

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA, acting)	3:20-CV-03018-RAL
by and through its Department of)	
Transportation,)	
)	
Plaintiff,)	BRIEF OPPOSING DEFENDANTS'
)	MOTION TO DISMISS AND
vs.)	REPLY IN SUPPORT OF
)	MOTION FOR
)	PRELIMINARY INJUNCTION
HAROLD FRAZIER, individually and)	
as Chairman of the Cheyenne River)	
Sioux Tribe,)	
)	
and)	
)	
CHEYENNE RIVER SIOUX TRIBE,)	
)	
Defendants.)	
)	

INTRODUCTION

Plaintiff, State of South Dakota (hereinafter "State"), files this brief in opposition to Defendants' Motion to Dismiss and as a Reply in support of the State's Motion for Preliminary Injunction. The State's Motion for Preliminary Injunction to restrain Defendants from removing and replacing speed limit signage on US Hwy 212 in and around LaPlant, SD should be granted. Defendants' Motion to Dismiss is without merit and should be denied.

ARGUMENT

I. Defendants' Motion to Dismiss Is Without Merit And Should Be Denied.

The Defendants' claims that this matter must be dismissed are misplaced. Initially, this matter contains, as the State alleges in its Complaint, a federal question as determined by 28 U.S.C. §1331. US Hwy 212 in South Dakota is a federal highway. In addition, the State's request for injunctive relief is not barred by the Defendants' sovereign immunity claims. Defendants' have no inherent sovereign right to regulate the highway and injunctive relief is appropriate where tribal officials engage in unlawful conduct.

A. This Court Has Jurisdiction In This Matter.

This Court retains jurisdiction over this matter as it involves a federal question. 28 U.S.C. §1331. Defendants' claim that this Court lacks subject matter jurisdiction over this matter is incorrect. The maintenance of a federal highway, constructed utilizing federal funds, is subject to federal law. *See* 23 U.S.C. §101 *et seq.* US Hwy 212 is federal highway that was constructed utilizing federal funds. Accordingly, interference with the State's ability to maintain US Hwy 212 implicates federal law and this Court has jurisdiction to hear this matter.

US Hwy 212 was constructed on a right-of-way granted pursuant to a federal statute. 25 U.S.C. § 311 authorizes the Secretary of the Interior to grant permission to State authorities for the establishment of public highways through any Indian reservation. In 1948, through legislation, Congress authorized the granting of rights-of-way over Indian lands. 25 U.S.C. §§ 323-

328. Accordingly, the State was granted easements for rights-of-way to construct and maintain a public road. Doc. 3-1. The Grantors were compensated for these grants and, other than the continued use as a public highway, no restrictions were placed on these grants. *Id.*

A right-of-way acquired for purposes of a public highway renders the land equivalent “to alienated, non-Indian land.” *Strate v. A-1 Contractors*, 520 U.S. 438, 454, 117 S.Ct. 1404, 1413, 137 L.Ed.2d 661 (1997). Federal law requires that the “consent of the proper tribal officials” is received and just compensation be made. 25 U.S.C. §§ 324-325. The grants here were made in accordance with federal law. Doc. 3-1. The Cheyenne River Sioux Tribe (hereinafter “CRST”) consented to, and received compensation for, the grants of right-of-way, without restriction. Therefore, as long as the land is maintained as a public highway, CRST cannot assert a “landowner’s right to occupy and exclude.” *Strate*, 520 U.S. at 456. Similarly, any “incidental regulatory jurisdiction” has also been eliminated. *See South Dakota v. Bourland*, 508 U.S. 679, 689, 113 S.Ct. 2309, 2316-2317, 124 L.Ed.2d 606 (1993).

Highways constructed and maintained under the Federal-Aid Highway Act (hereinafter “Act”), 23 U.S.C. § 101 *et seq.*, are subject to federal law¹. Federal law requires that the “State transportation department” maintain any highway constructed under the Act. 23 U.S.C. § 116(b). Such maintenance

¹ Contrary to the Defendants’ assertion in footnote 3 of their Memorandum in Support of Defendants’ Motion to Dismiss and Opposition to Motion for Preliminary Injunction, the Federal-Aid Highway Act relates to the National Highway System, which includes national highways as well as the Interstate System. 23 U.S.C. § 103.

includes the promulgation of speed limits as well as the installation of speed limit signage. 23 U.S.C. § 109. Therefore, any actions taken by the Defendants', or any other entity or person outside of the State, affecting the maintenance of the highway is contrary to federal law.

General principles of "inherent sovereignty" do not permit the Defendants' to regulate US Hwy 212. *See Bourland*, 508 U.S. at 694-695. Congress clearly established the process by which the State may obtain a right-of-way to construct a public highway through an Indian reservation. 25 U.S.C. §§ 323-325. The State has complied with that process and the Tribe's right to regulate the highway has been abrogated. There exists no relevant treaty or statute by which Congress intended to allow the Tribe to assert regulatory jurisdiction here.

"Tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and cannot survive without express congressional delegation." *Montana v. U. S.*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981). *Montana*, however, does recognize two exceptions to this rule, neither of which applies here. The first is when nonmembers enter into a consensual relationship with the tribe or its members. *Id.* at 565. Transfers of property interests between governmental entities, as is the case here, create property rights, not a continuing consensual relationship. *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1113 (9th Cir. 1999). The second is when the conduct "threatens or has some direct effect on the political integrity, the

economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 566. The potential act of driving carelessly on a highway through a reservation is not sufficient to implicate the second exception. *Strate*, 520 U.S. at 457-458. Given the fact that inherent sovereign powers of the tribe do not extend to activities of nonmembers, tribal efforts to “regulate nonmembers, especially on non-Indian fee land, are presumptively invalid.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330, 128 S.Ct. 2709, 2720, 171 L.Ed.2d 457 (2008) (internal quotations omitted). It is the Tribe’s burden to establish one of the exceptions. *Id.* In this case, however, neither exist.

The Defendants’ claim that the State’s Complaint is insufficient to support this Court’s jurisdiction is unsupported. Federal law is the basis under which the Defendants’ no longer retain the inherent sovereignty to regulate US Hwy 212 in South Dakota. Federal law authorized the granting of rights-of-way on Indian reservations. Federal law controlled the construction of the highway. Federal law dictates the continued maintenance of the highway.

Therefore, this matter is considered “an action ‘arising under’ federal law within the meaning of § 1331.” *Nat’l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853, 105 S.Ct. 2447, 2452, 85 L.Ed.2d 818 (1985). Accordingly, this matter is wholly within this Court’s jurisdiction.

B. Sovereign Immunity Does Not Bar This Action.

Neither CRST, nor Chairman Frazier, individually or in his official capacity, have regulatory authority over US Hwy 212 in South Dakota. Both

the State and CRST have sovereign responsibilities. CRST has the sovereign rights and responsibilities to “punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations.”

Bourland, 508 U.S. at 694. Pursuant to the rights-of-way granted to the State by CRST and various individuals, the State’s sovereign responsibilities include the maintenance of the highway. *See State of Mont. Dep’t of Transp. v. King*, 191 F.3d 1108, 1114 (9th Cir. 1999). Absent a relevant treaty or statute, CRST cannot now assert regulatory jurisdiction over the highway claiming inherent sovereignty. *Bourland*, 508 U.S. at 695.

Sovereign tribal immunity is not a bar to suits seeking injunctive relief against tribal officers engaging in unlawful conduct. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019). Chairman Frazier is acting contrary to federal law. He does not have authority, either as CRST Chairman or individually, to remove and replace speed limit signs located on US Hwy 212 in South Dakota. Therefore, the State may be suit for injunctive relief against Chairman Frazier for his unlawful conduct. *Id.*

The Supreme Court held in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that an exception to sovereign immunity exists when injunctive relief is sought against state officers in their individual capacities for continued violations of federal law. *Kodiak Oil*, 932 F.3d at 1131. This exception was extended to tribal officials in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 796, 134 S.Ct. 2024, 2035, 188 L.Ed.2d 1071 (2014). The State, in this matter, seeks injunctive relief, not damages, from

Chairman Frazier, who has exceeded the scope of his lawful authority.

Therefore, sovereign immunity does not apply.

II. Preliminary Injunction is Necessary.

Since the State filed on October 1, 2020, additional material facts have unfolded that CRST has failed to disclose in the filing of its motion, brief and affidavits. On or around October 5, 2020, Defendants covered the State's 55 mph Ahead warning signs and 55 mph speed limit signs. Affidavit of James Brooks at ¶¶3-5. Defendants instead placed 35 mph ahead warning signs and speed limit signs, not the 45 mph signs discussed in Defendants' brief and in the Affidavit of Chairman Frazier. *Id.* at ¶5; Defendants' Combined Memorandum in Support of Motion to Dismiss and Opposition to Motion for Preliminary Injunction (hereinafter "Defendants' Memorandum") at 6, 15, 16, and 17; Affidavit of Chairman Harold Frazier at ¶22. The current speed limit signage installed by the State is a full 20 mph lower than the 55 mph speed limit established by state administrative rule and 30 mph lower than the adjacent statutory speed limits of 65 mph. Second Affidavit of Christina Bennett at ¶¶10-11, 30. In other words, the Defendants' posted speed signs are an attempt to reduce motorists' speeds up to 30 mph as they pass through LaPlant, a rural area with low traffic volumes. *Id.*

South Dakota Department of Transportation (SDDOT) discovered the 35 mph speed limit postings on October 5, 2020, when SDDOT's Highway Maintenance Supervisor, James Brooks, passed through LaPlant to inspect the speed limit signing. Affidavit of James Brooks at ¶¶3-5. Mr. Brooks was

stopped by two CRST law enforcement officers, who engaged their patrol vehicle's light bar. *Id.* at ¶6. After approaching Mr. Brooks' vehicle, one of the officers declared, "I know you're looking at the signs. The Chairman wants them like that." *Id.* at ¶7. That officer also told Mr. Brooks, "If you try to change them, I've been instructed to take you guys off the Res." *Id.* SDDOT has made no further changes to the speed limit signing on US Hwy 212 in and around LaPlant since this threat was issued. Second Affidavit of John W. Villbrandt at ¶9. Hence, the 35 mph ahead warning signs and 35 mph speed limit signs placed by CRST have remained in place since at least October 5, 2020. *Id.*

The need for an injunction clearly remains as the State's efforts to work with the Defendants' have been rebuffed and the potential risk to all South Dakotans, both tribal and non-tribal members, continues to exist.

A. There is a Risk of Irreparable Harm.

The 2009 edition of the National Manual on Uniform Traffic Control Devices ("National MUTCD") is the uniform national standard for all traffic control devices, including speed limit signs, installed on any street, highway, or bicycle trail open to public travel and constructed with federal aid. 23 C.F.R. 655.603; 23 U.S.C. 109. US Hwy 212 in and around LaPlant was reconstructed from 1988 through 1991 with federal aid. Second Affidavit of John Villbrandt at ¶11. In 2000 and 2004, the SDDOT resurfaced this segment of highway, again using federal aid. *Id.* at ¶12. In 2011, SDDOT installed rumble strips on US Hwy 212 with federal aid. *Id.* at ¶13. Because

US Hwy 212 is a highway open to public travel and constructed with federal aid, the National MUTCD governs the installation of speed limit signs on the highway.² 23 C.F.R. 655.603; 23 U.S.C 109.

The National MUTCD contains standards and guidelines for using traffic control devices. Standards are mandatory and denoted by the use of the word “shall”, while guidelines are recommended and typically contain the word “should.” MUTCD Section 1A.13. Guidelines allow deviations only if engineering judgment or an engineering study justify a deviation. *Id.* The National MUTCD contains a standard, *i.e.* a mandate, for speed limit signing that requires a speed study for non-statutory speed limits: “Speed zones (other than statutory speed limits) shall only be established on the basis of an engineering study that has been performed in accordance with traffic engineering practices. The engineering study shall include an analysis of the current speed distribution of free-flowing vehicles.” Second Affidavit of Christina Bennett, Exhibit M.

Although the National MUTCD governs US Hwy 212, Defendants have ignored its mandates in posting the 35 mph speed limit on US Hwy 212. As acknowledged by CRST Tribal Transportation Director Dakota Longbrake, Defendants changed the speed limit signing without an engineering study or

² Although agencies may adopt their own manual on uniform traffic control devices, it must be in substantial conformance with the National MUTCD and approved by the Federal Highway Administration or Federal Lands Program. 23 C.F.R. 655.603. South Dakota follows the National MUTCD. Affidavit of Christina Bennett at ¶¶3 and 4. CRST has not adopted a federally approved manual and therefore is also bound by the National MUTCD.

engineering analysis of vehicle speeds – a violation of the federal MUTCD.

Affidavit of Dakota Longbrake at ¶¶4 and 5. According to Director Longbrake, CRST is in the process of performing such a study – a month and half after CRST began posting changed speed limits. *Id.* at ¶ 5. An engineering study or analysis is required because speeds that are set too low reduce rather than enhance highway safety. Second Affidavit of Christina Bennett at ¶24.

A common misconception is that lowered speeds always result in increased safety. The years of research and experience, underpinning the National MUTCD, do not support that broad assumption. Rather, safety is enhanced when motorists are traveling at about the same speed. Second Affidavit of Christina Bennett at ¶14. People who travel faster or slower than most traffic around them increase their chances of being in an accident. *Id.* at ¶15. The more speeds vary, the greater likelihood that vehicles will come into conflict and crash. *Id.* at ¶16. The science of speed limits is based on the principle that the behavior of a majority of drivers is reasonable and safe and setting limits at the speed most drivers travel fosters uniformity and reduces crashes. *Id.* at ¶17. Drivers intuitively select their speed based on their surroundings, including the roadway geometry, traffic conditions, weather, pedestrians, and other factors. *Id.* at ¶18. As a result, the National MUTCD recommends posting a speed limit “within 5 mph of the 85th percentile speed of free-flowing traffic.” Second Affidavit of Christina Bennett, Exhibit M, Section 2B.13. The 85th percentile speed “is the speed at or below which 85

percent of the motor vehicles travel.” *Id.*, Section 1A.13. Only engineering judgment and analysis can justify deviations from this guideline. *Id.*

Because motorist behavior is mainly influenced by the surrounding circumstances, merely posting lower speed limits does not consistently impact the behavior of most drivers. Second Affidavit of Christina Bennett at ¶19. Some drivers may attempt to obey the posted speed limit while others will disregard it based on the environmental cues, such as low traffic on a paved rural highway, that naturally foster higher speeds. *Id.* These wider speed differences increase the likelihood that crashes will occur. *Id.* at ¶20.

SDDOT’s observations of traffic show that the current 35 mph speed limit signing installed by CRST is much too low, resulting in an increased crash potential and reduced highway safety. *Id.* at ¶¶22-23; Affidavit of Darren Griesse at ¶27. SDDOT Traffic Engineer Darren Griesse traveled to LaPlant on September 21, 2020, to perform the engineering speed study mandated by the National MUTCD. *Id.* at ¶¶5 and 6. When he arrived, he discovered that CRST’s 45 mph speed limit signs were in place, rather than the 55 mph speed limits mandated by SDDOT’s administrative rule. *Id.* at ¶8. Engineering practice requires studying traffic under the existing speed limit conditions, not a proposed change. Affidavit of Darren Griesse at ¶9. Additionally, CRST’s posted 45 mph speed limit was inconsistent with other signage visible to drivers. Traffic approaching LaPlant from both directions, while preparing to leave the 65 mph zone, faced a 55 mph ahead warning sign and then an incongruous 45 mph speed limit sign. *Id.* at ¶¶8 and 9. Although the

conditions were not consistent with standard engineering practices, Griese observed vehicle speeds of 36 vehicles over the course of 2.5 hours. *Id.* at ¶¶10-14; Affidavit of Darren Griese, Exhibit N. Of these vehicles, 77.8% were traveling in excess of the 55 mph speed limit. Affidavit of Darren Griese at ¶18. The average speed was 60 mph and the 85th percentile speed was 67 mph – nearly twice the speed limit CRST has now posted on US Hwy 212 in and around LaPlant. *Id.* at ¶¶17 and 19. Griese observed no pedestrians during this time frame and noted the traffic level was low and comprised primarily of local vehicles. *Id.* at ¶16; Affidavit of Darren Griese, Exhibit N. Griese also reviewed crash data available to the State of South Dakota for the last five years, and found no crashes where speed was identified as a contributing factor. Affidavit of Darren Griese at ¶¶21 and 22. In sum, Griese concluded the data and his analysis failed to support a speed limit change to 45 mph, much less 35 mph. *Id.* at ¶28. On September 25, 2020, Griese telephoned CRST’s transportation director, Dakota Longbrake, and shared the results of his observations. *Id.* at ¶¶24-28. He also shared his conclusion that a speed limit reduction from 55 mph was not supported by traffic or crash data. *Id.* Mr. Longbrake did not raise any objections to Griese’s observations or conclusions. *Id.* at ¶28.

Defendants changing of the posted speed limits without a supporting engineering study violates the National MUTCD, the national uniform standard that governs this speed limit signing. Second Affidavit of Christina Bennett at ¶33. Consistent with years of data and experience that form the basis for the

National MUTCD, the data shows that merely lowering the posted speed limit has little effect on most drivers' behavior - the majority of drivers continued to travel at speeds well above the 45 mph speed limit posted by CRST at the time of Griese's observations. Affidavit of Darren Griese at ¶18, Affidavit of Darren Griese, Exhibit N. Because this data shows CRST's 35 and 45 mph speed limit postings are too low, these postings increase rather than decrease the likelihood of crashes by widening the speed differences of travelers. Second Affidavit of Christina Bennett at ¶¶14-16, and 33. CRST's 35 mph speed limit signage also creates a 30 mph drop between the 65 mph speed limit on US Hwy 212 and the 35 mph postings. *Id.* at ¶30. This drop in speed limit signing is contrary to sound engineering practice, which recommends an intervening transition speed zone in such circumstances. *Id.* at ¶¶29 and 31. The speed limit change from 65 mph to 35 mph is too abrupt for consistent and reliable driver observance, again fostering wide speed differences that undermine highway safety. *Id.* at ¶32. Because of these wide speed differences, Defendants 35 mph speed limit postings create an increased risk of vehicle conflicts and crashes that compromise the safety of the traveling public. *Id.* at ¶33.

The mere presence of a new convenience store on US Hwy 212 cannot, standing alone, justify further reductions in the speed limit. In areas with sparse development, such as LaPlant, the level of development should be reasonably consistent along the entire length of the lowered speed zone. Second Affidavit of Christina Bennett at ¶25. Federal guidance recommends

against setting a lowered speed limit in a rural area where, as in the case of the newly constructed Lakota Thrifty Mart Express, development is only located along a short section of the highway in the middle of the proposed speed limit. *Id.* at ¶26. In such circumstances, highway users will see no reason for the change in speed limit, compliance will be poor, variations in operating speeds will increase, and judgments of speed and distance become more difficult for all road users. *Id.* at ¶27. Such conditions will usually contribute to a reduction in a safety, especially for pedestrians and cyclists. *Id.* at ¶28.

Harm is irreparable when it cannot be adequately and completely remedied by money damages. *Watkins Incorporated v. Lewis*, 346 F.3d 841, 844-845 (8th Cir. 2003). Exposing the public to an increased risk of vehicle crashes, including the potential for injuries to people and property, cannot be measured entirely in monetary terms. And without the issuance of an injunction, the public will continue to be exposed to that risk, causing irreparable harm into the future. Furthermore, near misses, unjustified speeding citations and traffic stops, and driver and pedestrian confusion and frustration all defy compensation. Because Defendants have posted speed limits that are too low, that violate sound engineering principles, and that increase the potential for crashes and uncompensated injuries, there is a risk of irreparable harm that satisfies the first requirement for a preliminary injunction.

B. The Balancing of Harms Favors Granting the Preliminary Injunction.

The second element for consideration is a balancing of the harms that each party will experience if the injunction is granted or denied. *CDI Energy Servs.*, 567 F.3d at 401-2. This element also weighs in favor of granting the injunction.

Because SDDOT received federal aid in the construction of US Hwy 212, federal law demands that SDDOT properly maintain the highway, including the speed limit and other signing along the road. “It shall be the duty of the State transportation department or other direct recipient to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts.” 23 U.S.C. §116(b). If SDDOT fails in this duty, the Secretary of the United States Department of Transportation may withhold federal funds for highway projects across the state.

If at any time the Secretary shall find that any project constructed under the provisions of this chapter, or constructed under the provisions of prior Acts, is not being properly maintained, he shall call such fact to the attention of the State transportation department or other direct recipient. If, within ninety days after receipt of such notice, such project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the State highway district, municipality, county, other political or administrative subdivision of the State, or the entire State in which such project is located, whichever the Secretary deems most appropriate, until such project shall have been put in proper condition of maintenance.

23 U.S.C. §116(d).

SDDOT cannot be relieved of its maintenance responsibilities, even if CRST volunteered to take on this federal obligation. “The responsibility

imposed upon the State highway department, pursuant to 23 U.S.C. 116, for the maintenance of projects shall be carried out in accordance with policies and procedures issued by the Administrator. The State highway department may provide for such maintenance by formal agreement with any adequately equipped county, municipality or other governmental instrumentality but such an agreement shall not relieve the State highway department of its responsibility for such maintenance.” 23 C.F.R. §1.27.

In contrast to SDDOT’s federal legal obligation to properly maintain US Hwy 212, Defendants have no such duty to maintain US Hwy 212. Until its decision to install the subject speed limit signage, Defendants have not performed any maintenance on the highway. Second Affidavit of John W. Villbrandt at ¶14. All maintenance activities were performed by SDDOT. *Id.* Indeed, on the same date the CRST Council adopted its resolution seeking a lowered speed limit on US Hwy 212, it passed another resolution asking SDDOT to extend roadway lighting on US Hwy 212 in Eagle Butte as a safety enhancement. Affidavit of John W. Villbrandt (Doc. 5), Exhibit G (Doc. 5-5).

Nor can CRST convincingly claim that it has no means to pursue and advocate for speed limit and other highway changes to enhance safety in LaPlant. In response to the CRST Council’s resolution supporting a lowered speed limit on US Hwy 212, SDDOT expedited setting a hearing before the South Dakota Transportation Commission to consider reducing the speed limit. Affidavit of Joel Jundt (Doc. 4), Exhibit B (Doc. 4-2). The hearing is currently set for October 29, 2020, and SDDOT has provided the CRST Chairman, CRST

law enforcement, and CRST transportation personnel with the hearing notice and the process for submitting written comments and testifying by phone or in person. *Id.*; Affidavit of John W. Villbrandt (Doc. 5), Exhibit J (Doc. 5-8); Affidavit of June Hansen at ¶¶3-4; Affidavit of June Hansen, Exhibit R and S. Through this hearing process, CRST has an avenue for working cooperatively with SDDOT to explore speed limit changes.

CRST is also pursuing another means, made available by SDDOT, to address its concerns about pedestrian and bicyclist safety. CRST has filed a grant application with SDDOT to construct a pedestrian access path along US Hwy 212 extending from the school complex to the Lakota Thrifty Mart Express. Affidavit of Darren Griesse at ¶27. SDDOT is in the process of reviewing CRST's application as well as requests from other entities. Given the hearing and grant opportunities available to CRST for providing input and collaborating with SDDOT, granting the injunction will not harm CRST or its efforts to pursue highway safety.

Finally, CRST's conclusory statements about the benefits of its lowered speed limits, adopted without the requisite engineering study or consideration of engineering analysis and principles, fail to prove a threat to the public welfare if the injunction is granted. As noted above, the current artificially low speed limits actually undermine highway safety. Granting the injunction, so a proper engineering study can be completed and analyzed, is the best way to ensure speed limits that support the public welfare.

C. The State is Likely to Succeed on the Merits.

The State satisfies the third element, because it is likely to succeed on the merits. Engineering principles and traffic data demonstrate that CRST's 35 mph speed limit postings, imposed without regard for federal standards and legal obligations, diminish rather than enhance safety and justify a permanent injunction against CRST. Without evidence to support its misguided and extraordinary exercise of authority over a federal aid highway, built and maintained by SDDOT, Defendants cannot prevail in this case. Furthermore, for the reasons set out in Plaintiff's opening brief (Doc. 3), CRST has ceded supervision and control over US Hwy 212 right-of-way in favor of the State. Because the State is likely to prevail on the merits, this element weighs in favor granting the preliminary injunction request.

D. Granting the Preliminary Injunction Serves the Public Interest.

The public interest is furthered by prohibiting CRST's unlawful posting of arbitrary speed signage. Speed limits do not dictate reasonable driver behavior, they reflect it. For this reason, federal law imposes uniform national standards on federal aid highways and requires an engineering study and analysis of traffic data to support a speed limit change. 23 C.F.R. 655.603; 23 U.S.C. 109; Second Affidavit of Christina Bennett, Exhibit M. Imprudent and inaccurate conclusions about the relationship between traffic speed and traffic safety do nothing to protect the public. With no crash data showing speed as a contributing factor, and no traffic data to support CRST's 35 mph speed limit, the likelihood of crashes on US Hwy 212 has increased.

Second Affidavit of Christina Bennett at ¶¶26-28 and 32-33. If a preliminary injunction serves any purpose, it should be to insulate the public from rash and unfounded actions that contravene the public interest.

The public interest is also served by fostering discussion, collaboration, input and the sharing of information - all activities that can take place in the context of the public hearing expedited by SDDOT and scheduled for October 29, 2020, before the South Dakota Transportation Commission. At that hearing CRST will have the opportunity to share the results of its promised engineering study, discuss its concerns about pedestrian and bicyclist safety, and hear SDDOT and other interested parties share their thoughts and ideas for how to foster highway safety. CRST characterizes SDDOT's actions as a one-sided grab for power that threatens tribal sovereignty, but the record shows that CRST unilaterally changed the speed limits on August 31 without consulting SDDOT and the Defendants have consistently rebuffed SDDOT's efforts to work towards their common goal – traveler safety. SDDOT continues to stand ready to work with CRST, but the State asks this Court to restore the 55 mph speed limit so the parties can properly study and analyze the original traffic conditions and collaborate to reach a solution.

CONCLUSION

This matter arises under federal law and fits clearly under 28 U.S.C. §1331. As such, this court has jurisdiction to hear this matter. In addition, the State's request for injunctive relief is not barred by the Defendants'

sovereign immunity claims. Defendants' have no inherent sovereign right to regulate the highway and injunctive relief is appropriate where tribal officials engage in unlawful conduct. Accordingly, Defendants' Motion to Dismiss should be denied.

Federal requirements apply to federal aid highways like US Hwy 212. SDDOT is obligated to meet those requirements, including setting speed limits in compliance with the National MUTCD and properly maintaining speed limit signing along Highway 212. If Defendants are allowed to keep SDDOT from meeting these obligations, as well as permitted to ignore the National MUTCD standard requiring speed zones based on engineering study and principles, the traveling public will be exposed to the risk of irreparable harm; including, but not limited the loss of federal highway funds across the state. The State is likely to succeed on the merits, and the public interest is served by granting relief to the State. Therefore, the State respectfully requests that the Court issue a preliminary injunction prohibiting CRST from erecting highway signage along US Hwy 212 and from interfering with the installation and maintenance of highway signage.

Dated this 16th day of October 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the foregoing document is within the limitation provided for in D.S.D. Civ. LR 7.1(B)(1) using Bookman Old Style typeface in 12-point type. Said Brief contains 5,197 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 16th day of October 2020.

/s/ Yvette K. Lafrentz
Yvette K. Lafrentz
Assistant Attorney General