



COMMONWEALTH of VIRGINIA

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November 4, 2009

The Honorable Jim Webb
507 East Franklin Street
Richmond, Virginia 23219

The Honorable Mark Warner
919 E. Main Street, Suite 630
Richmond, Virginia 23219

Re: S.1178 – The Indian Tribes of Virginia Federal Recognition Act of 2009

Dear Senators Webb and Warner,

The Senate Committee on Indian Affairs' recent favorable action on S. 1178, The Indian Tribes of Virginia Federal Recognition Act of 2009, is an important step toward the federal recognition of six of Virginia's Native American Indian Tribes.

There are concerns, however, that passage of this legislation without certain amendments to affirm clearly the Commonwealth's taxation authority will result in significant losses in state motor fuel and tobacco product sales tax revenue. To ensure that the Commonwealth's legal authority in these areas is clear, I respectfully request your consideration of minor clarifying amendments to the legislation to address these concerns and safeguard the Commonwealth's ability to enforce its tax laws.

On its face, the legislation provides the tribes immunity from *any suit* brought by a state or state authority. This presumably would include the Commonwealth's Department of Taxation or the Department of Motor Vehicles, the agencies responsible for enforcing and collecting the Commonwealth's tobacco product and motor fuel taxes, respectively. Both S. 1178 and its companion legislation, H.R. 1385, provide for the Commonwealth's exercise of jurisdiction over all criminal offenses and civil actions arising on tribal lands; however, it is unclear if such a general provision would suffice as the clear and unequivocal waiver of the tribes' sovereign immunity necessary for the Commonwealth to exercise and enforce its taxation laws.

A review of governing federal case law leads to the conclusion that an explicit waiver of tribal sovereign immunity to allow the Commonwealth to enforce and collect state sales taxes

would be preferable to relying upon a general and ambiguous allowance for state jurisdiction over criminal and civil matters. Other states have been forced to litigate with their Native American Indian tribes concerning imposition and collection of state sales taxes, which has certainly been difficult and costly for all parties.

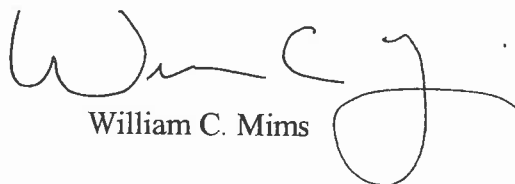
Moreover, the general waiver of the tribes' sovereign immunity included in the legislation would likely be tested, in light of applicable federal case law. Should the Commonwealth's tribes enter the motor fuel or tobacco product wholesale or distribution business, it might be possible to question the Commonwealth's ability to enforce its tax laws consistent with tribal sovereign immunity. In addition, should tax rates on these products increase, the situation could very well incentivize unlawful circumvention of the Commonwealth's tax laws altogether. These ambiguities and potential conflicts easily could be foreclosed by the proposed amendments.

It is my understanding that such amendments have been offered in the House by Representative Wittman. It is also my understanding that these amendments will not detract from the tribes' federal recognition or concomitant tribal sovereignty.

Given these concerns, I request you consider offering these amendments to provide the needed clarity to the current legislation. For your convenience, I have enclosed a slightly revised draft of Representative Wittman's amendments. I or my staff would be happy to discuss these matters at your convenience.

Thank you for your attention to this matter and your service to the Commonwealth.

Sincerely,



William C. Mims

cc: Governor Timothy M. Kaine
Congressman Rob Wittman

Enclosure

Proposed Amendments to S.1178/H.R. 1385

At the end of each sections 102, 202, 302, 402, 502, and 602, insert the following:

(4) Retail Business – The term “retail business” means a business that sells products directly to consumers as its primary function.

(5) Wholesale Business – The term “wholesale business” means a business that sells products to retail businesses as its primary function.

At the end of title I, insert the following (and conform the table of contents accordingly):

Sec. 109. State Sales and Use Taxes

- (a) In General. – Any wholesale or retail business established by the Tribe shall collect and remit all excise, sales, and use taxes imposed by the Commonwealth for any sales to persons who are not tribal members to the same extent as nontribal businesses within the Commonwealth.
- (b) Enforcement. – If the Commonwealth determines that a wholesale or retail business established by the Tribe is in violation of this section, the Commonwealth may enforce the tax laws of the Commonwealth against the tribal wholesale or retail business in a Commonwealth court of jurisdiction or in a district court of the United States.

At the end of title II, insert the following (and conform the table of contents accordingly):

Sec. 209. State Sales and Use Taxes

- (a) In General. – Any wholesale or retail business established by the Tribe shall collect and remit all excise, sales, and use taxes imposed by the Commonwealth for any sales to persons who are not tribal members to the same extent as nontribal businesses within the Commonwealth.
- (b) Enforcement. – If the Commonwealth determines that a wholesale or retail business established by the Tribe is in violation of this section, the Commonwealth may enforce the tax laws of the Commonwealth against the tribal wholesale or retail business in a Commonwealth court of jurisdiction or in a district court of the United States.

At the end of title III, insert the following (and conform the table of contents accordingly):

Sec. 309. State Sales and Use Taxes

- (a) In General. – Any wholesale or retail business established by the Tribe shall collect and remit all excise, sales, and use taxes imposed by the Commonwealth for any sales to persons who are not tribal members to the same extent as nontribal businesses within the Commonwealth.

- (b) Enforcement. – If the Commonwealth determines that a wholesale or retail business established by the Tribe is in violation of this section, the Commonwealth may enforce the tax laws of the Commonwealth against the tribal wholesale or retail business in a Commonwealth court of jurisdiction or in a district court of the United States.

At the end of title IV, insert the following (and conform the table of contents accordingly):

Sec. 409. State Sales and Use Taxes

- (a) In General. – Any wholesale or retail business established by the Tribe shall collect and remit all excise, sales, and use taxes imposed by the Commonwealth for any sales to persons who are not tribal members to the same extent as nontribal businesses within the Commonwealth.
- (b) Enforcement. – If the Commonwealth determines that a wholesale or retail business established by the Tribe is in violation of this section, the Commonwealth may enforce the tax laws of the Commonwealth against the tribal wholesale or retail business in a Commonwealth court of jurisdiction or in a district court of the United States.

At the end of title V, insert the following (and conform the table of contents accordingly):

Sec. 509. State Sales and Use Taxes

- (a) In General. – Any wholesale or retail business established by the Tribe shall collect and remit all excise, sales, and use taxes imposed by the Commonwealth for any sales to persons who are not tribal members to the same extent as nontribal businesses within the Commonwealth.
- (b) Enforcement. – If the Commonwealth determines that a wholesale or retail business established by the Tribe is in violation of this section, the Commonwealth may enforce the tax laws of the Commonwealth against the tribal wholesale or retail business in a Commonwealth court of jurisdiction or in a district court of the United States.

At the end of title VI, insert the following (and conform the table of contents accordingly):

Sec. 609. State Sales and Use Taxes

- (a) In General. – Any wholesale or retail business established by the Tribe shall collect and remit all excise, sales, and use taxes imposed by the Commonwealth for any sales to persons who are not tribal members to the same extent as nontribal businesses within the Commonwealth.
- (b) Enforcement. – If the Commonwealth determines that a wholesale or retail business established by the Tribe is in violation of this section, the Commonwealth may enforce the tax laws of the Commonwealth against the

tribal wholesale or retail business in a Commonwealth court of jurisdiction or in a district court of the United States.