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The Honorable Rosanna Malouf Peterson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a federally-recognized Indian tribal government and as *parens patriae* on behalf of the Enrolled Members of the Confederated Tribes and Bands of the Yakama Nation;

Plaintiffs,

v.

ERIC H. HOLDER, JR., et al.

Defendants.

NO. CV-11-3028-RMP

MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

Protective orders staying discovery in federal litigation may only be granted upon a showing of good cause. Good cause, in this context, requires the party seeking an order to show that it will suffer harm or prejudice if no protective order is issued. Here, Federal Defendants seek a protective order based on unspecified burdens and a misplaced confidence in their Motion to Dismiss. Put simply, Federal Defendants seek to obstruct Plaintiffs' discovery efforts without any demonstration that harm or prejudice will result from the narrow discovery sought by Plaintiffs.

The issue before this Court, therefore, is whether Federal Defendants may obtain a protective order indefinitely delaying discovery in this matter without meeting the requisite burden required in this jurisdiction for the issuance of such sweeping, prohibitive relief.

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation" or "Plaintiffs") oppose Federal Defendants' motion for a protective order (ECF # 44), and respectfully request an order: (1) compelling Defendant Department of Justice ("DOJ") to respond to discovery requests, and (2) ordering Federal Defendants to pay Plaintiffs' fees and costs associated with this motion pursuant to Fed. R. Civ. P. 26(c)(3) and 37(a)(5).

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In brief, Federal Defendants' motion for a blanket protective order falls well short of the legal standard required of parties seeking such an order. It is a motion for a stay of discovery, since no provision of the Federal Rules of Civil Procedure prevents discovery from moving forward. Motions for stays of discovery are disfavored; even a filed motion to dismiss does not establish grounds for staying discovery. *See Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D.Cal.1990); *Old Republic Title, Ltd. v. Kelley*, C10-0038JLR, 2010 WL 4053371 (W.D. Wash. Oct. 13, 2010). Federal Defendants have failed to support their motion with the facts and law required to cause this Court to grant such a prohibitive and disfavored order.

II. DISPUTED FACTS

Federal Defendants contend that no FRCP 26(f) conference occurred in this matter. That is false. On April 7, 2011, Plaintiffs' counsel sent an email to counsel for Federal Defendants entitled "FRCP 26(f) Conference" stating: "Please let us know when you might be available tomorrow or Monday for an FRCP 26(f) conference." Declaration of Gabriel S. Galanda, **Ex. A, 13**. Federal Defendants responded the same day, saying, in part, "I am not available for a Rule 26(f) conference until after I return." *Id*., 12. The next day counsel for Federal Defendants agreed to confer via phone, scheduling a time to do so, and the parties conferred at 2 PM on April 8. *Id*., 9.

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The parties conferred regarding those topics required by Fed. R. Civ. P. 26(f)(2). *Id*., ¶ 5. After the conference commenced, and after substantive topics identified prior to the conversation were discussed, Federal Defendants' counsel, for the first time, argued that the conference was not a FRCP 26(f) conference, and that "discovery is not appropriate at this time," citing Federal Defendants' potential forthcoming motion to dismiss under alternative Fed. R. Civ. P. 12(b) theories. *Id*., ¶ 6. Following the FRCP 26(f) Conference, the parties jointly formed a discovery plan and report, as required by rule. ECF # 15. Although Federal Defendants noted in the plan that they would not engage in initial disclosures, they willingly participated in the filing of the plan and did not seek a protective order at the time.

III. AUTHORITY

Federal Defendants seek an order staying discovery for some unspecified amount of time based on an unspecified burden. There is no authority for the proposition that a party may elect to characterize a discovery conference as premature, and thereby avoid its obligations under the discovery rules. A stay of discovery is an exceptional remedy and one not warranted here.

A. Federal Defendants Do Not Meet The Standard For Obtaining A Protective Order.

Federal Rule of Civil Procedure 26(c) governs the granting of a protective order. A protective order should be granted only when the moving party establishes "good cause" for the order, and "justice requires [a protective order] to

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protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense [...]." FRCP 26(c). Conversely, "A party seeking a stay of discovery carries a heavy burden of making a 'strong showing' why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975). The moving party must show a particular and specific need for the protective order, as opposed to making stereotyped or conclusory statements. *Gray*, 133 F.R.D. at 40; *Skellerup Indus. Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 600 (C.D. Cal. 1995).

Federal Defendants provide a single conclusory rationale for the exceptional relief they seek: "time and effort expended in responding to discovery is unjustified and would be a waste of both parties' time and resources if Federal Defendants prevail in their motion to dismiss." ECF # 44, 4:19-22. Federal Defendants apparently also believe that their forthcoming motion will contain no factual issues. First, speculation that Federal Defendants might succeed in their potential Motion to Dismiss based on Plaintiffs' Complaint is not grounds, under any authority, for issuing an order blocking discovery. Second, this is the very type of conclusory rationale for a discovery stay that courts routinely reject.

Federal Defendants have not made a "strong showing." In fact, Federal Defendants have failed to show they will suffer any harm or prejudice if they were compelled to participate in the discovery process dictated by the Federal Rules of

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Civil Procedure. Rather, Federal Defendants merely demand a stay of Plaintiffs' discovery requests pending the Court's ruling on a potential motion to dismiss. Critically, Federal Defendants have failed to provide any reason why Federal Defendants should not be subject to the rule against blanket discovery stays. Federal Defendants have done nothing more than predict, in conclusory fashion, that their motion to dismiss will succeed.

The intention of a party to move for judgment on the pleadings is not sufficient to justify a stay of discovery. *Gray*, 133 F.R.D. at 40. Had the Federal Rules contemplated that a motion to dismiss would stay discovery, the rules would have made it clear. *Id*. As the *Gray* court observed:

> In fact, such a notion is directly at odds with the need for expeditious resolution of litigation. Under Rule 33, for instance, interrogatories may be served at the same time as the summons and complaint. Since motions to dismiss are a frequent part of federal practice, this provision only makes sense if discovery is not to be stayed pending resolution of such motions.
>
> Furthermore, a stay of the type requested by defendants, where a party asserts that dismissal is likely, would require the court to make a preliminary finding of the likelihood of success on the motion to dismiss. This would circumvent the procedures for resolution of such a motion. Although it is conceivable that a stay might be appropriate where the complaint was utterly frivolous, or filed merely in order to conduct a "fishing expedition"… this is not such a case.

Id. Again, the only rationale Federal Defendants provide for not participating in discovery is that doing so would be a waste of time. Federal Defendants are incorrect. Even if the United States' unseen and unfiled motion to dismiss were

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granted on some unknown grounds, Plaintiffs fully expect and intend to proceed in third-party discovery with Federal Defendants. Federal Defendants are uniquely situated in this matter in that they possess almost all of the information relevant in this matter, even as to their co-defendant local law enforcement actors.

The only waste of time is Federal Defendants' attempts to avoid their discovery obligations. The discovery requests propounded on Federal Defendants could have been adequately responded to (and objected to within those responses) in less time than the Federal Defendants expended in drafting the instant motion.

Indeed, "[a] stay of discovery pending determination of a motion to dismiss is rarely appropriate when the pending motion will not dispose of the entire case." *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 3 (D.D.C.2001) (citation and internal quotation marks omitted). Federal Defendants' motion will not dispose of this case. Either the Federal Defendants will prevail on their motion, and be subject to third-party discovery; or Plaintiffs will prevail, and Federal Defendants will be subject to first-party discovery. Either way, Federal Defendants will be subject to discovery.

Starting discovery as contemplated by the federal rules will not waste any resources. Further, the discovery sought by Plaintiffs is neither oppressive nor burdensome; nor have Federal Defendants even argued that it is a waste of resources. Other than generalizations, Federal Defendants have not identified any

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particular harm or undue expense that they would suffer by answering discovery requests. Absent a showing of such harm or expense exists, Plaintiffs are left to conclude that there is no harm, and Federal Defendants' have failed to meet their burden here.

B. Plaintiffs Are Entitled To Discovery.

Federal Defendants' responses to Plaintiffs' discovery requests were due by May 13, 2011.[1] The federal rules dictate that once the parties have conferred as required by Fed. R. Civ. P. 26(f), a party may seek discovery. FRCP(d)(1). Besides Federal Defendants' argument that no Fed. R. Civ. P. 26(f) conference has occurred, they have no basis for arguing that discovery is premature. Discovery is not premature, and Federal Plaintiffs have failed to produce any authority to suggest they can unilaterally deem discovery to be "early," entitling them to avoid their obligations. ECF # 44, 4:10.

Plaintiffs are not required to explain why they need discovery; it is Federal Defendants' burden alone to prove why *they* should not be required to comply with the federal rules. Moreover, the narrow discovery propounded to date will very likely be necessary to respond to Federal Defendants' potential motion to dismiss. Plaintiffs have not engaged in far-ranging exposition of Federal Defendants' positions; rather, Plaintiffs have simply sought basic jurisdictional facts about what

[1] Federal Defendants voiced their objection to initial disclosures in the proposed discovery plan. Plaintiffs anticipate that the Court will rule on the objection, pursuant to FRCP 26(a)(1)(C), consistent with the authority set forth herein regarding discovery requests. Federal Defendants have no basis for not providing initial disclosures.

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happened on February 16. Only discovery will provide Plaintiffs with the information necessary to defend what Plaintiffs *expect* will be a motion to dismiss premised on an argument that Federal Defendants complied with their internal rules and other laws in entering the Reservation on February 16, 2011. Until Plaintiffs know what Defendants did on February 16, what policies and procedures governed their conduct, and who was on the Reservation, Plaintiffs cannot adequately respond to a motion to dismiss.

Plaintiffs are entitled to a response to the question of why the FBI pre-notifies the Nation regarding entry sometimes, and does not in other instances. *See* Galanda Dec., **Ex. B**, 19, Interrogatory No. 12. Plaintiffs are entitled to know what policies and procedures Federal Defendants follow when they enter the Reservation. *Id*., 18, Interrogatory No. 9. For instance, if Federal Defendants are bound by internal written policies that they did not follow, Federal Defendants' motion, one might speculate, will fail. Problematically, Federal Defendants ask the Court and Plaintiffs to simply trust them that discovery is not necessary. Such "trust," however well placed it may be, cannot serve as a basis for a blanket discovery order prohibiting discovery.

C. Plaintiffs Are Entitled To Fees

Fed. R. Civ P 37(a)(5) governs the award of expenses to a party against whom a protective order is sought but not obtained. Fed. R. Civ. P. 26(c)(3). A

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Court must require an unsuccessful movant to pay reasonable expenses incurred in opposing the motion, including attorney's fees, unless the motion was substantially justified. Again, Federal Defendants' motion was not substantially justified; Federal Defendants offer almost no authority for their position except for an unspecified allegation that discovery would be a waste of time. In a short amount of time, Federal Defendants could have responded adequately to the discovery requests at issue in May and avoided this motion altogether.

DATED this 21st day of June, 2011.

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CERTIFICATE OF SERVICE

I, R. Joseph Sexton, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the Office of Legal Counsel, Confederated Tribes and Bands of the Yakama Nation, 401 Fort Road/P.O. Box 151, Toppenish, WA 98948.

3. On June 21, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system pursuant to which the following will be served vie email:

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The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Toppenish, Washington, this 21st day of June, 2011.

s/R. Joseph Sexton

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