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7 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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9 CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA
10 NATION, a federally-recognized
Indian tribal government and as
11 *parens patriae* on behalf of the
enrolled members of the Confederated
12 Tribes and Bands of the Yakama
Nation,

13 Plaintiffs,

14 vs.

15 ERIC H. HOLDER, JR., Attorney
General of the United States; et al.,

16 Defendants.
17

NO. CV-11-3028-RMP

FEDERAL DEFENDANTS'
MEMORANDUM OF
AUTHORITIES IN SUPPORT
OF MOTION FOR
PROTECTIVE ORDER

18 **INTRODUCTION**

19 Federal Defendants seek an Order from this Court that interrogatories
20 propounded to Federal Defendants FBI and the Department of Justice are
21 premature at this time. Federal Defendants submit that a proper Rule 26(f)
22 conference has not occurred, but more importantly and regardless of Rule 26(f)
23 compliance, because a response to Plaintiffs' Second Amended Complaint
24 (Complaint) is not due until June 23, 2011, and because Federal Defendants will
25 be filing a motion to dismiss on 12b(1) and 12b(6) grounds, discovery is
26 premature and not appropriate at this time. Plaintiffs maintain that a Rule 26(f)
27 conference has occurred and that responses to their interrogatories are important in

1 order for them to be able to respond to the motion to dismiss and defend their
2 Complaint. As discussed below Federal Defendants disagree.

3 **BACKGROUND**

4 Plaintiffs filed their original Complaint in this case on March 8, 2011. ECF
5 No.1. A First Amended Complaint was filed on March 30, 2011. ECF No. 3. In
6 early April, Plaintiffs sought a Rule 26(f) conference. Federal Defendants
7 objected and advised Plaintiffs that because Federal Defendants were preparing a
8 motion to dismiss, discovery would not be necessary until after the motion was
9 considered. Without going into a factual recitation that would involve attaching
10 numerous emails and result in a factual dispute by the parties on what was or
11 wasn't said in various conversations, Federal Defendants submit that it is a fair
12 statement that Plaintiffs insisted they needed certain discovery in order to defend a
13 motion to dismiss and were entitled to a Rule 26(f) conference and early
14 discovery. Although Federal Defendants disagreed with that position, the parties
15 had a telephone conference on April 8, 2011. As expected, Plaintiffs treated the
16 call as a Rule 26(f) conference. Federal Defendants stated it did not consider the
17 phone call as satisfying Rule 26(f).

18 During the call, the parties primarily discussed the need for early discovery.
19 Again, Plaintiffs stated they needed certain information to defend a motion to
20 dismiss and outlined generally what they wanted to know. Federal Defendants
21 responded that the motion to dismiss would be a facial challenge to the allegations
22 in the Complaint and thus, for purposes of the motion, Federal Defendants would
23 not challenge any factual allegation in the Complaint. Thus, Federal Defendants
24 did not believe Plaintiffs needed any factual information from the Federal
25 Defendants to refute any argument in the motion to dismiss. Federal Defendants
26 additionally stated that once the motion was filed they would be open to again
27 discussing what information, if any, Plaintiffs believed they needed to adequately

1 respond to a Rule 12(b) motion. The parties could not come to an agreement on
2 the issue of early discovery. Thereafter, a Joint Scheduling Conference Certificate
3 was filed, and that document sets forth both parties' positions on the issue of Rule
4 26(f) and early discovery. ECF No. 15.

5 Plaintiffs propounded interrogatories to Federal Defendants Department of
6 Justice and the FBI on April 13 and April 19, 2011, respectively. Initially, Federal
7 Defendants decided that because they did not consider Rule 26(f) yet triggered,
8 any response, even a motion for protective order, was not necessary. Nevertheless,
9 Federal Defendants informally responded to the interrogatories in a letter, setting
10 forth their reasons why they were not formally responding to the interrogatories
11 and why responses to them were not necessary in order for Plaintiffs to adequately
12 defend a motion to dismiss. Thereafter, counsel conferred by phone about the
13 matter but the parties ultimately disagreed on whether responses to the
14 interrogatories were necessary. After some further correspondence, Federal
15 Defendants agreed they would file this motion for protective order rather than
16 Plaintiffs filing a motion to compel.

17 Federal Defendants now request the Court stay discovery until an order has
18 been entered regarding the motion to dismiss.

19 ARGUMENT

20 The trial court has broad discretion in decisions regarding discovery.
21 Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002); Goehring v. Brophy, 94
22 F.3d 1294, 1305 (9th Cir. 1996). "The court may, for good cause, issue an order to
23 protect a party or person from annoyance, embarrassment, oppression, or undue
24 burden or expense." Fed. R. Civ. P. 26(c). Orders to stay discovery promote the
25 efficiency of the courts. Little v. City of Seattle, 863 F.2d 681, 685 (9th Cir. 1989)
26 (stay of discovery, pending disposition of immunity issue, furthers the goal of
27 efficiency for the court and litigants).

1 Initially, "[a] party may not seek discovery from any source before the
2 parties have conferred as required by Rule 26(f)" unless the parties agree or are
3 otherwise authorized by the Court or court rules. Fed. R. Civ. P. 26(d)(1). Under
4 the Local Court Rules, this generally occurs after the Notice of Court's Scheduling
5 Conference. LR. 16.1. As stated above, it is the position of the Federal
6 Defendants that a discovery conference has not occurred. However, Federal
7 Defendants submit it is not necessary for this Court to decide on whether the
8 conversation on April 8, 2011 was technically sufficient to qualify as a Rule 26(f)
9 conference. Rather, the Court should consider the substantive purpose behind
10 Rule 26(f) conferences and whether there is a need for early discovery at this
11 stage, particularly in light of Federal Defendants' intention to file a motion to
12 dismiss based on the factual allegations in the Complaint.

13 "The purpose of F[ed]. R. Civ. P. 12(b)(6) is to enable defendants to
14 challenge the legal sufficiency of complaints without subjecting themselves to
15 discovery." Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir.
16 1987). Although Plaintiffs have stated that responses to the interrogatories they
17 have propounded are necessary in order for them to defend the motion to dismiss,
18 Federal Defendants disagree.¹ Moreover, if after the motion is filed, Plaintiffs
19 continue to contend that responses are needed to defend the motion, Plaintiffs can
20 then move for relief. Now, however, the time and effort expended in responding
21 to discovery is unjustified and would be a waste of both parties' time and resources
22 if Federal Defendants prevail in their motion to dismiss. Little v. City of Seattle,
23 863 F.2d. at 685; Fernandez v. Risenhoover, 399 Fed. Appx. 260, 261 (9th Cir.
24 2010) (district court acted within its discretion dismissing case on motion before

25 ¹ In light of LR 26.1 and 33.1(a), Federal Defendants have not attached
26 either the interrogatories nor the responsive letter by Federal Defendants, but will
27 do so if requested by the Court.

1 permitting further discovery when discovery could not have affected court's
2 ruling); Wood v. McEwen, 644 F. 2d 797, 801-02, (9th Cir. 1981) (protective
3 order staying discovery appropriate when court believes plaintiff is unable to state
4 a claim).

5 Accordingly, the Court should order a stay on discovery until an order is
6 entered regarding the Federal Defendants' motion to dismiss.

7 **CONCLUSION**

8 Based upon the foregoing points and authorities Federal Defendants
9 respectfully request the Court grant a stay of discovery pending disposition of the
10 motion to dismiss to be filed on or before June 23, 2011.

11 DATED this 10th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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
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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A

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