

June 5, 2019

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Re: Comments of the Monacan Indian Nation on the Revised Memorandum of Agreement (MOA) and Treatment Plan for Architectural Resources 032-0036 and 032-5124, and Archeological Sites 44FV0022, 44FV0024, and 44FV0268, associated with the James River Water Supply Pump Station and Pipeline Alignment

Dear Mr. VanderPloeg:

This letter responds to the materials distributed by your office on May 6, 2019, including the draft Memorandum of Agreement and Treatment Plan, for the James River Water Supply Project. We appreciate the Corps providing the consulting parties thirty (30) days to respond to this latest round of information, over the objections of the James River Water Authority (JRWA). In addition, the Monacan Indian Nation (Nation) appreciated the opportunity to engage in government-to-government consultation with you and your colleagues on May 20.

The Nation's concerns can be summarized as follows:

- 1) The Corps should not permit the destruction of Rassawek, the Nation's historic capital, and the disturbance of Monacan ancestors.
- 2) The Corps should not grant authority for this project to proceed under Nationwide Permit 12 and instead should require an individual permit application, which will allow the Corps to receive additional information regarding possible alternatives that would avoid or minimize impacts to Rassawek.
- 3) Should the Corps approve this project as currently designed, there are profound problems with the proposed Memorandum of Agreement, Treatment Plan, and Monitoring Plan that must be addressed.

### **1) The Corps Should Not Permit the Destruction of Rassawek**

The Nation is stridently opposed to siting a two-story pump station at Point of Fork, the site of Rassawek, the Nation's historic capital.

In 1612, when John Smith drew his Map of Virginia, he recorded an Indian town at the fork of the Rivanna and James rivers called Rassawek. Smith learned that Rassawek was the capital of the Monacan people: all Monacan towns sent their tribute to Rassawek and gathered there for major ceremonies. Rassawek was a large town, with a longhouse of sixty feet, and at least a dozen

roundhouses. A carbon-dated feature at Rassawek indicates occupation as early as 5,340 years ago, about 200 generations before John Smith.

That spot where the rivers meet, now known as Point of Forks, is one of the most concentrated archaeological districts in Virginia. The history of over two hundred generations of the Monacan people is written in this soil and landscape. Rassawek provides the Monacans a tangible connection to their ancestors, the vast majority of whom did not survive the arrival of the English, and many of whom are buried there. The Monacans' ancestors lived and died there, performed rituals, and met as a community, and the artifacts they left behind reveal important stories to Native and non-Native people alike.

Despite repeated warnings about the importance of Rassawek by historians, tribal leaders, and concerned citizens, JRWA plans to destroy the Nation's pre-colonial capital and burial grounds to build a water pumping facility. This plan is tragic and unnecessary—JRWA admits that there are alternative locations for the pump station that would still meet the water and sewer needs of the Zion Crossroads development. JRWA's only explanation for choosing this location is that it believes this location may save money over alternatives that do not erase irreplaceable Indian history.

The Nation is deeply troubled that JRWA would disturb their ancestors' resting places and has already obtained anticipatory burial permits from the state. When Indian burials are dug up by contractors, they are returned to the Nation—if at all—in cardboard banker's boxes. Monacan ancestors deserve to rest in peace, and their living community does not deserve to endure, once again, the emotional trauma of holding funerals and reburial ceremonies.

At a time when the National Park Service is working with advice from eastern Virginia tribes to interpret the capital of the Powhatan Confederacy, Werowocomoco, for visitors from across the United States, the Nation cannot help but wonder why the Corps would issue a permit to JRWA to destroy the Monacan capital. Surely the public interest requires JRWA and the Corps to do the only reasonable—and right—thing: move the pump station and save Rassawek.

## **2) The Corps Should Require an Individual Permit**

The Corps should require an individual permit application, which will allow the Corps to receive additional information regarding alternatives to avoid or minimize impacts to Rassawek, as well as to the two other historic districts and 3-4 National Register eligible sites that will be adversely affected if the pump station is built in its currently proposed location.<sup>1</sup>

Requiring an individual permit application will provide the Corps with additional information with which to make its decision, including information regarding feasible alternatives to building on top of Rassawek. A full analysis of possible alternative site locations is necessary to determine

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<sup>1</sup> The Corps's District Engineer has discretionary authority to require an individual permit when a proposed activity may be contrary to the public interest. *See* 33 CFR 330.1(d) ("If the DE finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit.")

whether impacts to Rassawek may be avoided or minimized. An individual permit would also require an evaluation of the project under environmental justice criteria, which will raise additional concerns regarding the project's appropriateness and illustrate that it is not in the public interest.

Furthermore, the Corps is permitting the James River Water Supply Project using two separate nationwide permits, segmenting its review. According to verbal representations made at the October 31, 2018 consulting parties meeting, the Corps permitted the water pipeline separately *because there were multiple possible site locations for the pump station*. The Corps claimed in signing off on the Louisa pipeline that the pipeline could be useful even if the pump station were not constructed. Indeed, if the Point of Forks location had been the only possible site location available for the pump station, then the Corps's segmenting of this "single and complete project" where "pieces cannot function independently" would have violated its own regulations.<sup>2</sup> JRWA now argues in its January 2019 letter that Point of Forks is the only site available. Either JRWA misled the Corps in the past or is misleading the Corps now. A robust analysis of alternatives and consideration of cumulative effects will bring needed clarity to the Corps as it meets its legal responsibilities in permitting this project.

In addition to exercising discretionary authority to require an individual permit, the Corps should require an individual permit because the JRWA project does not meet the general conditions of Nationwide Permit 12 for the following reasons:

- a) NWP 12 only applies if "the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States." This project plans to remove 4,500,000 to 11,000,000 gallons of water from a water of the United States **each day**.
- b) NWP 12's definition of "utility lines" does not include activities that drain a water of the U.S., such as a water intake that intends to drain 4,500,000 to 11,000,000 gallons of water from a water of the U.S. each day.
- c) General condition 7 states that "no activity may occur in proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization." In this case, JRWA is proposing to construct a public water supply intake where there currently is none.
- d) General condition 17 states that the NWP may not be used when there are more than "minimal adverse effects" on tribal rights. The disturbance of ancestors and the destruction of the Nation's historic capital cause more than minimal adverse effects on the tribe's rights. In addition, tribal members described to the Corps at the May 20 meeting the emotional, logistical, and financial impact of repatriation of human remains on the tribe, and how disturbance of Monacan ancestors through construction projects places a considerable and unique burden on the Monacan community.

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<sup>2</sup> JRWA argues that the project was lawfully segmented because the County of Louisa was the applicant for the water pipeline, while JRWA applied for the pump station. This argument is specious at best; Corps regulations clearly provide that permits should apply to "the total project proposed or accomplished by one owner/developer **or association of owners/developers**." 33 CFR 330.2(i) (emphasis added). JRWA is an association of developers pursuing the same objective.

This project is also deeply controversial and, as such, demands further scrutiny from the Corps. All consulting parties have expressed intense concern over this project, with multiple parties asking that the project be moved to another site where fewer tribal and historical resources will be damaged.<sup>3</sup>

Additional information will also assist the Corps in addressing longstanding and consistent concerns from consulting parties and the State Historic Preservation Officer (SHPO). Recent comments from the SHPO regarding the revised Treatment Plan and the Phase II report for the site 44FL0269 demonstrate that JRWA continues to submit substandard work and ignore legitimate and reasonable concerns regarding site methodology in such a historically significant and archaeologically complex area.

The Corps's policy is to "protect natural and cultural resources when possible."<sup>4</sup> Additional information will confirm that JRWA can complete its project at a different location to allow for the protection of cultural resources.

### **3) The Memorandum of Agreement and Treatment Plan are Fundamentally Flawed**

Should the Corps misguidedly determine to permit this project, there are profound issues with the proposed Memorandum of Agreement (MOA), Treatment Plan, and Monitoring Plan that must be addressed. Even if these issues are addressed, the Nation reserves the right to refuse to sign the agreements and to continue protesting the authorization of this project.

The MOA, Treatment Plan, and Monitoring Plan are fundamentally flawed in the following ways:

- a) The draft MOA fails to resolve adverse effects and allows the Section 106 process to be concluded before the Corps has been assured of basic issues of mitigation, site excavation methodology, treatment of human remains, and curation.
- b) The MOA provides no protections for cultural resources should JRWA abandon the project.
- c) The MOA's stipulations on the treatment of human remains are inadequate.
- d) The Treatment Plan is severely limited in scope and does not meet the threshold level of effort required for sites of this significance and information potential.
- e) The Treatment Plan remains ambiguous or inadequate regarding identification of cultural strata, excavation methods, sampling strategies, and what proportion of the affected archaeological sites will be excavated by hand.
- f) The Monitoring Plan does not have sufficient information regarding how work would be conducted or sufficient commitments to avoid the loss of important cultural information, artifacts, or human remains.

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<sup>3</sup> E.g., "I am not sure that the locality could have chosen a more archaeologically/historically/culturally significant and sensitive site of all [of the area of the James River along Fluvanna County]," Preservation Virginia statement to DHR in 2015.

<sup>4</sup> U.S. Army Corps of Engineers (USACE) Update on Compliance with Policies and Directives of President Obama's Memorandum on Tribal Consultation, 5 Nov 2009; available at [https://www.usace.army.mil/Portals/2/docs/civilworks/tribal/obamamemo\\_usaceupdate\\_25july.pdf](https://www.usace.army.mil/Portals/2/docs/civilworks/tribal/obamamemo_usaceupdate_25july.pdf)

- g) The quality of submitted cultural resource reports continues to fail to meet applicable standards.
- h) Proposed mitigation is not sufficient to resolve the adverse effects of this project, and the project proponent mischaracterizes the Nation as financially motivated instead of engaging substantively with their concerns.
  
- a) **The draft MOA fails to resolve adverse effects and allows the Section 106 process to be concluded before the Corps has been assured of basic issues of mitigation, site excavation methodology, treatment of human remains, and curation.**

The Section 106 process requires the Corps to identify historic properties that may be affected by a project, assess adverse effects, and seek to resolve those adverse effects, through avoidance, minimization, or by mitigation. A MOA that resolves adverse effects governs the entire undertaking and all its parts. *See* 36 CFR 800(c). Yet JRWA is asking the Corps to adopt a MOA that neither resolves adverse effects nor governs the entire undertaking. JRWA is asking the Corps to short-circuit that process by agreeing to a MOA that merely establishes a timeline for the resolution of effects to be decided in a treatment plan completed up to twelve months in the future. *See* Stipulation I(A). This approach neglects the agency’s responsibility to seek to resolve adverse effects prior to concluding the Section 106 process. It kicks the can down the road, undermining the purpose of tribal consultation and denying consulting parties sufficient information upon which to make a decision whether to be bound by the agreement.<sup>5</sup> This project is not one where adverse effects cannot be determined until some unknown point in the future; the adverse effects are known now. Resolution of those effects, including through data recovery methodology and a plan for treating human remains, must be decided before the Corps can execute a MOA for this undertaking.<sup>6</sup>

Stipulation I(F) states that the “Permittee has, and continues to, evaluate opportunities to further minimize the area of disturbance necessary to complete the Project... Should the Permittee substantially reduce the area of construction-related excavation within the boundaries of an archaeological site, it may propose a modification of the approved treatment plan.” If the Permittee believes there are still opportunities to minimize adverse effects, the Corps should require the Permittee to complete that analysis prior to the execution of this MOA.

Moreover, Stipulation II calls for incomplete cultural resources review on 44FV0269. The Corps should require JRWA to provide sufficient information such that SHPO can evaluate the eligibility of Site 44FV0269, and enable the parties to consult on how to resolve adverse effects prior to the conclusion of the Section 106 process. That resolution of effects should be in the body of the MOA, not in a future treatment plan.

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<sup>5</sup> “Consulting parties” is not adequately defined and yet is referenced throughout the MOA. Consulting parties should be defined to include invited signatories and concurring parties, as well as parties who are consulting but who have not signed or concurred.

<sup>6</sup> JRWA argues in its January 11, 2019 cover letter that “To the extent that further discussion of additional mitigation is warranted, JRWA believes the appropriate object of those discussions is the treatment plan and the appropriate time is after the MOA has been executed.” Such belief is contrary to the letter and spirit of the Section 106 process, which requires agencies to seek to resolve adverse effects prior to authorizing an undertaking.

In addition, the MOA's stipulations still do not require JRWA to transfer ownership of Monacan objects to the Nation or to pay for their permanent curation. Burying "maybes" in the Treatment Plan is not sufficient—the Corps should demand assurances and promises in the legally binding MOA that artifacts, human remains, and associated grave goods will be transferred to the Monacans for permanent curation.

**b) The MOA provides no protections for cultural resources should JRWA abandon the project.**

The Corps should remove the line in Stipulation I(C): "Nothing in this Agreement prohibits construction activities from proceeding (1) in areas outside the boundaries of any resource or site covered by the treatment plan or (2) within the boundaries of any such resource or site if data recovery for that respective resource or site has been completed." The Corps should not give JRWA's consultant free reign to decide when data recovery has been completed. In addition, if the Corps decides to retain Stipulation I(D), which would allow JRWA to proceed with construction activities at the site after the management summary has been accepted but before the technical report has been submitted, the Corps should require JRWA to post a surety bond in amounts sufficient to pay for all research, analysis, drafting of the technical report, and curation obligations in perpetuity. The Corps should ensure that even if JRWA abandons the project for any reason, the data recovered from the project will be preserved and interpreted.

Similarly, the Corps should remove Stipulation XII(C): "If the Permittee decides it will not proceed with the project, it shall so notify the Corps, the SHPO, and the other consulting parties and this Agreement shall become null and void." The Nation is concerned that the Permittee could abandon the project if costs exceed their budget and subsequently neglect to follow through on their commitments in the MOA.

**c) The MOA's stipulations on the treatment of human remains are inadequate.**

The MOA's Stipulation X on Human Remains is insufficient. According to the Virginia Department of Historic Resources (DHR), the Counties of Fluvanna and Louisa are classified as "museums" that must comply with the Native American Graves Protection and Repatriation Act (NAGPRA). Thus, if and when human remains are uncovered on the excavation, the Counties must initiate NAGPRA consultations to determine appropriate disposition of the remains. How will the Corps's responsibilities pursuant to this MOA be reconciled with the Counties' NAGPRA obligations? Which agency will have decision making authority for disposition of remains?

The draft MOA seems to punt these questions to a burial permit that has not yet been issued. Again, the Corps cannot conclude the Section 106 process and execute this memorandum when significant issues remain unresolved and undecided. The terms of the burial permit should be finalized prior to executing the MOA and compliance with that burial permit should be legally required by the Corps in addition to DHR. We note that JRWA has already violated the requirements of its anticipatory burial permit. During preliminary archaeological testing, DHR visited the site on at least two separate occasions and found that the principal investigator *required by the anticipatory burial permit to be on site at all times* was not there when work was being conducted. There should be enumerated consequences in the MOA if JRWA fails to comply with the burial permit.

In addition, the Nation will be requesting that contrary to JRWA's request, DHR not waive the public notice requirements of the burial permit. If JRWA intends to disturb Monacan ancestors, they should not be relieved of public scrutiny of their actions.

**d) The Treatment Plan is severely limited in scope and does not meet the threshold level of effort required for sites of this significance and information potential.**

The Nation reiterates the importance of Point of Fork/Rassawek as the Monacan capital, as a place where Monacan ancestors are buried, and as an important archaeological location with considerable research potential. The depth and stratification of archaeological deposits in the area are unique and create high archaeological sensitivity. Dr. L. Daniel Mouer made this point in a 2014 letter he wrote to members of JRWA and to DHR, and which was also sent to Corps regulatory staff. Dr. Mouer notes (emphasis added):

These are not the sort of archaeological resources that can be appropriately studied hurriedly if discovered during or just prior to imminent construction. Very similar locations along the Roanoke River in the outer Piedmont of North Carolina were studied by Dr. Joffre Coe of the University of North Carolina back in the 1950s and early 1960s, and deep, complex sites were found. *Detailed long term studies of sites of this sort are crucial for our understanding of thousands of years of prehistory in our region here in the James Valley.*

In recent communications with the Nation's counsel, Mouer reiterated this point, commenting that "prehistoric site resources in that confined space [at Point of Forks], which has been repeatedly flooded by the Rivanna and James together, offer the very best hope of our ever studying deep sequences of prehistoric occupation similar to the locations studied many decades ago by Joffre Coe on Gaston Island and similar areas along the Roanoke River."

Rassawek, and the archaeological region of Point of Fork generally, has considerable potential to provide information of great significance to the region and to the U.S. and the Monacan Indian Nation. The sensitivity of each of the eligible sites – which include deeply stratified deposits containing fairly unusual feature types for the Virginia Archaic such as postmolds (evidence of historic structures, including buried posts and other structural supports) and burned floors – must be understood as sites that Virginia archaeologists have only rarely been able to excavate, particularly in this region of the state.

One of the sites planned for data recovery, 44FV0268, has been characterized in the Treatment Plan as a deeply buried, stratified Archaic Period site. (The age and length of occupation are still undetermined, but the testing did recover a Morrow Mountain point dating to 4500-4000 BC.) Of the five trenches placed on the site, all but one contained native artifacts, and several found substantial features: circular pit/basins with fire-cracked rock and other indications of burned earth, and at least two postmolds in different areas. The postmolds are significant because they might be indicative of habitation or temporary protective or activity structures, which are very rare to find from the Archaic Period in this area. One of the pit features was cored to determine its depth, and was found to be over three feet deep, and several of the pit features contained "relatively-large

inclusions of charred organics,” also unusual to find and with immense potential for scientific testing and analysis. The features were found in the center of the site, on the adjacent terrace, and on the terrace slope at both shallow and deep parts of the site.

Fundamentally, the Treatment Plan for the sites is based around perpendicular linear trenches positioned to identify long profiles across the sections of the sites impacted by the project. Site 44FV0022 (Rassawek) includes the excavation of five perpendicular trenches, shaped almost exactly to the limits of disturbance of the water intake and pump station. As the draft Phase I/Phase II report notes, “the site probably extends to the east and west across the Rivanna River floodplain.” Partial data recovery is common in cultural resource management because project proponents resist excavating in parts of the site not directly affected by their project, project proponents generally do not have ownership or easements over the entire site, and because greater data recovery creates a greater impact on National Register eligibility than needed. In practice, though, once this project is in place, it is unlikely that Rassawek will be further investigated during the lifetimes of the Monacan citizens who currently consider it their responsibility to protect future generations and their cultural heritage. The loss of what could be – a long-term investigation over years and with the context of deep scholarship and greater resources – needs to be acknowledged by the Corps and appropriately mitigated by the project proponent. This potential loss is a key reason why the Nation, senior archaeological scholars, and other parties are so concerned about the use of the location for a pump station by an entity that seems to have inadequate financial resources or commitment to providing the site with a positive outcome. The proposed investigations of arbitrary sections of each site affected by the project do not allow for true delineations of site boundaries or characterizations of the sites beyond the permit area.

The Corps should review this information carefully, consult with regional experts, and consider whether a single episode of mechanically assisted (and largely unscreened) data recovery of this type is sufficient to mitigate this sort of site. The Nation contends that it is not. If Rassawek and these other highly sensitive sites are to be investigated, the Nation contends that the sites meet the criteria under the *Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites*, written by the Advisory Council on Historic Preservation (and referenced in the project MOA and in DHR’s *Guidelines for Conducting Historic Resources Survey in Virginia*) for guidance point #10: “Large, unusual, or complex projects should provide for special oversight, including professional peer review.” In recognizing the substantial significance of this region and its prime archaeological conditions, the Nation requests professional peer review as part of this project if it moves to data recovery.

- e) **The Treatment Plan remains ambiguous or inadequate regarding identification of cultural strata, excavation methods, sampling strategies, and what proportion of the affected archaeological sites will be excavated by hand.**

The Nation appreciates that the Treatment Plan now contains adequate background literature and historic and archaeological contextualization as a result of the Nation’s comments and those of DHR last fall. The Nation hopes that this contextualization has been incorporated into a revised Phase I/Phase II report for the project and is used to inform analysis moving forward. However, the Nation still has concerns regarding the sufficiency of the proposed methods for data recovery



at sites 44FV0022, 44FV0024, and 44FV0268 (and potentially, should further work be necessary, 44FV0269).

A key issue, noted by DHR, is that there is still a considerable lack of clarity regarding what is committed to in terms of excavation depth in some areas and in terms of how features and buried living surfaces will be identified. We agree, and defer to DHR's comments on issues of excavation depth commitments. In terms of mechanical identification and other aspects of the data recovery, we make additional observations.

In the testing planned for the three deeply stratified sites (44FV0022 (Rassawek), 44FV0024, and 44FV0268), the methods propose to trench across the project area as the primary method of data recovery. In each of these trenches, 3x3 foot test units will be excavated in arbitrary 10-cm levels to sample 10% of the exposed strata, using 1/4-inch screening mesh. Any features discovered will be fully excavated and fully screened with 1/8-inch mesh and sampled for flotation. The disposition of any area outside of these trenches will presumably be covered by the separate Monitoring Plan. While the Monitoring Plan mandates excavation of human burials and funerary features, it is not clear what other archaeological features would be counted as Significant Features "that, in the monitor's expert judgment, are likely to provide important historical or cultural information."

The Nation has consulted several prominent Virginia archaeologists with relevant experience, and has the following concerns about the planned methodology for the data recovery:

- The Nation desires an explanation for why open plan excavation by hand (perhaps with occasional overburden removal or deep testing assisted by heavy machinery) is not being proposed for these sites. The Nation has concerns regarding the sole use of mechanical equipment to identify and expose cultural layers for feature excavation, if that is what is being proposed, and would like to see more details regarding how trenches will be "incrementally" excavated. The Nation would like to see greater information regarding excavation methods and tools being proposed, and contends that occupation layers should generally be recovered by hand excavation using implements like shovels and trowels. Trowels are only mentioned in the Treatment Plan as a tool for sorting through clay soil during screening and for cleaning profile walls, and shovels are similarly only referenced for wall cleaning. The Nation would also like to see more discussion of how safety setbacks will be dug around trenches in a way that allows for systematic excavation of features that may be uncovered during the process. Identifying appropriate methods for how to excavate such deep sites in a sensitive, thorough, and efficient way is another reason why peer review is needed for this project.
- The excavation proposes to only screen 10% of the area proposed for trench excavation, which is itself less than 50% of the site volume of Rassawek that would be destroyed by this project. It appears that less than 5% of the total Rassawek site sediment will be screened, and unless the sediment is recovered in a feature, the screening will be done using 1/4-inch mesh. The Nation does not object to the unscreened, mechanical removal of alluvial, culturally sterile deposits. However, environmental and artifactual recovery of only 5% of a site is also associated with worse analysis outcomes (O'Neil 1993).

Additionally, screening using quarter-inch mesh is associated with considerable loss of small and micro artifacts such as glass beads (indicative of early European trade); rolled copper beads; awls and microdrills, and other small but significant objects (e.g. Lapham 2001; Johnson, Pritchard, and Poplin 2016). Screening at this mesh size is also associated with a 60-90% loss of some categories of faunal (animal) and human bone, especially for small species and infant bones (e.g. Pokines and De La Paz 2016; Zohar and Belmaker 2005; Quitmyer 2004). Given the descriptions of previous investigations at the site, flooding episodes, and the Columbia gas line impacts, recovery of isolated human bone outside of feature contexts seems likely and these methods seem unlikely to recover them. Given the significance of Rassawek as a high-status Monacan town, prestige items such as European glass beads (previously recovered at Monacan towns much further to the interior) and other small but highly important artifacts also seems plausible. The Nation requests that the Treatment Plan be adjusted to screen 100% of the strata identified as cultural layers excavated in these trenches. It also requests that all screening be done using 1/8-inch mesh or smaller, especially on the floodplain sediments mostly comprised of silts, loams, and sands that are less challenging to screen. Material from feature fill should either be saved for flotation or should be water screened through 1/16<sup>th</sup>-inch mesh. While this approach is beyond minimum requirements set by DHR for data recovery in Virginia, the Nation believes it is appropriate given the specific circumstances, and welcomes further discussion with DHR, the Corps, and peer review experts regarding how best to minimize loss of important artifacts and the bones of Monacan ancestors.

- It is unclear from the Treatment Plan how a unique and large feature, such as a longhouse, series of pits, burned surface, line of postmolds, or other expansive feature, would be excavated if part of it was recovered in one of these trenches (as they have already been during Phase II investigations). Will the trench be expanded to permit comprehensive mapping and excavation of the features? Given that the Phase II trenches were generally only dug down to a large feature and then stopped, we cannot be sure how densely features are packed on top of or adjacent to each other, and it may be more informative to open up a greater section of the site in open plan excavation to fully investigate how these features relate to one another. The Nation would like to see the Treatment Plan contain more commitments to mapping the relationship of features to one another at the site, which is in question due to the excavation strategy and current language included in the Monitoring Plan (see below). This is another reason that professional peer review is important for the sites – excavating these sorts of floodplain sites is challenging, and it is likely that open plan excavation would recover vastly more information of higher quality. Receiving information about these issues from independent experts may be important to assist the Corps in meeting its responsibilities under Section 106.
- The Nation would also like to understand better why there are no excavations planned to the east of the line marked “probable edge of historic river edge,” as there is one positive shovel test pit in that area and there was no deep testing trench put in that area. One of the two Deep Test Cores in that location, DTC13, is described as containing a possible buried surface 6 feet below the ground surface. The Nation was unable to find information in the Phase I/Phase II report or the Treatment Plan regarding how this river edge was identified

and what period it dates to. If there are earlier deposits containing potential cultural material dating to when the river channel was narrower, they should be investigated.

- The Treatment Plan does not provide any indication regarding the number of weeks or months planned for each excavation, the number of man-hours allotted, or how the staffing for the project is going to be arranged. Even if such information is not included in the Treatment Plan, given the sensitivity of the site and previous concerns regarding the presence on site of principal investigators and other elements, the Nation would like to be provided with information allowing them to assess the budget and comprehensiveness of this investigation. It is also important for the Corps, DHR, and the ACHP to understand these questions, in order to make an informed decision regarding whether the project as designed meets the ACHP guidance point #8: “The Federal Agency Official should ensure that adequate time and money to carry out all aspects of the plan are provided, and should ensure that all parties consulted in the development of the plan are kept informed of the status of its implementation.”
- f) The Monitoring Plan does not have sufficient information regarding how work would be conducted or sufficient commitments to avoid the loss of important cultural information, artifacts, or human remains.**

Given the previous points regarding the difference between a single-episode excavation and a longer-term research project, the Nation has concerns regarding information, artifacts, and human remains that might be lost as a result of the monitoring period on the site following data recovery. These concerns include:

- It is unclear what types of features beyond burial features would be counted as Significant Features that would justify stopping construction, as the Monitoring Plan largely leaves this up to the particular monitor’s discretion. The Nation would like to see specific feature types included in this list, and a set of guiding principles that might be used in making this determination for unanticipated or ambiguous discoveries. Such guiding principles should take into account the types of information that might be gathered from a particular feature, the potential of the feature to shed additional information regarding site loci or activity areas not investigated as part of trenching, and the feature’s likelihood of containing artifacts that might be of interest to the Nation. Even if features are not considered significant enough for partial excavation, the Monitoring Plan should commit to mapping them and to recovering sediment for potential screening or flotation.
- Even if a feature is identified as a “Significant Feature,” the Monitoring Plan currently states that such non-burial features only exposed partially in trench walls will only be excavated in a partial fashion unless they are “at a sufficiently shallow depth that it is possible to do so without significantly expanding the excavated area around the feature.” It is not clear what sort of construction activity will be occurring as trenches on Rassawek, as the construction plans provided illustrate a large gradually sloping basin that will be constructed for the intake pipe and pump station footprint rather than trenches. Regardless, the Monitoring Plan should provide greater assurances that work on the site will prioritize recovery of information from significant features, and the Corps should consider ways the

agreement documents could be revised so that recovery of information relies less on monitoring procedures.

- It is not clear from the Monitoring Plan how many monitors will be present on the sites, how many pieces of equipment each monitor will be responsible for observing, and how many sites a single monitor will be responsible for at once. The Nation requests that the Monitoring Plan require that there be at least one archaeological monitor for every piece of heavy machinery operating at any given time on a given site, so that monitors do not miss important features uncovered while they are observing another area. The Nation also requests that the Monitoring Plan is revised to make clear that if construction is happening in a given day on multiple locations, that a monitor be given sufficient time to travel to each site before work begins.
- The Nation requests that the Monitoring Plan include an explicit provision that if ground-disturbing construction activities are performed on an area of a site without an archaeological monitor present, that the Corps, VDHR, and all consulting parties be informed immediately so that the situation can be assessed and mitigation for the episode considered. The Nation also requests that a system be put in place so that the Nation and any other interested consulting party could be informed of a feature discovery on a daily basis, whether or not the feature is burial-related.

As a result of the importance of the site, during periods when the site is undergoing excavation and monitoring, the Nation would like to have an independent monitor on site to represent their interests and to provide daily updates to the Nation regarding site progress and developments.

**g) The quality of submitted cultural resource reports continues to fail to meet applicable standards.**

During these initial stages of investigation, when members of the Nation have only visited the site once and have not been offered additional access or review, the written materials are the only way of gauging the quality of the cultural resources work done on Rassawek and the other eligible sites and historic districts. The record so far on this project is mixed to poor, especially for initial drafts, which suggests that either JRWA is dramatically under-resourcing their primary archaeological sub-consultant, or that the sub-consultant does not have the capacity for a project of this magnitude. These concerns are based on the following elements of project review:

- The Draft Phase I/Phase II Report had substantial and extensive issues, which the Nation and DHR have discussed in previous comments. Feedback on that draft was issued in summer and November of 2018 and included not only concerns that the report lacked sufficient background context but also that the quantity and type of excavation done at Sites 44FV0024 and 44FV0268 was insufficient to determine the site’s eligibility for the National Register of Historic Places (NRHP). Site 44FV0269 was identified as “could be eligible” (not a clear determination), the site boundary was not defined, and the work again was insufficient to determine the site’s eligibility. These are fundamental failings, given that Phase II investigations according to DHR’s *Guidelines for Conducting Historic Resources Survey in Virginia* (September 2017) are intended to determine site eligibility for the Virginia Landmarks Register and the NRHP, accurately define site boundaries, and provide recommendations for future treatment. In terms of boundary delineation, the site boundaries submitted to V-CRIS for 44FV0022 (Rassawek) are the exact shape of the pump station and water pipeline permit area (see image above) rather than a shape based on site loci, activity areas, natural geographic breaks, or other pertinent factors. More than six months after providing feedback and a year after the report was initially submitted, the Nation has not seen a revised copy of this draft report.



- The initial Treatment Plan for the Phase III investigation also contained substantial issues. In a letter dated September 25, 2018, DHR initially characterized the planned work as “salvage archaeology,” and noted that it lacked an adequate research design or clearly defined research questions. DHR stated that there should be careful consideration regarding targeting strata for investigation, which should be based on research objectives, stratigraphic data, and a considered sampling strategy. This current revision attempts to address these criticisms, but as we discuss above, has not been successful in reassuring DHR and the Nation that the full breadth of archaeological strata will be investigated as part of this investigation or that sampling efforts will provide a robust recovery of critical information *and human remains* from the site.
- Most recently, the Nation received comments from DHR dated May 23, 2019 on the draft report for the Phase II investigation conducted at 44FL0269 because the initial Phase II testing was insufficient to determine eligibility for the National Register of Historic Places. The Nation has not yet seen the report in question, but the DHR’s comments were stark and indicated that there were so many inconsistencies and mistakes in the draft report that reviewers had been unable to review the report’s content. These easily identifiable errors include figures being duplicated, grammatical mistakes, and inconsistencies in the number of soil strata listed in particular units. DHR makes observations that the consultant’s conclusions regarding archaeological stratigraphy illustrated in site photographs is incompatible with the descriptions of these profiles in the text.

Revisions and resubmissions of submitted work are not entirely unusual in the DHR project review process, but it is deeply concerning to see the number of critiques, the number of errors, and the initial lack of fundamental elements such as a research design or sufficient data to determine site eligibility. There is currently no reason that the Nation should have faith in the quality of JRWA's work going forward based on this track record. The Nation has been expressing these concerns for almost six months and has not seen much indication of improvement.

**h) Proposed mitigation is not sufficient to resolve the adverse effects of this project, and the project proponent mischaracterizes the Nation as financially motivated instead of engaging substantively with their concerns.**

The Nation is troubled by JRWA's cover letter dated January 11, 2019 and its characterization of the Monacans' participation in this process. JRWA has failed to engage with consulting party concerns and has ignored substantive issues raised in December's round of MOA comments. The cover letter fails to acknowledge that every consulting party who commented in December asked that the project be moved.

The Nation submitted requests for mitigation on this project on September 28, 2018 based on an incomplete understanding of the project. The Nation relied on representations made by JRWA to tribal members that there are no feasible alternatives for siting this project, and the only way to accomplish the purpose of the project—delivering drinking water to Zion's Crossroads—was to impact Rassawek. Since that time, the Nation has learned that JRWA represented to the Corps that the pump station did not have to be built on Rassawek, and that the project could be built in alternate locations. Once the Nation was informed that JRWA had other options to deliver drinking water that would not require the destruction of their heritage, the Nation withdrew its requests for mitigation and has repeatedly called for JRWA to locate its project elsewhere.

Should the Corps decide to allow this project to move forward, the Corps should require robust mitigation befitting the destruction of such a significant site. JRWA argues in its January 11, 2019 cover letter that "To the extent that further discussion of additional mitigation is warranted, JRWA believes the appropriate object of those discussions is the treatment plan and the appropriate time is after the MOA has been executed." To postpone necessary discussion of mitigation until after the MOA has been executed would violate the Administrative Procedures Act and render the Corps non-compliant with Section 106.

The Nation shares below several comments regarding the proposed mitigation. These comments are not meant to be inclusive of all of the Nation's concerns, as the Nation contends that discussion of mitigation is premature pending the development of an Environmental Assessment pursuant to an individual permit application.

**(1) A Monacan 'intern' supervised by the archaeological contractor is not tribal monitoring.**

Interning for a cultural resource management company is not the same as independent tribal monitoring, which is required by some states and some federal agencies (*i.e.*, tribal monitoring is

required under the California Environmental Quality Act, and the U.S. Forest Service collaborates with tribal monitors in Arizona). If this site goes to data recovery, the Nation requests the discretion to retain tribal monitors who can independently represent Monacan interests, keep the tribe apprised about the ongoing excavation, and who would be paid like cultural resources consultants by the project proponent at a fair market rate for their time and expertise. The Nation requests a meeting with the Corps and DHR to determine how best to structure this sort of arrangement, which it understands is uncommon in Virginia but is par for the course in other states.

**(2) Expansion of the public interpretation elements from the Nation's previous comments has been limited.**

The Nation appreciates the inclusion of some elements of tribal review and of the included goal of addressing the erasure of Virginia Indians by Walter Plecker and other actions of the Commonwealth. In its November comments on the MOA, the Nation requested that the project develop and provide presentations and education materials to local schools, fund a DHR highway marker, and submit scholarly materials on Rassawek and the other findings to the Encyclopedia Virginia, an online open access repository with peer review associated with Virginia Humanities. These reasonable suggestions were not incorporated into this version of the MOA. We would like to understand why.

**(3) Because of property rights and the level of mistrust between the project proponent and affected landowners, there is no way of ensuring that the Monacan Indian Nation will be successful in their efforts to curate the objects affected by this project.**

As noted by landowner George Bialkoski on May 7, 2019, JRWA has thus far been unable to come to an agreement with local landowners regarding the dispensation of artifacts recovered as part of these investigations. This is very concerning to the Nation because it is a priority of the Nation to curate these materials at the tribal museum, so that tribal members may view these materials and learn from them. JRWA proposes returning the artifacts as a significant aspect of its mitigation plan—if the Corps cannot be certain that these efforts will be successful, it cannot factor them into a determination of whether adverse effects are resolved.

**Conclusion**

If the pump station is built as planned, Rassawek will be gone forever. The Monacan community will experience renewed collective trauma from the destruction of their heritage and the return of their ancestors in cardboard boxes. Members of the tribe who participated in reburials more than a decade ago still speak of their heartbreak as they opened cardboard boxes to find bits of bone from Monacan children, and the psychological toll of re-assembling baby skeletons to be reburied. The Nation has no desire to be put through that experience again.

The Corps should take the time it needs to conduct a proper and legally defensible permitting review process that takes into account all of the project's impacts.

Sincerely,



Marion Werkheiser  
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cc: Joe Hines, Principal, Timmons Group  
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Christian Goodwin, Louisa County Administrator  
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Greg LaBudde, Virginia Department of Historic Resources  
Roger Kirchen, Virginia Department of Historic Resources  
John Eddins, Advisory Council on Historic Preservation  
Jennifer Frye, Chief of the Western Virginia Regulatory Section, U.S. Army Corps of Engineers  
W. Tom Walker, Chief of Regulatory Branch, U.S. Army Corps of Engineers  
The Honorable Tim Kaine, United States Senate  
The Honorable Mark Warner, United States Senate  
The Honorable Ben Cline, United States House of Representatives



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