

INTERIOR BOARD OF LAND APPEALS

The Klamath Tribes

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THE KLAMATH TRIBES

IBLA 96-121

Decided April 12, 1996

Appeal of a decision by the Oregon State Office, Bureau of Land Management, to issue cultural resource use permit OR-40542 allowing archaeological collection, excavation, and mitigation at nine designated sites.

Affirmed.

1. Administrative Procedure: Administrative Review--Board of Land Appeals--
Constitutional Law: Generally

The Board will decline to review an argument that a BLM decision violates the Free Exercise Clause of the First Amendment when the appellant does not identify specific religious practices precluded or affected by the decision.

2. Constitutional Law: Generally

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994), was enacted to restore the compelling interest test to analysis of issues regarding the Free Exercise Clause of the First Amendment. It applies to protect individual religious practices rather than create a cause of action to review general claims of religious belief.

3. American Indian Religious Freedom Act--Indians: Archaeological Resources

The American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994), sets forth a governmental policy and does not create a cause of action or a judicially enforceable individual right. Under Departmental interpretation, AIRFA requires BLM to consult with Native Americans and consider the consequences of its decision on the exercise of their religion, but does not require its decision to be in accord with their beliefs. The Board does not review BLM's decision to ascertain whether it conforms to Native American religious beliefs or practices, but to determine whether BLM adequately consulted with them and carefully considered their religious values and practices, as well as reasonable measures to mitigate effects.

APPEARANCES: Lea Ann Easton, Esq., Portland, Oregon, for the Klamath Tribes; Marianne Werner King, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management; Christopher H. Meyer, Esq., Boise, Idaho, for Atlas Perlite, Inc.; Jane O'Keeffe, Lakeview, Oregon, Chairman, Lake County Board of Commissioners, amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Klamath Tribes (the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians) have appealed a November 24, 1995, Oregon State Office, Bureau of Land Management (BLM), decision to issue cultural resource use permit OR-40542 to Kautz Environmental Consultants (Kautz). The permit will allow Kautz to conduct archaeological collection, excavation, and mitigation at nine designated sites on Tucker Hill, Oregon. By letter dated January 12, 1996, the Tribes requested a stay of the decision. On January 18, 1996, the Tribes filed a statement of reasons in support of their appeal.

The permittee, Kautz, has been retained by Atlas Perlite, Inc. (Atlas), a subsidiary of the Atlas Corporation, to undertake work on Tucker Hill as part of the permitting process under which Atlas seeks approval of its plan of operations to mine perlite (Atlas Response to Stay Petition, App. B at 2). The record includes copies of an October 1995 draft environmental impact statement (DEIS) and a February 1996 final environmental impact statement (FEIS) which BLM prepared to review Atlas' proposed plan of operations (BLM Answer, Exhs. 1, 2). Prior to issuance of this permit, Kautz had conducted an archaeological reconnaissance of 570 acres, and BLM had conducted a reconnaissance of 370 adjacent acres. See BLM Answer, Exh. 3 at 1-3. This reconnaissance did not entail surface disturbance. Id. at 6. BLM's November 24, 1995, decision authorizes Kautz to conduct four or more shovel probes at each of the nine sites, dig a 1 meter by 1 meter test unit at seven of the sites, and dig three test units at another site. The nine approved sites are within the area of Atlas' proposed project. Id. at 8, 14.

On January 22, 1996, Atlas filed a statement in opposition to the stay petition, and submitted a copy of a November 7, 1995, letter from its legal counsel to the Area Manager, Lakeview Resource Area, Oregon, BLM, in support of its statement. On January 31, 1996, Atlas filed a motion for summary dismissal of the appeal for failure to serve an adverse party, and dismissal of an appeal of the same BLM decision filed by the Burns Paiute Tribe docketed as IBLA 96-122. Atlas also filed a response to the Tribes' petition for a stay, arguing, inter alia, that the petition was not timely filed.

By order dated February 1, 1996, the Board stayed the effectiveness of BLM's decision until March 31, 1996. On the day the order issued, the Lake County Board of Commissioners (Commissioners) filed a request to be designated an affected interest and intervenor, and opposed the stay petition. On February 8, 1996, Atlas filed a motion to reconsider the temporary stay.

On February 12, 1996, the Board received the record for issuance of the cultural resource use permit from BLM. On February 20, 1996, BLM filed a motion to consolidate the appeal with IBLA 96-122. The motion was taken under advisement in an order dated February 21, 1995. On February 26, 1996, BLM submitted a document titled "A Testing Plan for Archaeological Sites Located at Tucker Hill, Lake County, Oregon" (October 1995) prepared by Kautz in support of its application for the permit.

On March 1, 1996, BLM filed its answer to the appeal. On March 8, 1996, Atlas filed a motion to consolidate the appeal with IBLA 96-122 and with an additional appeal by the Tribes challenging a February 1, 1996, decision by BLM to issue an addendum to permit OR-40542, which has been docketed as IBLA 96-231. Atlas requested that the appeals be consolidated if its "requests to dismiss the appeals and deny the stay request are denied" and also requested expedited consideration (Motion at 3). On March 11, 1996, the Board received a copy of the addendum and other documents from BLM. On March 14, 1996, BLM filed a motion to lift the stay. By order dated March 28, 1996, the decision at issue in IBLA 96-231 was stayed.

Procedural Motions

We will address the numerous procedural matters the parties have raised prior to considering arguments concerning appellant's stay request and BLM's decisions.

The Commissioners seek designation as an "affected interest" and intervenor based upon the economic development the mining operation will provide. This Board does not designate affected interests. A party to a case who has been "adversely affected" by a decision has a right to appeal to the Board. 43 CFR 4.410(a); Kendall's Concerned Area Residents, 129 IBLA 130, 136-37 (1994), and cases cited therein. The Commissioners do not claim to have been adversely affected, but seek to represent the citizens of the county in the role of parens patriae. General economic benefit or harm is not a sufficient basis to give the Commissioners standing to prosecute an appeal. Blaine County Board of Commissioners, 93 IBLA 155, 157-58 (1986). Therefore, the Commissioners also do not have standing to intervene, and their request is denied. In light of their interest in the appeal, the Commissioners are granted status as amicus curiae.

Although Atlas has not formally requested permission to intervene, the record indicates that it holds mining claims on Tucker Hill and has filed a plan of operations to mine perflite. As a party directly affected by the decision on appeal, Atlas is clearly entitled to intervene, and intervention is granted. See Kendall's Concerned Area Residents, supra at 136.

Atlas' motion to dismiss the appeal for the Tribes' failure to serve an adverse party is denied. Atlas bases its motion on 43 CFR 4.413(a) which requires that a copy of a notice of appeal be served upon an adverse party within 15 days of filing (Motion at 5). As Atlas notes, 43 CFR

4.413(b) provides that failure to serve an adverse party will subject an appeal to summary dismissal. However, dismissal for failure to properly serve a party is discretionary, and this Board will decline to dismiss an appeal for a procedural deficiency when there is no showing that a party has been prejudiced. See, e.g., Red Thunder, Inc., 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990). Atlas does not argue that it has been prejudiced by late service and its briefing reflects an adequate opportunity to respond to the Tribes' arguments.

Atlas' request that a stay not be granted because the Tribes' request was not timely filed is denied. The fact that a stay request did not accompany the Tribes' notice of appeal is not determinative. A stay petition may be filed "any time during the time period for filing the notice of appeal." Robert E. Oriskovich, 128 IBLA 69, 70 n.1 (1993). ^{1/} The consequence of failure to file a stay petition within the period allowed is that the decision appealed becomes "effective on the day following the expiration of the appeal period." Id. at 70. When a timely appeal has been filed, a petition for stay may be filed any time during the appeal, and the request may be considered in the exercise of the Board's discretion. Id.; see David M. Burton, 11 OHA 117 (1995). Consequently, BLM's inability to provide the Tribes information during the period Federal employees were furloughed is not determinative. The Tribes' petition for stay is properly before the Board.

Atlas' motion for expedited consideration is granted. After review of the record to consider the Tribes' request for a stay, we have determined that the appeal may be resolved on the merits. Having granted expedited consideration of the merits, the Tribes' petition for a stay, Atlas' motion for reconsideration of the temporary stay, and BLM's motion to lift the temporary stay are denied as moot.

BLM's and Atlas' motions to consolidate the appeal with IBLA 96-122 are denied. Pursuant to the motion filed by Atlas, the Burns Paiute Tribe's appeal, IBLA 96-122, was dismissed by order dated March 29, 1996. Atlas' and the Tribes' motions to consolidate this appeal with IBLA 96-231 are denied. The order of March 28, 1996, which stayed the decision appealed in IBLA 96-231, identified issues not shared with the present appeal, and consolidation would delay issuance of this decision.

Arguments Presented by the Parties

The arguments presented by the parties frequently mix issues regarding stay issuance, the merits of the appeal, and the merits of allowing mining on Tucker Hill. Although the legal issues on appeal are narrower than the

^{1/} Although not part of Atlas' argument, we note that a Nov. 30, 1995, facsimile transmission from BLM to the Tribes stated: "The 30 day clock apparently begins the day the letter is mailed out, therefore November 24 in this case, not when you receive it." (Emphasis in original.) BLM's statement was incorrect. See 43 CFR 4.411(a).

standards for granting a stay set forth at 43 CFR 4.21(b), a brief description of the parties' arguments and positions will establish the context in which the conflict arises.

The Tribes "believe archaeological testing will desecrate sacred cultural and religious sites due to the excavation and/or manipulation of burials and sacred objects" (Petition at 1). They provide a copy of Klamath Tribes Resolution 92-047, which states that the "Tribes defines [sic] all cultural sites as sacred, any excavation of these sites violates the Tribes' spiritual values" (SOR, Exh. A). They argue that sufficient archaeological work has been done to establish that mining will adversely impact archaeological sites, as evidenced by statements in the DEIS that Tucker Hill fits the criteria to qualify as an Archaeological District and a Traditional Cultural Property. Id. at 1-2. They also contend that the DEIS errs in failing to recognize the variety of cultural resources which are significant to the Tribes and in declining to determine whether Tucker Hill meets the criteria for a cultural area of critical environmental concern and eligibility for listing as a National Historic District (SOR at 4-6). The Tribes assert that BLM's actions violate the First Amendment, the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1994), and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb (1994). Id. at 5.

In response to the Tribes' request for a stay, Atlas argues that an extended delay may result in loss of its underlying contract to provide perlite and jeopardize the project, potentially causing Atlas to lose the \$8,000,000 net present value of the project, the \$1,115,000 book value which Atlas has spent on the project, and other amounts (Response to Petition at 10 and App. A). Atlas argues that the Tribes will not suffer substantial harm if a stay is not granted because the permit allows only limited hand excavation techniques and there is no documented use of Tucker Hill by Indians for over 50 years. Id. at 10, 15. Atlas asserts that there is only one burial site in the vicinity of Tucker Hill, that it no longer contains human remains due to unlawful excavation decades ago, and that the permitted testing will not occur near the site. Id. at 11.

Atlas argues that the Tribes are unlikely to prevail on the merits of their appeal because the procedures BLM follows to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370a (1994), and the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470w-6 (1994), do not alter the company's rights under the Mining Law of 1872, 30 U.S.C. §§ 22-54 (1994). Id. at 12. Atlas contends that BLM's authority to regulate mining operations is defined as authority to prevent unnecessary and undue degradation (see 43 U.S.C. §§ 1732(b), 1782(b) (1988), 43 CFR Part 3809), and does not extend to prohibiting all disturbance of the land. Id. at 13-15. Finally, Atlas argues that gathering archeological and cultural information to comply with NEPA and the NHPA will assist BLM's decisionmaking, and is in the public interest. Id. at 15-16. Atlas also notes its willingness to cooperate with the Tribes and negotiate mitigation measures with them. Id. at 15.

BLM points out that the Tribes are not appealing a decision to allow Atlas to conduct mining operations, but a decision to issue a cultural resource use permit (Answer at 4). Nevertheless, BLM disputes the Tribes' suggestion that Atlas' proposed mining will disturb burial sites, pictographs, petroglyphs, caves, and rock shelters. *Id.* at 5. BLM contends that the archaeological survey is needed for BLM to comply with section 106 of the NHPA, 16 U.S.C. § 470f (1994), in reviewing Atlas' plan of operations and that it will assist BLM in meeting the requirement of Executive Order 11593 (36 FR 8921 (May 13, 1971) (reprinted at 16 U.S.C. § 470 (1994)), to inventory and nominate sites for listing on the National Register of Historic Places (Answer at 8-11; Motion to Lift Stay at 3-4). BLM distinguishes *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), arguing that, because Native Americans have not used Tucker Hill since the early 1900's, Native American religious practices will not be curtailed (Answer at 8-11). BLM argues that *Lyng's* discussion of the Free Exercise Clause of the First Amendment controls rather than the Tribal resolution, and that the Tribes have minimal chance of prevailing on their appeal. *Id.* at 6-7; Motion to Lift Stay at 4-6. BLM further argues that RFRA does not overrule *Lyng* and, in accord with its legislative history, did not prohibit issuance of the cultural resources use permit at issue (Motion to Lift Stay at 6-7).

Response to Arguments by the Parties

As noted by BLM, the decision on appeal is issuance of cultural resource use permit OR-40542 and not Atlas' yet to be approved plan of operations. To the extent the parties' arguments touch upon whether BLM properly may approve the plan of operations, they are premature. Similarly, the DEIS and FEIS prepared by BLM to review the plan of operations are not at issue, and are discussed and cited only for information pertaining to issues raised by the appeal.

[1] There are three legal grounds for the Tribes' argument that BLM's decision to approve archaeological excavation allows desecration of cultural and sacred sites which should be protected. First, they invoke the Free Exercise Clause of the First Amendment. This argument requires only a brief response. The Tribes state their claim in terms of a violation of their "rights and individual Indian people's rights to practice their religion" (SOR at 5) but identify no individual or Tribal religious practices precluded or affected by BLM's decision. The general assertion that any excavation impairs the exercise of religion by violating the Tribes' spiritual values is similar to the broad claims rejected in *Lyng v. Northwest Indian Cemetery Protective Association*, *supra* at 452 as amounting to a "veto" power over public programs. *See also id.* at 474-75 (Brennan, J. dissenting). Absent allegations that specific religious practices have been precluded or will be affected by the decision, there is little reason to review the considerable jurisprudence addressing the Free Exercise Clause. If we found BLM's decision to violate the Constitution and reversed, the ruling would be subject to challenge in Federal court by

Atlas. If the Board found no violation, the Tribes could appeal. Our analysis would not be entitled to the deference Federal courts traditionally accord agency interpretation of the law, but would be reviewed de novo. The Board will address specific Constitutional arguments raised by an appellant (except those challenging the constitutionality of a statute). However, we will decline to undertake detailed review of a general assertion that BLM has violated the Constitution.

[2] Second, the Tribes rely upon RFRA, supra. The statute was enacted to effectively overturn the Supreme Court's ruling in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), and restore the compelling interest test set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). 42 U.S.C. § 2000bb (1994). Although courts have differed in their analysis of the relationship between RFRA and the First Amendment, see Francis v. Keane, 888 F. Supp. 568, 572 n.5 (S.D.N.Y. 1995), review of case law suggests that, like the Free Exercise Clause, the Act applies to protect individual religious practices rather than to create a cause of action to review general claims of religious belief. Cf. United States v. Jim, 888 F. Supp. 1058, 1061 (D. Or. 1995) (Native American need not establish that others believe act of shooting eagles is religious). This understanding appears to be in accord with RFRA's provisions which state that its purpose is "to provide a claim or defense to persons whose religious exercise is substantially burdened by [a] government," provide that "[g]overnment shall not substantially burden a person's exercise of religion," identify the conditions under which "[g]overnment may substantially burden a person's exercise of religion," and provide judicial relief for "[a] person whose religious exercise has been burdened." 42 U.S.C. § 2000bb(b)(2), 2000bb-1 (1994). The Tribes frame their arguments in terms of their cultural and religious beliefs, but identify no individual whose exercise of religion would be substantially burdened. As Atlas notes, the record provides no evidence that any Native American has recently used Tucker Hill for religious practices. See DEIS at 36, 39; cf. FEIS at 19. We conclude that the Tribes have not presented a claim under RFRA.

[3] Third, the Tribes rely upon the AIRFA which states that it is

the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (1994). The Act sets forth a governmental policy and does not "create a cause of action or any judicially enforceable individual rights." Lyng v. Northwest Indian Cemetery Protective Association, supra at 455; see Wilson v. Block, 708 F.2d 735, 745-47 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983) (discussing legislative history).

Under Departmental interpretation of AIRFA, BLM must consult with Native Americans and consider the consequences of its decision on the exercise of their religion; AIRFA does not mandate that BLM's decision is to be in accord with their beliefs. The Blackfoot Tribe, 103 IBLA 228, 240 (1988). This Board does not review a BLM decision to ascertain whether the decision conforms to the Tribes' religious beliefs and practices. We consider whether BLM adequately consulted with the Tribes, carefully considered their religious values and practices, and undertook reasonable measures to mitigate effects when making its decision. Wilson v. Block, *supra* at 746-47; *see*, Red Thunder, Inc., 124 IBLA 267, 286-87 (1992); Red Thunder, Inc., 117 IBLA at 189-97, 97 I.D. at 275-79; Kenneth W. Bosley, 91 IBLA 172 (1986).

In this case, BLM has not provided documentation of meetings with the Tribes or other Native American groups or individuals, but BLM's early consultation with the Tribes and other Native Americans appears to have been the reason the prior archaeological surveys were conducted by Kautz and BLM without surface disturbance. The DEIS, which identifies a number of recent consultations, states that presentations were made to the Tribes and the Burns Paiute Tribe during the initial scoping period, that a "government to government" meeting was held with each of the tribes, and that there was an open meeting and field trip to Tucker Hill (DEIS at 9). ^{2/}

The DEIS devotes considerable space to addressing Native American concerns. The presence of numerous artifacts on Tucker Hill is noted:

The existence of obsidian has long made the formation an important source of raw material for stone tool making. "Lithic scatters", largely composed of the waste material from stone tool making, cover large areas of the formation with sometimes extremely dense concentrations of flakes.

At least one burial site has been identified along the lower slopes of the formation. Oral history indicates that others are located in the formation.

Stacked stone features are found throughout the formation. There are four currently known rock art sites, including pictographs and petroglyphs around the base and lower slopes of Tucker Hill. At least one other rock art site is reported to be located on the north side of the formation.

There are at least four caves and one rockshelter on the formation which were used by past occupants of the area. Many types of materials appear to have been cached in these features.

^{2/} The DEIS incorporates by reference a report of individual interviews by Dr. Robert Winthrop titled Tucker Hill Quarry Project, Tribal Consultation. *Id.* at 9, 35. The document is not part of the record on appeal.

There are currently some 39 archeological sites formally identified and recorded that are located on the Tucker Hill formation.

(DEIS at 36). After describing Native American occupation of the area, the DEIS lists information about the general Lake Abert/Chewaucan Marsh area, which includes Tucker Hill, drawn from interviews with Native Americans and archaeological research. Among other matters, it states:

Tucker Hill is a spiritual site located within a larger area recognized as having spiritual importance. * * *

The rock cairns on Tucker Hill are recognized by some of the tribal consultants as being religious sites. Though these were not identified as currently being used by any of the consultants, they stated that the cairn sites retained their religious nature. Such sites are recognized as important for the long-term maintenance of their religious practices in the future.

* * * * *

There is direct evidence for past use of Tucker Hill for religious purposes, based on the presence of pictographs/ petroglyphs, stacked stone features, cache caves, burials, and the general setting of the formation. While some of the stone features on the formation have been assessed by [the consulting] archeologist as hunting related, these cannot be ruled out as also being religious. Some tribal consultants stated that even if they are hunting related, they were used by spiritual leaders and are still sacred in either case. These tribal consultants have stated that the formation is a sacred area for them today.

(DEIS at 39-40, Modified by FEIS at 19).

In evaluating the consequences of Atlas' proposed plan of operations, the DEIS states:

Potential direct and/or indirect impacts of the project are generally associated with the physical archaeological features found on Tucker Hill and the use of the area by Native American peoples for traditional uses. While no direct evidence of current use of the formation specifically has been identified, it is considered a sacred location by some of the Native American consultants. They have expressed a desire to use the formation in the future and state that it is important for the maintenance of their cultural and spiritual values.

(DEIS at 72). Evaluating the effect of the proposed plan of operations on cultural resources, the DEIS sets out a number of conclusions, including:

1. "The disturbance of religious uses, both past and future, cannot be mitigated because of their nature."

2. "There will be no physical disturbance to any known burials, pictographs, petroglyphs, caves, or rock shelters.
Two stacked stone features may be destroyed if they cannot be avoided."

3. "The Tucker Hill project would result in both short-term and long-term impacts to the cultural values present. Some of the impacts to cultural values can be mitigated and some cannot. Some Native American consultants have indicated that the cumulative impacts of the project on Native American values and future uses of the Tucker Hill formation are significant in their view."

(DEIS at 73). Additionally, the DEIS identifies a mitigation strategy adopted in a Historic Properties Treatment Plan (HPTP) and makes recommendations for each of the nine sites (DEIS at 74-75; cf. FEIS at 20). It notes, however, that mitigation would not prevent the permanent loss of the sites or portions of them and, in particular, that "[t]he presence of the quarry and of operations personnel may destroy the religious values present in the stone cairns" on site KEC 32-32 (DEIS at 75; cf. FEIS at 20). The DEIS further states that implementation of an HPTP

would provide mitigation as much as is possible but would not fully mitigate the impacts. The disturbance of religious uses, both past and future, cannot be mitigated because of their nature. Visual impacts of the quarry to spiritual values of the formation cannot be mitigated completely since a portion of the formation would be removed and a visible scar would be left on the formation.

(DEIS at 96, cf. FEIS at 22).

Addressing cumulative impacts, the DEIS states:

Although the Native American consultants are concerned about the total Chewaucan River Basin, there may be both direct and indirect impacts to the spiritual/religious nature of the Tucker Hill formation. These impacts have been identified by some of the Native American consultants as being a major impact to the values of Tucker Hill for traditional Native American uses. The impacts to spiritual/religious values, in their view, cannot be mitigated and the impacts would be irreversible from the Native American viewpoint. The cumulative effects on the sacred values of the Chewuacan River Basin with development of the Tucker Hill project are difficult to measure, as it is not known if there are other sites within the basin with the same values and importance, to some of the Native Americans, as Tucker Hill.

(DEIS at 94).

When examining the DEIS we have not considered whether BLM has complied with the requirements of NEPA, the NHPA, or other law governing approval of Atlas' proposed plan of operations. BLM has neither approved or rejected the plan, and questions regarding it are not ripe for review. As stated above, our concern is whether BLM met its obligations under AIRFA. With respect to that issue, the DEIS can be used to establish that, before BLM issued the decision on appeal, it consulted with the Tribes, other tribes, and apparently individual Native Americans. The DEIS also demonstrates that BLM was well aware of the Tribes' religious objections to disturbance on Tucker Hill and considered possible mitigating measures. Although the DEIS was not written to address mitigation of the effects of the approved archaeological survey, the shovel probes and test units approved by BLM involve minimal surface disturbance and are to be treated in accord with standard archaeological practices under the supervision of the professional archaeologist conducting the field work. ^{3/} BLM sufficiently consulted with Native Americans and considered their religious beliefs and practices before it issued cultural resource use permit OR-40542. Accordingly, we hold that BLM complied with AIRFA.

The other arguments raised by the Tribes, Atlas, and BLM have been considered and are not determinative of the outcome of this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 24, 1995, decision by the Oregon State Office to issue cultural resource use permit OR-40542 to Kautz Environmental Consultants is affirmed.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

^{3/} Kautz's October 1995 Tucker Hill testing plan indicates, on page 15, that excavated materials will be sent to the Nevada State Museum. The record includes an agreement between Kautz and the Nevada State Museum for curation services.