MICHAEL C. ORMSBY
United States Attorney
PAMELA J. DeRUSHA
Assistant United States Attorney
Post Office Box 1494
Spokane, WA 99210-1494
Telephone: (509) 353-2767

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, vs. ERIC H. HOLDER, JR., Attorney General of the United States; et al., Defendants.	NO. CV-11-3028-RMP REPLY TO THE PLAINTIFFS' RESPONSE TO MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Trial courts often stay discovery when a motion to dismiss is pending, particularly when a primary issue is jurisdiction, there are no factual disputes and the motion to dismiss will be decided on legal grounds as in this case. Plaintiffs have failed to set forth any need for factual discovery pending a ruling on the motion. Accordingly, the United States' motion for a protective order should be granted.

/ / /

ARGUMENT

1. The Court should order a stay in discovery until the pending motion to dismiss is resolved.

The trial court has broad discretion in decisions regarding discovery. Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002). Included in that discretion is the trial court's ability to issue orders staying discovery, which trial courts often do when motions to dismiss are pending. See, e.g., Moss v. U.S. Secret Service, 572 F.3d 962, 966-67 (9th Cir. 2009) (court ordered a stay of discovery pending resolution of a motion to dismiss); see also Batchelder v. Kawamoto, 147 F.3d 915, 917 (9th Cir. 1998); Jarvis v. Regan, 833 F.2d 149, 155 (9th Cir. 1987); United States v. Cadet, 727 F.2d 1453, 1464 (9th Cir. 1984); Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984); Wood v. McEwen, 644 F. 2d 797, 801-02, (9th Cir. 1981); Fernandez v. Risenhoover, 399 Fed. Appx. 260, 261 (9th Cir. 2010).

In Jarvis the district court ordered a stay of discovery pending the disposition of a motion to dismiss because discovery was not "required to address the issues raised by defendants' motions to dismiss." 833 F.2d at 155. The Ninth Circuit held that the district court's order staying discovery was not an abuse of discretion because discovery is "only appropriate where there are factual issues raised by a Rule 12(b) motion". Id.(citing Rae, 725 F.2d at 481); see also Wagh v. Metris Direct, Inc., 363 F.3d 821, 829-30 (9th Cir. 2003) (holding a district court did not abuse its discretion by not allowing discovery when no factual issues were in dispute); overruled on other grounds by, Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007) (en banc).

In this case the United States filed its motion to dismiss on June 22, 2011, for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), and for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). ECF Nos. 50, 51. "The purpose of F[ed]. R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to

discovery." Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987); see also Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982) (government officials should not be subject to the burdens of broad-reaching discovery based upon bare allegations of malice). Importantly, trial courts also have discretion to stay discovery if exercise of jurisdiction is a preliminary question to be determined on a motion to dismiss. Twin City Fire Ins. Co. v. Employers Ins. of Wausau, 124 F.R.D. 652, 653 (D. Nev. 1989).

An order to stay discovery is well within the Court's discretion and it should be granted in this case. First, the primary issue in the United States' motion to dismiss is the Court's jurisdiction over the subject matter of Plaintiffs' Complaint. ECF Nos. 50, 51. It is appropriate for the Court to rule on whether it has jurisdiction to consider the Complaint before allowing discovery to go forward. Commencing unnecessary discovery at this point would be premature and an undue burden on both parties. See Harlow, 457 U.S. at 817-18; Rutman, 829 F.2d at 738; Twin City, 124 F.R.D. at 653.

Second, the discovery requested by Plaintiffs is not necessary to address the issues raised in the motion to dismiss. See ECF No. 48-1 (Ex. B); FBI Interrogatories, Ex. 1 to Attachment A. There are no factual issues raised in the motion. The United States informally replied to the interrogatories with a letter on May 16, 2011. See Letter to Plaintiffs, Ex. 2. In that letter to Plaintiffs, the United States informally responded to the interrogatories setting forth its position that the interrogatory questions were not relevant to the motion to dismiss and responses were not needed in order for Plaintiffs to respond to the motion. Id. Again, the motion accepts as true the allegations in the Complaint. ECF No. 51 at 2. Plaintiffs' response to this motion fails to set forth any grounds for their need for the discovery requested. Rather, they have responded that they "are not required to explain why they need discovery", that the burden is on the United

States, but that "discovery propounded to date will very likely be necessary to respond to Federal Defendant's potential motion to dismiss." ECF 47 at 8. Plaintiffs miss the mark here. They cite cases of general applicability to discovery and fail to acknowledge that there are no factual issues in dispute. As they have with their insistence that a Rule 26(f) conference has occurred, Plaintiffs once again erroneously emphasize form over substance. For the reasons set forth above, discovery propounded to Federal Defendants at this time is unnecessary and should be stayed pending a resolution of the motion to dismiss.

The scope of the United States' request should also be clarified to address comments in Plaintiffs' response. Plaintiffs refer to the United States' motion to stay very generally. It should be noted that the United States moves only to stay discovery intended for Federal Defendants as a party to this action. No other parties are implicated in this request.

Plaintiffs also reference "third-party discovery." ECF No. 47 at 7. The United States is unclear as to what Plaintiffs are referring, but interrogatories are limited by the federal rules to parties to the action. See Fed. R. Civ. P. 33. If the motion to dismiss is granted as posited by Plaintiffs, Federal Defendants would no longer be a party and not be subject to interrogatories.[1]

/ / /

/ / /

[1] Plaintiffs also claim that they are "entitled to a response to the question of why the FBI prenotifies the Nation regarding entry sometimes, and does not in other instances." ECF No. 47 at 9. Plaintiffs' demand is not relevant to any claim for relief in the Second Amended Complaint. Moreover, it is insincere because the FBI has explained to Plaintiffs its rationale for the action it took on February 16 and why prenotification of its actions is sometimes not operationally sound.

2. Plaintiffs' request for expenses and fees is not warranted.

Regardless of the Court's ruling, the United States' motion is substantially justified. First, there is a legitimate dispute about whether the parties conducted a bona fide discovery conference in the spirit of Fed. R. Civ. P. 26(f). In accordance with the Rule, "[A] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)" unless the parties agree or are otherwise authorized by the Court or court rules. Fed. R. Civ. P. 26(d)(1). Under the Local Court Rules, this generally occurs after the Notice of Court's Scheduling Conference. LR 16.1.

As set forth earlier, the United States has always taken the position that conversations with Plaintiffs' counsel about the need for discovery was not any agreement or acknowledgment that those conversations would constitute an appropriate discovery conference. The United States' willingness to talk with Plaintiffs about the need for discovery should not be interpreted as an agreement to a Rule 26 conference. But, even if this Court disagrees with the United States' position on this issue, certainly the United States is justified in its position that simply talking to Plaintiffs, as professionals should, about the need for discovery pending a motion to dismiss does not qualify as a discovery conference unless both parties agree.

Second, the United States' motion is also substantially justified based on the substantive merits as argued in this memorandum and it opening memorandum: that discovery should be stayed pending ruling on a motion to dismiss on jurisdictional grounds. The United States' position that discovery is not appropriate at this time is substantially justified and an award of expenses and fees to Plaintiffs is not warranted if this motion is denied is by the Court.

/ / /

/ / /

CONCLUSION

Based upon the foregoing points and authorities the United States respectfully requests the Court grant a stay of discovery pending disposition of the motion to dismiss filed on June 22, 2011.

DATED this 28th day of June, 2011.

MICHAEL C. ORMSBY
United States Attorney

s/ Pamela J. DeRusha

PAMELA J. DeRUSHA
Assistant U. S. Attorney
Attorney for Defendants
United States Attorney's Office
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767, telephone
(509) 353-2766, fax
USAWAE.PDerushaECF@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Gabriel S. Galanda:	gabe@galandabroadman.com
Anthony Broadman:	anthony@galandabroadman.com
Julio Carranza:	julio@yakamanation-olc.org
Kenneth W. Harper:	kharper@mjbe.com
Quinn N. Plant:	qplant@mjbe.com
George Fearing:	gfearing@tricitylaw.com
Lisa Beaton:	lisa.beaton@ci.kennewick.wa.us
Stephen J. Hallstrom:	stephen.hallstrom@co.benton.wa.us

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A

s/ Pamela J. DeRusha
Pamela J. DeRusha
Assistant United States Attorney
Attorney for Defendants
United States Attorney's Office
Post Office Box 1494
Spokane, Washington 99210-1494
(509) 353-2767(Tel)
(509) 353-2766(Fax)
USAWAE.PDerushaECF@usdoj.gov