



# COMMONWEALTH of VIRGINIA

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Colonel W.S. Flaherty  
Superintendent, Department of State Police  
Post Office Box 27472  
Richmond, Virginia 23261-7472

Dear Colonel Flaherty:

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

## Issue Presented

You ask whether federal recognition of the Pamunkey Tribe alters the analysis and conclusions of a 2001 Opinion of the Attorney General relating to the authority of state and local law-enforcement to serve legal process, arrest warrants, and subpoenas, and investigate alleged misdemeanors and felonies, on the Pamunkey reservation. You also ask about law-enforcement authority for the Mattaponi reservation. The federal government has not recognized the Mattaponi Tribe.

## Background

As you note, in 2001 this Office issued an opinion concluding that the King William Sheriff's Office has the same law-enforcement authority on these reservations as elsewhere in the county.<sup>1</sup> That opinion was premised, at least in part, on the fact that neither tribe at the time had been granted federal recognition. Because the tribes had a relationship with the Commonwealth only, the opinion found that state law governed the inquiry, and federal laws such as the Indian Country Crimes Act and the Indian Country Major Crimes Act did not apply.

The opinion noted that the Commonwealth's relationship with the tribes is rooted in the Indian Treaty of 1677, to which the Commonwealth stands as successor to the British Crown. Pursuant to the Treaty, lands within the reservations are held in fee simple by the Commonwealth, subject to the exclusive use and occupancy of the tribes. The Treaty, as well as subsequent actions of the General Assembly, imposes an obligation on the Commonwealth to "extend the same protections of the law . . . to members of the tribes as are extended to nonmembers."<sup>2</sup> Furthermore, nothing in the Treaty or other state law serves to limit the authority of law-enforcement on lands within the reservations. Accordingly, the

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<sup>1</sup> 2001 Op. Va. Att'y Gen. 36.

<sup>2</sup> *Id.* at 38.

opinion found that local law-enforcement has the same authority on the reservations as elsewhere in the locality.<sup>3</sup>

On October 6, 2015, the United States Department of the Interior officially acknowledged the Pamunkey Tribe as an Indian tribe within the meaning of federal law.<sup>4</sup> You ask whether this federal recognition limits the authority of state and local law-enforcement agencies on the Mattaponi and Pamunkey Indian reservations.

### Applicable Law and Discussion

Generally, primary jurisdiction over land classified as “Indian country” rests “with the federal government and the Indian tribe inhabiting it, and not with the States.”<sup>5</sup> Under federal statute, the term “Indian country” includes

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>6</sup>

This statutory definition of “Indian country” originated in early twentieth-century United States Supreme Court decisions.<sup>7</sup> In these cases, the Supreme Court “relied upon a finding of *both* a federal set-aside *and* federal superintendence in concluding that the Indian lands in question constituted Indian country,” and, as a result, “that it was permissible for the Federal Government to exercise jurisdiction over them.”<sup>8</sup>

Congress’s codification of the Supreme Court’s definition of the term “does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in [the Court’s] prior cases: Indian reservations; dependent Indian communities; and allotments.”<sup>9</sup> Therefore, lands occupied by Native Americans qualify as “Indian country” under federal law only in cases where 1) the land was set aside for Indian use by the federal government, and 2) the

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<sup>3</sup> *Id.* at 39.

<sup>4</sup> Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe, 80 Fed. Reg. 39,144 (July 8, 2015) (final determination eff. Oct. 6, 2015).

<sup>5</sup> *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998); *see also* 18 U.S.C. §§ 1151, 1152, 1153, 3242 (2015); 1-3 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[1] (LexisNexis 2015) [hereinafter, COHEN’S HANDBOOK].

<sup>6</sup> 18 U.S.C. § 1151; *see also* COHEN’S HANDBOOK, *supra* note 5, at § 3.04[2][c][ii] (stating that the modifying phrase “under the jurisdiction of the United States Government” in subsection (a) was “likely added to *exclude* from the scope of the statute Indian reservations governed by certain states and thus *not* under federal protection”) (emphasis added); *United States v. Ramsey*, 271 U.S. 467, 470-72 (1926) (discussing the two types of Indian allotments, neither of which applies here).

<sup>7</sup> *Venetie*, 522 U.S. at 528-30 (citing *Donnelly v. United States*, 228 U.S. 243 (1913); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. McGowan*, 302 U.S. 535 (1938)).

<sup>8</sup> *Id.* at 530 (emphasis added).

<sup>9</sup> *Id.* (citations omitted).

land remains subject to “federal superintendence.”<sup>10</sup> The Mattaponi and Pamunkey Indian reservations meet neither of these requirements. The lands were set aside by the Crown in the Indian Treaty of 1677, and the lands themselves remain under the superintendence of the Commonwealth, not the federal government.<sup>11</sup>

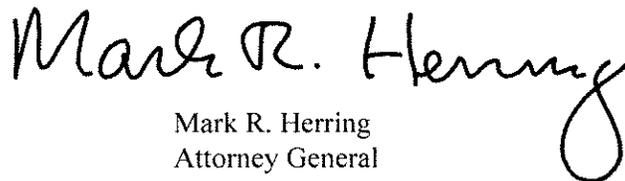
Importantly, in *Alaska v. Native Village of Venetie Tribal Government*, the Supreme Court unanimously rejected the argument that “Indian country exists wherever land is owned by a federally recognized Tribe.”<sup>12</sup> According to the Court, “[t]his argument ignores [the Court’s] Indian country precedents, which indicate both that the Federal Government must take some action setting apart the land for the use of the Indians ‘as such,’ and that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government.”<sup>13</sup> In addition, the Court noted that the “health, education, and welfare benefits” available to federally recognized tribes do not alone constitute “active federal control over the Tribe’s land sufficient to support a finding of federal superintendence.”<sup>14</sup>

### Conclusion

Accordingly, it is my opinion that the Pamunkey Indian reservation does not qualify as “Indian country” for federal purposes, despite federal recognition of the Pamunkey Tribe. My opinion is the same for the Mattaponi Indian reservation, where there has not been federal recognition of that tribe. Thus, Virginia state and local law-enforcement agencies retain the same authority on the Pamunkey and Mattaponi Indian reservations as elsewhere in the Commonwealth to serve legal process, arrest warrants, and subpoenas, and to investigate misdemeanors and felonies.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>10</sup> *Id.*

<sup>11</sup> *See* 2001 Op. Va. Att’y Gen. 36, 37-38.

<sup>12</sup> *Venetie*, 522 U.S. at 530 n.5.

<sup>13</sup> *Id.* (citing *McGowan*, 302 U.S. at 539, and *Pelican*, 232 U.S. at 449).

<sup>14</sup> *Id.* at 534.