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Va. Order Gives Tribes More Power Over State Permits

By **Clark Mindock**

Law360 (November 18, 2021, 5:30 PM EST) -- Virginia Gov. Ralph Northam issued a sweeping executive order Thursday requiring the commonwealth to consult with local Native American tribes in the permitting process, moving the state toward becoming the first in the nation where permits can be denied if affected tribes don't give their consent.

The executive order requires formal consultation with federally recognized tribal nations in Virginia when evaluating state permits for projects that might impact tribal environmental, historic or cultural resources — a move that brings the state in line with federal processes and 13 other states that already require that form of consultation.

But the Virginia order takes the matter a step further, mandating a process through which tribes in the state will be able to recommend that certain permits not be granted without their consent. That process, known more formally as free, prior and informed consent, is common practice outside the United States and even with some major banks stateside, but has not been seen in state or federal regulations so far.

"This is an important step in recognizing and acting on tribal sovereignty," Northam said before signing the executive order. "It is an understatement to say that the United States and state governments have too often failed to live up to the terms and agreements made with the tribes that were here first. But we continue working to do a better job at treating Virginia's tribes with the respect they deserve."

The executive order was announced during a state Native American Heritage Month celebration and came after consultation between the governor and state tribes including the Chickahominy Indian Tribes, the Monacan Indian Nation, the Nansemond Indian Nation, the Pamunkey Indian Tribe, the Rappahannock Tribe and the Upper Mattaponi Indian Tribe.

It will require that state permits for a variety of projects — including major state development projects, transmission lines, offshore wind projects, airports, oil and gas well drilling, and groundwater drilling — go through a process that directly involves impacted tribes. Previously, state permits could be issued without consulting tribes, leading to instances where allegedly impacted tribal interests are discovered after ground has been broken, leading to bitter legal disputes.

Without consultation, development projects can impact environmental concerns like water rights as well as cultural interests like burial grounds of tribal ancestors and wildlife that are key components of tribal history and culture.

"This executive order is an historic step forward in advancing the government-to-government relationship between Tribal Nations and states in this country, and we applaud Gov. Northam's bold and courageous leadership for honoring tribal sovereignty and the inherent right to free, prior, and informed consent," Fawn Sharp, president of the National Congress of American Indians, said in a statement.

The executive order comes as the relationship between tribal governments and state and federal governments has been an increasingly prominent concern in American politics. While President Joe Biden, a Democrat like Northam, has sought to bolster the relationship between **the federal government and tribes**, that effort has come alongside heavy criticism for the administration's support for **contentious pipeline projects** like the Enbridge Line 3 project that tribal interests in Minnesota say could destroy their cultural heritage and pollute drinking water.

Marion Werkheiser, an attorney with Cultural Heritage Partners, which represents six federally recognized tribes in Virginia, noted that the new rules actually date back centuries to a 1677 colonial Virginia treaty aimed at respecting the boundaries of tribal lands. But even with that unique history, she said the consultation and consent rules, if mimicked in other states, could provide valuable tools for tribes and developers to try to avoid the thorny types of fights that make headlines and legal headaches from the get-go.

"Many projects that ultimately need federal approvals must go through the state permitting process first," Werkheiser told Law360 on Thursday. "The requirement for states to consult with tribes allows tribal concerns to be raised earlier in the planning process, when design changes can be accomplished less expensively, and will help developers and tribes avoid costly public battles."

For legal practitioners whose clients might include tribes or industries that might be trying to develop in areas with tribal cultural history, the Virginia rules could be a major development worth taking note of, said James T. Maggesto, a partner at Holland & Knight LLP.

"If what this does on the state level is not only a consultation component but also a tribal consent depending on the circumstances, then that's potentially significant," Maggesto said. "I've never seen one specifically tailored to tribes at the state level to require consent because states, generally, leave that to the federal level in most circumstances. If there's truly a comprehensive requirement to consult and get the consent of tribes for state projects that impact environmental resources, it's significant."

While the executive order could be rescinded or modified by Glenn Youngkin, the Republican who beat Democratic nominee Terry McAuliffe to take over the governorship earlier this month, the order does appear to have some bipartisan backing. Among the supporters is Republican Rep. Rob Wittman, who said in a statement that Virginia tribes are important partners in the state and that the "order reflects that partnership by recognizing their voices in projects that impact them."

Representatives for Youngkin didn't reply to requests for comment on the future governor's position on the issue.

--Editing by Jill Coffey.

Correction: A previous version of this story incorrectly identified the Democratic candidate in the 2021 governor's race. The error has been corrected.