



July 23, 2019

Julie Langan, Director  
Virginia Department of Historic Resources  
2801 Kensington Avenue  
Richmond, VA 23221

**Re: Monacan Indian Nation's Objection to the James River Water Authority's Application for the Removal and Temporary Curation of Human Remains Located at Point of Fork, Fluvanna County, Virginia, DHR File No. 2015-0984.**

Dear Director Langan:

My law firm represents the Monacan Indian Nation ("the Nation"), a federally recognized sovereign tribe, regarding the James River Water Authority's ("JRWA") planned water pipeline and pump station at Point of Fork, Virginia. The Nation requests that the Virginia Department of Historic Resources ("DHR") deny JRWA's Application for the Removal and Temporary Curation of Human Remains, DHR File No. 2015-0984, dated March 22, 2019.<sup>1</sup> **It is critical to note at the outset that under no circumstances will the Nation support the issuance of a burial permit to JRWA for this project.**

#### **I. Virginia Law Requires Denial of the Burial Permit.**

Virginia law empowers DHR to issue or deny permits for the archaeological removal of human remains. Virginia's Administrative Code states at 17VAC5-20-60(B) that the Director shall "give priority to comments and recommendations made by individuals and parties most closely connected with the human burials subject to the application." It goes on to state:

In making a decision on the permit application, the Director shall consider the following:

1. The level of threat facing the human skeletal remains and associated cultural resources.
2. The appropriateness of the goals, objectives, research, design, and qualifications of the applicants to complete the proposed research in a scientific fashion. The director shall consider the U.S. Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation, set out at 48 FR 44716 (September 29, 1983), in determining the appropriateness of the proposed research and in evaluating the qualifications of the applicants.

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<sup>1</sup> DHR has the power to deny burial permits based on several enumerated considerations laid out in Va. Code §10.1-2305 and expanded upon in 17VAC5-20-60, as discussed herein.

3. Comments received from the public.
4. The appropriateness of the proposed disposition of remains upon completion of the research. The director may specify a required disposition as a condition of granting the permit.
5. The performance of the applicant on any prior permitted investigation.
6. The applicability of other federal, state and local laws and regulations.

17VAC5-20-60(C). The regulations also state that “Failure to adequately meet all conditions in a previous permit shall be grounds for denial of any subsequent permit applications.” 17VAC5-20-60(D).

Application of the six considerations enumerated in 17VAC5-20-60(C) – especially when coupled with the fact that the Nation, the party most closely connected with the burials, stridently opposes this project – requires DHR to deny the burial permit on multiple grounds:

1. **Level of Threat.** The human remains at the sites are not currently at risk or under threat – except those posed by the proposed project. JRWA grossly downplays the threat the project poses to Monacan burials, stating merely that the “possibility of finding human remains is moderate” while admitting that the site is difficult to protect from looting. To the contrary, the Nation knows that human remains are buried on this site. Burials have been located there numerous times; for example, in the 1880s, Gerard Fowke of the Smithsonian Institution identified 25 Indian burials uncovered by flooding, and in 1980, construction of a gas line in the area uncovered additional burials. Exposing this known burial site and its associated cultural objects by constructing a pump station will threaten the human skeletal remains and associated cultural resources, and will create significant risks that could be avoided entirely.
2. **Appropriateness of the goals, objectives, research, design, and qualifications of the applicants to complete the proposed research in a scientific fashion.** JRWA has hired a consulting firm, Circa~ Cultural Resource Management, LLC, to conduct archaeological testing and an abbreviated archaeological excavation at Rassawek. Circa~’s initial plan failed to cite any archaeological work performed in the area in the last 30 years, or to sufficiently describe Rassawek or its importance to Monacan and Virginia history. As discussed in the Nation’s recent comments regarding the draft Memorandum of Agreement, Treatment Plan, and Monitoring Plan circulated by the Army Corps of Engineers (MOA), Circa~’s plan to excavate the impacted sites involves considerable use of construction machinery and does not commit to excavating all features and layers that may be destroyed. Circa~ proposes to screen only around 5% of the part of Rassawek being destroyed by the project, meaning that isolated human remains are likely to be missed. Multiple senior archaeologists have expressed concern to the Nation, JRWA, and DHR that three or four highly stratified floodplain deposits will not be adequately excavated under Circa~’s approach.

Circa~ also violated its anticipatory burial almost as soon as DHR issued it. As reported in DHR’s October 17, 2017, letter to JRWA, a DHR representative visited the project location on two occasions the week after the agency issued the permit. The DHR representative

reported that Circa~ failed to meet certain permit conditions during his visits, and that the archaeologists responsible for the field investigations were not directly supervising the work.

The Nation also notes that the Principal Investigator on the project, Carole Tyrer, is not a Registered Professional Archaeologist. Her failure to register means that she is not subject to grievance procedures within the profession, and DHR's denial of the burial permit is the only way to achieve some accountability for her failure to meet professional standards. Inexplicably, the current permit application proposes to waive Secretary of Interior qualifications for the Principal Investigator, citing "extraordinary circumstances" (17 VAC Section 5-20-40(D) which are not listed or detailed. Given the cultural and spiritual sensitivity of the project location and Circa~'s previous disregard of burial permit requirements, the Nation is profoundly concerned about the quality of Circa~'s work and JRWA's failure to commit enough funding to achieve proper results. It is reasonable for DHR to require that anyone responsible in the future for disinterment of Monacan remains, when unavoidable, abide by the highest professional standards and hold a membership in the Register of Professional Archaeologists (RPA).

Circa~'s violations of the anticipatory burial permit, paired with the applicant's stated desire to sidestep research design and professional qualification requirements, provide ample grounds for DHR to deny the requested permit.

- 3. Public Comment.** The Nation notes that more than 1,300 individuals and organizations to date have signed a letter to the Army Corps and Governor Northam opposing the project and requesting that DHR deny the burial permit. Hundreds of these signatories are professional archaeologists and preservationists concerned about the excavation of burials and potential damage to the sites. The Nation's opposition to this burial permit is shared by the six other federally recognized Indian tribes in Virginia, the Alliance of Colonial Era Tribes, and the Inter-Tribal Women's Circle. Multiple non-tribal organizations have likewise requested that DHR deny the burial permit, including the Council of Virginia Archaeologists, the City of Charlottesville Human Rights Commission, Preservation Virginia, and the Piedmont Chapter of the Sierra Club. We enclose herewith a letter requesting that DHR deny the burial permit, along with signatures and public comments.

The Nation believes that by requesting that DHR waive the public notice requirement, JRWA seeks to avoid this broad public opposition to disturbing Monacan burials. JRWA should be required to post public notice that they intend to disturb Monacan ancestors, and taxpayers should be made aware that their government is conducting such a shameful act.

- 4. Appropriateness of the proposed disposition of remains upon completion of the research.** JRWA has not proposed any particular disposition of remains, stating in the application only that it "intends to work with the Monacan Indian Nation to develop a protocol to be implemented in the event any Native American remains are discovered during construction of the project." This proposal is neither sufficient nor appropriate. JRWA has demonstrated a lack of willingness to cooperate with the Nation in good faith in other aspects of the permitting process (see comment letters to the Army Corps of Engineers dated November 27, 2018, December 21, 2018, and June 5, 2019), and the Nation cannot be

compelled to cooperate with JRWA to disturb and disinter its ancestors against its will. Accordingly, DHR must deny the permit.

5. **The performance of the applicant on any prior permitted investigation.** As noted above (para. 2), Circa~ violated the anticipatory burial permit almost as soon as it was issued, thus establishing that it cannot be trusted to comply with the terms of any future burial permit. Circa~'s blatant violations are grounds for DHR's denial of the permit application.
6. **The applicability of other federal, state and local laws and regulations.** DHR has consulted with the Army Corps regarding the proposed project. As a result, DHR should be fully aware of the Nation's concerns about the Corps using the wrong permitting process (a Nationwide permit rather than an Individual permit, and illegally segmenting the project) and the Corps's failure to consider alternatives that would not disturb Monacan burials. DHR should not issue a burial permit as a result of such a flawed process. To issue a burial permit would be perceived as approval of the Corps's process, which has been inconsistent with federal law, and which the Nation reserves the right to challenge in court.

The Nation also notes that JRWA did not submit with its application notarized statements from landowners granting permission to remove human remains from their property and to conduct research on those remains, as required under 17VAC5-20-40(A)(4). The Nation understands that certain landowners do not wish to cooperate with this permit and are likely to refuse to sign it.

If DHR does not deny this permit application, in its current state and with the current applicants, it is unclear what permit ever would be sufficiently out of compliance with Virginia law and regulations to warrant denial.

## **II. The Balance of Equities Demands Denial of the Burial Permit.**

### **A. Disturbing the Monacans' Ancestors Should Be A Last Resort.**

Disturbing human remains should never be a developer's first resort, yet JRWA has offered no alternatives to disturbing the Monacans' ancestors – despite JRWA's admission that it could move the proposed pump station to any of at least three other locations. JRWA has known since at early as 2015 that the Point of Fork site is archaeologically, historically, and spiritually sensitive, but JRWA did not reach out to the Nation until June 2017. By that point, JRWA had finalized site plans and purchased the land for the future pump station, even though it knew that the project would likely disinter Monacan ancestral remains.

Though JRWA is well-aware that this project will destroy Monacan remains, it has yet to explain to the Nation why it must disturb these burials. Disturbing these graves should not be tolerated except for the most compelling reasons, which JRWA does not have.

**B. Repatriation Is A Traumatic Experience the Nation Should Not be Forced to Endure.**

JRWA has no understanding of the deep and unavoidable trauma that the Nation will suffer as a result of repatriation of its ancestors' remains. Tribes often have their ancestors' bones returned in cardboard boxes, having been handled unceremoniously by strangers. Careful treatment and rehabilitation of these remains is something that drains the Nation of emotional, financial, and mental resources and attention. The Nation has already had to endure several somber and traumatizing repatriation ceremonies in the past, and it does not wish to experience that again – especially when JRWA has the ability to avoid these issues by relocating the pump station.

**C. JRWA Cannot Promise to Return All Monacan Cultural and Human Remains to the Nation.**

JRWA does not commit to using thorough screening techniques and proposes to leave most features outside of the planned excavation trenches unexcavated. As a result, JRWA cannot claim to be providing the Nation with all human remains from the sites. Instead, it is highly likely that some remains of Monacan ancestors will be churned-up in fill and discarded as trash on a project site or wherever the fill is deposited. This outcome is unacceptable to the Nation, and should be unacceptable to the Commonwealth of Virginia and to the Army Corps, which has federal trust responsibilities to the Nation.

In addition, the Nation previously expressed to the Corps how important it is to the tribe to be able to preserve and store cultural archaeological remains at their tribal museum in Amherst, close to the majority of their tribal members. JRWA has stated that they will *try* to negotiate with landowners so that any artifacts found as a result of the excavation *might* be given to the Monacans for permanent curation. JRWA refuses to promise this outcome, however, and its negotiations on this front do not seem to be going well. Even if JRWA can come to an agreement with landowners, the Nation fears that JRWA's inadequate planning will result in the haphazard and disrespectful treatment of human remains.

**D. Procedures for the Careful Recovery of Human Remains at Site 44FV0269 are Unclear.**

The burial permit application states that the permit will cover “Sites 44FV0022, 44FV0024, 44FV0268, *and, if necessary, 44FV0269*” (emphasis added). The Corps recently determined that 44FV0269 is not eligible for the National Register, although DHR has not yet concurred with this determination due to substantial report deficiencies.

If 44FV0269 is not slated for data recovery, what will the procedures be for identifying and protecting human remains? Regardless of a site's National Register status, the Nation has a strong interest in the respectful treatment and systematic recovery of human remains from any Monacan site. Construction monitoring alone will lead to poor outcomes for recovery of any human remains on that site, and it is likely that JRWA simply plans to destroy that site if it is not legally required to excavate. DHR should require data recovery at 44FV0269 as a condition of any permit, to ensure that any Monacan ancestors on the site are recovered.

### **III. Should DHR Issue the Burial Permit Despite the Above, Conditions of the Permit Must Provide Adequate Care and Mitigation for the Removal of Monacan Ancestors.**

If DHR declines to exercise its authority to deny the burial permit, despite the overwhelming reasons to do so, various conditions must be attached to such a permit, as discussed below. The Nation reserves its rights to challenge any burial permit issued to JRWA regardless of whether these conditions are attached.

- 1. The burial permit should not be approved until basic issues of mitigation, site excavation methodology, treatment of human remains, curation, and inventory are appropriately resolved and finalized in a Memorandum of Agreement, Treatment Plan, and Monitoring Plan.** The Nation has profound concerns that the project proponent is pushing to have agreement documents finalized without providing adequate and detailed commitments regarding human remains and archaeological recovery. The Nation is concerned that 14 months after the submission of the Draft Phase I/Phase II report for this project, which had significant deficiencies, no consulting parties have been provided with a revised or final version of the report. The Nation is also concerned that the Corps may be moving towards concluding Section 106 consultation despite persistent concerns regarding archaeological methodology. The Nation asks DHR, as the state historic preservation office, to continue to press the Corps regarding the lack of clarity and commitments in these documents. Complying with the finalized agreements and providing final reports should be a condition of the burial permit.
- 2. The archaeological resources consultant used for the excavation and human remains recovery should be chosen with concurrence from the Monacan Indian Nation.** Monacan burials will be identified and recovered through archaeological methods, and the Nation must have confidence in the archaeologists doing this critical work. There is no way to separate the excavation of human remains from the wider archaeological investigation; many remains are likely to be recovered in bundled contexts or found as isolated bone from previous disturbances. The current archaeological recovery methods (as the Nation discussed in its June 5, 2019 comments to the Corps and in a July 10, 2019 meeting with DHR staff), are insufficient to preserve and recover all human remains. The Nation strongly objects to Circa~ conducting any further work on such significant and sensitive sites.
- 3. Before issuing the burial permit, DHR should consult with the three North Carolina tribes that also share Eastern Siouan background.** The Sappony Tribe, the Occaneechi Band of the Saponi Nation, and the Haliwa-Saponi Indian Tribe have an ancestral affiliation with the site of Rassawek and should be consulted on this burial permit. The Nation and other Eastern Siouan tribes who descend from the Monacan Confederacy are the parties most connected with the human burials, and these tribes may have additional perspectives that DHR should consider.
- 4. Before receiving a burial permit, JRWA should provide a surety bond as requested in the Nation's June 5, 2019 comments.** The bond amount should be determined by the archaeological consultant's estimate of the funds needed to ensure completion of site analysis

and report completion, as well as funds to cover all of the costs of repatriation and reburial in the event the project is abandoned.

**5. The permit should ensure the careful and respectful recovery of human remains from the project area, which include:**

- a. Assembly of a peer review process for excavation and human remains recovery on the project, as recommended in guidance from the President's Advisory Council on Historic Preservation.
- b. Geospatial recording of all sites excavated using a total station and geospatial analysis in ArcGIS or equivalent software, to ensure accuracy of site data for future analysis.
- c. Development (in conjunction with the spiritual preferences of the Monacan Indian Nation) of methodologies for human remains recovery, curation, and inventory by a trained osteologist meeting the Secretary of Interior standards and with experience in recovering prehistoric human skeletal remains in Virginia or the Mid-Atlantic.
- d. Screening of 100% of cultural layers encountered during data recovery through a 1/8<sup>th</sup> inch screen or smaller.
- e. Screening of 100% of non-burial feature fill encountered through a 1/16<sup>th</sup> inch screen or using a water flotation tank.
- f. Recovery of 100% of burial feature fill pending further negotiations with the Nation.
- g. Commitments that during site monitoring, a monitor shall have responsibility for only one piece of equipment operating at a single time.
- h. Greater description of requirements and guidance regarding how features discovered via monitoring should be identified, assessed, and recovered, in conjunction with peer review panel.
- i. Principal Investigators at the site, for both the excavation elements and the osteological recovery, should be Secretary of Interior qualified and hold memberships in the Register of Professional Archaeologists.
- j. Overnight security at the site throughout the entire excavation to ensure that human remains are not looted.

**6. JRWA should provide the Nation with the financial resources to pay for the reburials that will be required for the remains.** The budget for reburials includes the cost of funeral services to prepare the human remains, transfer and transportation of the bones, construction equipment to excavate grave shafts, feasting ceremonies associated with a reburial event, cost of items and containers used to reinter the remains, any associated headstone, plaque, or landscaping needed, and provisions for the perpetual care of the reburial sites. Attached is a budget description of what would be needed, which estimates the costs to total \$305,000. (See Appendix A, enclosed herewith.)

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For the reasons stated herein, under no circumstances will the Nation support the issuance of a burial permit to JRWA for this project and the Nation strongly urges DHR to deny JRWA's application, as required by applicable laws and regulations. The Nation welcomes further consultation with DHR as your office considers these issues. Please feel free to reach out to me with any questions or additional information requests.

Sincerely,



Marion F. Werkheiser  
Attorney at Law

Enclosures

cc: The Honorable Matt Strickler, Secretary of Natural Resources  
The Honorable Kelly Thomasson, Secretary of the Commonwealth  
Office of U.S. Senator Tim Kaine  
Office of U.S. Senator Mark Warner  
Nekole Alligood, NAGPRA Officer, The Delaware Nation  
Chief Robert Gray, Pamunkey Indian Tribe  
Executive Director Dante Desiderio, Sappony Tribe  
Chief B. Ogletree Richardson, Haliwa Saponi Indian Tribe  
Chairperson William Hayes, Occaneechi Band of Saponi Nation  
Chief Anne Richardson, Rappahannock Tribe  
Chief Frank Adams, Upper Mattaponi Indian Tribe  
Chief Gerald Stewart, Eastern Chickahominy Indian Tribe  
Chief Stephen Adkins, Chickahominy Tribe  
Chief Samuel Bass, Nansemond Indian Tribe  
Joe Hines, Principal, Timmons Group  
Carol Tyrer, President, Circa~ Cultural Resource Management, LLC  
Steve Nichols, Fluvanna County Administrator  
Greg Krystyniak, Faulconer Construction  
Christian Goodwin, Louisa County Administrator



### Appendix A: Anticipated Repatriation and Reburial Costs

<b>Equipment Cost</b>		<b>\$15,000</b>
<b>Perpetual Care of Site</b>		<b>\$100,000</b>
<b>Transfer and Transportation of Bones</b>		<b>\$2500 plus \$4.00 per mile</b>
<b>Individual Prep Supplies Total</b>		\$250 per Individual/ Approximately 150 individuals
<i>Sage</i>		
<i>Cedar</i>		
<i>Tobacco</i>		
<i>Eagle Feather</i>		
<i>Red Cloth</i>		
<b>Total</b>		<b>\$37,500</b>
<b>Staff to Prepare Remains</b>		Minimum 50 people for approximately 2 days
<i>Time/Labor</i>		\$150/day per person for a minimum of 50 people
<i>Hotel Costs</i>		\$99/day for minimum of 10 people
<i>Food Costs</i>		\$61/day at Federal Per Diem Rate for Lynchburg Va. Min 50 people
<i>Travel Reimbursement</i>		0.545 per mile for all travel. Min 50 people
<b>Total</b>		<b>Approximately \$250 - \$350 per person per day/ \$25,000 to \$35,000 total</b>
<b>Staff/Spiritual Leader for On-site Monitoring</b>		On-site Monitoring anytime Remains are found (estimate of 60 days)
<i>Time/Labor</i>		\$200/day for Spiritual Leader and Assistant (estimate of 60 days)
<i>Hotel Costs</i>		\$99/day for 2 people
<i>Food Costs</i>		\$61/day at Federal Per Diem Rate for 2 people
<i>Travel Reimbursement</i>		0.545 per mile for all travel for 2 people
<i>On-site Monitoring professional</i>		\$25/hr for the duration of the project (est. \$45,000 to \$ 55,000)
<b>Total</b>		<b>\$90,000</b>
<b>Feast Cost</b>		Minimum of 500 people in attendance
<i>Time/Labor</i>		\$150/day minimum of 20 people for 2 days (\$6,000 total)
<i>Supplies (non food items)</i>		\$5,000
<i>Food items</i>		\$10,000
<i>Facilities Cost</i>		\$2,500
<b>Total</b>		<b>\$23,500</b>
<b>Approx. Total</b>		<b>305,000</b>