

Stand Up For California!
“Citizens making a difference”

P. O. Box 355
Penryn, CA. 95663

March 7, 2012

Ms. Darrell Strayhorn
Freedom of Information Act
Department of the Interior
Office of the Solicitor
1849 C Street NW, MS-6556
Washington, D.C. 20240

Dear Ms. Strayhorn:

**RE: This is an Appeal under the Freedom of Information Act,
Control NO. BIA-2012-00226**

On November 15, 2011, I requested documents under the Freedom of Information Act (FOIA). On February 15, 2012, I received a response to my request in a letter signed by the Acting Regional Director. I appeal the partial denial of my request.

The Bureau of Indian Affairs (BIA) withheld 20 documents totaling an estimated 950 pages on the basis that Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)) allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.”

I understand the BIA’s position, but Exemption 5 does not allow an agency to withhold records¹ created by or shared with a third party, or whose source is not a government agency. Exemption 5 allows predecisional records to be kept within the agency in a manner similar to the attorney-client privilege. However, records created by a third party, or that are shared with a third party or otherwise released outside of a federal agency, are no longer privileged and cannot be withheld under Exemption 5. Accordingly, to the extent that the BIA relies on Exemption 5 to withhold records from or shared with a third party, or otherwise released outside of the BIA, at any point in time, that reliance is misplaced and I renew my request for those records.

The BIA invoked the same exemption in response to a FOIA request substantially similar to this one in *Dragonslayer, Inc. v. Salazar*, (Case No. 3:09-CV-135-PK (Dist. Or.

¹ The term “records” is used herein to mean anything denoted by the use of that word (or in its singular form) in the text of the Freedom of Information Act. The term includes correspondences, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise reproduced or stored).

**Appeal under the Freedom of Information Act
Control No. BIA-2012-00226**

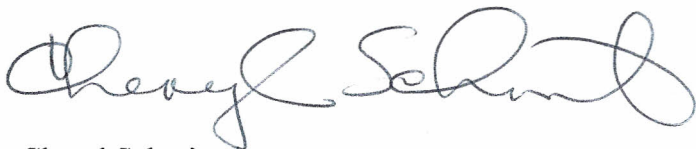
2010)). There, as here, the requester sought documents pertaining to the third party contractor selection process and communication among the BIA, the tribe and Analytical Environmental Services (AES), regarding the National Environmental Policy Act (NEPA) review and evaluation process. There, as here, the BIA invoked Exemption 5 to fully or partially withhold a number of the identified responsive documents. (*Dragonslayer*, Complaint for Declaratory and Injunctive Relief at 6).

The requester in *Dragonslayer* filed an administrative appeal and, after receiving no response from the BIA for more than ten months, filed a complaint for declaratory and injunctive relief in federal district court. In a process that took more than one year, the BIA ultimately produced all documents responsive to the plaintiff's FOIA request, including those that were in AES' control, and agreed to pay the plaintiff's attorney fees. (*Dragonslayer*, Joint Status Report at 2 (February 22, 2010).)

There is no reason why the result here should differ from the result in *Dragonslayer*. At the same time, there is no reason why reaching that result should entail delay, litigation and the payment of attorney fees. Accordingly, I again request that the BIA produce the withheld documents.

Thank you for your consideration of this appeal. If you have any questions, please contact me at (916) 663-3207 or at

Sincerely,



Cheryl Schmit
Stand Up for California
P.O. Box 355
Penryn, CA 95663

Attachments:

1. Original FOIA Request Letter, November 15, 2011
2. BIA FOIA Response E-mail November 15, 2011
3. BIA FOIA Response Letter December 13, 2011
4. BIA FOIA Response Letter, December 20, 2011
5. BIA FOIA Response Letter, February 15, 2012
6. *Dragonslayer, Inc. v. Salazar*, Complaint for Declaratory and Injunctive Relief, January 30, 2009
7. *Dragonslayer, Inc. v. Salazar*, Joint Status Report, February 22, 2010

Stand Up For California!
"Citizens making a difference"

www.standupca.org

P. O. Box 355
Penryn, CA. 95663

November 15, 2011

Ms. Laura Cloud
Office of the Assistant Secretary
Bureau of Indian Affairs
U. S. Department of the Interior
MS-3071, MIB
1849 C Street, NW
Washington, D.C. 20240

VIA FACSIMILE
202-208-6597

Dear Ms. Cloud:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552. By this letter I request that the U.S. Department of the Interior produce all records¹ in its possession, custody, or control—including records within the possession, custody, or control of the Bureau of Indian Affairs (BIA) and its Pacific Regional Office in Sacramento, California—involving the following materials:

1. Any records from, to, between, internal to, or mentioning the Bureau of Indian Affairs, the Enterprise Rancheria of Maidu Indians (hereinafter "Tribe"), its business partner Yuba County Entertainment, and its third-party contractor Analytical Environmental Services, including counsel and representatives, regarding the National Environmental Policy Act review and evaluation process, for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.

2. Any records relating to the third-party contractor selection process, the role of the Tribe in the review process, and the selection of the third-party contractor to prepare a Scoping Report, Draft Environmental Impact Statement, and Final Environmental Impact Statement for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California, including any memoranda of understanding between the Bureau of Indian Affairs, Analytical Environmental Services, and/or the Tribe, and other relevant documents and communications.

¹ The term "records" is used herein to mean anything denoted by the use of that word (or in its singular form) in the text of the Freedom of Information Act. The term includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise reproduced or stored). This request seeks responsive records in the custody of any Department of the Interior of Bureau of Indian Affairs Office, including, but not limited to, Main Interior in Washington and the BIA Regional Office in Sacramento, California.

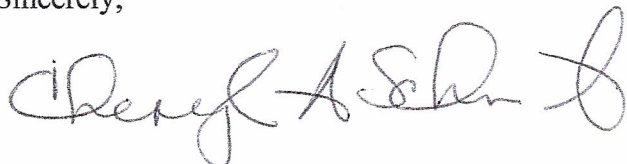
3. Any records from, to, between, internal to, or mentioning the Bureau of Indian Affairs, the Tribe, Yuba County Entertainment, and Analytical Environmental Services, including counsel and representatives, relating to the preparation, review, revision, or any other action taken with respect to the Scoping Report, Draft Environmental Impact Statement, or Final Environmental Impact Statement, for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.

This FOIA request is intended to include the production of responsive documents in the possession of Analytical Environmental Services, which has been contracted by the Bureau of Indian Affairs to work on the project that is the subject of this request. The issue of producing responsive documents in the possession of a third-party contractor working under the direction of the Bureau of Indian Affairs on this type of fee-to-trust application and casino project was litigated and resolved in Dragonslayer, Inc. v. Salazar, No. 09-135 (D. Or. 2010).

I am willing to pay fees for this request up to a maximum of \$5,000. If you estimate that the fees will exceed this limit, please inform me first.

If you have any questions about this request, please contact me at (916) 663-3207 or at cherylschmit@att.net. Many thanks in advance.

Sincerely,



Cheryl Schmit, Director
916 663 3207
cherylschmit@att.net
www.standupca.org

cherylschmit@att.net

From: Hartgrove, Monique <Monique.Hartgrove@bia.gov>
Sent: Tuesday, November 15, 2011 11:58 AM
To: cherylschmit@att.net
Cc: Cloud, Laura; Renick, Hillary E
Subject: FOIA Request BIA-2012-00226

Importance: High

November 15, 2011

Cheryl Schmit
Stand Up for California
P.O. Box 355
Penryn, Ca. 95663

Re: FOIA Control No. BIA-2012-00226

Dear Ms. Schmit:

This letter is in response to your Freedom of Information Act request addressed to the Bureau of Indian Affairs. Your request was received in this office for processing and assigned FOIA Control NO. BIA-2012-00226. Please reference this number on all your correspondence concerning this request.

We have assigned your request to the Bureau of Indian Affairs Pacific Regional Office, for a search of its files and direct response to you. The Pacific Regional Office is responsible for responding to FOIA requests for records in its purview. They will be communicating with you directly on any and all scope- and/or fee-related issues. You may expect to hear from their office shortly.

If you have any questions, feel free to contact this office by telephone at (202) 208-4542 or (202) 208-4174, by fax at (202) 208-6597, or by e-mail at foia@bia.gov.

Sincerely,

Monique Hartgrove for
Laura Cloud
Indians Affairs FOIA Officer



IN REPLY REFER TO:

FOIA 2012 00226

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

DEC 13 2011

Cheryl Schmit
Stand Up California
P.O. Box 355
Penryn, CA 95663

Dear Ms. Schmit:

This serves as notification that this Agency is taking a 10-day extension pursuant to 43 CFR 2.13 (a)(2), to properly process your request due to the need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request. We anticipate a response to your request to made on or before, January 3, 2012.

If you have any questions, please contact Douglas Garcia, Regional FOIA Coordinator, at (916) 978-6052.

Sincerely,

Acting Regional Director

cc: DECRMS



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

FOIA 2012-00226

Cheryl Schmit
Stand Up for California
P.O. Box 355
Penryn, CA 95663

DEC 29 2011

Dear Ms. Schmit:

This is in response to your Freedom of Information Act (FOIA) request which was received in our office on November 15, 2011. In your request, you requested a copy of the following documents:

1. Records from, to, between, internal to, or mentioning the Bureau of Indian Affairs (BIA), the Enterprise Rancheria (Tribe), Yuba County Entertainment (YCE), and Analytical Environmental Services (AES), regarding the National Environmental Policy Act (NEPA) review and evaluation process for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.
2. Records relating to the third party contractor selection process, the role of the Tribe in the review process, and the selection of the third-party contractor to prepare the Scoping Report, Draft Environmental Impact Statement (EIS), and Final EIS for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.
3. Records from, to, between, internal to, or mentioning BIA, the Tribe, YCE, and AES, regarding the preparation, review, revision, or any other action taken with respect to the Scoping Report, Draft EIS, or Final EIS, for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.

The BIA lacks control and custody over the documents in the possession of AES. Therefore, files in the possession of AES will not be searched for responsive documents because these are not records subject to disclosure under FOIA. This is not a refusal to disclose documents but rather a notification that there are no other documents to disclose. In addition to me, the officials responsible for this denial are Douglas Garcia, FOIA Coordinator and Lorrae Russell, Realty Specialist. This decision was made in consultation with Kevin Mack, Pacific Southwest Region, Office of the Solicitor.

You may appeal this response in accordance with 43 CFR §2.28. The FOIA Appeals Officer must receive your FOIA appeal no later than 30 workdays from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 p.m. E.T., Monday through Friday, will be deemed received on the next workday. Your appeal must be in writing and address to:

Freedom of Information Act
Department of the Interior
Office of the Solicitor
1849 C Street NW, MS-6556
Washington, D.C. 20240

You must include with your appeal, copies of correspondence between you and the Bureau concerning your FOIA request, including a copy of your original FOIA request and this denial letter. Failure to include this documentation with your appeal will result in the Department's rejection of your appeal. The appeal should be marked, both on the envelope and the face of the letter, with the legend, "FREEDOM OF INFORMATION ACT APPEAL". Your letter should include in as much detail as possible and reasons why you believe the bureau's response is in error.

In your request, you were willing to pay reasonable costs associated with providing copies of responsive records, up to \$5,000. We have determined your requestor category to be a commercial user. Commercial use requestors are charged fees for costs incurred in document search, review and duplication. The fee for processing your request is calculated as follows:

Document Search/Review:

Professional	21 hours @ \$10.50 per ¼ hour	\$882.00
Managerial	2 hours @ \$15.00 per ¼ hour	\$120.00
Duplication	2,200 pages @ \$0.13 per page	\$286.00
Total		\$1,288.00

Because the estimated charges for processing your request are greater than \$250.00, we will need payment in advance. Attached is a Bill of Collection in the amount indicated. Please send a check or money order for \$1,288.00 made payable to DOI-BIA-FOIA. To ensure proper credit, enclose a copy of the Bill of Collection with your payment and include the reference number on your payment. Mail check or money order to:


Bureau of Indian Affairs – FOIA
Fiscal Services – Collections
2051 Mercator Drive
Reston, VA 20191

It is possible that the fee for processing may be reduced if we are provided a more narrowed scope for your request. If you would like to narrow your request, please send a revised letter detailing the request. Also provide the amount you are willing to pay. If we do not receive payment or a revised request within 20 workdays for the date of this letter, we will consider that the requestor is no longer interested in pursuing this request and will close the file (43 CFR 2.17(b)).

Should you have any additional questions, please contact Douglas Garcia, Regional FOIA Coordinator, at (916) 978-6052 or Lorrae Russell, Alternate FOIA Coordinator, at (916) 978-6071.

952-1157

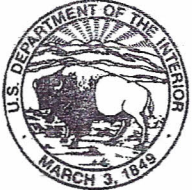
Sincerely,



Regional Director

Enclosure

cc: DECRMS



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

FOIA 2012-00226

FEB 15 2012

Cheryl Schmit
Stand Up for California
P.O. Box 355
Penryn, CA 95663

Dear Ms. Schmit:

This is in response to your Freedom of Information Act (FOIA) request which was received in our office on November 15, 2011. We received your FOIA fee payment of \$1,288.00 on January 13, 2012. FOIA control number 2012-00226 has been assigned to this request; please refer to this number in future correspondence. In your request, you requested a copy of the following documents:

1. Records from, to, between, internal to, or mentioning the Bureau of Indian Affairs (BIA), the Enterprise Rancheria (Tribe), Yuba County Entertainment (YCE), and Analytical Environmental Services (AES), regarding the National Environmental Policy Act (NEPA) review and evaluation process for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.
2. Records relating to the third party contractor selection process, the role of the Tribe in the review process, and the selection of the third-party contractor to prepare the Scoping Report, Draft Environmental Impact Statement (EIS), and Final EIS for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.
3. Records from, to, between, internal to, or mentioning BIA, the Tribe, YCE, and AES, regarding the preparation, review, revision, or any other action taken with respect to the Scoping Report, Draft EIS, or Final EIS, for the Tribe's fee-to-trust application and proposed casino project in Yuba County, California.

Enclosed are 56 documents totaling an estimated 3,050 pages that are responsive to your request. We are withholding 20 documents totaling an estimated 950 pages pursuant to Exemption 5 of the FOIA (5 U.S.C. 552(b)(5)). Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." The deliberative process privilege protects the decision-making process of government agencies and encourages the frank discussion of legal and policy issues by ensuring that agencies are not forced to operate in a fish bowl.

Kevin Mack, Assistant Regional Solicitor, Office of the Solicitor, Pacific Southwest Region was consulted in reaching these determination. Douglas Garcia, Regional FOIA Coordinator, along with Chad Broussard was responsible for making these determinations.

You may appeal this response in accordance with 43 CFR §2.28. The FOIA Appeals Officer must receive your FOIA appeal no later than 30 workdays from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 p.m. E.T., Monday through Friday, will be deemed received on the next workday. Your appeal must be in writing and address to:

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You must include with your appeal, copies of correspondence between you and the Bureau concerning your FOIA request, including a copy of your original FOIA request and this letter. Failure to include this documentation with your appeal will result in the Department's rejection of your appeal. The appeal should be marked, both on the envelope and the face of the letter, with the legend, "FREEDOM OF INFORMATION ACT APPEAL". Your letter should include in as much detail as possible and reasons why you believe the bureau's response is in error.

Should you have any additional questions, please contact Douglas Garcia, Regional FOIA Coordinator, at (916) 978-6052 or Janice Whipple-DePina, Alternate FOIA Coordinator, at (916) 978-6077.

Sincerely,

Acting 
Regional Director

Enclosure

cc: DECRMS