UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

ARTHUR DAVID LAROSE, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Civil Action No. 22-1603 (PJS/LIB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Christopher C. Hair
CHRISTOPHER C. HAIR
Trial Attorney
PA Bar # 306656
United States Department of Justice
Natural Resources Section
4 Constitution Square
150 M Street, NE, Suite 3.1004
Washington, D.C. 20002
Telephone (202) 305-0420
christopher.hair@usdoj.gov

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Plaintiff Arthur LaRose's claims, as pled against Federal Defendants, warrant dismissal in full. Plaintiff—a member of the Minnesota Chippewa Tribe ("MCT")—brings this lawsuit against both Federal and Tribal Defendants. Plaintiff challenges a 2022 decision by the MCT's Tribal Election Court of Appeals (not any federal agency). The Tribal court's decision deemed Plaintiff ineligible to seek re-election as the Secretary-Treasurer of the Leech Lake Reservation Business Committee (*i.e.*, a governing body of an MCT constituent band) based on his 1992 felony conviction. Both the MCT's constitution and a nearly-identical provision of MCT's Election Ordinance expressly exclude convicted felons from serving as Tribal officers. As relevant to the claims pled against Federal Defendants, Plaintiff asserts that the MCT's constitutional amendment excluding felons from officer positions "could not have been retroactively applied" by the Tribe "[b]ut for the election waivers granted by the Bureau of Indian Affairs ["BIA"]" in 2005—more than sixteen years before Plaintiff filed suit. Compl. (ECF No. 3) at p. 3. At the request of the Tribe, the BIA granted those election waivers in 2005 to permit absentee voting and other measures to increase voter access. *Id.* The BIA then conducted an election process on behalf of the Tribe known as a "Secretarial election," also in 2005, which the Secretary of the Interior approved in 2006. *Id.*

Plaintiff's complaint brings two Counts, only one of which pertains to Federal Defendants.[1] In Count I, Plaintiff alleges that Federal Defendants' approval of the 2005

[1] In both counts, Plaintiff refers generally to "Defendants" without specifying either the Federal or Tribal Defendants. Because the only federal action at issue in this lawsuit pertains to the 2005 Secretarial election, which is the focus of Count I, that claim pertains

Secretarial election violated the federal Indian Reorganization Act and the MCT constitution because the election failed to reach a Tribal quorum of 30%. *See* Compl. ¶¶ 35-42. In Count II, Plaintiff alleges that Tribal Defendants' retroactive application of the MCT Amendment barring felons violates the federal Indian Civil Rights Act and Fifth Amendment of the U.S. Constitution. *Id.* ¶¶ 43-64. On the basis of his claims, Plaintiff seeks declaratory and injunctive relief to include setting aside the 2005 Secretarial election and "prohibiting any activity in furtherance of the 2022 MCT election for the [Committee's] Secretary-Treasurer including swearing in of the other candidate." *Id.* at p. 24 (Plaintiff's "Requested Relief").

The Court should dismiss Plaintiff's complaint as pled against Federal Defendants for four independent reasons.[2] *First*, Plaintiff lacks standing to bring his claims against the Federal Defendants because his alleged injury—*i.e.*, his exclusion by Tribal Defendants as a candidate for tribal office—does not arise from any conduct of Federal Defendants. *Second*, Plaintiff failed to exhaust his administrative remedies as to his claims. *Third*, Plaintiff's claims against Federal Defendants are time-barred under the applicable six-year statute of limitations. *Fourth*, and finally, even if Count II can be construed to bring a claim against Federal Defendants (a notion we dispute), Plaintiff lacks any cognizable Fifth

to Federal Defendants. On the other hand, Count II relates to the application of the MCT constitution, which is a matter within the sole purview of Tribal Defendants.

[2] Tribal Defendants have separately moved to dismiss Plaintiff's claims against them, *see* ECF No. 27.

Amendment property interest in his elected office. In light of these points, the Court should dismiss Plaintiff's complaint against Federal Defendants with prejudice.

BACKGROUND

I. THE DEPARTMENT OF THE INTERIOR'S 2005 SECRETARIAL ELECTION

The MCT constitutional provision at the heart of Plaintiff's case was added to the Tribe's constitution via a 2005 amendment. Section 16 of the Indian Reorganization Act of 1934 ("IRA") authorizes the Secretary of the Interior to call and conduct elections by which Tribes can ratify and amend constitutions ("Secretarial elections"). 48 Stat. 984 (1934); codified as amended at 25 U.S.C. § 5123. As authorized by the IRA, the Secretary has promulgated regulations setting out the process for Secretarial elections. *See generally* 25 C.F.R. Part 81.

In February 2005, the MCT's Tribal Executive Committee requested the BIA to conduct a Secretarial election for the purpose of amending the Tribe's constitution to add two new provisions: (1) Amendment A, which created a residency requirement for candidates for certain officer positions; and (2) Amendment B, which prohibited persons convicted of a felony or certain lesser crimes from holding office. *See Wadena v. Midwest Reg'l Dir.*, 47 IBIA 21, 22; 2008 WL 2368107 (Apr. 23, 2008); *see also* Pl.'s Ex. P-2 (ECF No. 3-2). The MCT also requested "that to maximize voter participation the Secretary shall take such action as may be necessary to permit registration at the polls on the day of the Secretarial election." *Wadena*, 47 IBIA at 22. On August 8, 2005, the BIA's Midwest Regional Director forwarded the MCT's request to the BIA's Assistant Secretary - Indian

Affairs for action to the extent it requested a waiver of regulations governing the conduct of Secretarial elections. *Id.*; *see* 25 C.F.R. § 1.2 (authorizing the Secretary to "make exceptions to his regulations . . . where permitted by law and [where] the Secretary finds that such waiver or exception is in the best interest of the Indians").

In September 2005, the Acting Principal Deputy Assistant Secretary - Indian Affairs ("PDAS") approved the Tribe's requested waivers from certain provisions in 25 C.F.R. Part 81 (2005). *See Wadena*, 47 IBIA at 23.[3] In particular, the PDAS waived 25 C.F.R. § 81.11, which requires the Election Board to select a date by which voters must register to vote, and approved the Tribe's request to permit registration to occur up to and including the day of the election. *Id.* at 22-23. The PDAS also waived 25 C.F.R. § 81.9 to permit off-reservation polling places in Minneapolis and Duluth, Minnesota, and § 81.12, which requires the posting of an alphabetical list of registered voters 20 days prior to the election. *Id.* at 23. Instead, the PDAS required the posting of the list of tribal members eligible to register to vote and approved absentee voting. *Id.* at 24; *see* Fed. Defs.' Ex. 5 (ECF No. 24-7).

The BIA ultimately conducted the requested Secretarial election in 2005. In so doing, the BIA created a list of 34,153 tribal members eligible to register to vote in the election for posting at the Tribe's offices as well as at the tribal government centers of the six bands comprising the Tribe. *Wadena*, 47 IBIA at 23. The BIA also mailed 27,702

[3] The BIA regulations governing Secretarial election procedures found in 25 C.F.R. Part 81 were revised in 2015. *See* 80 Fed. Reg. 63106 (Oct. 19, 2015).

election packets to eligible voters, each of which contained a sample ballot, voter registration form, absentee ballot request form, and general information concerning the election (*e.g.*, location of polling places, date and time of election, the text of the two proposed constitutional amendments, voting by absentee ballot, and voter eligibility criteria). *Id.* at 23-24. The election notice also informed voters that they "can either register on election day at one of the voting precincts prior to voting or they may register by completing and returning the voter registration form included in this mailing." *Wadena*, 47 IBIA at 24. The BIA also informed voters that they could vote at any of the designated on-reservation polling places or at one of two off-reservation polling places in Duluth and Minneapolis, Minnesota. *Id.*

A total of 6,552 persons registered to vote; 4,986 ballots were cast for Amendment A and 4,989 ballots were cast for Amendment B. *Id.* A total of 1,677 voters voted at the polls while 3,348 voters voted by absentee ballot for a total of 5,025 ballots cast. *Id.* Of these ballots, 36 ballots were not counted because they were either spoiled or unsigned. *Id.* The Secretarial election was held and certified by the Secretarial Election Board in November 2005. *See* Declaration of James Redman (ECF No. 24-2) ¶ 13. Based on the election results, MCT's amendment to its constitution was approved by the Secretary of the Interior (via a delegated official) in January 2006. Compl. ¶ 20.

Specifically, the 2005 Secretarial election explained above resulted in an amendment to the MCT constitution to include the following provision:

> No member of the Tribe shall be eligible to hold office, either as a Committeeman or Officer, if he or she has ever been convicted of a felony

> of any kind; or of a lesser crime involving theft, misappropriation, or embezzlement of money, funds, assets, or property of an Indian tribe or a tribal organization.

Compl. at p. 4; *id.* ¶ 16. Further, after amending its constitution, the Tribe amended its Election Ordinance—which did not require BIA approval—to state that no Tribal member "shall be eligible as a candidate or be able to hold office if he or she has ever been convicted of any felony of any kind." *See* Pl.'s Ex. 5 (ECF No. 3-1 at p. 53) (citing Election Ordinance, Section 1.3(D)(2)(c)); *see also* Pl.'s Ex. 3 (ECF No. 3-3 at p. 66-98, 77) (MCT Election Ordinance § 1.3(D)(3), as amended Dec. 14, 2021).

II. ADMINISTRATIVE CHALLENGES TO THE 2005 SECRETARIAL ELECTION

Shortly after the 2005 Secretarial election, three MCT tribal members—but not the Plaintiff here[4]—raised several administrative challenges to the 2005 Secretarial election. *See* Compl. ¶ 18. Among other things, those members argued that the election was invalid because both tribal and Federal law require participation by 30% of the tribal members entitled to vote, and that all adult tribal members "entitled to vote" under the Tribe's constitution *Wadena*, 47 IBIA at 25-26. Thus, according to the members, since less than 30% of the tribal members who were eligible to vote under the Tribe's constitution actually voted, the election was invalid. *Id.* In response, the BIA's Regional Director explained

[4] Federal Defendants note that one of the challengers, Frank Bibeau, represents Plaintiff as counsel in this matter. Mr. Bibeau was also Plaintiff's attorney in the 2005 election challenge. *See* Redman Decl., Ex. 10 (ECF No. 24-12) ("Most assuredly neither LaRose's nor his attorney Frank Bibeau's comments pertaining to the Secretarial election have any reflection on the Leech Lake Tribal Council's official position regarding the election.").

that, under the Part 81 regulations that govern Secretarial elections, the calculation is based on the number of eligible Tribal members who register to vote in the election, not on how many Tribal members are eligible to vote. *Id.* Thus, as explained by the BIA, 76% of those entitled to vote participated in the 2005 Secretarial election. *Id.* The Interior Board of Indian Appeals ("IBIA") agreed with the BIA and rejected the administrative challenges to the 2005 Secretarial election. *Id.* at 33; Compl. ¶ 19. None of the *Wadena* appellants sought judicial review of the IBIA's decision upholding the BIA's approval of the 2005 Secretarial Election.

III. PLAINTIFF'S LAWSUIT

On June 19, 2022, Plaintiff filed the instant lawsuit, *see* ECF No. 1. Plaintiff's Complaint alleges that he is the Secretary-Treasurer for the Leech Lake Reservation Committee, which is one of six constituent bands of the MCT. Compl. (ECF No. 3) at p.1; *id.* ¶ 8. Plaintiff alleges that he has held either that position or the Chairman position for the past 18 years. *Id.* at p.1. However, Plaintiff claims that, in 2022, the MCT's Tribal Election Court of Appeals deemed him ineligible for reelection under both the Tribe's constitution and the Minnesota Chippewa Election Ordinance. *Id.*

Plaintiff alleges that, long after the 2005 Secretarial election, the MCT passed "[d]ue process revisions in the MCT Election Ordinance in 2019 and 2021" that "enabled candidates for the same seat to challenge the certification of other candidates," which resulted in Plaintiff's eventual disqualification for re-election to his office. *Id.* ¶ 26. According to Plaintiff, "[b]ut for the election waivers granted by [BIA] for conducting the 2005 Secretarial election for the MCT, and the . . . [constitutional] amendment . . . could

not have been retroactively applied to Plaintiff by Defendants MCT and MCT Tribal Election Court of Appeals." *Id.* at p. 3; ¶ 44.

Plaintiff's Complaint contains two counts. In Count I, *see* Compl. ¶¶ 35-42, Plaintiff makes the same argument the IBIA rejected in the *Wadena* administrative appeal. Plaintiff claims that Federal Defendants' certification of the 2005 Secretarial election violated the IRA and MCT constitution because that election failed the requirement of a Tribal quorum of 30% of those entitled to vote.[5] In Count II, *see id.* ¶¶ 42-64, Plaintiff claims that the Tribal Defendants' retroactive application of the MCT constitutional amendment to Plaintiff's felony conviction violates the Indian Civil Rights Act and entitles him to *habeas* relief.

On the basis of his claims, Plaintiff seeks declaratory and injunctive relief. In addition to declaratory relief that Defendants have violated the IRA, Indian Civil Rights Act, and U.S. Constitution, Plaintiff seeks an order to "[d]ecertify the 2005 Secretarial Election and withdraw the 2006 Secretary approval, and order the BIA to discontinue its misapplication of the Indian Reorganization Act in order to preclude this ongoing problem from recurring for the MCT Elections and tribal citizens." Compl. ¶ 63. Plaintiff also requests the Court to "cancel the . . . Secretary-Treasurer election and vacate the Decision & Order by the MCT Tribal Election Court of Appeals disqualifying Plaintiff as a certified

[5] As noted above, both counts are pled against "Defendants" generally; however, the only claim related to the 2005 Secretarial election (*i.e.*, the only federal action at issue in this litigation) is Count I.

candidate" and "restart the . . . Secretary-Treasurer election with Plaintiff LaRose named on the ballot." *Id.* ¶ 64.

IV. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

On June 27, 2022, Plaintiff filed an "emergency motion" for a preliminary injunction to "enjoin[] the defendants Minnesota Chippewa Tribe from proceeding with the present 2022 [MCT] Tribal Election process" and to "decertif[y]" the BIA's 2005 Secretarial election. *See* ECF No. 10 at 1-2. He also seeks habeas relief in the form of being "included on the 2022 MCT ballot for re-election" as Secretary-Treasurer. *See* Pl.'s Proposed Order (ECF No. 17) at 15. Both Federal Defendants and Tribal Defendants opposed Plaintiff's motion, *see* ECF Nos. 33 & 34, which is now fully briefed and pending before the Court.

LEGAL STANDARDS

The purpose of a motion to dismiss is to test "the sufficiency of a complaint[.]" *M.M. Silta, Inc. v. Cleveland Cliffs, Inc.*, 616 F.3d 872, 876 (8th Cir. 2010).

Rule 12(b)(1) provides that a complaint may be dismissed for lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1) & 12(h)(3). In ruling on a motion to dismiss for lack of subject-matter jurisdiction, a court is free to weigh the evidence—including evidence outside of the complaint—in order to decide whether that evidence establishes that the court has jurisdiction. *See Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

In reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court must accept as true all factual allegations in the complaint and draw all reasonable

inferences in favor of the non-moving party. *Aten v. Scottsdale Ins. Co.*, 511 F.3d 818, 820 (8th Cir. 2008); *see* Fed. R. Civ. P. 12(b)(6). The allegations must be sufficient to "raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). In assessing the plausibility of a claim, the court need not accept as true any allegation that is merely "conclusory." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). In ruling on a motion to dismiss under Rule 12(b)(6), the Court may consider documents necessarily embraced by the amended complaint and matters of public record without converting the motion into one for summary judgment. *See Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO BRING HIS CLAIMS AGAINST FEDERAL DEFENDANTS

As an initial matter, Plaintiff lacks Article III standing for any claim against Federal Defendants. If a litigant lacks standing to bring his claims, then the court lacks subject matter jurisdiction over the suit. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012). "To show standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury." *Young Am. Corp. v. Affiliated Computer Servs., Inc.*, 424 F.3d 840, 843 (8th Cir. 2005) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiff bears the burden of establishing standing and must support each element

"with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at *Id.* at 561.

Here, Plaintiff's alleged injury involves his ineligibility to serve as the Secretary-Treasurer for the Leech Lake Reservation Business Committee. *See* Compl. at p. 9 (alleging "personal and economic injuries" based on Plaintiff's inability "to continue to hold elective office"). But that injury, in and of itself, is insufficient to confer standing for claims against Federal Defendants as it is due to the independent actions of the Tribe and is not caused by any conduct by the Federal Defendants. Indeed, to establish the causation element of standing, an injury must be "fairly traceable" to a defendant's conduct and not the result of "the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (internal citation omitted). Here, it is the Tribe (not the BIA or any other federal agency) that rules on challenges to candidate eligibility.

While the BIA granted election waivers—as requested by the MCT—to expand MCT tribal members' access to voting in the 2005 Secretarial election (which Plaintiff does not appear to take issue with), the BIA did not exclude Plaintiff from holding or seeking tribal office. To be sure, Plaintiff alleges that waivers were used to "circumvent the MCT Const., Art. XIII requirement for at least 30% of eligible MCT voters' participation[.]" Compl. ¶ 39. However, Plaintiff does not point to any BIA action to waive the requirement for a 30% threshold. Nor can he point to any because, as noted above, the BIA's waivers pertained only to absentee voting, same-day registration, and additional off-reservation polling places—all of which were intended to *increase*

participation by eligible voters. And, even if the BIA had issued a waiver of the 30% threshold (it did not), that waiver would have applied to the Secretarial election, not any decision by MCT regarding Plaintiff's eligibility. To the extent Plaintiff is arguing that the Secretarial election was a step in the causal chain of his disqualification, Plaintiff still fails to satisfy the traceability element of standing because the alleged injury here is based on "mere speculation about the decisions of third parties" like MCT and not any "predictable effect of Government action on the decisions" on MCT. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019).

Notably, Plaintiff concedes the Secretarial election did not automatically work to exclude him from holding elected office. *See* Compl. at p. 9 (alleging that both Plaintiff and the Leech Lake Reservation Business Committee "relied in good faith" on a 2006 decision that changed the definition of what constitutes a felony for purposes of certification of tribal office candidates). Indeed, Plaintiff asserts that he was "certified and reelected several times over the past 18 years," *id.* ¶ 25—the majority of which occurred *after* the 2005 Secretarial election.[6] It was not until "[d]ue process revisions in the MCT Election Ordinance in 2019 and 2021" that allegedly "enabled candidates for the same seat to challenge the certification of other candidates" that a series of actions—none of which are alleged to have been taken by Federal Defendants—resulted in Plaintiff's disqualification from eligibility for re-election to his office. *Id.* ¶ 26. But the only *federal*

[6] On at least one of those occasions, Plaintiff cast the tie-breaking vote in favor of his own certification. *See* Pl.'s Ex. 1 (ECF No. 3-1) at p. 55, ¶ 13.

action at issue involves the BIA's 2005 Secretarial election. That election involved proposed amendments to the MCT constitution—not MCT's election ordinances, which remain outside of the purview of the BIA's assistance to the Tribe. *See* Redman Decl. ¶ 21.[7] Thus, Plaintiff's alleged injury based on recent changes to MCT's Election Ordinance is not fairly traceable to Federal Defendants' conduct.

For similar reasons, Plaintiff flunks the third requirement of standing—*i.e.*, redressability. That element requires a plaintiff to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotations and citation omitted); *see Advantage Media, L.L.C. v. Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006). In assessing redressability, the court must "consider the relationship between the judicial relief requested and the injury suffered." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021).

In this case, after amending its constitution, the Tribe also amended its Election Ordinance—which did not require BIA approval—to state that no Tribal member "shall be eligible as a candidate or be able to hold office if he or she has ever been convicted of any felony of any kind." *See* Pl.'s Ex. 5 (ECF No. 3-1 at p. 53) (citing Election Ordinance, Section 1.3(D)(2)(c)); Pl.'s Ex. 3 (ECF No. 3-3 at pp. 66-98, 77) (MCT Election Ordinance § 1.3(D)(3). Nowhere in Plaintiff's two counts does he challenge this Election Ordinance,

[7] As noted, the Court may consider evidence beyond the Complaint in evaluating Plaintiff's standing and the Court's jurisdiction to hear this case. *See Osborn*, 918 F.2d at 730.

which the MCT Election Court of Appeals found to be an independent basis from the MCT constitution to exclude Plaintiff from holding tribal office.[8] Rather, Plaintiff repeatedly alleges that the MCT's Tribal Election Court of Appeals' February 16, 2022, Decision and Order violates the MCT Election Ordinance. *See, e.g.*, Compl. ¶¶ 54-56. Moreover, the BIA has no role in approving changes to the MCT Election Ordinance, including the 2019 and 2021 amendments that allegedly harmed Plaintiff. *See* Redman Decl. ¶ 21; Compl. ¶ 26. Thus, Plaintiff can only speculate that a favorable decision regarding the 2005 Secretarial election will redress his alleged harms. Plaintiff fails to establish that the Tribe will not continue to bar him from office based on the MCT Election Ordinance even if the Court ruled in his favor on his challenge to the 2005 MCT constitutional amendment. Accordingly, because Plaintiff would presumably remain excluded from holding office by the MCT's Election Ordinance (which is not challenged here and, in any event, has no associated federal approval), Plaintiff has failed to establish the redressability prong of standing for his claims against Federal Defendants. *See Harp Advertising Ill., Inc. v. Vill. of Chicago Ridge, Ill.*, 9 F.3d 1290, 1292 (7th Cir. 1993) (no standing to challenge sign code's ban on off premises signs where proposed sign also violated unchallenged zoning restrictions).

[8] *See* Decision & Order (Feb. 16, 2022), Pl's Ex. 4 (ECF No. 3-1 at pp. 30-32). Plaintiff's pleadings make no effort to explain the relationship between the MCT constitutional amendment excluding felons from tribal office and the similar provision in the MCT Election Ordinance. That distinction is of no moment as the BIA has no role in approving amendments to the MCT Election Ordinance, per the MCT constitution. *See* Redman Decl. ¶ 21.

II. PLAINTIFF FAILS TO STATE A CLAIM REGARDING THE 2005 SECRETARIAL ELECTION

Even if Plaintiff had standing to bring his claims against Federal Defendants (which he does not), Plaintiff otherwise fails to state a claim under the IRA—or any other statute—related to the 2005 Secretarial election. Specifically, Plaintiff failed to exhaust his administrative remedies by seeking relief from the BIA under the straightforward process outlined in the IRA and Interior's regulations for challenging Secretarial elections. Further, Plaintiff's claims are considerably untimely. As discussed in Federal Defendants' opposition to Plaintiff's motion for a preliminary injunction, the only valid waiver of sovereign immunity for Plaintiff's claim for equitable relief against Federal Defendant falls under the Administrative Procedure Act ("APA"), *see* Fed. Defs.' Opp'n to Mot. for Prelim. Inj. (ECF No. 24) at 14-15, and such lawsuits must be timely filed within 6 years of final agency action. Yet Plaintiff filed his suit 16 years after the Secretarial election challenged here.

A. Plaintiff Failed to Exhaust His Administrative Remedies

First, Plaintiff failed to exhaust his administrative remedies with the BIA prior to filing his lawsuit as required. The procedures for calling, approving, and challenging an election to amend a tribal constitution are codified at 25 U.S.C. § 5123 and are "relatively straightforward." *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999). Once a tribe requests the Secretary to hold an election to ratify proposed constitutional amendments, the Secretary reviews the legality of the proposed amendments and calls an election within 90 days. 25 U.S.C. § 5123(c)(1)(B). However, the election results are not

binding until the Secretary approves them, and any qualified voter may contest the results to the Secretary within 5 days of the election. 25 C.F.R. § 81.43 (providing that "[t]he written challenge, with substantiating evidence, must be received by the Chairman of the Secretarial Election Board within 5 days after the Certificate of Results of Election is posted[.]"). Any challenges received by the Secretary after the deadline "will not be considered." *Id.* The Secretary then has 45 days to resolve these election contests, conduct an independent review, and approve or disapprove the election. 25 U.S.C. § 5123(d)(1).[9]

Here, Plaintiff's administrative remedy was to file an administrative challenge to the 2005 Secretarial election and he filed nothing of the sort. Instead, he alleges that he "exhausted his administrative and judicial remedies that may have existed *within the MCT*[.]" Compl. ¶ 34 (emphasis added). Federal Defendants are unaware of any administrative challenge brought by Plaintiff (and he alleges none) before the BIA with respect to the 2005 Secretarial election, much less any challenge within the strict timeframes contemplated under the IRA and Interior's regulations. Notably, at the time of the 2005 Secretarial election, Interior's regulations required challenges to be submitted within 3 days following the posting of the results of an election, *see* 25 C.F.R. § 81.22 (2005), not 5 days as currently required. As Plaintiff acknowledges, other qualified voters

[9] Federal Defendants note that the IRA permits judicial review for any "[a]ctions to enforce the provisions" in § 5123. 25 U.S.C. § 5123(d)(2). Here, the Secretary's approval of the 2005 election was consistent with the provisions and timeframes in § 5123 and Plaintiff does not allege otherwise. Thus, § 5123(d)(2) is inapplicable to this matter.

(including his counsel) challenged the 2005 Secretarial election under these provisions. Compl. ¶ 31. Plaintiff, on the other hand, did not.

Plaintiff's inaction before the BIA dooms his claim in light of the "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Until a plaintiff has pursued available administrative relief, his or her claim "is premature and must be dismissed." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993); *see Cornish v. Blakey*, 336 F.3d 749, 753 (8th Cir. 2003) ("Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145, (1992))). The rule requiring exhaustion of administrative remedies "is not a rule to be applied woodenly," *West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979), but it may be "relaxed only under extremely exceptional and unusual circumstances," *Glover v. United States*, 286 F.2d 84, 90 (8th Cir. 1961).

As discussed, Plaintiff failed to avail himself of the administrative process prescribed by the IRA and Interior's regulations. Further, Plaintiff's Complaint is devoid of any reason—much less an "exceptional" or "unusual" one—to excuse his inaction and permit judicial review without first having timely provided the agency the opportunity to consider and potentially remedy any alleged wrong. Notably, other courts, including the Eighth Circuit, have declined to review BIA decisions where there was failure to exhaust administrative remedies. *See, e.g., Blackbear v. Norton*, 93 Fed. App'x. 192, 193 (10th

Cir. 2004) ("Neither those plaintiffs whose appeal to the IBIA is pending nor those who chose not to appeal can point to a final agency action upon which to base their [APA] claim."); *Klaudt v. U.S. Dep't of Interior*, 990 F.2d 409, 411-12 (8th Cir. 1993) ("The federal regulations provide that administrative procedures must be followed before seeking relief in the court system.").

For the foregoing reasons, Plaintiff's claim against Federal Defendants is subject to dismissal for failure to exhaust administrative remedies.

B. Plaintiff's Claims Are Barred by the Six-Year Statute of Limitations Governing APA Claims

Second, even if Plaintiff has exhausted his administrative remedies (which he has not), Plaintiff's claim against Federal Defendants is untimely. Indeed, Plaintiff brings his claims *more than 16 years* after the Secretarial election in 2005. But civil actions against the United States must be filed "within six years after the right of action first accrues." 28 U.S.C. § 2401(a). For purposes of § 2401(a), a claim accrues "when the plaintiff either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim." *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 759 (8th Cir. 2009) (quotations omitted). While the Eighth Circuit has declined to rule on whether the six-year time bar set out in 28 U.S.C. 2401(a) is "jurisdictional," and thus not amenable to equitable tolling, that issue is not relevant. Even if 2401(a) is not jurisdictional, Plaintiff still faces a steep hurdle to establish that the statute of limitations should be equitably tolled, and Plaintiff's Complaint provides no basis for tolling. *See*

Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Corps of Eng'rs, 888 F.3d 906, 917-8 (8th Cir. 2018).

Here, the BIA conducted the Secretarial election in 2005, the Secretary approved the election results in 2006, and the administrative challenge to that election (*i.e.*, *Wadena*) became final in 2008. Plaintiff, who was serving as a Tribal officer at the time and had a felony conviction from 1992, knew or should have known at the time of the Secretarial election that his ability to continue to serve as a tribal officer was imperiled. Thus, Plaintiff should have brought suit within six years of the election results, at the very least, by 2014, *i.e.*, six years after the IBIA upheld the results of the 2005 Secretarial election in *Wadena*. Plaintiff attempts to excuse his inaction because—in his view—his claims were not previously ripe before 2022, when he "was without an injury-in-fact to claim or seek redress" regarding the 2005 Secretarial election. *See* Compl. at p. 8. But that ignores that there has been no additional relevant action by Federal Defendants since 2006. With respect to the Federal Defendants, there was nothing to further ripen.

There is no dispute that the federal agency action challenged here was fully completed long ago with the Secretary's approval of the 2005 Secretarial election. The *application* of the resulting amendments to the MCT constitution are the sole purview of the Tribal, not Federal, Defendants. And, as noted above, Congress put in place strict timeframes in the IRA for the Secretary to call an election and a mandatory duty to approve proposals within 45 days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws. *See* 25 U.S.C.

§§ 5123(c) & (d). And Plaintiff was presumably an eligible voter in 2005 since he alleges he is "enrolled member of the Minnesota Chippewa at Leech Lake Reservation[,]" *see* Compl. at ¶ 8, and was certified as a candidate and duly elected prior to the 2005 Secretarial election, *id.* at p. 2.

Further, there is little doubt that Plaintiff was aware of judicial and administrative proceedings potentially impacting his ability to hold tribal office as they are described in his Complaint. *See* Compl. ¶¶ 19, 23. For starters, Plaintiff attaches to his complaint a 2006 MCT Tribal Court ruling that addressed whether, under Minnesota law, he was properly deemed as a convicted felon. *See* Pl.'s Ex. P-3 (ECF No. 3-3 at 136-46) (*Gotchie v. Goggleye*, CV-06-07); *id.* at 137, n.2 ("Although LaRose is not a party to this action, the Court notes that the decision in this matter would apply to LaRose in the same manner as Goggleye, as LaRose's conviction was also deemed to be for a misdemeanor pursuant to Minn. Stat. 609.13."). Moreover, Plaintiff's counsel, who directly challenged the 2005 Secretarial election in the *Wadena* litigation, was also Plaintiff's attorney in 2005 at the time of the election challenge. *See* Redman Decl., Ex. 10 (ECF No. 24-12) at 3. And there is no merit to Plaintiff's position that he needed to wait until the MCT enforced its constitutional amendment before he could bring his claims against Federal Defendants. Indeed, the IBIA addressed the merits of the 30% vote threshold in the administrative challenge filed by other MCT members (though concluding that they lacked standing to bring other claims challenging the MCT's request to the BIA to conduct the Secretarial election in the first place). *See Wadena*, 47 IBIA at 26. Thus, based on Plaintiff's

unwarranted 16-year wait to bring his claims against the BIA, his claims are barred by the relevant statute of limitations.[10]

In sum, Plaintiff knew or should have known that as a qualified voter he could challenge the results of the 2005 Secretarial election at that time. Yet he chose to wait over 16 years to do so, demonstrating his lack of diligence in this matter. *See United States v. Mendez*, 860 F.3d 1147, 1150 (8th Cir. 2017) ("The statute starts to run when the movant knew, or in the exercise of reasonable diligence should have known, that he had a claim." (citing *Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997)). Indeed, Plaintiff provides no allegations that he diligently pursued his rights against the Secretarial approval in 2006, nor does he claim that he was denied the opportunity to appeal the election or that he even made an effort to appeal the results to the BIA at any point since the 2005 election. Thus, Plaintiff's claims are untimely and the Court should dismiss them.

C. Plaintiff Fails To State Any Claim Under the U.S. Constitution

Finally, because Count II of Plaintiff's Complaint does not implicate any action by Federal Defendants, the Court need not consider it as part of this motion. As noted above, Count II pertains to MCT's alleged "retroactive application" of the MCT constitutional amendment to Plaintiff's pursuit of Tribal office. That does not implicate any action or

[10] Federal Defendants' untimeliness arguments would apply with equal force to the extent Plaintiff would assert a facial challenge to Interior's regulations defining a tribal member's "entitlement" to vote, which were originally adopted in 1967. *See* Tribes Organized by Section 16 of Indian Reorganization Act & Other Organized Tribes, 32 Fed. Reg. 11779 (August 16, 1967). The Court need not tarry long with this point as Plaintiff's complaint, even liberally construed, contains no such facial challenge.

decision by the Secretary or the BIA. Indeed, the gravamen of Plaintiff's due process claim is that the *MCT Defendants*—not Federal Defendants—retroactivity applied the MCT constitutional amendment to violate "Plaintiff's rights without due process of law." Pl.'s Prelim. Inj. Mem. (ECF No. 16) at 6; *see id.* at 20 ("Plaintiff is being deprived of his various civil rights (due process, property, etc.) . . . because the MCT Election Court . . . will not recognize and address the ex post facto defenses and protections of Article XIII"); Compl. ¶ 57. Accordingly, Plaintiff does not appear to allege that the 2005 Secretarial election violated any of his constitutional rights.

Even if Plaintiff had pled a due process claim against Federal Defendants (which we dispute), it would be meritless. To prevail on any such claim, Plaintiff must establish (1) that defendants deprived him of a property interest protected by the Fourteenth Amendment and (2) that he was deprived of that property interest without adequate process. *Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 902 (8th Cir. 2000). "To have a constitutionally cognizable property interest in a right or benefit, a person must have 'a legitimate claim of entitlement to it.'" *Austell v. Sprenger*, 690 F.3d 929, 935 (8th Cir. 2012) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Only if that threshold question is answered in the affirmative, do we then inquire as to whether the procedures attendant to that deprivation were constitutionally sufficient. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citation omitted).

Here, Plaintiff lacks any protected property interest in any elected tribal office. "A protected property interest [] is 'a legitimate claim of entitlement as opposed to a mere

subjective expectancy.'" *Bituminous Materials, Inc. v. Rice Cnty., Minn.*, 126 F.3d 1068, 1070 (8th Cir. 1997) (quoting *Batra v. Bd. of Regents of the Univ. of Nebraska*, 79 F.3d 717, 720 (8th Cir. 1996)). "A person must have a legitimate claim of entitlement to his or her employment to have a property interest in it." *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir. 1994) (citation omitted). More to the point, "[t]here is no constitutional right to be elected to a particular office," *Parks v. City of Horseshoe Bend, Ark.*, 480 F.3d 837, 840 (8th Cir. 2007). Indeed, in *Taylor v. Beckham*, 178 U.S. 548, 576-77 (1900), the Supreme Court noted that "[t]he view that public office is not property has been generally entertained in this country[,]" and the fact that a statute or legislation may forbid the legislature from abolishing a public office, or reducing its salary, does not make such a position property. *See also Snowden v. Hughes*, 321 U.S. 1, 7 (1944) ("an unlawful denial by state action of a right to state political office is not a denial of a right of property or liberty secured by the due process clause"); *Velez v. Levy*, 401 F.3d 75, 85-87 (2d Cir. 2005) (citing cases); *Sherer v. Carlson*, 141 F.3d 1179 (9th Cir. 1998).

In sum, because Plaintiff lacks a property interest in his Tribal elected office, Plaintiff's due process claim—to the extent he would argue applies to Federal Defendants—fails.

CONCLUSION

For the foregoing reasons, Plaintiff lacks standing to bring his claims against the Federal Defendants. Moreover, Plaintiff fails to state a claim against Federal Defendants because he failed to exhaust his administrative remedies as to his claims, which are otherwise time-barred under the applicable six-year statute of limitations. Finally, Plaintiff

lacks any cognizable Fifth Amendment property interest in his elected office. In light of these points, the Court should dismiss Plaintiff's complaint against Federal Defendants with prejudice.

Dated: September 28, 2022
Washington, DC

Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Christopher C. Hair
CHRISTOPHER C. HAIR, Trial Attorney
PA Bar # 306656
United States Department of Justice
Natural Resources Section
4 Constitution Square
150 M Street, NE, Suite 3.1004
Washington, D.C. 20002
Telephone (202) 305-0420
christopher.hair@usdoj.gov