

Thomas E. Towe, Esq.
Towe, Ball, Enright, Mackey
& Sommerfeld, PLLP
2525 Sixth Avenue North
PO Box 30457
Billings, MT 59107-0457
Phone: 406-258-7337
Fax: 406-248-2647

Attorney for Nelvette Siemion

FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NELVETTE SIEMION, d/b/a)
WHITE BUFFALO RANCH,)
)
Plaintiff,)

Cause No: CV-09-87-BLG-RFC-CSO

v.)

COMPLAINT
(FEDERAL TORT CLAIMS ACT)

UNITED STATES DEPARTMENT)
OF THE INTERIOR, BUREAU OF)
INDIAN AFFAIRS, ROCKY)
MOUNTAIN REGION)
)
Defendant.)

COMES NOW the Plaintiff and alleges in support of her Complaint as follows:

PARTIES, JURISDICTION, AND VENUE

1. This is an action arising under the Federal Tort Claims Act, 28 U.S.C.

§2671 et seq.

1 Complaint (Federal Tort Claims Act)

2. Plaintiff, Nelvette Siemion, d/b/a White Buffalo Ranch, is an enrolled member of the Crow Tribe residing on the Crow Indian Reservation.

3. The Defendant United States Department of the Interior, Bureau of Indian Affairs, Rocky Mountain Region, is a federal agency of the United States government.

4. This Court has jurisdiction under 28 U.S.C. §1346(b). See also, the Federal Tort Claims Act, 28 U.S.C. §2671 et seq.

5. The sovereign immunity of the United States of America is waived under 28 U.S.C. §§2672, 2674, and 2679. See also, 28 U.S.C. §1346(b).

6. Venue is proper in the Federal District Court pursuant to 28 U.S.C. §1391(b)(e), because the office of the Defendant in question is located in Billings, Montana, and because all of the events and omissions giving rise to the claim occurred in this District. In addition, the real property involved in this case is located within the District and the Plaintiff resides in this District.

STATEMENT OF FACTS

7. Plaintiff, together with her husband, George Siemion, a non-Indian, has owned and operated the White Buffalo Ranch, also located within the physical boundaries of the Reservation for over 39 years.

8. Plaintiff has been leasing certain Tribal lands, comprising over 25

separate parcels of tribal property and Indian leases in furtherance of her operation of the White Buffalo Ranch. She and her husband have ranched much of this same property for the past 39 years.

9. Plaintiff raises American Bison (hereinafter “buffalo”) and uses other livestock on her ranch.

10. On or about May 28, 2008, agents of the Bureau of Indian Affairs (hereinafter “BIA”) at Crow rounded up approximately 175 of buffalo belonging to Plaintiff, Nelvette Siemion, and chased them over seven miles to a set of corrals at the CH Land & Cattle Company. Then they were loaded on trucks and trailers and hauled to the fair grounds at Crow Agency, Montana.

11. The Plaintiff’s buffalo were detained in corrals at Crow Agency, Montana, until Plaintiff posted a bond in the amount of \$16,384.65 at which time the buffalo were released back to the Plaintiff and the White Buffalo Ranch.

12. As a result of the drive to the CH corrals and the transport to Crow Agency, and because the officers, agents, and employees of the Defendant failed to exercise due care, damage was done to the buffalo herd. Three calves died. The stress on the buffalo caused them to lose weight and suffer other health problems. The value of the herd and the calves was diminished because of the acts of the Defendant. Plaintiff also incurred costs in retrieving the buffalo.

13. Plaintiff Nelvette Siemion submitted her Federal Tort Claim to Edward Parisian, Regional Director, United States Department of Interior, Bureau of Indian Affairs, Rocky Mountain Regional Office at 316 North 26th Street, Billings, MT 59101 on June 17, 2008. See copy of the Complaint, without attachments, attached hereto as Exhibit H.

14. On January 13, 2009, the Plaintiff received an official response denying the claim. See a copy attached hereto as Exhibit I. This law suit is filed within six months of that notice of denial of claim.

COUNT I

15. On May 12, 2008, a notice was published indicating the BIA intended to impound approximately 200 mixed age buffalo “undetermined ownership/no brands” located at the Fort Smith area. A copy of that Public Notice is attached hereto as Exhibit A.

16. On or about May 14, 2008 through counsel, Plaintiff Nelvette Siemion protested that the alleged trespass did not amount to a legal trespass because of the BIA’s failure to take action on a number of leases on which she had bid and on which she had previously leased, and on which she had a clear preference under tribal law. Immediate action was requested on these leases, and the BIA was requested to take no action regarding buffalo until it was determined whether or not these leases were

to be awarded to Nelvette Siemion. A copy of that letter is attached hereto as Exhibit B.

17. It was later determined that, among other things, the BIA assumed the responsibility for advertising and conducting the sealed bidding for the sale of tribal leases in March of 2006. The rules for the bid advertisement were carefully presented in the Notice and Advertisement for Bids. The Notice and Advertisement specifically provided that sealed bids would be received until 10:00 a.m. local time, April 24, 2006, and then the bids will be opened publicly at that time. It also stated that in accordance with Crow Tribal Resolution No. 2001-37, first and second preference will be enforced with regard to all bids. A copy of Resolution No. 2001-37 is attached hereto as Exhibit K. As a Tribal member and the current user of the same lands, Plaintiff Nelvette Siemion is entitled to both preferences.

18. On or about April 24, 2006, Plaintiff submitted proper bids on 24 parcels. The bids were timely and proper in all respects and were accompanied by the necessary bid deposit for each parcel. In the event any Indian entitled to a preference presented a higher bid, she was entitled to meet the high bid under Section 10 of Resolution No. 2001-37, which the bid advertisement said would strictly adhered to.

19. Plaintiff was the only bidder on 8 of the parcels. She was never notified of her right to match a higher bid on any of the other parcels. Nothing happened and

Plaintiff was never notified of anything, even after numerous inquiries. After the buffalo were seized, Plaintiff discovered that following the close of the deadline for submitting bids, another enrolled member of the Tribe, William He Does It, submitted a bid on eight of the tracts. The BIA properly returned his deposit and explained to him that his bid was late and could not be accepted. Nevertheless, later the BIA awarded the bid to William He Does It for those eight tracts without notifying Plaintiff.

20. The BIA failed to comply with the bid advertisement that said the preference rights would be strictly adhered to. Plaintiff was entitled to both preferences and was never granted an opportunity to exercise either one. As a result, the bids were awarded to other parties and Plaintiff was not even informed. She was not even given the courtesy of a return of her bid deposit. At the time the buffalo were seized, she had no knowledge that her bid had not been accepted. Whether or not the BIA was obligated to conduct the advertising and conduct of the sealed bidding, once they undertook that task, they had a fiduciary obligation to complete it correctly as advertised and as required by proper Tribal Resolution.

21. Failure to execute the obligations regarding the advertising and conducting of a sealed bid sale properly constitutes a tort recognized under the Federal Tort Claims Act.

COUNT II.

22. Plaintiff realleges all of those matters previously contained in this Complaint.

23. Neither Nelvette Siemion nor her counsel received a response to their letter of May 14, 2008 (Exhibit B). On or about May 28, 2008, Plaintiff filed an Appeal of the action or inaction regarding various leases. By letter dated May 28, 2008, to the Regional Director, Edward Parisian, with a copy to the Superintendent, George E. Gover, a letter accompanying the aforementioned Appeal, counsel for Plaintiff Nelvette Siemion specifically referred to the Appeal and asked that any action regarding the buffalo be held in abeyance until the Appeal could be determined.

24. Such abeyance was mandatory under the Code of Federal Regulations. Without a written Declaration that Public Safety, Protection of Trust Resources, or other public exigency requires immediate implementation of the decision, it may not be implemented pending the resolution of the appeal. 25 C.F.R. §2.6(a). No such written declaration was provided.

25. In the same letter, reference was further made to the 100 head of adult buffalo (plus baby calves) that had been herded to the corrals of CH Land & Cattle Company and demanded that they be released. A copy of that letter is attached

hereto as Exhibit C. This was not done.

26. Failure to follow the federal regulations constitutes a failure to execute the obligations of the BIA properly and this constitutes a tort recognized under the Federal Tort Claims Act,

COUNT III.

27. Plaintiff realleges all of those matters previously contained in this Complaint.

28. Upon notice to Plaintiff Nelvette Siemion and upon Notice of Impoundment (Exhibit A), Plaintiff Nelvette Siemion and White Buffalo Ranch rounded up all the buffalo which had been on lands previously leased from the Crow Tribe but lands on which the current lease had not yet been confirmed. The buffalo were then contained on lands whose leases were not in dispute and lands fully owned and controlled by the White Buffalo Ranch. However, a rainstorm caused large amounts of rain on May 25, 26, and 27, 2008. This rain caused the melting of snow that left openings in a fence which was not previously repairable because of the snow totally engulfing the entire fence line. A number of buffalo were discovered outside the fence on the early morning hours of May 28, 2008. This breach of the fence was discovered by George Siemion, Nelvette Siemion's husband, when he surveyed the area in his airplane.

29. At the same time, he noticed agents of the BIA riding four-wheel drive all-terrain vehicles headed for the same buffalo. Before he could get back to his ranch and head out to fix the fence and drive the buffalo back into their pasture, these buffalo were rounded up by agents of the BIA, herded to the CH Land & Cattle Company's corrals, and hauled away to Crow Agency, Montana. In most instances, the buffalo were lined up close to the fence seeking re-entry in the pasture which they strayed from early that day.

30. Thus, the buffalo in question were not trespassing; Plaintiff Nelvette Siemion had never received a response to her request for determination of whether she was awarded the leases to land on which the buffalo were originally located. At no time had she been told that she was not awarded the lease on those lands. Furthermore, she had leased them in the past and had a clear preference for leasing them again. Second, even assuming Nelvette Siemion was suppose to know that she did not receive those leases, she herded the buffalo off of these contested leased lands and placed them on uncontested leased land after the Notice was posted by the BIA (Exhibit A.) At no time was she given any notice that the buffalo were once again in the leased lands claimed no longer to be lands under the control of the White Buffalo Ranch.

31. Under 25 C.F.R. §166.804, once a person receives a trespass notice, they

have two ways in which to respond, namely, (A) comply with the ordered corrective actions, or (B) contact the BIA office issuing the Notice to explain why the trespass notice was in error. In this case, Plaintiff Nelvette Siemion did both. She complied with the ordered corrective action by removing the buffalo from the same area claimed as a trespass area and she contacted the Superintendent in writing to explain why the trespass notice was in error. It was in error because she had never been notified that these leases had not been awarded to her the same as many years in the past and to which she was entitled to an Indian preference. She had not even been notified that the Indian preference was being denied her.

32. While 25 C.F.R. §166.805, specifically provides that written trespass notice “will remain in effect for the same conduct identified in that written notice for a period of one year . . . ,” once the conduct has been corrected (by removing the trespassing animals, or by explaining why the trespass was in error), for the buffalo to have once again gotten through the fence on the morning of May 28, 2008, was not the “same conduct identified in” the previous written Notice. For this reason, the actions of the BIA on the morning of May 28, 2008, **were taken without notice, without following the procedures set forth in the regulations, and unlawful.**

33. In the event that the escape of these buffalo a second time after they were removed from the land on which they were claimed to be trespassing, is somehow

deemed “the same conduct,” the regulation is unlawful and unconstitutional in that someone cannot be punished for something for which they have not been noticed and of which they have no knowledge.

34. Failure to follow the federal regulations constitutes a failure to execute the obligations of the BIA properly and this constitutes a tort recognized under the Federal Tort Claims Act,

COUNT IV.

35. Plaintiff realleges all of those matters previously contained in this Complaint.

36. On or about May 29, 2008, Plaintiff Nelvette Siemion of the White Buffalo Ranch received a Notice that the buffalo in question could be redeemed by paying the sum of \$5,200.06. A copy of said Notice is attached hereto as Exhibit D. Said sum was tendered and offered but redemption of the buffalo was refused.

37. On or about June 2, 2008, Nelvette Siemion submitted a written request to redeem the buffalo for the sum then requested of \$15,184.69, and offered to pay the sum under protest. A copy of this written request is attached hereto as Exhibit E. This request was refused. Among other things, the White Buffalo Ranch was told that the buffalo could not be redeemed because it did not have adequate grass for them. Only after a lawsuit was filed in the Federal Court and counsel for Nelvette

Siemion negotiated with the Field Solicitor and the U.S. Attorney's Office was a number arrived at, at which the BIA finally accepted, namely, \$16,384.65.

38. On or about June 4, 2008, Nelvette Siemion tendered the payment of \$16,384.65 to the Realty Office of the BIA at Crow Agency and the buffalo were released. A copy of the check tendered on that day is attached hereto as Exhibit F. This payment was made under protest for the specific purpose of reserving the right to protest the amount or the right of the BIA to receive this amount. See "Protest Bond" written on the face of the check.

39. Upon request for an itemization of this \$16,384.65, Nelvette Siemion's counsel, Thomas E. Towe, received a letter from the U.S. Attorney's Office on or about June 5, 2008. A copy is attached hereto as Exhibit G.

40. In addition to the objection that the seizure of the buffalo was illegal, without notice, and not authorized by the regulations, Plaintiff Nelvette Siemion challenges the amounts for the following reasons:

- (A) \$4,000.02-cost of damage to Indian agricultural land. This is wrong and incorrect in that the amount of grass these buffalo could have eaten in a matter of hours is minimal, if at all. The double value penalty is incorrect. There is no way 100 mature buffalo cows with 75 newly born calves at \$1,333.34 worth of grass in a matter of one or two hours.

- (B) Enforcement costs-\$1,200.00. Said sum has not been and cannot be substantiated. There is no indication of what cost the BIA \$1,200.00.
- (C) Cost of Impounding the Bison- \$11,184.63. This is listed at the cost gathering, corralling, feeding, and tending to the bison. It has not been established and Plaintiff Nelvette Siemion objects on the grounds that it is not realistic, is too much, and should never have been incurred in the first place because the seizure of the buffalo was wrong.

The amount of the bond posted by Plaintiff under protest is overstated, illegal, improper, and should not have been allowed.

41. The BIA failed to execute the obligations of the BIA properly and this constitutes a tort recognized under the Federal Tort Claims Act. The overcharge constitutes a tort committed by the Defendant against the Plaintiff for which she is entitled to receive damages.

COUNT III

42. Plaintiff realleges all of those matters previously contained in this Complaint.

43. The Defendant, BIA, and its agents, officers, and employees treated the buffalo negligently and intentionally in such a manner that the buffalo and their calves were injured.

44. A large number of the buffalo seized were pregnant and about to give birth. The harassment and herding into corrals and loading unto trucks and trailers was not done in a manner conducive for pregnant buffalo. The stress, excitement, and harsh treatment of the buffalo and their calves by BIA agents caused the death of three buffalo calves and did considerable damage to the remainder of the herd.

45. The actions of the BIA, its agents, officers, and employees, caused loss of condition of the buffalo and interrupted their normal birth cycle and gain. This constituted damages to the buffalo and the herd in amount of \$133,785.65. See a detail of the damages set forth in Exhibit J attached.

46. In addition, Plaintiff Nelvette Siemion and the White Buffalo Ranch incurred expenses of \$5,400.00 retrieving the buffalo, shipping them back to their ranch, and unloading them into the pasture where they belonged.

47. Plaintiff posted a bond and paid under protest the sum of \$16,384.65.

48. The actions taken by the BIA agents, officers and employees were intentional, without authority, and clearly constitute a tort under the Federal Tort Claims Act. The agents were acting within the scope of their duties and the actions taken were not taken in the exercise or performance of a discretionary function or duty. They failed to exercise due care in the execution of a statutory or regulatory function. The Defendant and its agents, officers, and employees failed to exercise

due care. This constitutes negligence and the wrongful actions or omissions are actionable under the Federal Tort Claims Act. See 28 U.S.C. §2672.

WHEREFORE, Plaintiff Nelvette Siemion prays for judgment as follows:

1. That she be awarded damages in the amount of \$16,384.65 for the bond she was required to post to reclaim the buffalo and for \$5,400.00 of additional expenses she incurred in shipping them back to her ranch, unloading them, and placing them into their pasture.
2. For the sum of \$133,785.65 for damage and injury to the buffalo herd as a result of the failure to exercise due care in the execution of their statutory and regulatory functions of the BIA.
3. For such other and further relief as may be just and proper in the premises.

Dated this 10th day of July, 2009.

TOWE, BALL, ENRIGHT, MACKEY
& SOMMERFELD

By: /s/ Thomas E Towe
Thomas E. Towe,
Attorney for Nelvette Siemion

CERTIFICATE OF SERVICE

I hereby certify that, on the 10th day of July, 2009, a copy of the foregoing document was served on the following persons by the following means:

1-2 CM/ECF
_____ Hand Delivery
_____ Mail
_____ Overnight Delivery Service
_____ Fax
_____ E-Mail

1. Clerk, U.S. District Court

2. Victoria Francis
 US Attorney for Montana
 2929 3rd Avenue North, Suite 400
 PO Box 1478
 Billings, MT 59103

TOWE, BALL, ENRIGHT, MACKEY &
SOMMERFELD, P.L.L.P.

By: /s/ Thomas E. Towe
 Thomas E. Towe
 Attorney for Nelvette Siemion