LOWER BRULE SIOUX TRIBE
LOWER BRULE INDIAN RESERVATION
LOWER BRULE, SOUTH DAKOTA

IN TRIBAL COURT

Case No. Civ. 16-1-001

LOWER BRULE SIOUX TRIBAL MEMBERS: Gail Ziegler, Janice Larson, George Estes, Sheryl Scott, Janet Traversie, and Maria Sexton,

Plaintiffs,

ANSWER AND MEMORANDUM IN SUPPORT OF DISMISSAL

v.

ORVILLE C. (RED) LANGDEAU, JR.,

Defendant.

PRELIMINARY STATEMENT

Plaintiffs have filed an action to remove defendant from his position as elected representative on the Lower Brule Sioux Tribal Council. For the reasons set forth hereafter, the Court should dismiss the action with prejudice.

ANSWER

Defendant Orville Langdeau, Jr., moves to dismiss the petition for numerous reasons including but not limited to lack of jurisdiction, denies the allegations that he lives off the Reservation, that the Gilman house is not within the exterior boundaries of the Lower Brule Indian Reservation, relevance of the Superintendent's November 6, 2005, letter, or the allegation that petitioner's constitutional rights have been violated.

REASONS

A. Statute of Limitations

Chapter VIII, § 1-8-6 (1), provides as follows:

> (1) Any action against the Tribe or its officers or employees arising from the performance of their official duties must be

> commenced within one (1) year from the date the cause of action occurred... .

The affidavit submitted by Orville Red Langdeau, Jr., attached as exhibit 1, shows that Langdeau was first elected to the Lower Brule Sioux Tribal Council in 1990 and many times thereafter. Most recently, he was elected in 2010, 2012, and 2014 to the present. If 2002 is considered the date when the cause of action first arose, then it is far beyond the one year statute of limitation under 1-8-6 (1). Even if 2012 or 2014 is used as the date when the cause of action arose, the statute of limitation has run and this action cannot be brought or maintained. A statute of limitation bars any action from being maintained in any court or body that is not within the time permitted by the governing statute of limitations. Anson v. Star Brite Inn Motel, 788 NW2d 822 (SD 2010); Murray v. Mansheim, 779 NW2d 379 (SD 2010).

B. Failure to State a Claim for Removal

The petition for removal in this case basis its reason on the allegation that Langdeau does not reside on the Lower Brule Indian Reservation.

A petition for removal of any elected official submitted by a tribal member can only be submitted to the Tribal Council pursuant to Article V, § 4 of the Tribal Constitution and Bylaws. This provision requires a petition that must be presented to the Tribal Council and it must contain charges that the official has violated the Code of Ethics set forth in Article V, § 5 (a), (b), or (c). The petition must also bear the signatures of no less than 30% of the qualified voters voting in the last regular tribal election. The petition is fatally devoid of both requirements required of any petition to remove submitted by tribal members. Even if the petitioners in this case maintain that they have a right under Article V, § 4, to file in this Court because of non-action by the Council,

the petition could not have been acted upon by the Council because of the fatal defects set forth nor would this Court be able to render any relief on the basis of the fatally defective petition.

C. Failure to Exhaust Remedies

The Lower Brule Sioux Tribe Election Ordinance requires every person seeking an elected office to file a petition containing at least 5 signatures of registered voters. Chapter 6, § 6-1. The candidate must meet certain requirements, including that he or she is at least 21 years of age, have never been convicted of any felony, shall not have committed a Code of Ethics violation, and have been a resident. Chapter 6, § 6-5. The Election Board is **the sole judge of the qualifications of candidates** and must ensure due process to all concerned. Id. Any challenge to the qualifications of any candidate to seek office must be filed with the Election Board no later than 3 days following certification. The Election Board must make a decision on any challenge no later than 19 days following certification. Chapter 7, § 7-1. Thereafter, any challenge to the certification of the election must be filed within 5 days in this Court and the Court must make a decision within 20 days of filing, Chapter 14, 14-16, 14-17.

If the petitioners in this case felt that Orville Langdeau, Jr., was not a proper resident when he ran for election numerous times in the past, they were required to challenge him at the time and get a decision from the Election Board, who is the sole judge to the qualifications of any candidate. Assuming arguendo but certainly not conceding the fact, it appears that perhaps they also could have challenged the certification of election and then gone into this Court.

Petitioner's were required to challenge Langdeau if they felt he was not a resident of the Reservation when he ran numerous times in the past. Indeed, only by challenging could they bring up the purported lack of residency. They cannot wait months and indeed years after

Langdeau has been elected or relected to seek relief by urging the Court to remove him from his position.

Petitioners had a remedy and they failed to exhaust it. Friends of Norbeck v. U.S. Forest Service, 661 F3d 969 (8th Cir. 2011); Harwood v. Apfel, 186 F3d 1039 (8th Cir. 1999); Klaudt v. Department of Interior, 990 F2d 409 (8th Cir. 1993); Froholm v. Cox, 934 F2d 959 (8th Cir. 1991); Crow Creek Sioux Tribe v. Bureau of Indian Affairs, 463 F.Supp. 964 (D.S.D. 2006). The action must be dismissed for this independent reason.

D. Laches

Because plaintiffs have not acted in a timely fashion and have not complied with the time provisions in the Tribal Code or in the Election Ordinance, if this matter is not barred by the applicable statute of limitations, it is barred by laches.

If plaintiffs had full knowledge of the facts upon which their action is based, they engaged in unreasonable delay before commencing any action, and allowing them to maintain the action will result in prejudice to Langdeau, the action is barred by laches. Lamar Advertising of South Dakota v. Heavy Constructors, 745 NW2d 371 (SD 2008); Burch v. Bricker, 724 NW2d 604 (SD 2006); Culhane v. Michels, 615 NW2d 580 (SD 2000). The laches defense applies to election disputes. Nelson v. Dickenson, 268 NW 103 (SD 1936); Dobson v. Lindekugel, 162 NW 391 (SD 1917); Maher v. Jahnel, 19 NW2d 453 (ND 1945).

Janice Larson has signed the present action as a plaintiff. See Petition for Removal on file attached as exhibit 2. She also served on the Lower Brule Sioux Tribe Election Board. She signed an Order of Dismissal With Prejudice on July 19, 2004, attached as exhibit 3, dismissing an identical complaint noting in the order "the Board having taken notice of at least one

substantially identical challenge to Mr. Langdeau in the past, and the Board taking notice that at least one previous Board and at least one Tribal Court have finally decided each of these challenges in the past." The Board concluded "that the within challenges appear to be, at best, cumulative repetitions of already decided issues, and the within challenges further appear to be, at worst, frivolous or malicious, or both, requests in bad faith that the Board needlessly subject Mr. Jandreau and Mr. Langdeau to harassment and annoyance." The Board ordered the challenge against Langdeau to be dismissed with prejudice.

Gail Ziegler, while chief judge of the Lower Brule Sioux Tribal Court, was involved in an attempt to have Langdeau removed for the same reasons as set forth in the petition now before the Court. She knew about the issue over nearly 15 years ago. See exhibit 1, Orville Langdeau affidavit, ¶¶ 4, 5.

E. Mootness

Numerous primary and general elections have been held where Langdeau was elected and relected numerous times and the results certified. First, the case is moot because the primary elections and general elections have been held with Langdeau's name on the ballot. No stay of the election were ever sought by petitioners. No ruling was ever sought administratively or judicially before either the primary or general elections were held. No injunctive relief was sought. Thus, no attack can be made on the results of either the primary or general elections where Langdeau ran and was elected. Two Hawk v. Rosebud Sioux Tribe, 534 F2d 101 (8th Cir. 1976). Second, in Thompson v. Brown, 434 F2d 1092 (5th Cir. 1970), it was held that an attack on a primary election will be mooted if an uncontested general election has been held prior to judicial consideration. See Toney v. White, 476 203, 207 (5th Cir. 1973). In this case, there was

no stay or injunction sought with regard to the general elections. Third, as in Two Hawk, supra, it would be wholly inappropriate and improper to dispossess a present, validly elected official of his office on the weight of a belated attack on primary and general elections.

F. Sovereign Immunity

Under Chapter VIII, § 1-8-4 of the Lower Brule Sioux Tribe Constitution and By laws, it states that "(e)xcept as required by federal law, or the Constitution and Bylaws of the Lower Brule Sioux Tribe, or specifically waived by a Resolution or Ordinance of the Tribal Council specifically referring to such, the Lower Brule Sioux Tribe shall be immune from suit in any civil action, and **its officers and employees immune from suit for any liability arising from performance of their official duties.**" Defendant Langdeau is a setting Tribal Council official exercising his official duties in that capacity. He holds the office after having been found qualified not once, but numerous times by the Lower Brule Sioux Tribe Election Board. He is protected by sovereign immunity from the present suit.

G. Res Judicata

Under South Dakota law, res judicata applies if a second action is brought on the same cause of action as the first. Hicks v. O'Meara, 31 F3d 744 (8th Cir. 1994); Ruple v. City of Vermillion, 714 F2d 860 (SD 1983). The test for determining if both causes of action are the same is query into whether the wrong sought to be addressed is the same in both actions. Merchants State Bank v. Light, 458 NW2d 792 (SD 1990). Under South Dakota law, when a second action seeks redress for the same wrong as a prior action, res judicata bars relitigation of a claim or issue actually litigated or which could have been properly raised and determined in the prior action. Hanig v. City of Winner, 527 F3d 674 (8th Cir. 2008).

Res judicata bars an attempt to relitigate a prior determined cause of action by parties, or one of the parties in privity, to a party in an earlier suit. Chapman v. Chapman, 713 NW2d 572 (SD 2006). Moreover, when a person who was not a party to an earlier suit but who was adequately represented by someone with the same interests who was a party to the prior suit, the non-party is barred by res judicata of the former suit when the interests of the non-party and her representative are aligned and the representative understood itself to be acting in a representative capacity, interests were identical, and the prior parties had ever incentive to protect such interests. Yankton Sioux Tribe v. U.S. Dept. Heath and Human Services, 533 F3d 634 (8th Cir. 2008).

Decisions by administrative bodies acting within their proper jurisdiction are entitled to res judicata preclusion. E.g., Kent v. United Omaha Life Ins. Co., 481 F3d 988 (8th Cir. 2007) (res judicata/collateral estoppel fully applicable to determination by administrative body where facts fully established); Zavadil v. Alcoa Extrusions, 437 F.Supp.2d 1068 (D.S.D. 2006); Krull v. Jones, 46 F.Supp.2d 997 (D.S.D 1999); Jundt v. Fuller, 736 NW2d 508, 2007 SD 62 (unappealed administrative determinations accorded res judicata); Oglala Sioux Tribe v.Homestake Min. Co., 722 F2d 1407 (8th Cir. 1983).

Identical actions against Orville Langdeau were brought by Carl Johnson previously in Carl Johnson v. Orville (Red) Langdeau and the Lower Brule Sioux Tribe in Civ. 02-6-0070. See attached Residency Violation Motion for Preliminary Injunction attached as exhibit 4. This case was determined on its merits on August 13, 2002. See exhibit 4 attached Judgment.

The Lower Brule Election Board previously dismissed identical challenges against Langdeaux on July 19, 2004. See exhibit 5 attached Order of Dismissal with Prejudice and facts

under D. above.

The perceived wrong in the first action by Carl Johnson is identical to the wrong alleged in this action presently before this Court. The present wrong was litigated previous in the Carl Johnson case and again determined by the Election Board on July 19, 2004. Janice Larson was on the Election Board when the July 19, 2004, Order of Dismissal with Prejudice was entered by the Board. She now has signed the present Petition for Removal before the court now. The present petitioners before this Court are raising the identical issue that was previously decided and their claim here is barred by res judicata. Gail Ziegler was the chief judge of the Lower Brule Sioux Tribal Court in 2002 and attempted to have Langdeau removed. This was the same court that dismissed Carl Johnson's lawsuit on August 13, 2002. See exhibit 1, Orville Langdeau affidavit, ¶¶ 4, 5. The interests of the present petitioners are identical to Carl Johnson and the challengers in the Election Board matter. Carl Johnson and the challengers in the Election Board matter had ever incentive to vigorously litigate the same issues that the present petitioners make in this case. Likewise, petitioners in this case make their claim as "Lower Brule Sioux Tribal Members."

H. Langdeau is a Resident

On December 8, 2002, the Lower Brule Sioux Tribal Council appointed Orville Langdeau, Jr., defendant, to be caretaker of the land known as the Gilman South Unit. See exhibit 6 attached. This real estate is located on the southern boundary of the Lower Brule Indian Reservation. Former Chairman Michael Jandreaux in the case brought by Carl Johnson testified that this land was acquired by the Tribe pursuant to Federal law. The Constitution and Bylaws of the Lower Brule Sioux Tribe state that the jurisdiction of the Tribe covers all territory established

by the Act of March 2, 1889, and to all other lands added thereto under any law of the United States. From the affidavit of Scott Jones, attached as exhibit 7, the facts set forth therein having been previously presented to the court in the Carl Johnson lawsuit, shows that the house in which Landeau occupies as caretaker of the Gilman property is approximately 4,970 feet north of the historical southern boundary of the Lower Brule Indian Reservation. But even if the house was south of the 1889 boundary, it would still be on land added to the Reservation under laws of the United States and therefore would still be on the Lower Brule Indian Reservation. Moreover, any temporary absence from the 1889 boundaries because of the appointment as caretaker of Tribal property would not disqualify Langdeau to vote and hold office.

CONCLUSION

For all the above reasons, the petition for removal should be dismissed. The action has been previously litigated and decided years ago. The action is frivolous and malicious and petitioners should be made to reimburse Langdeau for attorney's fees and cost in defending the action.

Dated February 16, 2016.

Terry L. Pechota
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CERTIFICATE OF SERVICE

I certify that on February 16, 2016, I caused to be served by first class mail, postage prepaid, from Rapid City, South Dakota, the above answer and memorandum in support of dismissal upon the following people at the address listed:

Gail Ziegler, Box 15, Lower Brule, SD 57548

Janice Bad Horse Larson, Box 24, Lower Brule, SD 57548

Maria Sexton, 22298 Little Bend Road, Lower Brule, SD 57548

Janet Traversie, Box 85, Lower Brule, SD 57548

George Estes, Box 304, Lower Brule, SD 57548

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