

**Remarks of Marion F. Werkheiser, Managing Partner, Cultural Heritage Partners, PLLC,  
and Legal Counsel to the Monacan Indian Nation  
at the Army Corps of Engineers Consulting Party Meeting  
Regarding the James River Water Authority's Proposed Construction of a Water Pump  
Station on Rassawek, the Historic Capital of the Monacan Indian Nation  
August 9, 2019**

Good morning. My name is Marion Werkheiser, and my law firm represents the Monacan Indian Nation, a federally recognized sovereign nation.

The Nation is deeply disappointed that the Army Corps of Engineers is failing to meet its legal responsibilities and seems prepared to sanction the disinterment of Monacan ancestors and the destruction of Rassawek, the Monacans' most important historic town.

Indeed, the Corps has called us all here today to move forward with this profoundly misguided project without fully analyzing alternative locations, including a "no action" alternative, as required by law.

Instead of directing the Water Authority to move its project to a more appropriate location, the Corps instead plans to entrust the excavation of one of the most important places in all of Virginia history – and the handling of sensitive human remains—to unethical and unqualified consultants.

The Monacan Indian Nation unequivocally opposes this project and will refuse to sign any Memorandum of Agreement that would allow the destruction of Rassawek.

Rassawek was mapped by Captain John Smith in 1612 at the confluence of the James and Rivanna Rivers. In the 1880s, and again in the 1930s, the Smithsonian Institution documented 40-50 hearths at Rassawek and numerous Indian burials. In 1980, celebrated archaeologist Dan Mouer observed burials at the site and recorded their location with the Department of Historic Resources. We have known for 400 years that Rassawek is located at Point of Fork, and the Water Authority has been on notice since they first conceived of locating their project that they could not have chosen a worse location for their pump station—indeed, DHR, Preservation Virginia, and Dr. Mouer all told them that so back in 2015. Therefore the James River Water Authority's claims that they are surprised to learn "in the 11<sup>th</sup> hour" of objections to their plans are absurd and disingenuous. They literally had 400 years notice that this was a precious historical resource and five year's notice that the state's own experts thought locating it here was a bad idea.

Yet here we are. The Water Authority continues to pursue this project, hoping that locating the project on top of Rassawek will be less expensive than other available alternatives. The Corps, having illegally segmented the review of this project into two separate permitting actions, now stubbornly proceeds with a permitting approval, hoping they can get away with a sloppy job because, frankly, they usually do. Today you will hear the Water Authority present a manufactured crisis designed to bring a sense of urgency to approving this project. They will tell you that all the alternatives that they originally considered to cost only \$2-5 million more than

Point of Fork will suddenly cost tens of millions more. They will tell you there is only one place they can put this project. By building the water treatment plant first without getting approval for their pump station location, they really *may* have constrained their options. But that is JRWA's and the Corps's own fault for illegally segmenting the project review. The Monacan Indian Nation should not have to pay for that costly mistake of law, and a court may well find that the entire project must start over from scratch, and that the water treatment plant must be moved because the permitting process was wrong from the start.

Lest anyone think I am exaggerating - look at what the Corps did at Surry-Skiffes Creek. In that case, a federal court is considering ordering Dominion to remove tens of millions of dollars' worth of electric transmission towers they built in the James River because the Corps – this same Corps district – failed to follow the same legal requirements at issue in this case. The Corps should not repeat past mistakes and should stop this process and require an individual permit, and not allow JRWA to try to shoehorn a last-minute cursory alternatives analysis to put lipstick on this pig.

Today you will hear the Corps say that they are trying to make the best of a bad situation, and that JRWA's consultant has agreed to make improvements to the Treatment Plan. None of us should put faith in JRWA's consultant. They have proven themselves not worthy of our trust. First, their draft treatment plan proved that they are completely lacking in expertise to undertake an excavation of a site like Rassawek. In addition to being unqualified, they have proven to be unethical. First, they have violated the terms of their anticipatory burial permit multiple times, resulting in a complaint letter from Virginia's Department of Historic Resources. Second, significant portions of the Treatment Plan were copied, word for word, from the dissertation of Jessica Herlich, a doctoral student of Professor Martin Gallivan. In addition, Dan Hayes submitted a letter to the Corps explaining that Circa used his name without his permission and that he never saw the Treatment Plan on which he is listed as an author.

The Corps' refusal to date to order the James River Water Authority to engage an appropriate consultant to evaluate the harms to a site of this extraordinary magnitude and sensitivity shows just how seriously the Corps is taking its obligations to evaluate harms to Virginia's historic and cultural resources.

I would like all of us to be on the same page about what happens next. Today the Corps will tell you that the Nation cannot stop this project. They will tell you that even if the Nation and all the consulting parties decline to sign this Memorandum of Agreement, they can still approve the project. They will tell you that you have no option but to make the best of a bad situation and play along and try to make the proposed MOA and treatment plan better. They will tell you their hands are tied because Section 106 is just a process—and it does not guarantee a specific outcome. Then, in the coming weeks, they will circulate a final MOA and ask you to sign it. Then, regardless of your refusal to sign, they will approve permits for this project. And they will hope that we will all swallow that bitter pill and move on.

But the Monacan Indian Nation will not move on. We will continue to protest this project in every available forum. We will petition every state agency to rescind approvals for the project. If DHR approves the burial permit, we will challenge it. After the Corps approves this permit, we

will file a lawsuit to stop construction of the project. Then we will sue the Corps for violations of the National Environmental Policy Act, the National Historic Preservation Act, and abrogation of their federal trust responsibility to the Tribe. We will have court hearings, we will wait for court decisions, and we will all file appeals, for at least the next five years.

I want all of you here today to know that we are in this for the long haul.

So, to JRWA, I ask you: is the Point of Forks location still the least expensive option when you factor in at least five years of litigation and delay?

To the Corps, do you want to be the poster child for failed tribal consultation, protested by the public and tribes from across the country?

And I would ask to the imagined future breweries of Zion Crossroads, what are customers going to think when they learn you dug up Indian burials to pipe in the water for their beer?

In closing, Rassawek is a priceless historic resource for the Commonwealth. It is shocking that anyone would go along with plans to destroy the site and traumatize the tribe by disinterring burials because a federal agency decided to do some favors for a developer who got terrible advice from its consultants.

Chief Branham now wishes to address the group on the topic of the planned disturbance of Monacan ancestors.

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