

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 NEZ PERCE TRIBE,  
5 *Petitioner,*

6  
7 vs.

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9 WALLOWA COUNTY,  
10 *Respondent,*

11  
12 and

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14 K & B FAMILY LTD. PARTNERSHIP,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2004-036

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19 CITY OF JOSEPH,  
20 *Petitioner,*

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22 vs.

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24 WALLOWA COUNTY,  
25 *Respondent,*

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27 and

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29 K & B FAMILY LTD. PARTNERSHIP,  
30 *Intervenor-Respondent.*

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32 LUBA No. 2004-042

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34 CONFEDERATED TRIBES OF  
35 THE COLVILLE RESERVATION,  
36 *Petitioner,*

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38 and

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40 MILDRED FRASER, LIAM O'CALLAGHAN  
41 and LYNNE PRICE,  
42 *Intervenors-Petitioner,*  
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vs.

WALLOWA COUNTY,  
*Respondent,*

and

K & B FAMILY LTD. PARTNERSHIP,  
*Intervenor-Respondent.*

LUBA No. 2004-044

ORDER

**MOTIONS TO INTERVENE**

K & B Family Ltd. Partnership moves to intervene on the side of respondent in LUBA Nos. 2004-036, 2004-042 and 2004-044. There is no opposition to those motions, and they are allowed.

Mildred Fraser, Liam O’Callaghan, and Lynne Price (hereafter intervenors) move to intervene on the side of petitioner in LUBA No. 2004-044. There is no opposition to their motion, and it is allowed.

**RECORD OBJECTIONS**

**A. Fraser, O’Callaghan and Price Objections**

Intervenors object that the record filed by the city does not include a large number of documents that discuss the historical interest of the tribal petitioners in the property that is the subject of this appeal. Those documents apparently were submitted to the planning commission and were specifically rejected by the planning commission. Although it is not entirely clear, intervenors appear to argue in their April 26, 2004 letter that while the planning commission rejected those documents, the county board of commissioners may not have rejected those documents.

We do not understand intervenors to argue that they separately submitted the disputed documents to the board of county commissioners. Neither do we understand intervenors to argue that the documents the planning commission specifically rejected were placed before the board of

1 county commissioners by county staff. If neither intervenors nor county staff placed the disputed  
2 documents before the board of county commissioners, those documents are not properly part of the  
3 record.

4 Intervenor’s record objection is denied.<sup>1</sup>

5 **B. Nez Perce Tribe, City of Joseph and Confederated Tribes of the Colville**  
6 **Reservation Objections**

7 The record objections of these three petitioners overlap. The objections of the  
8 Confederated Tribes of the Colville Reservation (hereafter Colville Tribes) are the most extensive  
9 and appear to include all of the Nez Perce Tribe and City of Joseph objections. Petitioners contend  
10 that the county should be ordered to include the following items in the record:

11 “A Guidebook for Protecting Cultural Resources, which the [board of county  
12 c]ommissioners discussed at their meetings of February 2, 9, and 12, the summaries  
13 of which are part of the record that the County submitted to [LUBA].<sup>[2]</sup>

14 “A letter from State Archaeologist Dennis Griffin dated January 30, 2004, which the  
15 [board of county c]ommissioners also discussed at their meetings of February 2, 9,  
16 and 12, the summaries of which are part of the record. Commissioner DeBoie read  
17 from this letter at the February 2 meeting, and the quoted excerpt is in the summary  
18 of that meeting which is part of the record that the county submitted to this Board.

19 “Any account of the conversation between County Commissioner DeBoie and  
20 archaeologist Bruce Womack beyond what is referred to in the summaries of the  
21 February 2, 9, and 12 [board of county c]ommissioners’ meetings.

22 “A February 6 letter from Stephen Suagee of the Colville Tribes expressing  
23 concerns about the County’s intent to rely on the Guidebook, the January 30 State  
24 Archaeologist’s letter, and the conversation between Commissioner DeBoie and  
25 Bruce Womack.

26 “A February 5 letter from the Nez Perce Tribe expressing similar concerns.

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<sup>1</sup> Our ruling that the disputed documents were specifically rejected by the planning commission, and that they are not properly part of the record for that reason, does not necessarily mean that the county correctly rejected those documents. If intervenors believe the county erroneously rejected those documents, they may assign error on that basis in their petition for review.

<sup>2</sup> It may be that only parts of this Guidebook were provided to the county.

1           “Tape recordings, or complete and accurate transcripts, of the February 2, 9, and  
2           12 proceedings in the appeal before the [board of county c]ommissioners, because  
3           the summaries of those proceedings that have been included in the record are  
4           incomplete and do not accurately reflect the proceedings on critical points. The  
5           County acknowledges this in its letter of April 21 that rejects the Tribes’ request to  
6           add the above documents to the record.” Colville Tribes’ Objections to the Record  
7           6-7.

8           It is clear that the parties in this appeal have an underlying legal dispute about whether the  
9           board of county commissioners properly considered the first three items noted above (the  
10          Guidebook, the January 30, 2004 letter, and the conversation one commissioner had with  
11          archeologist Womack) after the evidentiary phase of the local proceedings had concluded.  
12          However, it is equally clear that the board of county commissioners specifically concluded that the  
13          disputed guidelines, letter and conversation, as well as the tribes’ February 5, 2004 and February 6,  
14          2004 letters, were not to be included in the county’s record in this matter. Record 2-3 and 2-4;  
15          Nez Perce Tribe’s Objection to the Record 7-8. That action was sufficient to specifically reject  
16          these items. Because each of these items was specifically rejected, none of these items are properly  
17          included in the record. OAR 661-010-0025(1)(b).

18          As was the case with intervenors’ objection, whether the board of county commissioners  
19          committed legal error by considering the Guidebook, letters and conversation after the evidentiary  
20          record was closed and without giving any party an opportunity to rebut or comment on the  
21          Guidebook, letters and conversation is a separate question. We tend to agree with petitioners that if  
22          they assign error to the county’s consideration of the Guidebook, letters and conversation, that it  
23          may well be necessary for LUBA to have the Guidebook and letters and to know the substance of  
24          the conversation to resolve the assignment of error. We will leave it to the parties to agree on the  
25          best way to make that information available to us.<sup>3</sup> If the parties cannot reach an agreement on how

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<sup>3</sup> The letters are attached to petitioners’ record objections. The Guidebook or the parts of the Guidebook that were supplied to the county are presumably readily available. If there is an additional written account of the conversation between Commissioner DeBoie and archaeologist Womack, that also is presumably readily available.

1 to make that information available to LUBA, any party may file an appropriate motion under OAR  
2 661-010-0045.

3 The county apparently intends to submit the tape recordings of the February 2, 9, and 12  
4 proceedings with other oversized or difficult-to-duplicate documents, as permitted by OAR 661-  
5 010-0025(2). Record Table of Contents 2. At least some of the petitioners have obtained copies  
6 of those tapes from the county and prepared partial transcripts. We assume the county will  
7 promptly makes copies of those tapes available to any parties who have not yet obtained them and  
8 request them. Under our rules, petitioners may prepare partial transcripts from those tapes and  
9 attach those partial transcripts their briefs if they believe such partial transcripts are necessary.<sup>4</sup>

10 Petitioners' record objections are denied. The record shall be considered settled as of the  
11 date of this order. OAR 661-010-0026(6).

12 The petitions for review shall be due 21 days from the date of this order. The response  
13 briefs shall be due 42 days from the date of this order. The Board's final opinion and order shall be  
14 due 77 days from the date of this order.

15 Dated this 1<sup>st</sup> day of June, 2004.  
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23 Michael A. Holstun  
Board Chair

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<sup>4</sup> Although petitioner Colville Tribes contends that LUBA needs those tapes to resolve the pending record objections, we do not agree.