

**BEFORE THE WATER MANAGEMENT BOARD  
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL  
RESOURCES**

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**IN RE APPLICATION 1992-1 THE TOWN OF  
BUFFALO FOR APPROPRIATION OF PUBLIC HELL  
CREEK FORMATION FOR MUNICIPAL USE**

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**DAKOTA RURAL ACTION’S MOTION FOR COUNSEL TO APPEAR  
AND PARTICIPATE REMOTELY AT SCHEDULED HEARING ON  
MERITS OF APPLICATION OR FOR CONTINUANCE**

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Dakota Rural Action (hereinafter, “DRA”), by and through the below-signed Attorney hereby moves the Water Management Board (hereinafter, “WMB”) to permit its Counsel to appear and participate remotely (video and audio) in proceedings scheduled in this matter for July 9-10, 2020 due to the growing COVID-19 pandemic, the age and other medical conditions of DRA’s Counsel which place him at much higher risk from any exposure at the Hearing or building in which it is to be held, and the di minimis and insufficient safety and health precautions approved by the Board for the Hearing.

Should the Board refuse to permit Counsel for DRA to appear and participate in the hearing remotely, DRA hereby requests a continuance of at least 60 days to

permit either the COVID virus to be really (not wishfully) gone, reasonably safe and healthy protocols be implemented, or for DRA to attempt to find other counsel willing to risk catching the COVID virus in order for the matter to proceed.

There is no prejudice to any party by the granting of the relief requested, including a continuance.

This Motion is based upon the following facts and circumstances:<sup>1</sup>

1. The hearing is scheduled for over 3 hours on Thursday and Friday, July 9-10, 2020. The nature of the proceedings in a confined space with poor air circulation in the Mathew Training Center will require the public, the parties, counsel, the Water Management Board and staff participants to be in a confined space with poor circulation for lengthy periods of time each of those days, which science shows enhances risks of contamination.

2. The United States, as well as much of the rest of the world are in the midst of a public health emergency due to the exponential spread of COVID-19, the respiratory disease caused by the novel corona virus SARS-CoV-2. According the Centers for Disease Control (“CDC”), this coronavirus is spreading very easily and sustainably between people, including asymptomatic people.<sup>2</sup> Persons of all ages

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<sup>1</sup> See, Statement of Facts and citations in Complaint, Cheyenne River Sioux Tribe v. Trump, et al, Civ.No. 20-01709 (D.S.D.) [Document No. 1]. Special thanks to Counsel of record for the Big Fire Law and Policy Group.

<sup>2</sup> Centers for Disease Control and Prevention, *How Corona Virus Spreads*, <https://www.cdc.gov/corona-virus/2019-ncov/how-corona-virus-spreads.html> (last visited 6/20/20).

have contracted the disease.<sup>3</sup>

3. Since April 2020, the United States has led the world in the total number of COVID-19 cases. As of April 30, 2020, the United States has confirmed over one million cases of COVID-19 and reported 60,999 deaths due to COVID-19. In the past month and a half, these numbers have more than doubled. The United States has, as of a week ago, had confirmed 2,312,302 cases of COVID-19 and reported 120,402 deaths due to COVID19 and counting.<sup>4</sup>

4. Even mild cases of the COVID-19 generally involve about two weeks of fevers and dry coughs and are more severe than the flu.<sup>5</sup>

5. COVID-19 can severely damage lung tissue, cause a permanent loss of respiratory capacity, and also damage kidney, heart, and liver tissues as well as other systemic damage.<sup>6</sup> The surge of COVID-19 cases also causes mounting strains on healthcare systems, including critical shortages of doctors, nurses, hospital beds, medical equipment, diagnostic tests, and personal protective equipment.<sup>7</sup>

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3 Robert, Verity, et al., Estimates of the Severity of Coronavirus Disease 2019: A Model-Based Analysis, *The Lancet* 6 *Infect. Dis.* (Mar. 30, 2020), [https://www.thelancet.com/action/showPdf?pii=S0140-6736\(20\)30999-2](https://www.thelancet.com/action/showPdf?pii=S0140-6736(20)30999-2)

4 Lisa Lokerd Maragakis, *Coronavirus Disease 2019 v. the Flu*, Johns Hopkins Univ. Health, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu> (last visited June 23, 2020); see also COVID-19 Dashboard, Johns Hopkins Ctr. For Sys. Sci. & Eng'g, <https://www.arcgis.com/apps/opsdashboard/index.html#bda759470fd40299423467b48e9ecf6> (last visited June 23, 2020) (GIS map of global COVID-19 cases developed by Johns Hopkins Ctr. For Sys. Sci. & Engineering).

5 Holly Secon & Aria Bendix, *There is a wide misconception of what a 'mild' case of the COVID-19 looks like. It can be ugly and brutal.* *Business Insider* (Apr. 16, 2020), <https://www.businessinsider.com/mild-coronavirus-cases-high-fever-dry-cough-2020-3>.

6 Ctrs. For Disease Control & Prevention, *Interim Clinical Guidance for Management of Patients With Confirmed Coronavirus Disease* (last visited June 21, 2020).

7 Megan L. Ranney, et al., *Critical Supply Shortages – The Need for Ventilators and Personal Protective*

6. In serious cases, individuals' lungs "become filled with inflammatory material [and] are unable to get enough oxygen to the bloodstream."<sup>8</sup> Severe cases of COVID-19 cause acute respiratory distress syndrome in which fluid displaces air in the lungs. Such patients "are essentially drowning in their own blood and fluids because their lungs are so full."<sup>9</sup> The virus frequently causes extreme symptoms, including fever and chills that can last for weeks, excruciating pain, debilitating fatigue, an unremitting cough, uncontrollable diarrhea, and an inability to keep down food and water.<sup>10</sup>

7. People of all ages have contracted COVID and died from it, but the illness for older adults poses special risks for the elderly and those with certain pre-existing medical conditions. According to the CDC's analysis, 80% of all COVID-19 related deaths in the United States are people 65 and older.<sup>11</sup> COVID-19 also poses greater risks for people with pre-existing heart and respiratory conditions, individuals with compromised immune systems, and those with many other

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Equipment during the COVID-19 Pandemic, *New Eng.J.Medicine*, Apr 30, 2020).

<https://www.nejm.org/doi/full/10.1056/NEJMp2006141>; World Health Org., *Shortage of personal protective equipment endangering health workers worldwide* (Mar. 3, 2020), <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide> .

<sup>8</sup> Graham Redfearn, *What happens to people's lungs when they get coronavirus?*, *The Guardian* (Apr. 14, 2020), <https://www.theguardian.com/world/2020/apr/15/what-happens-to-your-lungs-with-coronavirus-covid-19> .

<sup>9</sup> Lizzie Presser, *A Medical Worker Describes Terrifying Lung Failure from COVID-19 – In His Young Patients*, *ProPublica* (Mar.21, 2020), <https://www.propublica.org/article/a-medical-worker-describes--terrifying-lung-failure-from-covid-19-even-in-his-young-patients>.

<sup>10</sup> See, e.g., *Ibid*; Leah Groth, *Is Diarrhea a Symptom of COVID-19?*

<sup>11</sup> Ctrs. For Disease Control and Prevention, *Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited June 23, 2020).

conditions.<sup>12</sup> As of May 30, 2020, among COVID-19 cases, the most common underlying health conditions were cardiovascular disease (32%), diabetes (30%), and *chronic* lung disease (18%).<sup>13</sup> Hospitalizations were six times higher and deaths 12 times higher among those with reported underlying conditions compared with those with none reported.<sup>14</sup>

8. DRA's Counsel is seventy (70) years of age, is a heart patient, and has other serious medical issues which make him at very high risk generally with regard to exposure to the COVID-19. He has been advised by his medical providers that attending the hearing involving hours in a confined space under the health and safety protocols established by the Board, particularly including the failure to mandate mask wearing in the building, would be contrary to their medical advice and put him at an unreasonable health and safety risk. As health officials agree, the average risk for a sustained indoor event poses a risk 20x higher than a similar event outdoors. It is noted that at least one Board member with similar medical conditions is being permitted by the Board to participate remotely so as to not have to attend in person and be subjected to the high risks of infection involved.

9. The effects of the pandemic on public social interaction will last well

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<sup>12</sup> Ctrs. For Disease Control and Prevention, *Groups at Higher Risk of Severe Illness*,

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

<sup>13</sup> Ctrs. For Disease Control and Prevention, *Morbidity & Mortality Weekly Report*, June 19, 2020,

<https://www.cdc.gov/mmwr/volumes/69/wr/mm6924e2.htm>.

<sup>14</sup> *Ibid.*

into the summer of 2020, if not longer. Experts have indicated that seasonal changes are “unlikely to stop transmission.”<sup>15</sup> Dr. Anthony Fauci, head of the National Institute of Allergy and Infectious Diseases, recently reiterated his warning of a second wave of COVID-19 infections. “When people talk about a second wave in the summer, you can’t about a second wave in the summer because we’re still on the first wave.”<sup>16</sup>

10. The COVID-19 pandemic has deeply affected South Dakota. As of July 1, 2020, the State had confirmed 6726 cases.<sup>17</sup> Ninety-three (93) South Dakotans have died from the disease.<sup>18</sup> Of those that were tested, there were Sixty-Two (62) new people who tested positive for the disease since the day before.<sup>19</sup>

11. There has never been a stay-at-home order in South Dakota, nor are there any active stay-at-home orders that apply to all citizens on State land or Tribal areas. The State’s decision to forego a statewide order has been the source of considerable controversy, as was the Governor Kristi Noem’s decision to use state resources to participate in trials of hydroxychloroquine to treat COVID-19.<sup>20</sup>

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15 Marc Lipsitch, Harvard T.H.Chan School of Public Health, Ctr. For Communicable Disease Dynamics, *Seasonality of the SARS-CoV2: Will COVID-19 go away on its own in warmer weather?* <https://ccdd.hsph.harvard.edu/wil-covid-19-go-away-on-its-own-in-wamer-weather/> (last visited June 21, 2020).

16 Ross Krasny, *Don’t Plan on Summer Holidays in the U.S., Fauci Tells the British*,

17 South Dakota Department of Health, *Novel Coronavirus (COVID-19) Updates and Information*, <https://doh.sd.gov/news/coronavirus.aspx#SD> (last visited July 1, 2020).

18 *Ibid.*

19 *Ibid.*

20 Griff White, *South Dakota Governor Resisted Ordering People to Stay Home. Now It Has One of the Nation’s Largest Coronavirus Hot Spots*, Washington Post, <https://www.washingtonpost.com/national/south-dakotas->

12. DRA has indigenous members who, as in the past, would like to attend the public hearing in person. One of the Individual Intervenors, Elizabeth Lone Eagle, is a member of the Cheyenne River Sioux Tribe and resides in a remote area within the Cheyenne River Reservation boundaries.

13. The COVID-19 pandemic has a particularly devastating effect on Native American communities. Non-Hispanic American Indian or Native persons have a COVID-19 hospitalization rate approximately 5.5 times that of non-Hispanic White persons.<sup>21</sup>

14. COVID-19 has put the Cheyenne River Sioux people in dire jeopardy. Remoteness, millions of acres of land, and a historically failed trust has meant and means a lack of adequate infrastructure.

15. Disparities in access to transportation further exacerbate Native Americans' access to healthcare. The Cheyenne River Sioux Tribal government has 1,700 miles of mostly unpaved roads with funds, with grossly insufficient funds to maintain more than some 300 miles of road. During certain times of the year, wet conditions and melting snow make some roads nearly impassable. Compounding the issue, several roads are still closed after the historic flooding in

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[governor-resisted-ordering-people-to-stay-home-now-it-has-one-of-the-nations-largest-coronavirus-hot-spots/2020/04/13/5cff90fe-7daf-11ea-a3ee1ae0a3571\\_story.html](https://www.wy.gov/newsroom/press-releases/governor-resisted-ordering-people-to-stay-home-now-it-has-one-of-the-nations-largest-coronavirus-hot-spots/2020/04/13/5cff90fe-7daf-11ea-a3ee1ae0a3571_story.html) (last visited June 23, 2020).

<sup>21</sup> Ctrs for Disease Control & Prevention, COVID View, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (last visited June 22, 2020).

March 2019 destroyed entire swaths of the road all over the Reservation. In many areas, there is no telephone or internet service. Residents in outlying communities must travel up to ninety (90) miles to reach basic Indian Health Services medical care at the Tribal headquarters in Eagle Butte.

16. Underlying health disparities further render Native Americans particularly vulnerable to COVID-19. Native Americans suffer from disproportionately high rates of diabetes, cancer, heart disease, and asthma, which subject them to a greater risk of fatal complications from COVID-19.

17. The Cheyenne River Sioux Tribes' HIS facility in Eagle Butte has only eight in-patient beds, six ventilators, two negative pressure rooms, inadequate staff, and zero respiratory therapists to care for the Reservations 10,000 resident Tribal members. If more advanced medical intervention is needed for a COVID-19 patient, the patient would be transferred by HIS to an off-Reservation facility, the closest of which is 175 miles (three hours) away.

18. On or about June 20, 2020, DRA filed a Motion for COVID-19 Safety Precautions, seeking various safety precautions including mandatory mask wearing, COVID-19 daily rapid testing protocols, a room with good ventilation at a minimum as recommended by the CDC for persons over 65 and persons with certain medical conditions, at greater risk of not surviving the virus.

19. The Water Rights Staff responded that steps would be taken to comply with CDC guidelines and will sanitize the meeting room after each days's session, will secure wipes participants can use to wipe areas, there would unlikely be tests and healthcare workers to perform COVID-19 tests, that DENR employees will wear masks when social distancing cannot be maintained, that the State does not "require" screening of the public, and that masks will be optional. See, Chief Engineers's Response to DRA's Motion to COVID-19 Protections, dated June 18, 2020.

20. That SD Governor Kristi Noem, by Executive Order 2020-8 requested that people "suspend or modify business practices as recommended by CDC guidance that involve 10 or more people to be in an enclosed space where physical separation of at last 6 feet is not possible.

21. In its following Order, the Pre-Hearing Chairman denied DRA's Motion in its entirety. The Order stated that CDC Guidelines would be followed, except where Executive Order from Governor Noem instructed the contrary or ignoring of safety protocols of mask wearing making them optional, no daily COVID-19 checks except for optional temperature checks and voluntary remaining at home if have symptoms.

22. **"In general, your risk of getting severely ill from COVID-19 increases as you get older. In fact, 8 out of 10 COVID-19-related deaths** reported

in the United States have been among adults aged 65 years and older....”

“As you get older, your risk of being hospitalized for COVID-19 increases. **Everyone, especially older adults and others at increased risk of severe illness, should take steps to protect themselves from getting COVID-19.**” (Bold in original text) (last viewed July 1, 2020)

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

23. “If you are thinking about participating in an event or gathering:

If you are at increased risk for severe illness, consider avoiding high-risk gatherings. The risk of COVID-19 spreading at events and gatherings increases as follows:

**Lowest risk:** Virtual-only activities, events, and gatherings.

**More risk:** Smaller outdoor and in-person gatherings in which individuals from different households remain spaced at least 6 feet apart, wear cloth face coverings, do not share objects, and come from the same local area (e.g., community, town, city, or county).

**Higher risk:** Medium-sized in-person gatherings that are adapted to allow individuals to remain spaced at least 6 feet apart and with attendees coming from outside the local area.

**Highest risk:** Large in-person gatherings where it is difficult for individuals to remain spaced at least 6 feet apart and attendees travel from outside the local area.” (last viewed 7/1/20)

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>

24. According during the morning news on July 1, 2020 advertisement

From the State of South Dakota published on KOTA-TV: “The best way to avoid COVID-19 is to avoid exposure.”

Counsel for DRA therefore seeks authorization from the Board to do that – to avoid exposure. He thereby seeks authorization and the ability to participate on

behalf of DRA in the Hearing remotely, with both audio and video receiving and sending capability.

In the alternative, since no party has expressed any prejudice would be forthcoming, DRA respectfully requests a continuance of at least 60 days with the hopes that at that time either the Board would agree to safety protocols to best protect the public, the parties, and the Board and its staff or the COVID-19 would no longer be a serious threat to elders with/or those special medical conditions which dramatically increase risk of serious medical complications, if not death.

This Motion is further based on DRA's Rights to Due Process including the right to participate fully in these proceedings without the unnecessary health risk posed by the timing of the scheduled hearing amidst the growing pandemic and in the absence of imposition of each and every one of the above minimal required and prudent safety precautions.

Dated this 2<sup>nd</sup> day of July, 2020,

/s/ Bruce Ellison  
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**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of DRA's Motion for DRA Counsel to Appear And Participate Remotely or for Continuance for was served and filed with the Chief Engineer, c/o [eric.gronlund@st.sd.us](mailto:eric.gronlund@st.sd.us) and by U.S. postage paid to Eric Gronlund, Chief Engineer, DENR, 523 E Capitol, Pierre, SD 57501.

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Dated this 2<sup>nd</sup> of July, 2020.

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