely on evidence suggesting that the adverse effect on fishing practices would be minimal (as opposed to evidence indicating more substantial effects).\textsuperscript{482} Again, the court saw no basis for interfering with the decision to discount tribal concerns that might stand in the way of satisfying Newport News’s water demands.

\textsuperscript{471}See id.
\textsuperscript{472}See Mattaponi V, 621 S.E.2d at 89.
\textsuperscript{473}See id.
\textsuperscript{474}See id. The court also addressed and rejected several VAPA claims that were made by the Alliance. See id. at 89-91.
\textsuperscript{475}See id. at 91.
\textsuperscript{476}See id. at 92.
\textsuperscript{477}See id. (citing VA. CODE ANN. § 62.1-44.15:5(C)).
\textsuperscript{478}See id. at 92.
\textsuperscript{479}See id.
\textsuperscript{480}See id. at 92-93.
\textsuperscript{481}See 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.
\textsuperscript{482}See id.
The final portion of the 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 were governed by federal law because *Worcester v. Georgia* established that the federal government is “the exclusive arbiter of all Indian affairs” and the Constitution gives only the federal government treaty-making authority, as well as authority over Indian affairs. Moreover, the Constitution’s Supremacy Clause adopts as federal law treaties that had been made between Indian tribes and Great Britain. Consequently, the Tribe argued, the Treaty’s provisions are enforceable as a matter of federal law. 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.

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. The court thus viewed the term “United States,” as used in the Supremacy Clause, 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 might have been parties to pre-Revolutionary War treaties that were still being 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. The court noted that the Mattaponi Tribe was not federally recognized and that the Tribe had not shown that it had otherwise been extended federal protection on the basis of a federal guardianship relationship. Finally, the court dismissed as dicta the U.S. Supreme Court’s statement in *Worcester* 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.’”

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), which was not challenged by the state or the City. The Treaty’s enforceability was limited, however, the court held, by the state

---

483 See id.
484 See id. at 94.
485 See id.
486 See id. at 94-95. The court also noted that although the Nonintercourse Act provides protection “to all Indian tribes,” the Tribes was not asserting a claim under the Nonintercourse Act at this stage of the litigation, although it had originally done so. See id. at 95.
487 See id. at 94-95. The Indian Commerce Clause provides the foundation for a guardian-ward relationship between the United States and Indian tribes, the court noted. See id.
488 See id. at 95.
489 See id. (quoting Worcester v. Georgia, 31 U.S. 515, 559 (1832)). The court stated that the language related to the adoption of previous treaties by the United States was referring to treaties made after the colonies declared independence. See id. The court also dismissed the other cases on which the Tribe had relied as not establishing that Indian treaties with Great Britain are federal law. See id.
490 Id. The court noted that it did not need to decide whether the Treaty was valid and enforceable Virginia law, because
common law doctrine of sovereign immunity, which rendered the state immune from a suit based on Treaty-based claims.\textsuperscript{491} Moreover, the holding that the treaty was not a matter of federal law not only protected the state from suit (under the sovereign immunity principle), but also immunized state officials from suit.\textsuperscript{492} 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.\textsuperscript{493}

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

While the Tribe continued to pursue its challenge to the SWP permit issuance in state court, 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.\textsuperscript{494} The Tribe’s petition for a writ of certiorari highlighted the significance of the decision: for the first time, a state supreme court had held that an Indian treaty is \textit{state} law and is not enforceable as \textit{federal} law under the Supremacy Clause, thus departing from the basic constitutional principle that states cannot be parties to treaties.\textsuperscript{495} 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.”\textsuperscript{496} The Virginia decision deprived the tribes whose leaders had signed one of the nation’s oldest treaties of “the benevolent protection of two hundred years of a carefully developed uniform body of federal Indian jurisprudence.”\textsuperscript{497}

The Tribe pointed out that the Virginia decision had created an “anomalous category of Indian treaties that are governed solely by state law.”\textsuperscript{498} Because the Constitution explicitly vests the

\textsuperscript{491}See id. at 96.\textsuperscript{492}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 \textit{Ex parte Young}. As noted below, the court relied on its characterization of the Treaty as the basis for holding that \textit{Ex parte Young} was inapplicable, stating that it 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. See id. at 96-97.\textsuperscript{493}See id. at 96-97.\textsuperscript{494}See id. at 1-2.\textsuperscript{495}See id. at 11.\textsuperscript{496}See id. at 13. The status of post-Constitution treaties is settled by the language of the Supremacy Clause itself. See id.
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.\textsuperscript{499} Moreover, the Virginia decision conflicted with the Supreme Court-endorsed principle of universal succession,\textsuperscript{500} according to which the United States acquired all of Great Britain’s treaty rights and obligations relating to U.S. territory. The universal succession principle, coupled with the Constitution’s structure, points toward the United States having inherited Great Britain’s 1677 Treaty obligations, which should be enforceable, as federal law, under the Supremacy Clause.\textsuperscript{501}

Furthermore, the Virginia court’s holding that an Indian treaty arises under state law conflicts with Supreme Court precedent establishing that, under the Supremacy Clause, \textit{all} treaties are superior to any inconsistent state constitution, statute, or common law. 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.\textsuperscript{502} The application of sovereign immunity doctrine afforded the Treaty “less force than a common contract” and violated the Indian law canons of construction and other protective principles established by the Court.\textsuperscript{503}

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.\textsuperscript{504} The Virginia decision ignored the federal government’s special role in this area.\textsuperscript{505} The petition urged the Court to grant certiorari in order to right the wrong done in this particular case, and also in recognition of the likely recurrence of issues surrounding the status of \textit{pre-Revolutionary treaties}.\textsuperscript{506}

Virginia’s brief in response derisively characterized the Treaty on 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.”\textsuperscript{507} Although state attorney general opinions and state court decisions refer to the 1677 Treaty by its proper name,\textsuperscript{508} the brief referred to the Treaty as the “1677 Treaty on the Mattaponi and Pamunkey Indian reservations and referring to the “Indian Treaty of 1677”.

\textsuperscript{499} See id. at 13, citing Reid v. Covert, 354 U.S. 1, 16-17 (1957), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832).
\textsuperscript{500} See id. at 14.
\textsuperscript{501} See id. at 15.
\textsuperscript{502} See id. at 15.
\textsuperscript{503} See id. at 15-16. The canons of construction require, for example, that when Indian treaties are interpreted, their words are to be interpreted in the sense that the Indians would have understood them and any ambiguities are to be construed in favor of the Indians. Commonwealth v. Maxim, 695 N.E.2d 212, 213 (Mass. App. Ct. 1998).
\textsuperscript{504} \textit{Mattaponi Cert. Petition, supra} note 494, at 17. This principle was affirmed by Great Britain in the Proclamation of 1763 and adopted by the United States in the Articles of Confederation. See id.
\textsuperscript{505} See id. at 19.
\textsuperscript{506} See id. at p. 19 & n. 12. The petition noted that approximately 175 \textit{pre-Revolutionary treaties} were negotiated. The question of the enforceability of these treaties as a matter of federal law is of thus of “vital importance” to many tribes and they should not be left to be interpreted without “the uniform principles of federal law.” See id. at 20.
\textsuperscript{507} See \textit{Mattaponi Indian Tribe v. Commonwealth of Virginia, Brief of the State Respondents in Opposition to the Petition for a Writ of Certiorari, No. 05-1141, May 10, 2006, at 2 [hereinafter State Certiorari Brief].
In addition to this dismissive treatment of the 1677 Treaty, the state cast aspersions on the identity of the Tribe. 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 “the determination of 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. 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, it emphasized that the federal government “has never declared that the Mattaponi are a federally recognized Indian Tribe.” 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.

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. Like the Cherokee Nation before it, whose suit seeking protection from state violations of treaty rights the Supreme Court rejected in 1831 on jurisdictional grounds, the Mattaponi Tribe found that the Supreme Court’s doors were closed to its plea for vindication of its treaty rights.

4. Back to the Circuit Court

The Tribe’s return visit to the circuit court, to pursue its claims against Newport News and allied localities, resulted in a significant opinion addressing an issue that had not been 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. The defendants denied that the King William Reservoir would infringe on treaty rights and argued that the reserved water rights doctrine did not apply in eastern states like Virginia. The circuit court rejected the defendants’ summary judgment motions as to both the Treaty and the reserved water rights claims, raising the possibility of a new avenue of relief for violation of water-related rights of the Mattaponi and other Virginia tribes.

509 See State Certiorari Brief, supra note 507, at 1. The Tribe was referred to as “the Mattaponi” rather than as “the Tribe” throughout the brief, a further indication of the desire to denigrate the Tribe’s status before the Supreme Court.
510 Id. at 2, 2 n.4 (emphasis added).
511 See id. at 2 n. 4.
512 Id. at 3 (emphasis in original).
513 Id.
515 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, it was not a “foreign state.” See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The treaty rights violation claim was considered by the Court the following year in a challenge by Christian missionaries to the Georgia statutes. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
517 Mattaponi VI, 2007 WL 6002103 at *2.
518 Id. at *4 (denial of motion re: treaty rights) & 16 (denial of motion re: reserved water rights).
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.”\textsuperscript{519} The Tribe asserted that Article VII of the 1677 Treaty, providing “[t]hat the said Indians have and enjoy their wonted conveniences of Oystering, fishing, and gathering Tuccahoe, Curtenemmons, wild oats, rushes, Puckoone, or anything else for their natural Support not useful to the English, upon the English Devidends,”\textsuperscript{520} clearly protected its fishing rights and that the proposed reservoir would have “adverse and severe” effects on the exercise of those rights.\textsuperscript{521} 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.\textsuperscript{522} The defendants, in response, argued that the Article VII language “not useful to the English, upon the English Devidends” meant that the state had the “predominant right” to use the land as it saw fit, such as by building the reservoir.\textsuperscript{523}

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.”\textsuperscript{524} The parties had each presented support for viable alternative interpretations of the language, which indicates a “latent ambiguity” in the language that made summary judgment on the Article VII claim inappropriate.\textsuperscript{525} The court agreed with the Tribe that it might be able to assert reserved water rights pursuant to the \textit{Winters} doctrine.\textsuperscript{526} 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.”\textsuperscript{527} 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.”\textsuperscript{528} 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, thus infringing upon the riparian rights attached to the Mattaponi Reservation, while the defendants claimed that the River’s tidal action would ensure that

\textsuperscript{519} \textit{Id.} at *3. The defendants included Newport News and other localities with an interest in the project. \textit{See id.} at *1.
\textsuperscript{520} \textit{Id.} at *3, quoting the 1677 Treaty at Middle Plantation.
\textsuperscript{521} \textit{See id.}
\textsuperscript{522} \textit{See id.}
\textsuperscript{523} \textit{See id.} The court noted that “the Defendants place substantial emphasis on the language “English Devidends” 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.” \textit{Id.}
\textsuperscript{524} \textit{Id.} at *4.
\textsuperscript{525} \textit{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. \textit{See id.} The court also noted that treaty interpretation “is typically finalized only after trial or a thoroughly developed record on summary judgment.” \textit{Id.}
\textsuperscript{526} \textit{See id.}
\textsuperscript{527} \textit{Id.} at *10.
\textsuperscript{528} \textit{Id.} at *5. The riparian rights system is today subject to provisions of supplemental legislation, such as the Virginia statutory provisions that are 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. \textit{See id.}
both water quantity and quality would remain constant.\textsuperscript{529}

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 as long as it remains beneficial.”\textsuperscript{530} It was within the western context that the U.S. Supreme Court created the \textit{Winters} doctrine, providing that “the creation of Indian reservations necessarily implies that water was reserved for the Indian reservation’s use, in an amount sufficient to achieve the primary purposes of the Indian reservation.”\textsuperscript{531} If a reservation lacked sufficient water, “the government’s purpose of transforming the tribe into an organized society” by creating the reservation would not be fulfilled and the tribe’s aboriginal fishing and hunting practices might not be preserved.\textsuperscript{532} Because the doctrine is based on necessity, the court stated, it “preempts state water law \textit{only when necessary}, and only by impliedly reserving that quantity of water necessary to fulfill” the government’s purpose.\textsuperscript{533}

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 \textit{Winters} doctrine could potentially have force in the state context.\textsuperscript{534} The court focused on the element of necessity underlying the \textit{Winters} doctrine – water is impliedly reserved to an Indian tribe, and to its guardian, when necessary for reservation viability and for protection of aboriginal practices.\textsuperscript{535} The \textit{Winters} court had reasoned that the United States, acting as guardian, would have reserved sufficient water for tribes when it created reservations and that, moreover, 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 them on their reservations. By the same token, if a state government recognized land as a reservation that would help a tribe protect its aboriginal practices, then the state would also have intended for adequate water to be available. Indeed, Virginia had even followed the United States’ example of acting as a guardian by appointing trustees for the Mattaponi Tribe.\textsuperscript{536} Moreover, the \textit{Winters} reasoning also made “it 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.”\textsuperscript{537} In sum, compatibly with \textit{Winters}, it could be asserted

\textsuperscript{529} Id. at *6. 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.

\textsuperscript{530} Id. at *7-8.

\textsuperscript{531} Id. at *9, citing \textit{Winters v. United States}, 201 U.S. 564, 576 (1908).

\textsuperscript{532} Id.

\textsuperscript{533} Id. (emphasis in original).

\textsuperscript{534} See id. at *10. The court explained further that it agreed with the defendants that the \textit{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.” 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 this did not mean that reserved water rights are unique and exclusive to the federal system.” Id. Thus, while the Tribe could not rely on the \textit{Winters} doctrine itself, its underlying logic might still be the basis for reserved water rights for the Tribe.

\textsuperscript{535} Id. at *10.


\textsuperscript{537} Id. at *12. The court noted that “\textit{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
that sufficient water to carry out the purposes of the Mattaponi Reservation were impliedly reserved
and that the Mattaponi Tribe negotiated to set aside water to sustain the Reservation and protect
traditional practices in the 1677 Treaty.\footnote{538}

The court did sound a cautionary note as to the likelihood of the successful assertion of a
reserved water rights claim in riparian rights states.\footnote{539} 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,”\footnote{540} without any need to invoke the \textit{Winters} doctrine.\footnote{541} 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-guaranteed right,”\footnote{542} because a riparian rights system might not
guarantee that a riparian owner has a \textit{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 to be unreasonable, or an upstream owner
might make a new but reasonable use of water that creates a water quantity or quality deficiency for a
downstream user.\footnote{543} 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 protection of tribal aboriginal practices,\footnote{544} and the Tribe therefore
might be able to successfully assert reserved water rights. Although the Tribe’s pleadings stated that
the Tribe had reserved a sufficient quantity and quality of water at the time of the signing of 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.\footnote{545} The court granted the Tribe leave to amend its pleadings to address the
necessity element of a reserved water rights claim.\footnote{546}

Ultimately, the Tribe decided to not pursue the reserved water rights and treaty rights
arguments at this point and agreed to dismiss the suit against Newport News and the other
defendants, while continuing to oppose the project.\footnote{547} An agreement between the Tribe and the City

\footnotesize
\begin{itemize}
  \item \footnote{538} Similarly bargained to reserve water for their own sustenance.” \textit{Id.} The court noted that the \textit{Winters} doctrine had so far only been applied in the federal context “because of the rarity of state-maintained Indian reservations for tribes that are not federally recognized.” \textit{Id.}
  \item \footnote{539} \textit{Id.} at *13.
  \item \footnote{540} \textit{Id.} at *14.
  \item \footnote{541} Regarding the necessity element, the court explained that the \textit{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.” \textit{Id.} at *13 (emphasis in original).
  \item \footnote{542} \textit{Id.} at *14.
  \item \footnote{543} \textit{See id.} The affected downstream owner then “may be unable to sustain the gainful activity he enjoyed before the upstream user’s new use.” \textit{Id.}
  \item \footnote{544} \textit{Id.} at *15. The fact 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 \textit{Winters} doctrine. \textit{Id.}
  \item \footnote{545} \textit{Id.} at *15-16. 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 aboriginal practices.” \textit{Id.} at 15-16.
  \item \footnote{546} \textit{See id.} at *16 (dismissing the defendants’ motion for summary judgment on the reserved water rights claim).
  \item \footnote{547} \textit{Bobbie Whitehead, Mattaponi Agree to Drop Lawsuit Over Reservoir, INDIAN COUNTRY TODAY, Apr. 13, 2007.} The decision was made in April 2007, two months before the Tribe’s suit was scheduled to go to trial. \textit{See id.}
\end{itemize}

65
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.548 In discussing the Tribe’s decision, the Tribe’s attorney 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.”549 Continuation of the suit carried the risk of a judicial interpretation of the Treaty that limited its protections; the Tribe “wanted to make sure that the treaty remained protected and intact.”550

**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 of the Army Corps of Engineers in the U.S. District Court for the District of Columbia, challenging the decision by the North Atlantic Division of the Corps to ignore the recommendation of the Corps’s Norfolk District and issue the CWA Section 404 permit for the reservoir project.551 The Tribe intervened in the suit as a plaintiff and added EPA as an additional defendant, based on EPA’s decision to reverse its position on the project and not veto the permit’s issuance.552 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.553 Even before the Tribe joined the suit, the original plaintiffs had noted the negative impact that the completion of the project would have on local tribes, as well as the politics at play: “Agencies have twice denied Newport News permits to 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.”554 The Tribe was of course best suited to represent its interests in “preserving its own

---

548 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 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.

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

550 Id.


552 Alliance to Save the Mattaponi v. W.S. Army Corps of Engineers, Unopposed Motion to Intervene as Plaintiffs (Nov. 8, 2006), 2006 WL 5954422 (D.D.C.) [hereinafter Motion to Intervene].

553 See id.

554 Michael Town, Executive Director of the Sierra Club’s Virginia Chapter, quoted in Southern Environmental Law Center, Press Release, Group Sues Army Corps to Stop Reservoir Project in Coastal Virginia (July 17, 2006), http://www.southernenvironment.org/newsroom/2006/07-17_king_william_lawsuit.htm.
culture, traditions, and spiritual wellbeing.”

The plaintiffs argued that the granting of the Section 404 permit (and EPA’s failure to veto it) violated the Clean Water Act because the project would cause significant degradation of wetlands and was unjustified given that less damaging practicable alternatives exist. The Corps’s decision to issue the permit also violated NEPA, as it was based on a faulty and outdated environmental impact statement. Finally, in addition to violating the CWA and NEPA, the Corps and EPA had, the plaintiffs alleged, violated the “no net loss of wetlands” policy included in the Chesapeake 2000 Agreement by allowing a project that will cause “a net loss of wetlands functions, values, and acreage.” 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.

In March 2009, the district court granted a long hoped for victory to the Mattaponi Tribe and its allies, holding that both the Corps and EPA had acted arbitrarily and capriciously in issuing and failing to veto the project’s Section 404 permit. After reviewing the evidence in the administrative record, the court agreed with almost all of the plaintiffs’ claims as to the Corps’s and EPA’s conduct in connection with the issuance of the permit. First, the court agreed that the Corps acted arbitrarily and capriciously in concluding that the project was the least damaging practicable alternative. The Corps improperly reached this conclusion on the basis of the alternatives included in the Final EIS, despite the occurrence of several important changes, such as a decrease in the projected water need, since the EIS was completed in 1997. The court noted that before “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

---

555 See Motion to Intervene, supra note 552.
556 Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers, First Amended Complaint, No. 1:06-cv-01268-HHK (Jan. 31, 2007), 2007 WL 811357 (D.D.C.), paras. 93-105 [hereinafter First Amended Complaint]. 40 C.F.R. sec. 230.10(c) 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.” “Waters of the United States” included wetlands.
557 First Amended Complaint, supra note 556, paras. 107-115. Under 40 C.F.R., 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. See id., para. 112. The complaint also claimed that issuance violated the requirement that a permit not be issued unless potential adverse impacts on the aquatic ecosystem are minimized and violated the public interest review requirements. See id., paras. 116-123 (aquatic ecosystem impact); 124-131 (public interest review).
558 See id., paras. 132-136. 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.
559 See id., paras. 137-141. The Corps failed to prepare a Supplemental EIS even though substantial changes in the project had occurred and significant new circumstances had arisen since the Final EIS. See id., para. 139.
560 See id., paras. 142-147. One of the goals of the Chesapeake 2000 Agreement was to “achieve a non-net loss of existing wetlands acreage and function.” Id. para. 144 (quoting the agreement).
561 Id. para. 146. See also id. paras. 74-78 (discussing the inadequacy of the wetlands mitigation plan).
562 See id (prayer for relief).
564 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”).
565 There had been a substantial decrease in the projected water need 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 relay on the Final EIS without explaining why the EIS remained sufficient despite these changes. Id. at 129-30.
adverse effects of or potential political opposition to other alternatives.”

The court also agreed that the determination that the project would not significantly degrade waters was arbitrary and capricious. The Corps had 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 values such that it results in no net loss of wetland functions and values.” The Corps had simply ignored concerns about the mitigation plan that had been raised by the Corps’s Norfolk District and by the U.S. Fish and Wildlife Service, which had repeatedly expressed “‘strong opposition’” to the permit issuance because the project “‘constitutes a net loss of wetlands and aquatic habitats, and will result in significant degradation of the aquatic ecosystem.’” 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. 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 issuance of the permit for the project was in the public interest, a prerequisite for issuance of a Section 404 permit, was also arbitrary and capricious.

The court accordingly granted summary judgment to the plaintiffs on these three claims.

The court also granted summary judgment to the plaintiffs on a final element of their complaint: the claim that EPA had acted arbitrarily and capriciously by relying on factors other than an analysis of the project’s environmental effects in deciding not to veto the permit. The CWA authorizes the EPA Administrator to veto a permit when the Administrator determines that the discharge that would be authorized by the permit would “have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” The record showed, the plaintiffs argued, that the Administrator indeed had determined that issuance of the permit would have unacceptable adverse effects, and yet nonetheless decided, on the basis of unrelated factors, to not veto the permit. The court noted that while the Administrator has some discretion as to the veto decision, this “is not a roving license to ignore the statutory text.” 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

---

566 Id. at 130.
567 Id. at 132. The Norfolk District had “seriously critiqued” the techniques and procedures on which Newport News had based its wetlands functional assessments but the Corps did not address these concerns. See id. at 133.
568 Id. at 132 (quoting a February 2005 letter from the Service).
569 See id. at 136.
570 See id. at 136. 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. sec. 320.4(a). 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 had determined that the Corps’s conclusion that issuance of the permit complied with the guidelines was arbitrary and capricious, it followed that the determination that issuance of the permit complies with the public interest requirement was also arbitrary and capricious. Alliance to Save the Mattaponi, 606 F. Supp. 2d at 136.
571 Alliance to Save the Mattaponi, 606 F. Supp.2d at 136.
572 See id. at 141.
573 33 U.S.C. sec. 1344(c).
574 Alliance to Save the Mattaponi, 606 F. Supp.2d at 139.
575 Id. at 140 (quoting Massachusetts v. EPA, 549 U.S. 497, 533 (2007)).
“there was a water supply shortfall that needed to be addressed.” In other words, the Administrator, like so many government officials before him, had decided that non-Indian demands trumped Indian rights and interests. The court concluded that because the Administrator had relied on factors other than those which Congress had intended him to consider, the decision to not veto the permit was arbitrary and capricious.

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

In June 2009, the U.S. Department of Justice announced that it would not appeal the district court’s decision. In the wake of this announcement, Newport News decided that the project “had no future” and switched gears to focus on unwinding work done in connection with the project, such as land acquisitions and existing mitigation work. The project had already cost Newport News over $50 million. 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. The district court decision also prompted the Corps to suspend the project’s Section 404 permit.

While the court’s decision brought much consternation to Newport News and the other cities that had looked to the Mattaponi River to satisfy their demand for water, for the Mattaponi Tribe, it amounted to a victory in spite of what had seemed to many 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 had succeeded in protecting the land and waters of the homeland of Pocahontas and of generations of other members of the Powhatan tribes from the destruction that the reservoir project had threatened. By displaying the persistence that characterized their ancestors’ resistance to 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 had themselves struggled to preserve.

---

576 Id. The Regional Administrator (who, under the relevant regulations, must first recommend that the Administrator deny a permit) 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. at 140. None of these factors had “anything to do with whether granting the permit would have an unacceptable adverse effect.” Id.

577 See id. at 141.


579 See id. Newport New Mayor Joe S. Frank stated that “[t]he ability to move forward no longer exists. . . . As far as I am concerned, this project has no future.” Id.

580 Id.

581 Cathy Grimes, Tap is Finally Turned Off for King William Reservoir, DAILY PRESS, Sep. 23, 2009, at A4.

582 See Hirschauer, supra note 578, at A1.
IV. 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 objections to the project that the Mattaponi Tribe had raised. The focus of the federal district court 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 environmental law) issues. Although the state courts addressing the Tribe’s challenge to issuance of the SWP permit 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 law – a striking conclusion that the U.S. Supreme Court declined to review.

The Indian law-related conclusions that state and federal courts and agency officials reached, and failed to reach, are discussed below. These conclusions bear examination because of their potential significance not just for the Mattaponi but for other tribes as well, who may learn lessons from the Tribe’s experiences that will assist them in trying to defend their own land, resources, and rights against projects that threaten 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, to no avail. The Tribe also asserted to the Corps that the project would violate the 1677 Treaty, and that with the adoption of the Constitution, the federal government had assumed the responsibility to enforce the Treaty’s provisions, such as the three-mile buffer zone around the Reservation. 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. 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. His failure to consider this possibility, or devote more attention to the issue, may have been attributable to the fact that (as he noted) Treaty obligations were ultimately not implicated because of his decision to recommend denial of the permit. The federal district court did not address the treaty rights issue at all, a neglect that was reinforced by the Supreme Court’s rejection of the Tribe’s cert. petition. Consequently, the federal judiciary left unanswered important questions about the status of the Treaty, which are explored below.

As discussed above, the state attorney general opined that relevant provisions of the Treaty had been “abrogated by implication” and therefore did not present an obstacle to the project. See supra note 319 and accompanying text.

See ACE District Decision, supra note 310, at 189.

See id.

See id. at 220 (the Treaty was “held by” Virginia, not the federal government, and “therefore, any Corps permit decision would not violate the Treaty”), 297 (obligations under the Treaty passed to Virginia).

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 was between the governments of nations, not between Indian nations and a local government. 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 having continued force -- the Tribe has continued to 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. This fact is hardly surprising, though, given the status of the Tribe and its land and legal rights when the United States took shape as an independent nation. The Tribe was living in peace, having already agreed to friendship and alliance with non-Indian settlers by treaty, on land guaranteed to the Tribe by a then century-old treaty. The Tribe had not fought against the United States in the latter’s war for independence, as some other tribes had. Finally, the Tribe’s sovereignty – its political status as an entity with authority over a designated reserved area – had already been acknowledged. As a result, the purposes for which the United States and tribal nations entered into treaties in the years following American independence already had been satisfied, obviating the need for a treaty to be executed.

Professor David Wilkins has 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 honored, lest the tribes be drawn to align themselves with Spain or Great Britain.” 588 Where the Mattaponi Tribe was concerned, peace and boundaries had already long been established, and there was no threat of the Tribe trying to continue a relationship with Great Britain, let alone seek one with Spain. From the Tribe’s perspective, too, the goals for 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. 589 The Mattaponi Tribe already had a boundary line between its reserved land and Americans’ land; its status as a tribal nation had been recognized and reaffirmed by 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 party to a treaty that had settled the kinds of questions that were at the heart of United States-tribal diplomacy at the time. In short, from the perspective of both sides, it was

589 See id. at 297.
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” and later on behalf of the United States, to focus its diplomatic attentions on tribes such as those located in Virginia’s Kentucky district (who actively resisted non-Indian encroachment) and those (like the tribes of the Six Nations) who had demonstrated sympathies with Great Britain. In its dealings with larger, formidable tribes such as the Six Nations, for example, the new government endeavored to convince the tribes that provisions of agreements with Great Britain, such as the boundary line established with by the 1768 Treaty of Fort Stanwix, would be held to.

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 passed 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, “the rights and obligations of the predecessor State, relating to the territory transferred, are transmitted to the successor State.” Consequently, “the successor State inherits the treaty rights and obligations of the predecessor State relating to the territory transferred.” Treaties creating rights and obligations with respect to a territory, such as boundary treaties, in particular have been regarded as passing rights and obligations to a successor State. Subsequent to the development of the clean slate doctrine, even newly independent states that have favored the latter doctrine have tended to accept territorial treaties, and particularly those that establish boundaries, that were concluded by a former colonial power. Such treaties are understood as attaching to a territory, so they are transmitted along with the territory when it is transferred by one State to another. A new treaty was not needed, then, because the United States (as the united colonies came to be known) had stepped into the shoes of Great Britain after independence (formally recognized by the Treaty of Paris) was achieved. The United States, which embraced the colonies and provided the national government previously provided by the Crown, would have succeeded to the rights and obligations with

---

590 See Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 27 (1994), quoting JCC. 2:174-77, 183, 192, 194 (noting that Congress appointed commissioners of Indian affairs to engage in treaty discussions with tribes “in the name, and on behalf of the united colonies.”)

591 See id. at 26.

592 See id. at 28.

593 See C. Emanuelli, State Succession, Then and Now, with Special Reference to the Louisiana Purchase, 63 LOUISIANA 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. at 1280.

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

595 id. The public property and debts of the predecessor State also passed to the successor State. See id.

596 See id. at 1283-84.

597 Id. at 1284.

598 See id. at 1283-84.

599 See Wilkins, supra note 588, at 310.

respect to the territory of the Powhatan tribes that were parties to the 1677 Treaty. The United States certainly had no interest in trying to repudiate the land cessions and other rights gained by Great Britain via 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, and the rights and relationship that it recognized, to be a nullity.

Statements supporting the succession of the United States to Great Britain’s claims and obligations have been made by the United States Supreme Court and lower federal courts. 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 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. The Constitution vested 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, has adopted and sanctioned the previous treaties with the Indian nations.”  The United States “succeeded to all the claims of Great Britain, both territorial and political.” 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 a claim of the Catawba Indian Tribe that the United States breached its fiduciary duties to the Tribe, the Court of Claims noted that Great Britain had negotiated treaties with the Tribe in 1760 and 1763 and stated that “when the United States achieved independence from Great Britain, it became invested with all of the former sovereign’s rights and obligations under the 1760 and 1763 treaties.”

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 that was ceded by the tribes prior to the Revolution and to recognize the reservations that stemmed from 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 under the terms of the Treaty.

Ultimately, it is simply an historical accident that the 1677 Treaty was entered into early enough that it was signed with Great Britain rather than the United States. For the Mattaponi Tribe to be regarded as not having a treaty with the United States seems to be particularly unjust in view of the fact that the Tribe’s peaceful relations with Americans obviated the need for a new treaty to be signed. It seems absurd for the federal government to treat the Mattaponi Tribe as having fewer rights as against the United States and its citizens than tribes whose belligerence necessitated a post-independence treaty with the United States.

Finally, failure by the United States to honor the 1677 Treaty is 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. While the United States

---

601 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). In *Worcester*, 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.

602 *Id.* at 544. [add Ct of Claims opinion].


604 See *Mattaponi Cert. Petition*, supra note 494, at 2

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 and is currently reconsidering this decision.

b. The Treaty as Federal Law

The question of whether the 1677 Treaty is properly regarded as a matter of federal law (as the Tribe argued) or of state law (as Virginia and the Army Corps of Engineers maintained) was not settled by the litigation over the King William Reservoir project. The Supreme Court’s denial of the Tribe’s petition for certiorari to review of the Virginia Supreme Court’s holding on the state law status of the Treaty meant that the issue of whether the Treaty is enforceable as a matter of state law was not addressed definitively. 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 cert. 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 tribes and noted that cases touching upon these treaties arose as early as 1812. Courts deciding several of these cases in recent years have proceeded upon an assumption that these treaties are a matter of federal law. In a 2005 case involving the Unalachtigo Band of Nanticoke-Lenni Lenape Nation, for example, the Appellate Division of the New Jersey Superior Court considered the tribe’s demand for specific performance under a 1758 treaty. The Tribe, which is not federally recognized but had indicated its intent to seek formal recognition, argued that a subsequent sale of land guaranteed under the treaty without federal approval was void under the federal Indian Trade and Nonintercourse Act. The Nonintercourse Act declares void conveyances of interests in Indian

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.

606 See Gale Courcy 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 adoption).

607 The U.S. State Department set up a website to facilitate public consultation on the Department’s review of the U.S. position. See http://www.state.gov/s/tribalconsultation/declaration/.

608 Mattaponi Cert. Petition, supra note 494, at i. The Tribe’s petition for a writ of certiorari asked the Court to consider the question of “whether 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.

609 See Mattaponi Indian Tribe v. Virginia, No. 05-1141, Brief of the National Congress of American Indians as Amicus Curiae in Support of Petitioners, May 10, 2006, at 5 (explaining that these tribes’ rights and obligations “are defined in whole or part by pre-Revolutionary treaties, patents and Parliamentary acts.”) [hereinafter NCAI Amicus Brief].

610 Id. at 5 (“treaties, patents and Parliamentary acts.”).

611 See New Jersey v. Wilson, 11 U.S. (7 Cranch) 164, 165 (1812), which discussed a 1758 treaty.


613 867 A.2d at 1226.

614 Id. at 1227. As explained by the superior court judge who dismissed the Tribe’s claim, the Tribe’s claim was that the state’s purchase of land to which their rights had been recognized under the 1758 Treaty was void because “the treaty could only be overcome with consent of the United States.” Id. at 1226 (quoting the trial court judge). The tribal claim was thus ultimately a claim of violation of the Nonintercourse Act.
land without federal approval. The Unalachtigo Band court determined that New Jersey courts lacked jurisdiction over the tribe’s claim because only Congress has authority to regulate commerce with the Indians. The court relied on statements by the Supreme Court in Oneida Nation v. County of Oneida 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. The New Jersey court thus took a different view of the relationship between states and tribes, and the role of state law when tribal land-related claims are at stake, than did the Virginia Supreme Court in the King William Reservoir project litigation.

The NCAI amicus brief also noted that Catawba Indian Tribe of South Carolina v. South Carolina, a 1989 Fourth Circuit decision, had concluded that an action involving the Tribe arose “under the Constitution, laws, or treaties of the United States” where the tribe claimed a right of occupancy under treaties made with Great Britain. Similar assertions of federal law’s supremacy where Indian lands are concerned were set out in Cayuga Indian Nation of New York v. Cuomo. 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 include other tribal lands within the reach of 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.

As the NCAI explained in its brief, regarding the 1677 Treaty and others like it as a matter 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 create a conflicting “patchwork” of rules for treaty rights. The NCAI urged that the Court recognize pre-Revolutionary treaties of the United States and thus remain consistent with its own precedents, such as Worcester. The federalism principles that are at the heart of Worcester have been reiterated by the Supreme Court in subsequent cases establishing that powers of external sovereignty, like treaty-making power, reside only in the federal government. When the colonies, acting as a unit, separated from Great Britain, “the powers of

615 See 25 U.S.C. sec. 177 (“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.”).
616 See 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 had failed to showed that it was the successor in interest to the tribe from whom the land at issue was reserved in 1758 and therefore lacked standing. Unalachtigo Band of Nanticoke-Lenni Lenape Nation v. New Jersey, 2008 WL 2165191 (D. N.J. 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) (per curiam).
618 See NCAI Amicus Brief, supra note 609, at 7-8 (noting that the disparity between this decision and the Virginia decision indicates the unsettled nature of this matter).
619 See id. at 7 n.9, citing Catawba Indian Tribe of S.C. v. South Carolina, 865 F.2d 1444, 1456 (4th Cir. 1989).
621 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.
622 See NCAI Amicus Brief, supra note 609, 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).
623 See id. at 9.
external sovereignty passed from the Crown . . . to the colonies in their collective and corporate capacity as the United States of America.” 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. 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 governments are ill-suited to handle relations with tribes. 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 can not be the last word in this issue.

2. Federal Recognition (or the Lack Thereof)

Yet another question left unaddressed by the federal district court in the reservoir litigation was whether the Corps was required to consider the project’s impact on the reservation of a tribe that has not yet been formally recognized as such by the federal government. The Norfolk District Commander consulted with the Mattaponi Tribe and visited its Reservation, but claimed that the Corps was not legally obligated to do so. This treatment demonstrates a challenge that faces the Mattaponi Tribe and a number of other tribes. The Mattaponi have existed in their homeland as a tribe – as a political and social entity – since time immemorial. The state of Virginia has continued to recognize this fact. Yet the Tribe has not enjoyed formal federal acknowledgment of this reality.

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 over a case that involved tribal land claims and therefore was governed by federal law. Similarly, the federal district court subsequently hearing the case did not reject the claim because the Unalachtigo Band was not recognized by the United States (nor indeed even by the state). Rather, protection by the Act depended on a plaintiff’s showing that “it is or represents an Indian tribe,” as determined under the test set out in Montoya v. United States. The court did not address whether the Tribe satisfied the test because it concluded that the Tribe did not have sufficient evidence that it was the

---

Curtiss-Wright Export Corp., 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.

625 See NCAI Amicus Brief, supra note 609, at 13, quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936). 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 have belonged to the federal government as “necessary concomitants of nationality.” See id. at 7, quoting Curtiss-Wright, 299 U.S. at 318.

626 See id. at 13-14.

627 See id. at 14-15.

628 See supra note 350 and accompanying text.

629 ACE District Decision, supra note 310, 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”).

630 Unalachtigo Band, 2008 WL 2165191 at *1.

631 Id. at *1, 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.” 180 U.S. at 266.
successor in interest to the tribe for whom the land at issue was reserved in the 1758 treaty. 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 lack of formal federal acknowledgment of the Mattaponi Tribe does not alter the fact that the federal government has recognized the existence of the Tribe and other Virginia tribes in a number of ways. The Tribe has already participated in a number of federal Indian programs, and otherwise been treated by federal government agency employees as recognized tribes are treated. Virginia tribes have benefitted, for example, from federal funds under the Indian Self-Determination and Educational Assistance Act. The Mattaponi and Pamunkey Tribes have received job training program funding from the Department of Labor, through a consortium established by the tribes and the Monacan Tribe in 1981. The Mattaponi and Pamunkey Tribes have also been included in repatriation-related activities under the Native American Graves Protection and Repatriation Act.

Federal government employees have recognized that these tribes do, in fact, exist in a number of other ways, in the past and in the present. Anthropologist James Mooney, for example, documented the continued existence of Virginia tribes in his capacity as a Smithsonian employee. More recently, Colonel Carroll consulted with the Mattaponi Tribe in considering the permit request the reservoir project, an act that indicates recognition (albeit not formal administrative acknowledgment) of the existence of the Tribe as a political entity. In the 1930 Federal Census, two individuals who were members of Virginia tribes were enumerated as Chiefs, with their tribal affiliation (Mattaponi and Pamunkey, respectively) noted. Census enumerators, acting as agents of the federal government, thus acknowledged the governmental positions held by these two individuals in their respective political entities. The special status of members of the Mattaponi and Pamunkey Tribes was also recognized by the federal government during the Second World War, in which members of these tribes (whose reservation residence was acknowledged on their military

632 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, i.e., the one whose lands were protected by the 1758 Treaty. See id. at *15.

633 The Chickahominy Tribe, for example, was the beneficiary of ISDEA funding beginning in the 1970’s, when the Charles City County School board began to receive funds under the ISDEA on behalf of Chickahominy students in the county’s schools. See S. 480, sec. 101 (27).

634 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 1995, 63 Fed. Reg. 64,525, 64,525 (Nov. 20, 1998) (including the Mattaponi-Pamunkey-Monacan Consortium on the list of grantees). See also http://www.mpmjobs.org/AboutUs.htm (a “Native American employment and training program funded by the Work Force Investment Act through the U.S. Department of Labor”).

635 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. 21389, 21,389 (May 7, 2009) (noting that the Mattaponi Tribe had been consulted in connection with an inventory of human remains and associated funerary objects found in Virginia and would be notified of the repatriation decision).

636 See supra note 207.

637 See supra note 346-347 and accompanying text.


77
service registration cards) were inducted on a special day.\textsuperscript{639}

At the observances of the four hundredth anniversary of the Jamestown settlement, 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.\textsuperscript{640} 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 years and be photographed with their members. It seems disingenuous (to say the least) for the government to then 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 recognition\textsuperscript{641} resembling those used by the federal government.\textsuperscript{642} This 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 interest in seeking formal federal acknowledgment. Moreover, the fact that the House of Representatives has passed recognition legislation for other Virginia tribes, which do not have reservations or as extensively documented a history of relations with non-Indian government officials as does the Mattaponi Tribe, also indicates that at least one branch of the federal government is willing to formally recognize reality: some of the Powhatan tribes continue to exist in twenty-first century Virginia.

3. Federal Trusteeship Responsibilities

The existence and the extent of the trusteeship obligations owed by the federal government to the Mattaponi Tribe in the context of the Section 404 permit process were also left unaddressed by the federal district court in the litigation over the permit issuance. In response to the Tribe’s assertion that issuance of a permit for the project would violate the Corps’s trust responsibilities to the Tribe\textsuperscript{643} the Norfolk District stated (erroneously) that “the federal trust responsibility to Native American tribes applies only to federally recognized tribes” but decided to nonetheless treat the Mattaponi Tribe as though it were federally recognized, “to the extent possible and appropriate.”\textsuperscript{644}

There historically has been a general neglect of Virginia Indians by the national government. The fact that the United States has neglected the responsibilities that it owes to the Mattaponi Tribe in the past 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 involving a tribe in Maine, which was part of Massachusetts before achieving separate statehood. In

---

\textsuperscript{639} See, e.g., Registration Card of George Farris Custalow, Jr., Apr. 27, 1942, indicating that he was born and resided at Sweet Hall, King William Co., Va., on the Mattaponi Indian Reservation; see supra note 287 and accompanying text (induction day).


\textsuperscript{641} For a description of the Virginia requirements, see http://www.indians.vipnet.org/stateRecognition.cfm.

\textsuperscript{642} See supra note 303 (summarizing the federal requirements).

\textsuperscript{643} See ACE District Decision, supra note 310, at 189. The Tribe also raised the Treaty of 1646 as an obstacle to issuance of the permit. Id.

\textsuperscript{644} See id. at 220.
Joint Tribal Council of Passamaquoddy Tribe v. Morton, the First Circuit held that the United States continued to enjoy a trust relationship with the Passamaquoddy Tribe, despite the fact that for many years the Tribe had had an active relationship with the Massachusetts and Maine state governments but not the national government. The court found that the policy reflected in the Nonintercourse Act was to protect Indian tribes’ right of occupancy, even when no treaty has 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.” Assistance provided by the state is “not necessarily inconsistent with federal protection,” the court explained, and the state’s assumption of duties to a tribe does “not cut off whatever federal duties existed.” The court found that the federal government’s inactivity in relation to the Tribe and refusal, on several occasions, of tribal requests for assistance did not sever the trust relationship that existed between the government and the Tribe. In short, the United States government cannot be confident that it can ignore responsibilities toward the Mattaponi Tribe and other pre-constitutional sovereigns with impunity.

More recent cases have also recognized that a trust relationship can exist despite federal neglect of responsibilities that inhere in that relationship. In Golden Hill Paugussett Tribe of Indians v. Weicker, 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.”

Finally, the federal government’s awareness of potential trust responsibilities toward Virginia tribes and of the continued existence of these tribes, and in particular the reservation tribes, 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 had taken a railroad right-of-way across the reservation in 1855 without the consent of the United States or Virginia, let alone the Tribe. 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,” citing the Passamaquoddy Tribe decision. The report recognized that federal law prohibited the acquisition of interests in Pamunkey tribal land without federal government consent. 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, reflecting the Department’s awareness that the Tribe might have a valid claim against

646 Id. at 374.
647 Id. at 377.
648 Id. at 378.
649 See id. at 380.
650 Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 56 (2d Cir. 1994). See also Unalachtigo Band, 867 A.2d at 1226 (noting the trust relationship arising from the Act and citing Golden Hill).
651 H. Rep. No. 96-1144 to accompany H.R. 7212, Ratifying a settlement agreement in a land dispute between the Pamunkey Indian Tribe and the Southern Railway, 3.
652 Id. at 3. The report cited Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), and Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974), as support for the application of the Nonintercourse Act. Id.
653 See id.
654 See id. at 2 (setting out waiver language, in section 5 of the bill), 8-9 (noting DOI waiver request), 11 (setting out
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 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.” Clearly the key concern was avoiding any expenses that might arise from admitting that trust responsibilities existed, rather than a concern that the Pamunkey Tribe was not in fact a tribe. As Passamaquoddy Tribe and subsequent cases have shown, however, federal eagerness to shirk trust responsibilities does not make them disappear.

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. While the court expressed skepticism about the Tribe’s ability to establish such rights, the fact that the court was ailing to recognize the possibility was significant, and not only for the Mattaponi Tribe. In a 2000 article, Professor Judith Royster argued that reserved water rights doctrines should be applicable in the eastern United States and serve as the basis for water rights claims by eastern tribes. 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.” When land was set aside for the Powhatan tribes (now reduced to the Mattaponi and Pamunkey Reservations), this action implicitly reserved, for the tribes’ use, sufficient water to fulfill the purposes for which the land was set aside, i.e., to provide a base for them to sustain themselves through their agricultural practices, supplemented by hunting and fishing. The tribes and the Crown could not have intended for land to be set aside without sufficient water to sustain the tribes, through these endeavors, in the reserved area. Furthermore, the reservation of land 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. 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.

Secondly, 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), and agriculture on the reserved land and beyond it, this implicitly reserved the water necessary to support these practices. Water rights thus implicitly were reserved both by reserving land and by reserving the right to engage in activities that depend on water. The King William Reservoir project

---

655 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”).
656 Id. at 8.
658 Id. at 174.
659 See id.
660 See id. at 176.
661 See id. at 177.
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,” 662 based on the trust responsibility owed to the tribes by the government of the "discovering" nation and its successor in interest 663 and on the government’s power to set aside water for tribal use. 664 In the Mattaponi case, the Crown had the power to sign the Treaty guaranteeing tribal and resource rights (and implicitly reserved water rights) and, via various Treaty provisions, affirmed a protective relationship with the signatory tribes. 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, 665 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. The reserved water rights that attach to the Mattaponi Reservation continue to exist unless the Reservation is terminated, 666 which has not occurred. Existing uses reserved by the 1677 Treaty similarly were reserved forever, 667 unless the Treaty is abrogated, which it has not been. Under reserved water rights doctrine, the Mattaponi Tribe’s water rights are paramount over subsequent state-law based water rights. 668

Finally, the fourth basic principle of Indian reserved water rights doctrine, that tribal reserved water rights are not lost or abandoned by non-use, 669 is not, strictly speaking, necessary to protect Mattaponi rights, because the Tribe clearly has continued to utilize its rights. By continuing to fish on the Mattaponi River, as well as by operating the tribal fish hatchery, the Tribe 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. 670 In the case of the Mattaponi, the applicable treaty reserved buffer zones around “Indian townes” in which non-Indian could not “seate or plante.” Non-Indian settlement was prohibited to ensure availability of land for Indian agricultural and other activities, and consequently the Tribe should be entitled to claim the water that would be needed for farming this land. 671 As to reserved water rights based on aboriginal practices, the reserved water would likely “be determined by the specific circumstances of the practice and the watercourse.” 672 For the Mattaponi Tribe, with fishing, hunting, oystering, and plant harvesting rights under the 1677 Treaty, 673 the water would need to be sufficient to preserve the existence of the relevant resources. In the King William Reservoir project litigation, the Tribe’s fishing rights were of greatest concern, due to the potential impact on salinity and consequently on fish of the planned water extraction. Quantification of

662 Id. at 179.
663 See id. at 173.
664 See id. at 174.
665 See id. at 179-80 (exploring the constitutional foundations of the federal government’s authority over Indian affairs).
666 See id. at 182.
667 See id.
668 See id.
669 See id.
670 See id.
671 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.” Id. at 196.
672 See id.
673 See supra note 157 and accompanying text.
Mattaponi water rights (and the corresponding availability of permits for other users) would need to take into account factors like salinity in order to protect aboriginal uses. 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 relevant stream at a temperature of 68 degrees or less and maintain a prescribed minimum flow.\textsuperscript{674}

In summary, a claim by the Mattaponi Tribe of reserved water rights would fit well within the guidelines identified by Professor Royster for establishing reserved Indian water rights. As she noted, 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 purposes for which land was reserved can be accomplished – exist in the East as well.\textsuperscript{675}

Although Professor Royster was not focusing on tribes that are not federally recognized, she noted that the same underlying principles support reserved water rights for both federally recognized and non-federally recognized tribes, such as the Mattaponi Tribe.\textsuperscript{676} A 2006 article by Professor Hope Babcock explored the federal law basis for these rights\textsuperscript{677} and the question of whether nonfederally recognized eastern tribes can claim reserved tribal water rights. She concluded that such a claim is supported by not only legal doctrine\textsuperscript{678} but also by normative\textsuperscript{679} and utilitarian\textsuperscript{680} 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. Reserved water rights should arise whenever land is set aside for a tribe to enable it to survive, whether by the federal government or a state or colonial government.\textsuperscript{681} 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.”\textsuperscript{682} 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.\textsuperscript{683}

Professor Babcock’s article illustrated a number of the points by reference to the Mattaponi Tribe,\textsuperscript{684} with whose circumstances she was very familiar as a director of the Institute for Public Representation, which has served as the Tribe’s counsel.\textsuperscript{685} The circuit court judge considering the

\textsuperscript{674} United States v. Anderson, 6 INDIAN L. REP. F-129, F-130, cited in Royster, supra note 657, at 196.
\textsuperscript{675} Royster, supra note 657, at 197
\textsuperscript{676} See id. at 174 n. 174.
\textsuperscript{677} See id. at 174.
\textsuperscript{679} See id. at 1234-39.
\textsuperscript{680} See id. at 1240-46 (focusing on historical redress for injuries done to Indians, distributive equity, and the federal government’s fiduciary obligations).
\textsuperscript{681} See id. at 1247.
\textsuperscript{682} See id. at 1256.
\textsuperscript{683} Id.
\textsuperscript{684} 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,” which rights “continue in force” as long as the tribes “continue to occupy their traditional homelands.” Id. at 1259.
\textsuperscript{685} 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).
Tribe’s reserved water rights claims cited Professor Babcock’s article\(^\text{686}\) 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.”\(^\text{687}\) 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,\(^\text{688}\) which seems surprising in light of the Tribe’s experience in challenging the permits for the reservoir project. After all, the state permits that were 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. Its Treaty rights and rights to engage in aboriginal practices were threatened by the permits issued by the state, which seems to be a clear indication that reserved water rights were indeed necessary to ensure the quantity and quality of water required by the Tribe. At any rate, the settlement of the litigation over the project has left for another day the question of how successful Virginia tribes will be in asserting reserved water rights.

V. 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.”\(^\text{689}\)

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.\(^\text{690}\)

This article has shown 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 as well. And 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 has persevered in the face of repeated threats to its aboriginal and treaty rights and 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 was not achieved, however, on the explicit basis of its

\(^{686}\) Mattaponi VI, 2007 WL 6002103, at *7.

\(^{687}\) Id. at *12.

\(^{688}\) See supra notes 539-541 and accompanying text.

\(^{689}\) Kenneth Custalow, quoted in Lawrence Latané III, Another Legacy of Jamestown: For Indians, the Struggle Continues 400 Years Later, RICHMOND TIMES-DISPATCH, May 6, 2007 at A1.

\(^{690}\) Bush Jamestown Remarks, supra note 640.
rights under the treaty that shaped the creation of Virginia, despite the strong claims that the Tribe has on the basis of the 1677 Treaty. Rather, victory was achieved on the basis of principles of federal administrative and environmental law. More needs to be done by state and federal governments in order to fully live up to the provisions of the 1677 Treaty, and to 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 and its land and resources. The Tribe should be recognized as possessing reserved water rights, based on reservation of land and aboriginal practices. Finally, the United States should stop denying reality and 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.”

691 [http://www.nps.gov/colo/Jamestown/jamestown.htm](http://www.nps.gov/colo/Jamestown/jamestown.htm)