



COMMONWEALTH of VIRGINIA

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July 19, 2013

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Robert W. Duncan, Executive Director
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Jack G. Travelstead, Commissioner
Virginia Marine Resources Commission
2600 Washington Avenue, Third Floor
Newport News, Virginia 23607-4333

Dear Messrs. Duncan and Travelstead:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether members of Virginia Indian tribes are subject to Virginia's fish and wildlife laws and regulations with respect to seasons, moratoria, minimum size limits, possession limits, and method of take. If they are, you ask if there are any geographical limits to the application of those laws and whether there is any distinction among subsistence, recreational and commercial hunting, trapping and fishing. You also ask whether members of these tribes are required to obtain a fishing license from the Virginia Marine Resources Commission to fish in tidal waters.¹ Finally, you seek guidance as to which Virginia Indian tribes are formally recognized by the Commonwealth.

Response

It is my opinion that an Indian who habitually resides on an Indian reservation or an Indian that is a member of a Virginia recognized tribe² who resides in the Commonwealth is not required to obtain a

¹ There is a statutory exception for fishing and hunting license requirements that fall within the purview of the Department of Game and Inland Fisheries. VA. CODE ANN. § 29.1-301(I) (2011). There is no such exemption for those within the purview of the Virginia Marine Resources Commission. See VA. CODE ANN. § 28.2-226 (Supp. 2013).

² The Indian tribes that have been formally recognized by the Commonwealth are the Cheroenhaka (Nottoway) Indian Tribe of Southampton County, the Chickahominy, the Eastern Chickahominy, the Mattaponi, the Upper Mattaponi, the Monacan, the Nansemond, the Nottoway Indian Tribe of Virginia, the Pamunkey, the Patawomeck, and the Rappahannock. See S.J. Res. 127, 2010 Va. Acts 3104-08; S.J. Res. 12, 2010 Va. Acts 3020-21; H.J. Res.

license to fish in Virginia's inland waters, or to hunt or trap in Virginia. It is also my opinion that members of the Virginia tribes that were parties to the Treaty of 1677³ with England are not required to obtain a license to fish or oyster in Virginia's tidal waters provided the activity is limited to harvesting for sustenance. Finally, it is my opinion that Virginia Indians are bound by the trapping, hunting and fishing laws and regulations of the Commonwealth regardless of whether they are on or off a reservation.

Applicable Law and Discussion

Generally, it is unlawful to hunt, trap or fish in the Commonwealth without a license.⁴ Nonetheless, there is an exception to the license requirement that provides that "[n]o license to hunt, trap or fish shall be required of any Indian who habitually resides on an Indian reservation⁵ or of a member of the Virginia recognized tribes who resides in the Commonwealth."⁶ The fishing license exception is based on Indian heritage and is limited to fishing in Virginia's inland waters.⁷ Nonetheless, members of any Virginia tribe that was a party to the Treaty of 1677 are not required to have a license to fish or oyster in Virginia's tidal waters provided they are doing so for their sustenance. The Treaty of 1677 states in pertinent part that "the said Indians have and enjoy their wonted conveniences of Oystering, fishing, and

171, 2010 Va. Acts 2797-2801; H.J. Res. 150, 2010 Va. Acts 2786-87; H.J. Res. 32, 2010 Va. Acts 2745-46; H.J. Res. 390, 1989 Va. Acts 2139-40; H.J. Res. 205, 1985 Va. Acts 1526; H.J. Res. 54, 1983 Va. Acts 1270.

³ The tribes that signed the Treaty of 1677, per the spellings within the treaty, are the Appomattux, the Manakins, the Maherains, the Nansaticoes, the Nanzem'd, the Nanzemunds, the Nottowayes, the Pamunkey, the Pomunkey, the Portabacchoes, the Sappones, and the Wayonoake. Treaty between Virginia and the Indians, King Charles II - Queen of the Pomunkey *et al.*, May 29, 1677, reprinted in 14 VA. MAGAZINE OF HISTORY AND BIOGRAPHY (1906-1907) at 289-96.

⁴ See § 28.2-225 (2011) (making it "unlawful to fish in the tidal waters of the Commonwealth or those waters under the joint jurisdiction of the Commonwealth without first obtaining the required license, subject to the exemptions set out in § 28.2-226.") and § 29.1-300 (2011) ("[i]t [is] unlawful to hunt, trap or fish in or on the lands or inland waters of this Commonwealth without first obtaining a license, subject to the exceptions set out in § 29.1-301.") "Inland waters...include all waters above tidewater and the brackish and freshwater streams, creeks, bays, including Back Bay, inlets, and ponds in the tidewater counties and cities." Section 29.1-109 (Supp. 2013).

⁵ The phrase "any Indian who habitually resides on an Indian reservation" is not limited to members of state recognized tribes. Section 29.1-301(I). It falls to the person claiming this exemption to show that it applies. See *Commonwealth v. Bailey*, 124 Va. 800, 803, 97 S.E. 774, 775 (1919) (explaining that any exception to the licensing tax for hunting must be strictly construed against those seeking to employ it).

⁶ Section 29.1-301(I). In order to enjoy this exception, the person seeking to invoke it

[m]ust have on his person an identification card or paper signed by the chief of his tribe, a valid tribal identification card, written confirmation through a central tribal registry, or certification from a tribal office. Such card, paper, confirmation, or certification shall set forth that the person named is an actual resident upon such reservation or member of one of the recognized tribes in the Commonwealth

Id.

⁷ The exception, set forth in § 29.1-301(I), must be read together with the statute invoking this exception, § 29.1-300, to give the exception its proper scope. See *Lillard v. Fairfax Cnty. Airport Auth.*, 208 Va. 8, 13, 155 S.E.2d 338, 342 (1967) ("[u]nder the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogeneous system, or a single and complete statutory arrangement.") Because the statute invoking the exception only addresses fishing in Virginia's inland waters, the exception for a fishing license is likewise limited to fishing in Virginia's inland waters.

gathering . . . anything else for their natural Support not usefull to the English.”⁸ Because the Commonwealth stands as the successor to the English Crown in the Treaty of 1677,⁹ it respects the spirit and intent of the treaty. Therefore, the Commonwealth still recognizes this exception.

Despite these exceptions, Virginia Indians must follow fish and wildlife laws and regulations with respect to seasons, moratoria, minimum size limits, possession limits, and method of take. The term “[l]icense’ has generally been defined as conferring a right to do something which otherwise one would not have the right to do”¹⁰ The statutory license exception, based on heritage and the exemption that comes from the Treaty of 1677, places Virginia Indians on equal footing with all others who are exempt from the licensing requirement, such as landowners hunting, fishing and trapping on their own property.¹¹ Virginia Indians, along with all other exempt hunters, anglers and trappers, must comply with applicable fish and wildlife laws and regulations with respect to seasons, moratoria, minimum size limits, possession limits, and method of take to the same extent as anyone required to obtain a license. Additionally, Virginia Indians are subject to regulations promulgated by the Department of Game and Inland Fisheries and the Virginia Marine Resources Commission provided that the regulations are not written or applied in a discriminatory manner against Indians.¹²

Additionally, the gaming and fishing laws and regulations are as applicable on a reservation as they are elsewhere in the Commonwealth. While Virginia Indians have the exclusive right of use and occupancy of reservation land, the Commonwealth owns the land.¹³ There is nothing in place that limits the Commonwealth’s jurisdiction. Therefore, the laws and regulations of the Commonwealth apply on a reservation.¹⁴

⁸ Treaty between Virginia and the Indians, *supra* note 3, at art. VII.

⁹ See 2001 Op. Va. Att’y Gen. 36, 37 (opining that, with respect to the Treaty of 1677, “[t]he Commonwealth now stands as the successor to the Crown[,]” the party with whom the Virginia Indians entered into the treaty).

¹⁰ 12A M.J. Licenses § 2.

¹¹ For example, one who hunts on his own land is not required to have a hunting license yet is still required to abide by other hunting laws and regulations. Compare § 29.1-301(A) (exempting landowners, among others, to hunt, trap and fish within the boundaries of their own lands from licensing requirements), with *Bailey*, 124 Va. at 803, 97 S.E. at 775 (explaining that any exception to the licensing tax for hunting must be strictly construed against those seeking to employ it).

¹² “No state shall...deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV § 1. See also VA. CONST. art. I, § 11 (stating that “the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged”) and *Puyallup Tribe v. Dep’t. of Game of Wash.*, 391 U.S. 392, 398, *holding limited by* 414 U.S. 44 (1973), *vacated sub nom. Bennett v. Dep’t. of Game of Wash.*, 414 U.S. 509 (1973) (explaining that, while commercial net fishing by the Indians was protected by the treaty at issue, guaranteeing the right to “fish at ‘all usual and accustomed places[,]” nevertheless the treaty did not preclude the state from making reasonable, necessary, and nondiscriminatory regulations affecting the manner of the Indians’ fishing.)

¹³ 1976-77 Op. Va. Att’y Gen. 107, 109. See also *E. Band of Cherokee Indians v. United States*, 632 F.2d 373, 375 (4th Cir. 1980) (explaining that, after the Revolutionary War, the United States succeeded to England’s sovereignty and where Indian possessory rights to any particular land had been extinguished, the rights passed to the state in which such land was located); 2001 Op. Va. Att’y Gen. at 37-38 (explaining that Virginia Indians have a right of exclusive possession to their reservation lands with fee simple remaining in the Commonwealth).

¹⁴ See 2001 Op. Va. Att’y Gen. at 39 (explaining that the sheriffs have the same authority on a reservation as they do in the rest of the county in which they have jurisdiction).

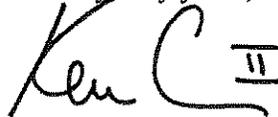
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Conclusion

Accordingly, it is my opinion that an Indian who habitually resides on an Indian reservation or an Indian that is a member of a Virginia recognized tribe who resides in the Commonwealth is not required to obtain a license to fish in Virginia's inland waters, or to hunt or trap in Virginia. It is also my opinion that members of the Virginia tribes that were parties to the Treaty of 1677 with England are not required to obtain a license to fish or oyster in Virginia's tidal waters provided the activity is limited to harvesting for sustenance. Finally, it is my opinion that Virginia Indians are bound by the trapping, hunting and fishing laws and regulations of the Commonwealth regardless of whether they live on or off a reservation.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and cursive.

Kenneth T. Cuccinelli, II
Attorney General