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)

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR 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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INTRODUCTION

Plaintiff's lawsuit challenges two federal actions: (1) election waivers granted by the Bureau of Indian Affairs ("BIA") in 2005 with respect to a Secretarial Election to amend the Minnesota Chippewa Tribe's ("MCT") constitution; and (2) the Secretary of the Interior's 2006 approval of the results of that Secretarial Election. At the culmination of those actions, the MCT amended its constitution to, among other things, prohibit individuals who had "ever been convicted of a felony of any kind"—like Plaintiff Arthur LaRose—from holding tribal office. Compl. (ECF No. 3) at p. 4; *id.* ¶ 16. As established in Federal Defendants' motion to dismiss (ECF No. 34), Plaintiff lacks standing to bring his otherwise unexhausted and untimely challenges based on any federal action. Moreover, Plaintiff's challenges pertain to, at least in part, a non-existent property interest—*i.e.*, the ability to run for reelection to the tribal office that he no longer holds.

Plaintiff's opposition (ECF No. 37) fails to establish his standing to bring this lawsuit against Federal Defendants. That is, Plaintiff fails to show that his alleged harm (*i.e.*, his ineligibility to run for tribal office) was caused by the aforementioned federal actions. Also, Plaintiff merely speculates that a favorable ruling would redress his alleged harm because the MCT's Election Ordinance (which also renders felons ineligible for tribal office) independently nullifies his candidacy. Plaintiff further fails to meaningfully address the other independent grounds for dismissal discussed in Federal Defendants' motion—*i.e.*, both his failure to administratively exhaust his claims and the untimeliness of his claims brought more than 16 years after the 2005 Secretarial Election. And Plaintiff's

belated and unsupported assertion that Federal Defendants' conduct was *ultra vires* fails because the BIA and Secretary's actions were duly authorized under the Indian Reorganization Act and Interior's implementing regulations. Finally, Plaintiff fails to address Federal Defendants' cited authority that Plaintiff lacks a constitutional property interest in his reelection to tribal office. Accordingly, the Court should dismiss Plaintiff's complaint against Federal Defendants with prejudice. [1]

ARGUMENT

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

First, Plaintiff fails to establish standing because his ineligibility to run for tribal office was not caused by any federal action. Plaintiff seems to admit as much when he acknowledges that "[i]n the past several election cycles, Plaintiff has consistently been certified as a candidate . . . *under the 2006* [MCT] *Amendment*[.]" Opp'n at 12 (emphasis added). Indeed, Plaintiff states that he "has relied upon decided tribal court law and tribal enacted law on Leech Lake Reservation in 2006" as a candidate until "in 2022, it was ignored by the MCT Tribal Court of Election Appeals." *Id.* at 28. Thus, Plaintiff's opposition makes plain that his alleged injury was caused by the independent actions of the MCT in its alleged retroactive *application* of the MCT constitutional amendment in 2022.

[1] Plaintiff also brings claims against several Minnesota Chippewa Tribe ("MCT") defendants (*i.e.*, the "Tribal Defendants"), which have separately moved to dismiss (ECF No. 34).

Where, as here, a plaintiff's alleged injuries arise from the independent actions of a third party—in this case, a sovereign Indian tribe—"standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). Plaintiff bears the burden of plausibly showing that the choice of a third party "have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Plaintiff has not met his burden here.

As discussed above, Plaintiff's opposition asserts that the Tribal Defendants unlawfully applied the MCT constitutional amendment to him. *See, e.g.*, Opp'n at 12 (asserting that the "MCT Defendant's applying the 2006 Amendment to Plaintiff's 1992 conviction violates the traditional presumption against retroactivity and Plaintiff's rights without due process of law."); *id.* at 19 (arguing that the MCT never "intended . . . to make the 2006 Amendment applicable to all convictions, including those [like Plaintiffs] entered prior to its enactment"). Plaintiff claims that the MCT's action was erroneous because, in his view, he "was never convicted of a felony." *Id.* at 26. But Federal Defendants had no role in the MCT's interpretation or application of its constitution in this case, which was the role of the tribal courts. Moreover, Plaintiff's complaint is devoid of any well-pled factual matter to suggest any involvement by the federal government in the certification of Plaintiff's candidacy for tribal office. Thus, Plaintiff's alleged injury is not fairly traceable to the Secretary's approval many years ago of the results of the 2005 Secretarial Election.

In an attempt to salvage his standing, Plaintiff asserts that the BIA's granted requested election waivers to "circumvent" the 30% voter quorum in the MCT constitution. Opp'n at 5. Not so. In fact, the BIA's election waivers *expanded* MCT tribal members' access to voting in the 2005 Secretarial Election. *See* Redman Decl. (ECF No. 24-2) ¶ 10 (listing waivers).[2] Plaintiff does not allege that the BIA somehow waived the 30% voting threshold; instead, he baldly asserts that the waivers served as a "voting obstacle[.]" Opp'n at 8. As noted in Federal Defendants' motion, Interior's regulations defining a tribal member's "entitlement" to vote were originally adopted in 1967. *See* Fed. Defs.' Mot. at 21, n.10 (citing Tribes Organized by Section 16 of Indian Reorganization Act & Other Organized Tribes, 32 Fed. Reg. 11,779 (August 16, 1967). And the BIA's waivers relevant to this case had nothing to do with that entitlement. In any event, the Court need not accept as true Plaintiff's conclusory arguments and allegations of an abstract "obstacle," *see Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). Moreover, Plaintiff fails to respond to Federal Defendants' discussion of how the BIA's waivers worked to expand voting access in this case, not limit it, *see* Fed. Defs.' Mot. at 11, and therefore has waived the issue. *See Rivera v. Bank of America, N.A.*, 993 F.3d 1046, 1051 (8th Cir. 2021) ("Because [plaintiff] did not raise [an] argument before the district court in opposition to [defendant's] motion to dismiss, we consider it waived."). Accordingly, Plaintiff's fails to satisfy the traceability requirement of standing.

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[2] The Court may consider evidence outside of the complaint in ruling on whether it has subject-matter jurisdiction here. *See Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

Plaintiff also fails to show that his alleged injury is redressable here. After amending its constitution, the MCT 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 opposition does he address this Election Ordinance, except to allege that the Ordinance "implement[s]" the MCT constitutional amendment. Opp'n at 28. But Plaintiff does not dispute the MCT's authority to amend its Election Ordinance separately from its constitution. More to the point, Plaintiff fails to dispute (and therefore waives) that the Election Ordinance independently excludes him from holding tribal office, notwithstanding the MCT constitution. Further Plaintiff fails to dispute that the BIA has no role in approving changes to MCT election laws. *See* Redman Decl. ¶ 21; Compl. ¶ 26. Accordingly, Plaintiff can only speculate that a favorable decision regarding the 2005 Secretarial Election will redress his alleged harms where he would still be barred from tribal office based on the MCT Election Ordinance alone. That is insufficient to establish standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) (the mere "unadorned speculation" as to the existence of a relationship between the challenged government action and the third-party conduct "will not suffice to invoke the federal judicial power").

Plaintiff's reliance on the D.C. Circuit's decision in *Hudson v. Haaland* to establish standing is inapposite. *See* Opp'n at 22 (citing 843 F. App'x 336 (D.C. Cir. 2021)). In *Hudson*, the D.C. Circuit concluded that the plaintiff lacked any cognizable injury-in-fact because he was neither a tribal officer nor affected by the rules providing for a recall of such officers for potential discharge after a felony conviction. *Id.* at 22-23. Here, Federal Defendants do not dispute that Plaintiff has been injured by the MCT's ruling that he is ineligible for tribal office. And, in any event, the existence of an injury-in-fact, standing alone, is insufficient to establish standing. *See Young Am. Corp. v. Affiliated Computer Servs., Inc.*, 424 F.3d 840, 843 (8th Cir. 2005) (standing requires an "(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" (citation omitted)).

Finally, Plaintiff spills a lot of ink over the Constitution's ex post facto clause. *See* Opp'n at 12-22. But Plaintiff points to no federal action with any retroactive effect. As discussed, the Secretary approved the results of the Secretarial Election in 2006. Again, Plaintiff admits he has been "consistently" certified as a candidate for tribal office since the 2005 Secretarial Election. *See id.* at 12. Thus, Plaintiff lacks standing because Federal Defendants' role in this case was limited to conducting the 2005 Secretarial Election and approving its results.

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

Even if Plaintiff had standing, his claims should be dismissed for two independent reasons—failure to exhaust and untimeliness. Moreover, Plaintiff's complaint states no

ultra vires claim against Federal Defendants, nor does he dispute that he lacks a property interest in his ability to run for reelection to tribal office.

A. Plaintiff Failed to Exhaust His Administrative Remedies.

Plaintiff had every opportunity to bring his claims before the Department of the Interior and the Indian Board of Indian Appeals ("IBIA") under the administrative process prescribed by the Indian Reorganization Act and Interior's regulations. Yet Plaintiff chose to bring his claims exclusively in tribal court, and not before the Department of the Interior or any other federal agency. *See* Fed. Defs.' Mot. at 16; Compl. ¶ 34 (alleging that he "exhausted his administrative and judicial remedies that may have existed within the MCT"). That is insufficient. As noted above, the United States has no role in the MCT's interpretation of tribal law or the MCT constitution. Plaintiff does not dispute the existence of an established administrative process for such challenges, *see* Fed. Defs.' Mot. at 15-16, and does not dispute that he chose not to avail himself of that process.

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. *See Glover v. United States*, 286 F.2d 84, 90 (8th Cir. 1961) (the rule requiring exhaustion of administrative may be "relaxed only under extremely exceptional and unusual circumstances"). And Plaintiff's opposition offers nothing on the subject. That dooms Plaintiff's claims here.

B. Plaintiff's Claims Are Untimely.

Plaintiff's claims are also considerably untimely pursuant to the applicable statute of limitations, 28 U.S.C. § 2401(a). Plaintiff does not dispute that he was aware of the 2005 Secretarial Election or of the resulting MCT constitutional amendment. Rather, Plaintiff argues that his claims are not untimely "because [his] injury in-fact happened Feb. 16, 2022, when the MCT Tribal Court of Election Appeals decided Plaintiff was not eligible to be a candidate for office based on their retroactive application of the ex post facto amendment to the MCT Constitution." Opp'n at 25. But Plaintiff knew or should have known well before 2022 that, having previously "accepted a plea bargain" for "felony charges[,]" *see id.* at 26, the constitutional amendment may impact his candidacy (depending, of course, on the MCT's interpretation and application of it). And Plaintiff was not obliged to await a negative outcome based on the MCT constitutional amendment to bring his claims. That injury inquiry is properly limited to the Court's standing analysis and, even so, the Eighth Circuit has noted that, so long as an injury is certainly impending, "[w]e do not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them[.]" *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013).

Plaintiff also fails to show he is entitled to tolling here. As established above, Plaintiff never brought any claims before Interior or IBIA. Thus, no matter the purported diligence with respect to his *tribal* challenges (which Federal Defendants do not dispute), he provides no basis for tolling his *federal* challenges. *See* Opp'n at 28-29. And his conclusory argument that his case involves "unique circumstances" is unavailing, *see id.*

at 29, where Plaintiff fails to proffer any explanation whatsoever as to why he failed to follow the procedures and expedited timeframes in the IRA and 25 C.F.R. Part 81 for challenging a Secretarial Election. Accordingly, tolling is inappropriate here. *See Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. U.S. Corps of Eng'rs*, 888 F.3d 906, 917-18 (8th Cir. 2018) (A plaintiff is entitled to equitable tolling where he has "pursuing his [or her] rights diligently" and "some extraordinary circumstances stood in his [or her] way and prevented timely filing.") (internal citations and quotation marks omitted).

Plaintiff gains no greater traction by arguing that the BIA's waivers and Secretary's approval of the election results were *ultra vires*. *See* Opp'n at 8. *Ultra vires* action typically consists of agency action taken "in direct contravention of an express and narrowly defined limit on agency authority." *Key Med. Supply, Inc. v. Burwell*, 764 F.3d 955, 963 (8th Cir. 2014). To begin, Plaintiff makes no such assertion of *ultra vires* agency action in his complaint, and it is "axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Morgan Dist. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) (quotation omitted). Moreover, Plaintiff's belated attempt to repackage his claims as *ultra vires* to avoid the statute of limitations is unavailing. To wit, the Eighth Circuit "has expressed a clear disinclination to accept plaintiffs' characterization of agency actions as *ultra vires* where is it possible to characterize a dispute merely as one of statutory interpretation concerning the scope of agency authority." *Key Med. Supply, Inc.*, 764 F.3d at 962 (citing *Neb. State Legis. Bd.*,

United Transp. Union v. Slater, 245 F.3d 656, 659-60 (8th Cir. 2001)).[3] Here, Plaintiff fails to dispute the Secretary's authority to issue waivers under 25 C.F.R. § 1.2. What is more, neither Plaintiff's complaint nor his opposition make any assertion that Federal Defendants failed to follow Interior's duly-promulgated regulations governing Secretarial Elections, *see generally* 25 C.F.R. Part 81, or the procedures required by the Indian Reorganization Act, *see, e.g.*, 25 U.S.C. § 5123(d)(1) (requiring the Secretary to "approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws"). Rather, Plaintiff merely disagrees with the Secretary's decision. *See* Opp'n at 10 (asserting that Federal Defendants "legal review" of the MCT amendment was deficient). Thus, Plaintiff fails to establish any violation—much less a "plain" or "unambiguous" one—of any mandatory statutory provision related to Secretarial elections. *See Slater*, 245 F.3d at 659 (citation omitted).

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

Finally, Plaintiff's opposition does not address Federal Defendants' argument that Count II of the complaint, which pertains to the MCT's alleged retroactive application of the MCT constitutional amendment, does not implicate any action by Federal Defendants. Moreover, Plaintiff fails to respond to Federal Defendants' citation to binding authority from the Eighth Circuit indicating that he lacks any protected property interest in any

[3] Similarly, the D.C. Circuit has described an *ultra vires* claim as "essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009).

elected tribal office. *See* Fed. Defs.' Mot at 22-23 (citing cases). Accordingly, Plaintiff has waived any argument to the contrary. *See Rivera*, 993 F.3d at 1051. By failing to engage on these arguments, Plaintiff has conceded them.

CONCLUSION

For the foregoing reasons, and those discussed in Federal Defendants' motion, 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. Further, Federal Defendants took no *ultra vires* or retroactive action against Plaintiff. 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: November 2, 2022

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