

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA, acting)
by and through its Department of)
Transportation,)

Plaintiff,)

vs.)

HAROLD FRAZIER, individually and)
as Chairman of the Cheyenne River)
Sioux Tribe,)

and)

CHEYENNE RIVER SIOUX TRIBE,)

Defendants.)

CIV 20-3018

BRIEF IN SUPPORT OF
PLAINTIFF'S APPLICATION
FOR TEMPORARY RESTRAINING
ORDER AND MOTION FOR
PRELIMINARY INJUNCTION

INTRODUCTION

This brief supports Plaintiff's request for a Temporary Restraining Order and a Preliminary Injunction to restrain the Cheyenne River Sioux Tribe and its chairman Harold Frazier from removing and replacing speed limit signage on US Hwy 212.

FACTUAL BACKGROUND

On August 18, 2020, South Dakota Department of Transportation (SDDOT) Area Engineer John Villbrandt was notified by SDDOT Maintenance Supervisor James Brooks that a message board had been set up east of LaPlant, SD. Affidavit of John Villbrandt. Mr. Brooks advised that the trailer was set up in a 65 mph zone just east of the east bridge in LaPlant, SD just

prior to a 55 mph zone. *Id.* The sign advised of a 45 mph speed limit. *Id.* At the time, Mr. Brookes did not know if the 45 mph notification was a mistake or intentional.

On August 19, 2020, SDDOT Area Engineer Villbrandt contacted Cheyenne River Sioux Tribe (CRST) Police Chief Chuck LeCompte about the speed radar trailer. *Id.* Mr. Villbrandt advised Chief LeCompte that a permit was required to place a trailer in the highway right-of-way. *Id.* Chief LeCompte notified Mr. Villbrandt that the trailer was there due to the opening of a new convenience store. *Id.* Mr. Villbrandt was also notified, for the first time, that the CRST would be seeking a permanent speed reduction. *Id.* Mr. Villbrandt then advised Chief LeCompte of the need for a resolution from the CRST. He also advised Chief LeCompte that the speed radar trailer must be removed until a permit was obtained. *Id.* Mr. Villbrandt then emailed a link to the application for a Permit to Occupy a Right of Way.

On August 20, 2020, Rose Mandan, CRST Indian Highway Safety Coordinator, contacted Mr. Villbrandt about the need for a permit to occupy the right of way. Mr. Villbrandt discussed the process with Ms. Mandan. Ms. Mandan sent an application to Mr. Villbrandt on August 26, 2020, who promptly reviewed and granted the application for a speed radar trailer to be placed at milepost location 187+0.68 with the following conditions: 1) the speed limit on the trailer must match the speed limit on the highway (55 mph), 2) the trailer must be placed as close to the edge of the shoulder as possible, and

3) flash mode must be turned off. Affidavit of John Villbrandt, Exhibit D. No resolution to modify the speed limit was discussed or provided at this time.

On September 1, 2020, Dakota Longbrake, Director of the CRST Transportation Department notified Mr. Villbrandt via phone that Chairman Frazier ordered CRST Transportation staff to replace the 55 mph speed limit signs around LaPlant, SD with 45 mph speed limit signs on Monday, August 31, 2020. When Director Longbrake became aware of this change, he instructed his employees to remove the 45 mph signs and replace the 55 mph signs. CRST Transportation staff complied. Later that day, Chairman Frazier drove by the area and saw the 55 mph signs and he again ordered CRST Transportation staff to remove the 55 mph speed limit signs and replace them with 45 mph speed limit signs. CRST Transportation staff complied. SDDOT Area Engineer Villbrandt traveled to the area to confirm and take pictures. Affidavit of John Villbrandt, Exhibit E.

While in the area taking pictures of the switched signs, Mr. Villbrandt found that the speed radar trailer was not properly placed. The trailer should have been placed in the 55 mph speed zone and the sign on the trailer should note the correct 55 mph speed. Instead, the trailer was placed in the 65 mph speed zone and had an erroneous 45 mph speed limit sign. Affidavit of John Villbrandt, Exhibit E. This was of particular concern in that it was placed before the sign notifying drivers of a reduced speed to 55 mph ahead. In essence, a westbound driver would be traveling in a 65 mph zone and would

see a speed radar trailer with a 45 mph speed limit sign. Next, the driver would see a sign warning of 55 mph ahead and then a 45 mph speed limit sign.

Also, on September 1, 2020, CRST Transportation Director Longbrake provided SDDOT with the resolution regarding a change in the speed limit. Affidavit of John Villbrandt, Exhibit G. Up until that date, SDDOT was unaware of the resolution and, therefore, was unable to begin the process to modify the speed limit near LaPlant, SD. Director Longbrake provided additional information stating that a new convenience store had recently opened in LaPlant, SD, which was causing increased pedestrian as well as turning traffic. In an effort to reduce safety risks, CRST wished to reduce the speed in this area.

On September 2, 2020, SDDOT Area Engineer Villbrandt contacted Chief LeCompte and advised him of the improper placement of the radar speed trailer. Mr. Villbrandt also notified the CRST Transportation Department that the 55 mph speed signs would need to be returned to their original position and the 45 mph signs removed. Director Longbrake was not available, but a message was left for him. Affidavit of John Villbrandt. Mr. Villbrandt followed up on September 3, 2020 to reiterate that the 55 mph speed signs needed to be replaced. Mr. Villbrandt was subsequently notified by a SDDOT maintenance crew that the speed radar trailer had been removed but that the 45 mph signs were still in place. *Id.*

On September 8, 2020, SDDOT maintenance workers removed the 45 mph speed limit signs and replaced the 55 mph speed limit signs. *Id.* Later

that same day, CRST Transportation staff removed the 55 mph signs and replaced them with the 45 mph signs. On September 9, 2020, CRST Transportation staff and SDDOT maintenance staff met to exchange signage. CRST Transportation staff stated that they plan on also replacing the caution speed ahead signs as well. SDDOT maintenance staff relayed this information to SDDOT Area Engineer Villbrandt.

On September 15, 2020, Secretary Bergquist sent a letter to CRST Chairman Frazier discussing the legal and safety issues regarding the removal and replacement of speed limit signage. Affidavit of Joel Jundt, Exhibit A. Secretary Bergquist also notified Chairman Frazier that the copy of the resolution received by the SDDOT on September 1, 2020, would be considered a petition to modify the speed limit and briefly outlined the process to change a speed limit. *Id.* Finally, Secretary Bergquist notified Chairman Frazier that SDDOT maintenance staff would return the 55 mph speed limit signs and that they should remain in place until the Transportation Commission determines that a speed limit change is warranted and adopts the modification. *Id.* On that same date, CRST Patrolman Martell left a voicemail for Area Engineer Villbrandt again requesting flashing yellow lights for the 45 mph signs. Affidavit of John Villbrandt.

On September 16, 2020, SDDOT maintenance staff removed the 45 mph speed limit signs and replaced with the 55 mph speed limit signs in LaPlant, SD. *Id.* This was completed by 7:05 a.m. Shortly after noon on that same day, SDDOT Highway Maintenance Supervisor James Brooks was notified by

an area resident that the 55 mph speed signs were removed and replaced with 45 mph speed signs. *Id.* SDDOT Area Engineer Villbrandt contacted CRST Patrolman Martell and advised him that flashing lights would not be provided as the current speed limit is 55 mph not 45 mph. *Id.* In the same phone call, Mr. Villbrandt informed Patrolman Martell that a letter had been sent to Chairman Frazier regarding the proper procedure to change a speed limit. Until such time that the speed limit is changed by the Transportation Commission, it will remain at 55 mph. Mr. Villbrandt forwarded a copy of the letter to Chief LeCompte and asked that it be provided to Patrolman Martell. *Id.* On September 18, 2020, Patrolman Martell again contacted Mr. Villbrandt to request that warning lights be placed on the speed limit signs in LaPlant. Affidavit of John Villbrandt, Exhibit I.

On September 21, 2020, SDDOT Secretary Bergquist sent a second letter to Chairman Frazier. Affidavit of Joel Jundt, Exhibit B. Secretary Bergquist advised Chairman Frazier that the request to initiate rulemaking proceeding to lower the speed limit in and around LaPlant, SD had been granted. *Id.* He went on to state that the request had been expedited and would be discussed at the next hearing on October 29, 2020. *Id.* He further explained the process and provided information as to how to participate in the process. *Id.* In addition, Secretary Bergquist again explained that changing of the speed limit signs is not authorized. *Id.* He stated that SDDOT staff would be removing the 45 mph signs and replacing the 55 mph signs immediately and asked that they

remain until the Department has completed the process to evaluate the change in speed limit. *Id.*

On September 21, 2020, SDDOT maintenance crews again removed the unauthorized 45 mph speed signs and replaced the 55 mph speed signs. On September 29, 2020, the 55 mph speed signs were again removed and replaced with 45 mph speed signs. On September 30, 2020, SDDOT maintenance replaced the 55 mph speed limit signs. Also, on September 30, 2020, Chairman Frazier sent a letter to SDDOT Secretary Bergquist requesting that the SDDOT “cease interfering with tribal operations.” Affidavit of Joel Jundt, Exhibit L.

PRELIMINARY INJUNCTION STANDARDS

When considering a motion for preliminary injunctive relief, this Court must consider four factors: “(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase Sys., Inc. v. C L Sys., Inc.* 640 F.2d 109, 113 (8th Cir.1981) (en banc).

ARGUMENT

A. THREAT OF IRREPARABLE HARM TO THE STATE OF SOUTH DAKOTA

Continued unauthorized removal and replacement of the speed limit signage on a US highway will cause irreparable harm to the State of South Dakota and its citizens. First, CRST’s attempted manipulation of the legal speed limit prevents the State of South Dakota from fulfilling its obligations to

its citizens. Second, allowing the modified speed limit signage to remain, even for a short period, is unsafe for all travelers on US Hwy 212. The effect of these harms is irreparable to the State and its citizens.

Typically, irreparable harm occurs when the injury cannot be fully compensated by awarding damages. *General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir.2009). Such is the case here when considering the State's obligations to the people of South Dakota. The safety of the citizens of South Dakota and all travelers on US Hwy 212 is, potentially, at issue, an injury to which an award of damages is not adequate compensation.

US Highway 212 in and around LaPlant, SD is included in the state trunk highway system as defined in SDCL 31-4-1. SDCL 31-4-206. The state trunk highway system is to be controlled and supervised by the SDDOT. SDCL 31-1-5. Maximum speed limits on streets, highways, and interstates are set by statute. See SDCL 32-25-1.1; 32-25-4; 32-25-7.1. The Transportation Commission may establish limits of less than the maximum if requested by SDDOT. SDCL 32-25-7. Furthermore, the SDDOT is required to "conspicuously post signs at the beginning and end of a portion of highway to show the maximum speed limit . . . on that portion of the highway." SDCL 32-25-7. If the speed limit signs are being changed by the CRST, arbitrarily and without notice, the SDDOT is unable to properly supervise and maintain the state highway trunk system and ensure that the proper signage is in place. In turn, this is a potential risk to the safety of all travelers.

Without a preliminary injunction maintaining the status quo, the SDDOT cannot ensure that drivers are being adequately advised of the speed limits on US Hwy 212. Nor can the SDDOT ensure that the speed limits posted are safe and correct. In this matter, a potentially unsafe situation was created with the inconsistent signage that was erected. Furthermore, the unauthorized signage would be inconsistent with the signage required under the Manual of Uniform Traffic Control Devices (MUTCD), which is the current national signing standard issued by the Federal Highway Administration (FHWA). Affidavit of Christina Bennett, Exhibit K. In addition, prior to CRST placing these unauthorized speed limit signs, no engineering study was performed to assess the need and safety of a modified speed limit.

It is not necessary to show actual harm, rather the possibility of harm is sufficient. *B.K. ex rel. Kroupa v. 4-H*, 877 F.Supp.2d 804, 821 (D.S.D. 2012), *aff'd sub nom. Kroupa v. Nielsen*, 731 F.3d 813 (8th Cir.2013). The State is not aware of any incidents that have occurred at this location, but the possibility of injury occurring because of incorrect signage on this highway is too great of a risk. Drivers on US Hwy 212 are traveling at 65 mph, notified of a reduction to 55 mph and then, suddenly, a sign showing 45 mph appears. This can most certainly promote some serious traffic risks for drivers and others in the LaPlant area.

Ultimately, the State will be irreparably harmed as the CRST has sovereign immunity. Courts in other districts have found that irreparable harm exists based on the sovereign immunity of a Tribe. *See Idaho v. Coeur*

d'Alene Tribe, 794 F.3d 1039, 1046 (Tribe's sovereign immunity would likely bar State from recovery of monetary damages incurred during litigation); *Wisconsin v. Stockbridge-Munsee Cmt.*, 67 F.Supp.2d. 990, 1019-20 (Remedies are limited because the Tribe has sovereign immunity). That is also the case here. The State has limited remedies available because of the Defendant's sovereign immunity. As such, the State's harm is irreparable.

B. SOUTH DAKOTA HAS A HIGH PROBABILITY OF SUCCESS ON THE MERITS

"While 'no single factor is determinative,' the probability of success factor is the most significant." *Home Instead, Inc. v. Florance*, 721 F.3d 794, 497 (8th Cir.2013). In this matter, Plaintiff has a high probability of success on the merits as the Defendants' actions are clearly unlawful.

The State of South Dakota and the SDDOT has the exclusive right to regulate the speed limit on US and State highways in South Dakota. The United States granted easements for rights of way to the State of South Dakota for the construction and maintenance of this public highway. Exhibit 1. The CRST or individual landowners were compensated for the easements and did not retain any gatekeeping rights. The easements are without limitations as to tenure and, so long as they are maintained as public highways, CRST cannot assert a landowner's right. *See Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). Here, as in *Strate*, the Tribe consented to the right-of-way, received just compensation, and the easement did not include any reservation of tribal control over the right-of-way. Furthermore, the

purpose of the right-of-way was to facilitate public access. Therefore, again as in *Strate*, traffic is subject to the State's control.

In *Nord v. Kelly*, 520 F.3d 848, the Eighth Circuit Court of Appeals reinforced the right of the State to control a public highway traversing over Indian land. Without a statute or treaty granting tribal authority, the plain language of the right-of-way granting easement applies. *Nord*, 520 F.3d at 854. The plain language of the easement in this matter clearly shows that the State has exclusive right to the right-of-way. No rights were retained by the Tribe and no statute or treaty has provided for any tribal authority against non-Indians in this situation.

Neither CRST nor Chairman Frazier have the authority to modify the speed limit on US Hwy 212. These highways are designated as part of the state trunk highway system and are controlled and supervised solely by the SDDOT. See SDCL 31-1-5; 31-4-14; 31-4-206; 31-5-1. The Transportation Commission has the exclusive authority to modify speed limits on the state trunk highway system and any interested person can request that such a modification be considered. SDCL 32-25-7; SDCL 1-26-13.

CRST does not have the authority to regulate the movement of non-tribal members on US and State highways that cross the Reservation. Tribal power is circumscribed "over reservation land in which non-Indians have acquired property rights substantial enough to be considered 'land alienated to non-Indians,' such as easements and rights of way." *State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1112 (9th Cir. 1999). Without a treaty or

federal law, “a tribe has no civil regulatory authority over non-tribal members for activities on reservation land alienated to non-Indians.” *Id.* (citing *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)).

Therefore, CRST has no authority to restrict travel of non-tribal members on US and State highways that have been constructed and are maintained under granted rights of way.

In what has now been referred to as the *Montana* Rule, the U.S. Supreme Court held that without a specific congressional delegation, like a treaty or federal law, a tribe has no authority over non-tribal members for activities on reservation land alienated to non-Indians. *Montana*, 450 U.S. at 564-565, 101 S.Ct. 1257-1258; *King*, 191 F.3d at 1112-1113. Since *Montana*, the threshold presumption is that tribes do not have regulatory jurisdiction over non-Indians on fee lands within the reservation. *Red Fox v. Hettich*, 494 N.W. 2d 638, 646-47 (S.D.1993) (citing *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz. L.Rev. 329, 345 (1989)). Tribes have inherent power to regulate tribal membership, domestic relations among members, and rules of inheritance for members as well as to protect self-government. *Montana*, 450 U.S. at 564, 101 S.Ct. 1257. Any “[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.” *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 2311, 150 L.Ed.2d. 398 (2001). Thus, CRST has no civil authority to regulate the actions of non-members on land alienated to the State of South

Dakota by grant of easement such as the US and State highways running through the Reservation.

There are two recognized exceptions to the *Montana* rule. *King*, 191 F.3d at 1113. One, a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe through arrangements like commercial deals or contracts. *Id.* That exception does not apply here as a consensual relationship is not created through the granting of a right of way. *Id.* Two, a tribe may hold inherent power to exercise civil authority over non-Indian's conduct on fee land within the boundaries of the reservation when that conduct directly affects the "political integrity, the economic security, or the health or welfare of the tribe." *Id.* Merely traveling on a public highway through the Reservation does not affect any of these.

CRST and Chairman Frazier have no authority to regulate travel on these public highways. The SD DOT is responsible for preserving the highway right-of-way free from any encroachments except those approved by the Highway Administrator. 23 C.F.R. § 1.23. The free and safe flow of traffic is not to be impaired on public highways without express approval. *Id.* Furthermore, the Transportation Commission has exclusive authority to establish a maximum speed limit less than those established by South Dakota statute. SDCL 32-25-37. No such approval was requested or granted; therefore, the speed limit remains and replacing the speed limit signage is unlawful.

C. THE BALANCE OF INTERESTS FAVORS THE STATE OF SOUTH DAKOTA

The State of South Dakota is not infringing, nor does it wish to infringe, on the sovereignty the Tribe has over its members. The State of South Dakota, however, has an obligation to support all the citizens of South Dakota. Arbitrarily modifying the speed limit on US and State highways through the Reservation does not support or protect the citizens of South Dakota.

There is an established process, created utilizing scientific data, to determine the appropriate speed limit. Prior to modifying a speed limit, an engineering study is required to assess the risks of making such a change. In fact, posting a lower speed limit without the proper analysis could increase the safety risk on the highway. Affidavit of Christina Bennett. Furthermore, decreasing speed limits that are not consistent with an engineering analysis could produce even greater highway safety risks. *Id.*

Allowing these lower speed limit signs to remain compromises the safety and welfare of all South Dakotans. The State has a responsibility to all its citizens, tribal and non-tribal members alike. “Ordinarily,” it is now clear, “an Indian reservation is considered part of the territory of the State.” *Nevada v. Hicks*, 533 U.S. 353, 361–62, 121 S. Ct. 2304, 2311, 150 L. Ed. 2d 398 (2001) (*citing* U.S. Dept. of Interior, Federal Indian Law 210, and n.1(1958)). Ensuring that the roadways on which South Dakotans travel are safe is crucial.

D. THE GRANT OF PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Maintaining a public highway is clearly in the public interest. South Dakotans have a right to travel free from obstruction on public highways. See 23 C.F.R. § 1.23. Removing and replacing speed limit signage creates an unnecessary risk to drivers. Specifically, in this area, the lack of consistency in the warning signage creates an even greater risk to drivers. CRST's and Chairman Frazier's action create more safety risks for the public and should not be allowed to continue.

The public interest is also served by requiring all parties to adhere to federal and state law. The law is clear, CRST does not have the authority to restrict travel on US Hwy 212. These public highways are to be maintained for the benefit of the public. The State of South Dakota has legally obtained rights of way across the Reservation for use as public highways. Allowing CRST and Chairman Frazier to arbitrarily modify the speed limit signage impedes the State of South Dakota's ability to maintain public highways in a safe manner for the welfare of all South Dakotans.

CONCLUSION

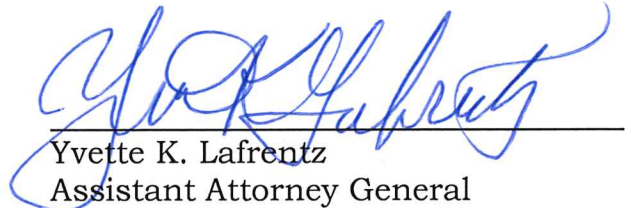
CRST and Chairman Frazier have unlawfully removed and replaced speed limit signage. The State of South Dakota has been granted easements by the United States and the CRST for the use of public highways. As such, the CRST has no civil authority to regulate the actions of non-Indians on these highways. Continuing to remove and replace speed limit signage on US Hwy 212 will cause irreparable harm to South Dakota and its citizens. It is in the

public interest to maintain the speed limit signage that is consistent with the speed limit established on this highway so that all South Dakotans can travel safely. Accordingly, the State of South Dakota respectfully requests that this Court grant a temporary restraining order restraining CRST and Chairman Frazier from removing and replacing speed limit signage.

Dated this 1st day of October 2020.

Respectfully submitted,

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