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# JAMES RIVER WATER AUTHORITY

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132 Main Street, P.O. Box 540, Palmyra, VA 22963



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January 11, 2019

By Email (Steven.A.Vanderploeg@usace.army.mil)

Mr. Steven VanderPloeg  
Environmental Scientist  
US Army Corps of Engineers,  
Norfolk District  
9100 Arboretum Parkway, Suite 235  
Richmond, Virginia 23236

**Re: James River Water Authority Project  
Revised Memorandum of Agreement  
USACE Action ID Number: NAO-2014-00708  
DHR File No. 2015-0984**

Dear Mr. VanderPloeg:

The James River Water Authority (JRWA) is pleased to submit this revised *Memorandum of Agreement Among James River Water Authority, the Virginia State Historic Preservation Office, and the Norfolk District, Corps of Engineers Regarding the James River Water Supply Project* (January 2019) (MOA). JRWA respectfully requests that this revised MOA be distributed for final execution.

JRWA is confident that this revised MOA fully addresses all relevant comments from the Virginia Department of Historical Resources (VDHR) and consulting parties on the prior versions of the MOA circulated for review and comment on August 27 and November 21, 2018. JRWA wishes to highlight several of the changes that have been made to the MOA and the forthcoming draft treatment plan in response to comments.

### **Incorporation of VDHR Comments**

On December 20, 2018, VDHR submitted comments on the November 21, 2018 version of the MOA and attached Archeological Monitoring Plan. The newly revised MOA incorporates VDHR's edits and responds to each of the Department's comments.

Most significantly, VDHR commented that Site 44FV0269 should not be assumed eligible and that an archeological evaluation should be performed. In response to this comment, the revised MOA includes a new Stipulation II. This stipulation provides that a Phase II study will be conducted for Site 44FV0269.

If it is determined that the site is eligible and will be adversely affected by the Project, the stipulation provides a process for the submission, review, and approval of a site-specific treatment plan prior to any ground disturbance of the site.

VDHR also commented that the MOA should include provisions for mitigation in further consultation with the Monacan Indian Nation. In response to this comment, JRWA states that it has made a good faith effort to respond to every request for mitigation made by the Monacans. As discussed further below, several of JRWA's responses are incorporated in the MOA, with the remainder to be included in the forthcoming revised treatment plan. 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.

### **Incorporation of the Monacan Indian Nation Comments**

JRWA respects the Monacans' historical ties to Point of Fork and welcomes their active participation in the National Historic Preservation Act Section 106 process. The MOA and treatment plan give the Monacans a meaningful role in the archeological study and the development of archeological reports and public information. JRWA also believes it is important that artifacts associated with the Monacans' history be returned to the tribe and proposes to provide funding to assist the tribe in curating those artifacts.

In written comments on the first version of the MOA dated September 28, 2018, the Monacans made five broad requests for additional mitigation. Because the Monacans' subsequent comment letters did not include any additional substantive requests for mitigation or specific changes to the MOA, JRWA has made a good faith effort to accommodate each of the five requests in the September 28 letter. Those requests, and JRWA's response, are summarized below.

The Monacans' first request is for "monetary compensation." More specifically, the letter requests (1) a "payment of \$500,000 in unrestricted funds"; (2) an unspecified amount of funding for a needs assessment for the Tribal museum; and (3) a contribution of "up to \$150,000" for improvements at the museum. Unfortunately, as a public water authority JRWA is not in the position to meet the full amount of the demand for monetary compensation. Furthermore, JRWA believes that any payment of "unrestricted funds" is not a legally appropriate form of mitigation under Section 106. Nevertheless, JRWA has committed to providing the Monacans with funding for the Tribal Museum to facilitate the tribe's ability to care for artifacts discovered by the Project. To this end, the forthcoming treatment plan proposes to make a contribution of \$100,000 toward upgrades at the museum. An additional \$25,000 will be contributed toward a needs assessment. Lastly, JRWA will pay a curation fee (based on VDHR's standard fee of \$350/box) to whichever repository receives the artifacts and related research materials. It is JRWA's preference that the Monacan Tribal Museum be the repository and that this fee be paid directly to the tribe. Stipulation VIII of the MOA provides flexibility for the artifacts to be delivered to the Monacans or, if the Tribal Museum is unable to properly store or curate the artifacts at that time, for the artifacts to be safely curated by VDHR. In the latter case, JRWA would readily support a request by the Monacans to take the artifacts from VDHR under a long-term loan agreement at such time as they

are capable of properly curating them. JRWA believes this financial contribution of \$125,000 (plus curation fees) is fair and consistent with the principles of Section 106.

The Monacans' second request is that the archeological study proposed for this Project "be used as an opportunity to re-examine adjacent sites with likely association to Rassawek or other JRWA project sites." To fulfill this request, JRWA has significantly expanded the scope of background research and revised the research questions in the forthcoming treatment plan. The research focus has been reworked to evaluate the inter-relatedness of the various archeological sites at and around Point of Fork, including Elk Island. JRWA also has made an effort to gain access to archaeological materials from previous studies in the area so that they may be reexamined and incorporated into the research study. JRWA is working with the Smithsonian facility in Maryland to reexamine and photograph the artifacts and records collected from their excavations in the late 19th century and early 20th century. In addition, JRWA will review the artifacts, photos, and field records housed at VCU and from other excavations at Elk Island.

The Monacans' third request is to "clearly articulate the repatriation rights of the Monacan to human remains and associated cultural artifacts." As noted above, JRWA intends to facilitate the return of cultural artifacts to the Monacans by making a substantial contribution to the Monacan Tribal Museum. Out of sensitivity to issues associated with the handling of human remains and funerary objects, JRWA believes that a burial permit issued by VDHR is the appropriate vehicle to best accommodate the Monacans' request for repatriation of remains—in the unlikely event any are disturbed. That process allows for the development of an advance protocol for handling, recovering, and reburying any human remains that may be found at any archaeological sites associated with the Monacans in a less public forum than the MOA. While JRWA agrees that any disturbed human remains within the archeological sites are likely to be Monacan, the burial permit process also allows other tribes to express any interest they may have in the matter. Accordingly, Stipulation X of the MOA provides that a burial permit will be obtained from VDHR prior to construction. JRWA submitted a letter to VDHR on October 12, 2018 to start the burial permit review and tribal consultation process, and it looks forward to working with VDHR to ensure that the Monacans' religious and cultural beliefs are appropriately addressed.

The Monacans' fourth request is to be involved in the archeological work for the Project. This request has been accommodated in several respects. First, Stipulation IV.D provides tribal members the right to visit the site to monitor ongoing data recovery activities at any time. Second, this stipulation creates a position for a member of the Monacan Indian Nation to participate directly in data recovery at the site as a paid intern to the Project archeologist. Third, Stipulation I.E commits JRWA to sending knowledgeable representatives to attend a meeting of the Monacan Tribal Council in Amherst, Virginia, at the conclusion of archeological field work, for the purposes of (1) briefing the tribe on any discoveries, (2) answering questions and responding to feedback from the tribe, and, (3) most importantly, discussing a plan for further tribal involvement. This stipulation provides that the plan should, at a minimum, afford the Tribal Council's representatives the opportunity to review and provide input on all preliminary draft archeological reports and public information materials. Lastly, the stipulation memorializes JRWA's earnest commitment to incorporate the views and opinions of the Monacan Indian Nation into any archeological reports and public information materials that pertain to the tribe's heritage and history. JRWA believes

these stipulations provide an unprecedented opportunity for the tribe to be a partner in the archeological study of the Project site.

The Monacans' fifth request was to expand the "public interpretation aspect" of the treatment plan. As specifically requested in the letter, JRWA has committed in the treatment plan to use the public information materials to "increase understanding of the Monacan presence on the landscape" and "challenge the often-held view that there are no Virginia Indians." The treatment plan commits to a wider distribution of information materials developed for this Project. Given that the Monacans will be able to participate in the development of those materials, JRWA believes this request has been fully addressed.

The Monacans filed additional comments on November 27 and December 21 expressing general opposition to the Project. These letters marked a significant and unexpected reversal in their longstanding position. The Monacans first became formally engaged with the Project in June 2017, when they notified the Corps and VDHR of their intent to participate as a consulting party. Since that time, JRWA has made a good faith effort to engage the tribe above and beyond the formal Section 106 consultation process by engaging tribal representatives in numerous telephonic and email discussions and informational meetings; working closely with the tribe through the previous anticipatory burial permit process; offering to send representatives to Tribal Council meetings; providing copies of key documents (e.g., Phase I/II Cultural Resource Report) to the tribe prior to the formal consulting party comment periods; hosting a tour of the site with Chief Dean Branham and other tribal representatives, at their request, on August 11, 2018; and delivering a host of Project information, including renderings, plan sheets, elevation views, and drone footage, for review at the Tribal Council's August 18, 2018 meeting. It is unfortunate that the Monacans would dramatically reverse their stated position on the Project at this late hour after a history of constructive discussions. Nevertheless, JRWA remains committed to working with the Monacans in a good faith effort to address their concerns.

### **Comments from Other Consulting Parties**

Additional comments on the November 21, 2018 version of the MOA were received from the Fluvanna Historical Society, Virginia Canals & Navigations Society, and Preservation Virginia. None of these consulting parties requested specific modifications to the MOA that were not also mentioned in VDHR or the Monacans' comments. Accordingly, no additional changes have been made to the MOA in response to these comments.

### **Request to Conclude Consultation Process and Circulate the MOA for Execution**

As documented in the respective Regional Water Supply Plans for the Counties of Fluvanna and Louisa, and acknowledged in the Virginia Water Protection permit issued to JRWA by the Virginia Department of Environmental Quality in 2015, existing water supplies are inadequate to meet the projected water supply demands in the region to be served by the Project. Timely completion of the James River Water Supply Project is critical to secure a reliable municipal water supply for growing populations and economic development in the Counties. However, this vital public project is approaching the five-year anniversary of the submission of the Joint Permit Application and is

past the planned in-service date. There is an urgent public need to bring the permitting process to an orderly conclusion.

The Section 106 consultation process for this Project has been lengthy and robust. Consulting parties, including the federal and state tribes, have been involved in the process since at least June 2017. Numerous meetings, teleconferences, and comment periods have been held. To date, two versions of the MOA and one draft of the treatment plan have been circulated to consulting parties for review and comment. All substantive comments on the MOA have been addressed. Comments related to the first draft of the treatment plan will be addressed in the forthcoming revision—which need not be approved prior to execution of the MOA—in the manner summarized in this letter.

JRWA understands that the only outstanding request for further consultation is a request from the Monacans for another meeting with the Corps and VDHR. That request was not made until October 31, 2018, at a meeting with the Corps, VDHR, consulting parties, and JRWA. Notwithstanding the apparent urgency with which that request was communicated (and reiterated in a November 27, 2018 email), the tribe's current position (per a December 19, 2018 email) is that it will not schedule a meeting until the Corps has responded to a Freedom of Information Act request for documents related to a permit verification issued for a separate project. Nothing in that permit file can reasonably be expected to have material relevance to the task at hand: consultation on the resolution of adverse effects within the Permit Area for the JRWA Project. JRWA will not speculate on the tribe's motives, but it is per se unreasonable for a consulting party to indefinitely prolong the consultation process by making a request to meet and then refusing to calendar a date for the meeting. The Monacans are a sophisticated sovereign nation who hired legal counsel to assert their rights. They have fully engaged in the consultation process. An open-ended request for a meeting on an ancillary matter at some unspecified date in the future should not be allowed to prevent the conclusion of this already protracted process.

JRWA has endeavored, to the maximum extent practicable, to accommodate every request to further avoid, minimize, and compensate for the Project's adverse effect on historical resources. However, JRWA cannot entertain an eleventh-hour demand to move the Project—which was publicly announced at a February 2014 public information meeting—to a new location. Such a demand is technically and logistically impractical and cost-prohibitive. In planning the final route/location, numerous options were evaluated before the present Project location was selected. The fact is that no practicable alternatives are available to meet the urgent public water supply needs necessitating this Project. Indeed, the Virginia Department of Environmental Quality concluded in its November 2015 decision to issue a Virginia Water Protection Permit to JRWA, which was based on the same Joint Permit Application, that the present Project design is the "least environmentally damaging and practicable alternative."

Given the lack of practicable alternatives, JRWA has taken a responsible and respectful approach to siting the necessary pump station and pipeline route to minimize additional impacts at Point of Fork—which has been impacted over the years by residential, agricultural, transportation, and industrial development—and to minimize the likelihood of encountering and/or impacting cultural resource features or any burial remains. Examples of this approach include siting the pump station in a former agricultural tract/open field and setting it back from the James River such that it would have minimal viewshed impact; choosing a pipeline alignment that, to the maximum extent

practicable, utilizes the existing CSX right of way, Dominion transmission easements, Colonial Gas pipeline easements, and areas in existing agricultural use (i.e., Bialkowski & Lyttle tracts); minimizing impacts to streams and wetlands; and utilizing an existing road that was located in a former State Road right of way (Columbia Road). The pump station and pipeline route have also been located in areas of Point of Fork that, due to the land forms and history of previous disturbance, are expected to present the lowest probability that burials will be disturbed during Project construction. This decision was supported by the fact that no human remains or funerary objects were encountered during archeological field work conducted for the Phase I/II report. Lastly, to minimize long-term impacts to the site, the pump station employs an enclosed design that would minimize the aboveground Project footprint to less than 3,500 square feet (or 0.08 acres), which is similar in size to a house. This design also minimizes, if not eliminates, ambient noise outside of the pump station building during normal operations. Any incremental increase in noise at the location is expected to be de minimis in comparison to other sources of noise at the site today, such as farming equipment and CSX freight trains passing by.

JRWA asserts that the Section 106 process for this Project has functioned as intended and has reached its logical conclusion. The views of the State Historic Preservation Officer and consulting parties have been fully and repeatedly expressed in writing and at meetings, and the MOA has evolved to reflect those views. No substantive comments on the MOA remain unresolved. The National Historic Preservation Act does not, of course, require avoidance of all historic resource impacts—even if a consulting party, including a federally recognized tribe, objects. JRWA therefore respectfully requests that the revised MOA be finalized, with VDHR's concurrence, and promptly circulated to all relevant parties for execution.

Sincerely,



Steven M. Nichols  
James River Water Authority

Copy:

Ms. Julie Langan, VDHR Director  
Mr. Roger Kirchen, VDHR  
Mr. Greg LaBudde, VDHR  
Mr. D. D. Watson, James River Water Authority Chair  
Mr. Christian Goodwin, Louisa County Administrator