



NATIONAL CONGRESS OF AMERICAN INDIANS

June 7, 2020

EXECUTIVE COMMITTEE

PRESIDENT
Fawn R. Sharp
Quinault Indian Nation

FIRST VICE-PRESIDENT
Aaron Payment
Sault Ste. Marie Tribe of Chippewa
Indians

RECORDING SECRETARY
Juana Majel-Dixon
Pauma Band of Luiseño Indians

TREASURER
Clinton Lageson
Kenaitze Indian Tribe

REGIONAL VICE-PRESIDENTS

ALASKA
Rob Sanderson, Jr.
Tlingit & Haida Indian Tribes of
Alaska

EASTERN OKLAHOMA
Norman Hildebrand
Wyandotte Nation

GREAT PLAINS
Larry Wright, Jr.
Ponca Tribe of Nebraska

MIDWEST
Shannon Holsey
Stockbridge Munsee Band of
Mohican Indians

NORTHEAST
Tina Abrams
Seneca Nation of Indians

NORTHWEST
Leonard Forsman
Suquamish Tribe

PACIFIC
Erica Mae Macias
Cahuilla Band of Indians

ROCKY MOUNTAIN
MARK POLLOCK
Blackfeet Nation

SOUTHEAST
Nancy Carnley
Ma-Chis Lower Creek Indian Tribe of
Alabama

SOUTHERN PLAINS
Robert Tippeconnie
Comanche Nation

SOUTHWEST
Vacant

WESTERN
Alan Mandell
Pyramid Lake Paiute Tribe

CHIEF EXECUTIVE OFFICER
KEVIN ALLIS
FOREST COUNTY POTAWATOMI
COMMUNITY

NCAI HEADQUARTERS
1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

Lt. Gen. Todd T. Semonite
Chief of Engineers
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Steven A. VanderPloeg
U.S. Army Corps of Engineers (Norfolk
District)
Western Virginia Regulatory Division
9100 Arboretum Parkway, Suite 235
Richmond, VA 23236

RE: Opposition to James River Water Authority’s Department of the Army Permit Application in CENAO-WRR, NAO-2014-00708

Dear Lt. Gen. Semonite and Mr. VanderPloeg:

On behalf of the National Congress of American Indians (NCAI), the oldest, largest, and most representative national organization comprised of tribal nations and their citizens, I write to oppose the James River Water Authority’s Department of the Army Permit Application in NAO-2014-00708 due to a lack of full and meaningful consultation with the Monacan Indian Nation in this proposed federal action.

I. Background

Federal, state, and private lands are carved from the ancestral territories of tribal nations. As such, tribal nations maintain deep, ongoing, religious, social, historic, and cultural connections to their ancestral homelands. For example, and pertinent here, what is known today as Point of Fork, Virginia rests upon the historic capital of the Monacan Indian Nation, Rassawek.

Rassawek was first documented by John Smith on his “Map of Virginia,” published in 1612. The site was later subject to archaeological investigations in the 1880s by the Smithsonian Institution and again in the 1980s by Virginia Commonwealth University professor Dr. Daniel Mouer. During these investigations taking place in the 1880s and 1980s many burials were documented and evidence of extensive building complexes uncovered.¹ More recently, a JRWA survey identified multiple National Register eligible sites that the proposed project will adversely affect.² The Council on Virginia

¹ Gerard Fowke, *ARCHAEOLOGICAL INVESTIGATIONS IN JAMES AND POTOMAC VALLEYS* (U.S. Government Printing Office) (1894); Daniel Mouer, *1985 Archaeology at Point of Fork, Fluvanna County, Virginia*, *FLUVANNA COUNTY HISTORICAL SOCIETY BULLETIN* (1985).

² Supplemental Information Packet from Timmons Group on behalf of the James River Water Authority to Steven VanderPloeg, Env’t. Scientist, U.S. Army Corps of Engineers (June. 6, 2020), p. 162, 163. (<https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll7/id/14202>) (last visited, June 6, 2020).

Archaeologists described these archaeological deposits as “sites of immense significance” due to their “exceptional level of preservation, high potential for the presence of burials, and the fact that they are included in the earliest European documentation of the region.”³

II. NCAI Opposes USACE Individual Section 404 Permit

In a letter dated September 10, 2019, the United States Army Corps of Engineers (USACE) denied JRWA’s request to permit the Point of Fork pump station and pipeline project under a Nationwide Permit and instead required JRWA to seek an individual permit pursuant to Section 404 of the Clean Water Act. USACE based its decision on “concerns and uncertainty regarding the proposed project’s impacts to historic properties” and determined that “further analysis supporting the public interest evaluation is required.”⁴ On March 18, 2020, JWRA submitted supplemental information to assist USACE in its review of JWRA’s permit application.⁵

Overall, NCAI opposes JRWA’s proposed siting of the water pump station and pipeline project on the Monacan Indian Nation’s historic capital of Rassawek due to the likely destruction of tribal cultural resources and ancestral remains. Further, NCAI requests USACE to engage in meaningful consultation with the Monacan Indian Nation and to conduct an Environmental Impact Statement (EIS), pursuant to the National Environmental Policy Act (NEPA).⁶ The EIS should fully evaluate potential impacts to the archaeological and cultural resources by the proposed site, and consider the Monacan’s suggestion to investigate locating the project at the “Forsyth Alternative.”⁷

NCAI has several resolutions that speak to the importance of protecting the cultural heritage of tribal nations.⁸ This duty is more pronounced since federally recognized tribal nations have a unique legal and political relationship with the United States that is defined by the U.S. Constitution, executive orders, treaties, statutes, and court decisions. The Constitution grants Congress plenary and

³ Letter from Council of Va. Archaeologists to Steven Vanderploeg, Env’t. Scientist, U.S. Army Corps of Engineers (Sept. 9, 2019) (http://www.culturalheritagepartners.com/wp-content/uploads/2020/03/COVA_JRWA_Sept_2019.pdf) (last visited June 6, 2020).

⁴ Letter from U.S. Army Corps of Engineers, to Christian Goodwin, Louisa Cnty. Administrator and Eric Dahl, Fluvanna Cnty. Administrator (Sept. 10, 2019) (http://www.culturalheritagepartners.com/wp-content/uploads/2019/09/CorpsLetter_IndividualPermit.pdf) (last visited, June 6, 2020).

⁵ *Supra* note 2.

⁶ 42 U.S.C. 4321 et seq.

⁷ Letter from Greg Werkheiser Counsel for the Monacan Indian Nation to the James River Water Authority (March 10, 2020) (http://www.culturalheritagepartners.com/wp-content/uploads/2020/03/CHPLettertoJRWA_ForsythAlternative_3_10_2020.pdf) (last visited, June 6, 2020).

⁸ See NCAI Resolution #PHX-08-069C, *NCAI Policy Statement on Sacred Places* (2008) (describing NCAI’s policy position on sacred places, stating that “prior to any transfer or any issuance of permits, a cultural survey is undertaken in consultation with tribes as part of the initial stages of any federally-mandated identification process.”); NCAI Resolution #LNK-12-023, *Federal Investigation of Observance of Federal Trust Responsibility to Protect Native American Ancestral Lands and Cultural Resources* (2012); NCAI Resolution #PHX-16-067, *Tribal Trust Compliance for Federal Infrastructure Permitting* (2016) (stating “Indian tribal governments must be provided, in a manner similar to state governments, full and early participation in ‘purpose and need’ infrastructure permitting discussions, and funding for participation in federal permitting processes.”); NCAI Resolution #ATL-14-032, *Calling for Protection of Native Peoples’ Sacred Places, Sacred Objects and Ancestors under United States, Native Nations and International Law, Policy and Practice* (2014) (opposing “acts of desecration or dispossession, or any adverse effect, damage, endangerment, injury or threat to Sacred Places, Sacred Objects and Ancestors.”) (last visited June 6, 2020).

exclusive authority to legislate on tribal affairs.⁹ Furthermore, the Supreme Court determined that the United States assumed a fiduciary obligation to tribal nations in exchange for the historic taking of the immense lands and natural resources necessary to establish the United States.¹⁰ These responsibilities include taking steps to consider the potential impacts of a federal project on tribal cultural heritage. In practice, USACE also acknowledges affirmative duties owed tribal nations.

i. The Army Corps of Engineers Has a Responsibility to the Monacan Indian Nation Based on its Policies and Procedures for the Protection of Historic Properties

Pursuant to the USACE’s “General Policies for Evaluating Permit Applications,”¹¹ the Corps must conduct a public interest analysis prior to issuing a permit.¹² Among the relevant factors USACE must consider in this analysis are the cumulative effects of the project on historic properties.¹³ The regulations further require USACE to review historic, cultural, scenic, and recreational values.¹⁴ Specifically, this subsection directs USACE to give “due consideration to the effect which the proposed structure or activity may have on values such as those associated with...historic properties...[and] archaeological resources, including Indian religious or cultural sites...”¹⁵

Appendix C to 33 C.F.R §325 also “establishes the procedures to be followed by [USACE] to fulfill the requirements set forth in the National Historic Preservation Act [NHPA].”¹⁶ Appendix C clarifies that a “designated historic property” is one that is either listed in the National Register of Historic Places or has been determined eligible for listing in the National Register of Historic Places.¹⁷ The Appendix also defines “historic properties” as those properties which have “historical importance to any person or group” and includes districts, sites, buildings, structures, or objects “*eligible for inclusion*, but not necessarily listed on the National Register”¹⁸ (emphasis added). As noted above, several National Register eligible properties have been identified by previous archaeological excavations at Rassawek. Importantly, USACE’s analysis includes both “designated historic properties” and “undesignated historic properties.”¹⁹

⁹ *U.S. v. Lara*, 541 U.S. 193, 200 (2004) (explaining that “[t]his Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that [plenary and exclusive] power”).

¹⁰ *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831); *United States v. Mitchell*, 463 U.S. 206, 225 (1983), (reiterating “the undisputed existence of a general trust relationship between the United States and the Indian People”); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

¹¹ 33 C.F.R. 320.4.

¹² 33 C.F.R. 320.4(a)(1).

¹³ *Id.*

¹⁴ 33 C.F.R. §320.4(e).

¹⁵ *Id.*

¹⁶ Appendix C to 33 C.F.R §325 para. 2.

¹⁷ Appendix C to 33 C.F.R §325 para. 1(a).

¹⁸ Appendix C to 33 C.F.R §325 para. 1(b).

¹⁹ Appendix C to 33 C.F.R §325 para. 3(a) (stating “upon receipt of a completed permit application, the district engineer will...determine if there are any designated historic properties which *may* be affected by the proposed undertaking [and] will also consult with other appropriate sources of information for knowledge of undesignated historic properties which may be affected.”) (emphasis added).

ii. The Army Corps of Engineers Has a Responsibility to the Monacan Indian Nation Based on its Policies and the National Environmental Policy Act

In fulfilling its NHPA requirements through Appendix C, USACE must also satisfy NEPA.²⁰ To meet the goals of NEPA, federal agencies must prepare a detailed statement (Environmental Impact Statement (EIS)) for “major federal actions significantly affecting the quality of the human environment” and in so doing, consider among other things, “any adverse environmental effects which cannot be avoided should the proposal be implemented.”²¹ In developing an EIS, an agency must “study, develop, and describe appropriate alternatives to recommended course of action in any such proposal which involves unresolved conflicts concerning alternative uses of available resources.”²² The agency must also “rigorously explore and objectively evaluate all reasonable alternatives” and state how those alternatives meet or do not meet the requirements of the Act.²³ An important part of developing an EIS is consultation with tribal nations.²⁴

In light of previous archaeological findings, the historic and cultural significance of Rassawek to the Monacan Indian Nation and to the United States, and the potential impacts the proposed project may have on those resources, NCAI requests that USACE conduct an EIS, including full consideration of the “Forsyth Alternative,” as requested by the Monacan Indian Nation.

III. Conclusion

In closing, NCAI thanks you for the opportunity to submit these comments and looks forward to further discussion on how USACE can meet its statutory, regulatory, and trust responsibilities to protect and preserve the cultural heritage of tribal nations and ensure tribal participation is properly integrated and tribal interests properly and meaningfully considered. If you have additional questions, please contact Darren Modzelewski, NCAI Policy Counsel, at dmodzelewski@ncai.org or (202) 466-7767.

Sincerely,



Kevin J. Allis
Chief Executive Officer

²⁰ Appendix C to 33 C.F.R §325 para. 2(b).

²¹ 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.10. *See also, Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (stating, “if any ‘significant’ environmental impacts might result from the proposed agency action, than an EIS must be prepared *before* the action is taken.”).

²² 42 U.S.C. § 4332(2)(E).

²³ 40 C.F.R. § 1502.14(a)-(c).

²⁴ 40 C.F.R. § 1502.2(d)(2); 40 C.F.R. § 1502.7(a)(1).