



## INTERIOR BOARD OF INDIAN APPEALS

Quapaw Tribal Remediation Authority of the Quapaw Tribe of Oklahoma v.  
Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

61 IBIA 55 (06/30/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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QUAPAW TRIBAL REMEDIATION	)	Order Affirming Decision
AUTHORITY OF THE QUAPAW	)	
TRIBE OF OKLAHOMA,	)	
Appellant,	)	
	)	
v.	)	Docket No. IBIA 13-085
	)	
ACTING EASTERN OKLAHOMA	)	
REGIONAL DIRECTOR, BUREAU	)	
OF INDIAN AFFAIRS,	)	
Appellee.	)	June 30, 2015

In this appeal, the Board of Indian Appeals (Board) is asked to decide whether it was arbitrary and capricious, or contrary to law, for the Bureau of Indian Affairs (BIA) to declare as withdrawn a bid by the Quapaw Tribal Remediation Authority (QTRA or Appellant), a would-be purchaser of undivided restricted Indian interests in chat, known as the “Sooner Chat Pile,” after QTRA advised BIA that it could not accept the liabilities associated with co-located operations involving another operator who holds contract rights to the undivided unrestricted interests in the same chat pile.<sup>1</sup> QTRA appeals from a March 4, 2013, decision of BIA’s Acting Eastern Oklahoma Regional Director (Regional Director), who affirmed a decision by BIA’s Miami Agency Superintendent (Superintendent) to treat QTRA’s bid as effectively withdrawn.

We conclude that it was neither contrary to law nor unreasonable for BIA to construe QTRA’s letter as withdrawing its bid. We reject QTRA’s arguments that BIA had a duty to QTRA to address (and presumably resolve to QTRA’s satisfaction) a variety of what appear to be disputed issues associated with the purchase and removal of the “co-mingled” chat jointly owned in restricted and unrestricted status. QTRA’s arguments on appeal only serve to reinforce our conclusion that the numerous “due diligence” issues of

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<sup>1</sup> “Chat” refers to the gravel-like waste material generated from milling operations to recover lead and zinc from metal-bearing ore in the Tri-State Mining District of Southwest Missouri, Southeast Kansas, and Northeast Oklahoma. See 40 C.F.R. § 278.1(b); Final Rule, 72 Fed. Reg. 39331, 39334 (July 18, 2007) (Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as “Chat”).

concern to QTRA associated with perfecting its bid, and removing co-mingled chat, made it unlikely that QTRA would have submitted the necessary documents to BIA in a reasonable time period, and thus it was not arbitrary or capricious for BIA to deem QTRA's bid as withdrawn. We therefore affirm the Regional Director's decision.

### **Background**

The Sooner Chat Pile is located in Ottawa County in northeastern Oklahoma and at one time was estimated to contain approximately 9.4 million tons of residual chat, covering approximately 320 acres. (Administrative Record (AR) No. 76) (2005 estimate). The chat pile, and other similar piles in the area, are designated part of the U.S. Environmental Protection Agency's (EPA) Tar Creek Superfund Site. Although chat contains hazardous substances, it has value as a non-residential road construction material or aggregate, and as part of the selected remedy for the cleanup, EPA selected commercial chat sales for such purposes. *See* EPA Record of Decision, Feb. 2007, at 47-48 (AR No. 15).

The Sooner Chat Pile is on land that is jointly owned by Indians in "restricted fee" and by a non-Indian in unrestricted fee. The Sooner Chat Pile is referred to as "co-mingled," in part because it is derived (mined) from several Quapaw Indian restricted allotments, and in part because the chat itself, which the parties agree is personal property, is also owned in undivided fractional interests, some considered restricted and some unrestricted. The parties agree that Indian restricted interests, whether in real or personal property, may not be alienated without BIA approval.<sup>2</sup> An unrestricted ownership interest, in contrast, is alienable without BIA approval.

As QTRA acknowledges, the present appeal "presents only a small part of a decade long" dispute over the disposition of the Sooner Chat Pile. Opening Brief (Br.), June 28, 2013, at 26 (sic). QTRA's entry into the dispute is relatively recent, beginning with its winning bid in 2011 to enter into a sales agreement with the owners of the undivided restricted interest in the chat. The underlying controversy involving sale and removal of chat from the Sooner Chat Pile dates from at least 2002, when the Estate of Joseph Mountford (Estate), a non-Indian owner claiming an unrestricted majority interest in the chat, and the land on which it is located, entered into a contract with Bingham Sand & Gravel Co., Inc. (Bingham) for the purchase and removal of chat.<sup>3</sup> Bingham continues to

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<sup>2</sup> For purposes of this appeal, it is undisputed that the Indian ownership interests in the chat itself are restricted against alienation without BIA approval.

<sup>3</sup> The record indicates that the Indian restricted ownership of the chat collectively constitutes somewhere between 33% and 38%, and the unrestricted ownership constitutes somewhere between 62% and 67%. *See* AR No. 75, 77. QTRA contends that the

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have a purchase contract with the Estate for its unrestricted interest in the chat. *See* Regional Director’s Br., July 25, 2013, at 4.

In February 2011, after several unsuccessful or unresolved attempts<sup>4</sup> by Bingham to obtain a chat sales agreement with the restricted Indian owners with BIA approval, the Superintendent issued a notice announcing the “sale of the undivided interest of Indian-owned chat” located in several chat piles, including the Sooner Chat Pile, pursuant to an EPA record of decision for the Tar Creek Superfund Site, and subject to the approval of a chat sales agreement, site operations plan and associated documents, and a business lease for the restricted land. Notice of Sale of Indian-Owned Chat Piles by Sealed Bids, Feb. 16, 2011 (AR No. 68, pt. 2). The notice announced, inter alia, that

4. . . . [B]ids will be accepted and considered for the *undivided restricted interest only*. The prospective purchaser/tenant will be responsible for arranging for the leasing and payment to those owners of undivided unrestricted interests or fee interest.

. . . .

10. Prior to the consideration of approval the successful bidder shall complete and provide ALL supporting documents as set forth in the Appendices to the Chat Sales Agreement and the Business Site Lease, including but not limited to the Site Operations Plan . . . .

*Id.* at 2 (unnumbered).

Shortly after BIA issued the notice that it would accept bids for the restricted interests in the Sooner Chat Pile, the Quapaw Tribe of Oklahoma (Tribe) chartered QTRA. *See* Resolution No. 021911-C, Feb. 19, 2011 (AR No. 70). Among QTRA’s purposes is “to try to achieve greater benefits for the Tribe and tribal members in the processing,

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(...continued)

ownership of the land and chat have been “questioned” in related appeals and litigation, but agrees that such issues are not germane to this appeal and does not purport to be appealing ownership determinations or issues of title. Opening Br. at 5; Reply to Regional Director at 7 n.5. QTRA does not contend that it holds any ownership interest in either the land or the chat.

<sup>4</sup> It appears that a decision by the Superintendent to approve a chat sales agreement between Bingham and the restricted interest owners, based on a finding that the Indian owners of approximately 70% of those restricted interests consented, is the subject of an appeal pending before the Regional Director brought by certain restricted owners. *See* Opening Br. at 11-12.

removal and sale of chat.” *Id.* at 3 (§ 104.A).<sup>5</sup> QTRA is authorized “to enter into chat sales agreements with federal, state or other governmental entities.” *Id.* at 5 (§ 107.B).

On May 4, 2011, QTRA submitted a bid pursuant to BIA’s notice, under which it proposed to purchase and remove a minimum of 200,000 tons of chat from the Sooner Chat Pile per year for a price of \$2.20 per ton, for up to 10 years. Bid Form for Chat Sales Agreement, May 4, 2011 (QTRA’s bid) (AR No. 58). QTRA’s 200,000-ton figure is accompanied by an asterisk for a note stating that the figure “assumes one operator on pile.” *Id.* Bingham also submitted a bid for the purchase of chat from the restricted interest owners at \$1.80 per ton, proposing to remove a minimum of 55,000 tons of chat per year for 5 years. Bid Form for Chat Sales Agreement, May 4, 2011 (Bingham’s bid) (AR No. 61).

The Superintendent informed both QTRA and Bingham that QTRA had submitted the highest bid for the purchase of the restricted Indian interests in the chat. In a letter to QTRA, the Superintendent asked QTRA to submit an executed copy of the chat sales form agreement and appendices, which BIA had provided; to post the required surety bond; and to prepare and transmit for approval a Site Operations Plan. Letter from Superintendent to QTRA, May 25, 2011, at 1-2 (unnumbered) (AR No. 60). The Superintendent noted that QTRA’s bid had assumed that one operator would conduct removal operations on the pile, and thus the Superintendent advised QTRA that its Site Operations Plan should specify the sole operator. The Superintendent also noted that because Bingham currently was conducting removal operations pursuant to a contract with the Estate, as owner of the unrestricted interests in the chat, BIA recommended that QTRA contact Bingham to discuss how operations might proceed. *Id.* at 2 (unnumbered).

In a corresponding letter to Bingham, the Superintendent advised Bingham that QTRA had submitted a higher bid for the undivided Indian interests. The Superintendent noted that BIA was aware that Bingham had a contractual relationship with the owner of the non-Indian majority undivided interest in the chat, and that Bingham was conducting removal operations. Letter from Superintendent to Bingham, May 25, 2011 (AR No. 59). The Superintendent advised Bingham that he had recommended to QTRA that it contact Bingham “to discuss and hopefully resolve issues related to their proposed operations” on the chat pile. The Superintendent stated that if QTRA did not contact Bingham within a reasonable amount of time, BIA did not object to Bingham contacting QTRA to initiate discussions. *Id.* at 2.

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<sup>5</sup> Profits earned by QTRA are distributed to the Tribe, and QTRA must specifically distribute 10 cents per ton of chat sold by QTRA to a fund for the benefit of the general membership of the Tribe. *Id.* at 7 (§§ 110.C, 110.D).

A month later, QTRA wrote to the Superintendent and to EPA's Region 6 Superfund Division Director, regarding BIA's request for an executed chat sales agreement, surety bond, and Site Operations Plan. QTRA asserted that "the decision by the BIA to change its position from allowing only a single operator on each Indian chat pile, as announced at the Chat Bid Meeting, to one of allowing multiple operators on these chat piles, as announced in the BIA letter to Bingham, creates the need for further consultation and discussion with the BIA and [EPA] Region 6 before finalizing the requested documents." Letter from QTRA to Yates and Coleman, June 23, 2011, at 1 (AR No. 62). According to QTRA, "the presence of multiple operators will create environmental, legal, permitting, and operational issues that must be addressed before we can complete the materials you have requested." *Id.* QTRA outlined a variety of issues and concerns that it had, some relating to the restricted-unrestricted ownership status of the chat and others relating to environmental permitting and liability issues that it believed would arise by having two operators at the site. QTRA stated that "the multiple operator position that the BIA has now adopted complicates the minimum annual removal rate (recall the quantity in the QTRA bid was conditioned upon having only one operator)." *Id.* at 3 (unnumbered). QTRA asserted that it believed it was premature to execute a chat sales agreement until QTRA "can properly assess the results of the submission to the restricted owners and the impact of having multiple operators on the pile meeting with the BIA and EPA." *Id.* QTRA concluded by reporting that it had completed an initial draft of a Site Operations Plan, but required feedback from EPA and BIA "before consulting with Bingham and finalizing the plan, if there are to be multiple operators on one pile." *Id.*

It is unclear whether EPA responded to QTRA, but on October 28, 2011, the Superintendent did, stating that he had been in contact several times with QTRA's President, and had met earlier in the week with representatives of the Tribe and QTRA's counsel to discuss some of the issues raised in QTRA's letter. Letter from Superintendent to QTRA, Oct. 28, 2011 (AR No. 63). The Superintendent did not describe the content of those discussions, except to state that counsel for QTRA had advised that QTRA still wished to proceed with its bid. The Superintendent again stated that in order to finalize QTRA's bid, QTRA would need to execute and submit the chat sales agreement and appendices, post the required surety bond, and transmit for BIA's approval a Site Operations Plan.

With respect to QTRA's desire to be the sole operator on the pile, the Superintendent recommended that QTRA contact Bingham to work out appropriate arrangements to enable QTRA to proceed. The Superintendent stated that "[i]t has been and remains the preference of [BIA] to approve only one chat sales agreement and business site lease to one entity for the purchase and removal of the restricted chat in a chat pile." *Id.* at 2. He also stated that should QTRA be able to reach an operational agreement under which QTRA would subcontract operations to a third party, or choose to limit its

operations to an appropriate area of the pile to remove QTRA's proposed quantity of chat, without interference from another operator (such as Bingham), BIA would not object to such operational arrangements if such arrangements were found to be in the best interest of the restricted owners. *Id.* The Superintendent further advised that any written operational agreement reached between QTRA and Bingham should be included in QTRA's proposed Site Operations Plan. *Id.* The Superintendent concluded by offering to meet to discuss the requirements for finalizing QTRA's bid, but also stated that if the documents were not provided to BIA by November 17, 2011, BIA would assume that QTRA had withdrawn its bid to purchase the restricted chat interests. *Id.*

QTRA responded to the Superintendent, characterizing his letter as "maintaining your requirement that the QTRA must co-locate operations with Bingham . . . , a shift in position from our previous understanding that only one operator would be allowed at each pile." Letter from Gilmore to Superintendent, Nov. 18, 2011 (AR No. 64). QTRA referred to its June 2011 letter "outlining several due diligence concerns" that it had about co-locating with Bingham. QTRA noted that Bingham was operating without a lease or sales agreement approved by BIA, and stated that QTRA could not "properly assess environmental and other legal concerns that a co-located entity operating without federal approval presents to [QTRA's] operations." *Id.* QTRA then stated that "the QTRA Board decided that the QTRA [was] could not accept the liabilities associated with co-located operations." *Id.* QTRA also asked BIA to take action to terminate Bingham's operations occurring on the chat pile "so that the QTRA can prepare the proper site plan and other required materials." *Id.*

In response to QTRA, the Superintendent issued a decision in which he concluded that BIA considered QTRA's bid as "null and void and otherwise withdrawn." Letter from Superintendent to QTRA, Dec. 14, 2011, at 1 (AR No. 65). The Superintendent also stated that he had determined that it would not be in the best interest of the Indian restricted landowners "to continue to allow the QTRA to attempt to perfect its bid which has been pending for more than seven months." *Id.* According to the Superintendent, QTRA had "failed to demonstrate that it has made any diligent efforts to address [QTRA's] operational concerns with Bingham . . . , the entity currently conducting operations on the Sooner Chat Pile pursuant to an agreement with the non-Indian owners and with authorization of [EPA]." *Id.*

QTRA appealed to the Regional Director and the Regional Director affirmed the Superintendent. *See* Letter from Regional Director to Williams, Mar. 4, 2013 (Decision) (AR No. 79). After summarizing the events leading up to the Superintendent's decision, the Regional Director found that more than 7 months after the bid was awarded, QTRA "had submitted neither its proposed agreements for dissemination to the undivided restricted owners, nor evidence that it had fulfilled or was attempting to fulfill the insurance and other requirements mandated of lessees pursuant to 25 C.F.R. [Part] 162." *Id.* at 2.

The Regional Director found that QTRA “has failed to meet its bid obligations by failing to provide to the [Superintendent] the required documentation demonstrating that it is financially, administratively, or logistically ready to assume the obligations set forth in its bid,” and that QTRA “failed to move forward to perfect its bid within a reasonable length of time.” *Id.* at 3.

QTRA timely appealed to the Board and filed an opening brief. The Regional Director, Bingham, and the Estate filed answer briefs, and QTRA filed reply briefs.

### Standard of Review

The Board reviews questions of law, and the sufficiency of evidence, *de novo*. *Aloha Lumber Corp. v. Alaska Regional Director*, 41 IBIA 147, 157 (2005). When a BIA decision involves an exercise of discretion, we do not substitute our judgment for BIA’s, but we do review the decision to determine whether it is reasonable, i.e., in accordance with the law, adequately explained, and adequately supported by the evidence. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). An appellant bears the burden to demonstrate error in the decision being appealed. *Tafoya v. Acting Southwest Regional Director*, 46 IBIA 197, 200 (2008).

### Discussion

On appeal to the Board, QTRA devotes a considerable portion of its briefs to arguing that BIA has failed to act in the best interest of the restricted Indian owners and that Bingham has and continues to unlawfully remove chat from the Sooner Chat Pile because it has no agreement with the restricted Indian owners, whose undivided interests in the chat cannot be separated from those of the unrestricted owner. But QTRA agrees that the issue before the Board in this appeal “is narrow,” limited to whether BIA erred by deeming QTRA’s bid as withdrawn without “first answer[ing] QTRA’s due diligence questions.”<sup>6</sup> Opening Br. at 3.

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<sup>6</sup> As noted earlier, QTRA does not claim to be a restricted owner of the chat, or of the land on which it is located, nor is QTRA an organization or association of restricted chat owners. Both BIA and Bingham contend that a sizeable majority (70%) of restricted owners of the Sooner Chat Pile consented to a sales agreement with Bingham, but that Bingham’s efforts to purchase the restricted interests have consistently been blocked by a minority group of restricted owners, including QTRA’s President. QTRA contends that consents obtained by Bingham from restricted owners were coerced. Those issues are not within the scope of this appeal. None of the restricted Indian owners entered an appearance or filed briefs as interested parties.

QTRA cites no statute or regulation that would impose on BIA a duty, as a matter of law, to answer a would-be chat purchaser's due diligence questions that the would-be purchaser believes must be resolved before it is prepared to submit the required documentation to perfect its bid. We thus review BIA's decision to determine whether QTRA has met its burden to demonstrate that it was unreasonable for BIA to deem QTRA's bid as withdrawn. We conclude that QTRA has not met its burden.

First, QTRA seeks to blame BIA for making its bid "impossible" by imposing upon it a "requirement" to co-locate with Bingham, which QTRA contends is not lawfully operating on the chat pile. *Id.* at 2. But the Superintendent did not "require" QTRA to co-locate with Bingham. Instead, he recognized that only Bingham, and not QTRA, had an agreement with the owners of the *unrestricted interests* in the chat, and he recommended that QTRA contact Bingham to address how two purchasers of the chat—one a purchaser of the unrestricted undivided interests and another the purchaser of the restricted undivided interests, might proceed as an operational matter.

QTRA contends that BIA personnel made statements at a preliminary chat meeting that there would be only one operator on each chat pile, but cites as evidence only its own letter making the same allegation, devoid of any detail. *Id.* at 13 (citing AR No. 62 (Letter from QTRA to Yates and Coleman, June 23, 2011, at 1)); *see supra* at 5. But even assuming that BIA personnel suggested at a preliminary meeting that there would be only one operator on each of the multiple chat piles included in the bid announcement,<sup>7</sup> the announcement itself was not so restricted. Indeed, QTRA apparently felt it necessary to qualify its bid by stating that the bid "assumes one operator on pile." Bid Form for Chat Sales Agreement, May 4, 2011 (AR No. 58). No such assumption would need to have been made explicit if QTRA believed that BIA had decided to impose a one-operator restriction. Whether the combination of QTRA's successful bid for the restricted interests, and Bingham's contract with the unrestricted owner, might result in one operator on the pile, or two, was a matter that the Superintendent left open for QTRA and Bingham to discuss, and for QTRA to incorporate in a proposed Site Operations Plan. There is no evidence in the record that QTRA ever made any attempt to contact Bingham to address operational or liability issues of concern to QTRA.

QTRA argues that BIA impermissibly "required" it to "coordinate operations" with Bingham as a "condition of its winning chat bid." Reply to Regional Director, Aug. 12, 2013, at 1. Again, the Superintendent's letter to QTRA framed the matter as a *recommendation* that QTRA contact Bingham, recognizing that Bingham had a contract with the owner of the unrestricted interest. Letter from Superintendent to QTRA, May 25,

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<sup>7</sup> The Sooner Chat Pile was only one of several chat piles included in BIA's bid announcement.

2011 (“we recommend that you contact Bingham”); *see also* Notice of Sale of Indian-Owned Chat Piles by Sealed Bids, Feb. 16, 2011 at 2 (unnumbered) (AR No. 68, pt. 2) (“The prospective purchaser/tenant will be responsible for arranging for the leasing and payment to those owners of undivided unrestricted interests or fee interest.”). Based on QTRA’s own legal theories, as discussed below, it is difficult to understand how QTRA could proceed with operations *without* coordinating in some respect with the unrestricted owner and its contractor. But ultimately, because QTRA never submitted a draft of a Site Operations Plan to BIA for review, reflecting either coordination with Bingham in QTRA’s proposed operations, or the absence of such coordination for its proposed operations, BIA never reached the issue of whether it would “require” coordination by QTRA with Bingham or the Estate as a condition of approval.

QTRA, in objecting to Bingham’s activities, repeatedly invokes a letter sent by a BIA official in 2002 taking the position that because the chat is owned in undivided restricted and unrestricted interests, “[w]hen you move one grain of material, you move both restricted and unrestricted ownership,” and thus “all interest holders should enter into agreements simultaneously in order for the pile to be divided equitably.” Opening Br. at 6 (quoting Letter from Superintendent to Bingham, Jan. 21, 2002); *see* Reply to Regional Director at 4. The irony of QTRA’s position is not lost on the Board. BIA’s request for bids was limited to the sale of Indian restricted ownership interest. Under QTRA’s own legal theory, it would be impermissible for QTRA to remove chat—even with the consent of the Indian restricted owners and BIA’s approval—unless QTRA had obtained some legal right to remove the “unrestricted” chat simultaneously. Thus, it is unclear how QTRA, even as the sole operator on the pile, could proceed without coordinating or cooperating in some respect with Bingham as the purchaser from the majority interest owner in the pile.<sup>8</sup>

Bingham, for its part, states that it has no objection to co-locating with QTRA, and contends that the Sooner Chat Pile is spread over a large enough area to permit two operators. *See* Brief of Interested Parties, Aug. 19, 2013, at 2-4 (unnumbered). Bingham also states that it has been escrowing proceeds from its sales proportionate to the restricted interest ownership. *Id.* at 4. QTRA responds by stating that “facts concerning the escrow and that some of the restricted owners<sup>[9]</sup> have accepted escrowed funds further establish

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<sup>8</sup> The present appeal only involves the issue of whether it was reasonable for BIA to consider QTRA’s bid as withdrawn. We express no opinion on whether an owner of chat may remove a portion, e.g., attributable to its ownership interest, without the consent of other owners (and BIA’s approval, if the other owners’ interests are restricted).

<sup>9</sup> It appears that QTRA’s President, James Gilmore, is among the restricted owners who requested and were provided with payments from Bingham’s escrow account. *See* Brief of Interested Parties, Ex. 1 (Affidavit of Thomas Michael Williams ¶ 4). Gilmore and several  
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unresolved confusion and unanswered questions about the Sooner Chat Pile and the inability by the QTRA to ‘perfect’ its bid pending clarification on these issues.” Reply to Interested Parties, Sept. 4, 2013, at 3 n.1. It is difficult to discern how this response aids QTRA in this appeal, offering yet another apparent concern that QTRA considers an obstacle to perfecting its bid.

Although QTRA contends that Bingham’s removal activities are unlawful and should be stopped by BIA, it acknowledges that this issue is the subject of separate proceedings that are still pending before the Regional Director.<sup>10</sup> Moreover, in related litigation, a Federal court of appeals found that the federal issue of Secretarial approval with respect to Bingham’s removal of chat is both substantial and disputed. *Gilmore v. Weatherford*, 694 F.3d 1160, 1173 (10th Cir. 2012) (disagreeing with the lower court’s conclusion that the issue of Secretarial approval is not contested, and noting that the Department of the Interior “has never made a definitive decision on the issue of whether federal law in all circumstances prohibits an unrestricted owner from removing its fractionated share of chat from a pile unless and until it enters into a contract with the restricted owners approved by BIA”). The dispute about Bingham’s activities appears to be unresolved, and if that fact raised due diligence questions for QTRA, as a potential purchaser, QTRA was apparently within its rights to decline to perfect its bid by declining to submit the necessary documents to BIA. But BIA has no duty to resolve QTRA’s concerns to QTRA’s satisfaction, and it was not unreasonable for BIA to treat QTRA’s bid as withdrawn after receiving QTRA notice that QTRA could not accept the liabilities associated with the situation as it existed.

QTRA next contends that BIA’s decision to treat its bid as withdrawn is not in the best interest of the restricted Indian owners. It is well-established that a party generally must assert its own rights and interests, and cannot rest its claim for relief upon the rights and interests of third parties. *Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 311 (2005). Although “[t]hird party standing may be granted in exceptional circumstances where the party asserting the right has a close relationship with

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other restricted owners have a separate appeal pending before the Board, in which they challenge a decision by the Regional Director regarding their request for BIA to accept into trust the funds that Bingham has escrowed. See *James Cantrell v. Eastern Oklahoma Regional Director*, Docket No. IBIA 14-047.

<sup>10</sup> QTRA argues that the two appeals should be “consolidated,” but the two appeals are in different forums—this one is before the Board, and the other is pending before the Regional Director. QTRA did not seek to have the present appeal stayed, pending resolution of the separate proceedings before the Regional Director.

the person who possesses the right and where there is a hindrance to the third party's ability to protect his own interests," *id.*, no such circumstances are shown here. Some of the Indian owners are separately pursuing their own claims or appeals involving Bingham and BIA. *See, e.g., Gilmore*, 694 F.3d 1160. There is no hindrance to their ability to assert their own interests. Moreover, it is not clear that QTRA's interests are necessarily aligned with the restricted owners, at least not in all respects. For example, in this appeal QTRA embraces the conclusion of the Federal district court in *Gilmore* that "there is no disputed issue of federal law that BIA approval is required before a co-tenant may dispose of property containing trust and non-Indian property." Opening Br. at 10 n.8. But in *Gilmore*, the Indian restricted owner-plaintiffs successfully convinced the court of appeals to reach the opposite conclusion—that the issue of Secretarial approval relating to the removal of chat by an unrestricted owner was both substantial *and disputed*. *Gilmore*, 694 F.3d at 1174-75. The issue in that case involved Federal court jurisdiction, and not the ultimate merits of the plaintiffs' claims, and it appears that QTRA and the Indian restricted owner-plaintiffs in *Gilmore* are likely in agreement on what they contend Federal law, in substance, requires. But the diverging litigating positions serve to illustrate the potential divergence of interests between QTRA as a would-be purchaser of the chat and the restricted Indian owners. *See also Graven v. Western Regional Director*, 59 IBIA 202, 203-04 (2014) (rejecting the appellant-sublessee's attempt to assert the interests of Indian landowner-lessors).

### Conclusion

When QTRA advised BIA that it could not accept the liabilities associated with co-located operations on the Sooner Pile, it was reasonable for BIA to treat QTRA's bid as withdrawn. BIA had no affirmative duty to QTRA, as a would-be purchaser and bidder, to resolve QTRA's due diligence concerns.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's March 4, 2013, decision.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge