

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 Case No.: 3:24-cv-00045-MMD-CSD

4 MICHAEL ERWINE,
5 Plaintiff

Order

Re: ECF Nos. 64, 71

6 v.

7 UNITED STATES OF AMERICA, et al.,
8 Defendants

9 Before the court are two motions to stay discovery pending resolution of motions to
10 dismiss. The first motion is filed by defendants Michel Hall, John Leonard, and Zachary
11 Westbrook (collectively, the Tribal Defendants). (ECF No. 64.) Plaintiff filed a response. (ECF
12 No. 74.) The Tribal Defendants filed a reply. (ECF No. 85.) The second motion is filed by the
13 United States. (ECF No. 71.) Plaintiff filed a response. (ECF No. 82.) The United States filed a
14 reply. (ECF No. 87.) The court held a hearing on these motions on August 28, 2024, and issues
15 the instant Order.

16 For the reasons set forth below, the motion to stay discovery filed by the United States is
17 granted, but the motion to stay discovery pending resolution of the motion to dismiss filed by the
18 Tribal Defendants is denied.

19 **I. BACKGROUND**

20 The lengthy factual and procedural background of Plaintiff's original 2018 lawsuit¹ and
21 current lawsuit filed in 2024 are discussed in the court's earlier order granting a motion to stay
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¹ In Plaintiff's 2018 lawsuit, 3:18-cv-00461-RCJ-WGC, the defendants were granted summary judgment, which was affirmed by the Ninth Circuit on March 7, 2023.

1 discovery filed by defendants Churchill County and Sheriff Benjamin Trotter. (ECF No. 32.) In
2 short, Plaintiff was employed by the Churchill County Sheriff's office from December 2015,
3 until he was terminated in October 2016. Plaintiff alleges Trotter made false and stigmatizing
4 comments in a memorandum that was placed in Plaintiff's personnel file when he was employed
5 by the Churchill County Sheriff's Office (the Trotter Memorandum). Plaintiff avers that the
6 Trotter Memorandum was then disclosed to other law enforcement agencies which resulted in his
7 being unable to obtain employment as a law enforcement officer.

8 Plaintiff was eventually able to gain employment with the Washoe Tribe of Nevada and
9 California (Washoe Tribe), where he worked between October 2019 and March 2022. Westbrook
10 was a sergeant and then chief of police for the Washoe Tribe; Leonard was the deputy chief of
11 police for the Washoe Tribe; and Hall was a sergeant for the Washoe Tribe. Plaintiff also
12 includes allegations against defendant Gene Burk, whom Plaintiff alleges was general counsel
13 for the Washoe Tribe.² Plaintiff's First Amended Complaint (FAC) asserts claims against the
14 Tribal Defendants concerning his employment and termination from the Washoe Tribe
15 including: racial discrimination under 42 U.S.C. § 1981; conspiracy to interfere with civil rights
16 and obstructing justice under 42 U.S.C. § 1985(2); conspiracy to interfere with civil rights for
17 deprivation of rights and privileges under 42 U.S.C. § 1985(3); and a Fifth Amendment due
18 process claim (against Westbrook, Leonard, and Hall).³

19 The Tribal Defendants have moved to dismiss Plaintiff's FAC, arguing: (1) the court does
20 not have subject matter jurisdiction over them pursuant to the doctrine of sovereign immunity,

21 _____
22 ² Burk is representing himself in this matter. He has not filed a motion to dismiss or a motion to
23 stay discovery, but he asserted at the hearing that the Tribal Defendants arguments apply to him
as well.

³ The tort claims for defamation, defamation per se, and intentional interference with contractual
relations against the Tribal Defendants were dismissed pursuant to stipulation. (ECF No. 89.)

1 which they claim applies to the Washoe Tribe as well as its officers and employees when they
2 act in their official capacities and within the scope of their authority; (2) Plaintiff failed to join
3 the Washoe Tribe, which is a necessary party; (3) the District of Nevada is an improper venue for
4 the Plaintiff's claims which arose within the interior boundaries of the Washoe Tribe; and
5 (4) Plaintiff failed to exhaust tribal administrative remedies before filing suit. (ECF No. 62.)

6 The Tribal Defendants move to stay discovery pending resolution of their motion to
7 dismiss on the basis that the sovereign immunity of the Washoe Tribe extends to officers and
8 agents of the tribe acting in their official capacity within the course and scope of their positions
9 and authority.

10 Plaintiff asserts two claims against the United States under the Federal Tort Claims Act
11 (FTCA) for wrongful termination/tortious discharge and bad faith discharge.

12 The United States has moved to dismiss the claims against it on the basis that the court
13 lacks subject matter jurisdiction because Plaintiff failed to exhaust administrative remedies, and
14 in any event, his allegations fail to establish a plausible claim for tortious discharge or bad faith
15 discharge of employment.

16 The United States moves for a stay of discovery pending resolution of its motion to
17 dismiss arguing the court lacks subject matter jurisdiction over this matter because Plaintiff
18 failed to exhaust administrative remedies as to the claims asserted under the FTCA.

19 **II. DISCUSSION**

20 **A. Standard to Stay Discovery**

21 "Courts have broad discretionary power to control discovery." *Kor Media Group, LLC v.*
22 *Green*, 294 F.R.D. 579, 581 (D. Nev. 2013) (citation omitted). "The Federal Rules of Civil
23 Procedure do not provide for automatic or blanket stays of discovery when a potentially

1 dispositive motion is pending.” *Id.* (quotation marks and citation omitted). “Instead, a party
2 seeking to stay discovery carries the heavy burden of making a strong showing why discovery
3 should be denied.” *Id.* (citation omitted). At the outset, courts are guided by Federal Rule of Civil
4 Procedure 1 to ensure a “just, speedy, and inexpensive determination of every action and
5 proceeding.”

6 Judges within the District of Nevada have used varying approaches to determine whether
7 a stay of discovery is warranted while a potentially dispositive motion is pending: the
8 “preliminary peek” approach and the “good cause” approach.

9 Under the “preliminary peek” approach, courts look at whether: (1) the pending motion is
10 potentially dispositive; (2) the potentially dispositive motion can be decided without additional
11 discovery; and (3) the court has taken a ‘preliminary peek’ at the merits of the potentially
12 dispositive motion and is convinced that the motion may be successful and the claim(s) will be
13 dismissed. *Id.* (citation omitted).

14 “The fact that discovery may involve inconvenience and expense is not sufficient,
15 standing alone, to support a stay of discovery.” *Kor Media*, 294 F.R.D. at 583 (citation omitted).
16 “[T]here must be *no question* in the court’s mind that the dispositive motion will prevail, and
17 therefore, discovery is a waste of effort.” *Trzaska v. Int’l Game Tech.*, No. 2:10-cv-02268-JCM-
18 GWF, 2011 WL 1233298, at *3 (D. Nev. Mar. 29, 2011) (emphasis original).

19 Under the more lenient “good cause” approach, courts evaluate: (1) whether the
20 dispositive motion can be decided without further discovery; and (2) whether good cause exists
21 to stay discovery. *See Schrader v. Wynn Las Vegas, LLC*, 2:19-cv-02159-JCM-BNW, 2021 WL
22 4810324, at *4 (D. Nev. Oct. 14, 2021) (citations omitted). Good cause may exist if the moving
23

1 party convinces the court the plaintiff cannot state a claim. *Id.* It may also exist when other
2 factors are present, such as undue burden or expense or prejudice. *Id.*

3 This court has used the preliminary peek approach to assess whether a stay is warranted
4 pending resolution of a dispositive motion.

5 **B. The United States**

6 Plaintiff alleges in the FAC that he was terminated for refusing to engage in conduct that
7 Plaintiff believed to be illegal: failure to arrest an individual during a DUI traffic stop even
8 though he lacked probable cause to do so; failure to carry out lawful directives and orders related
9 to his refusal to arrest an individual no November 15, 2021, when it would have been unlawful to
10 do so; the failure to follow an alleged order to place on individual in the back of his patrol
11 vehicle on February 20 2022, when doing so would have been illegal. Plaintiff further alleges the
12 United States violated the implied covenant of good faith and fair dealing and terminated him
13 from the Washoe Tribe in bad faith. (ECF No. 59 at 41-45.)

14 The United States argues that Plaintiff did not present these tort claims to the federal
15 agency, but alleged only that he was not afforded due process before being fired, which they
16 assert is a different right, with a different source, than the state tort law claims asserted in the
17 FAC. Additionally, the incident dates mentioned in the FAC are absent from Plaintiff's
18 exhaustion form. For these reasons, the United States contends the court lacks subject matter
19 jurisdiction over the claims asserted against it.

20 The United States is generally immune from suit unless there is a clear waiver of that
21 immunity. *See Dep't of Ag. Rural Devel. Rural Housing Service v. Kirtz*, 601 U.S. 42, 48 (2024)
22 (citations omitted). Subject to certain exceptions, the FTCA waives sovereign immunity for
23 certain torts committed by federal employees acting within the scope of their employment.

1 *Brownback v. King*, 592 U.S. 209, 212 (2021) (citation omitted). “The timely filing of an
2 administrative claim is a jurisdictional prerequisite to the bringing of a suit under the FTCA[.]”
3 *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980) (citation omitted).

4 Plaintiff’s response to the United States’ motion to stay discovery does not address the
5 argument that he failed to exhaust administrative remedies with the federal agency before filing
6 this action.

7 The court finds that the United States’ motion to dismiss is potentially dispositive of all
8 of the claims asserted against it, and the motion can be decided without additional discovery.
9 Moreover, the court has taken a preliminary peek at the motion and is convinced the United
10 States will likely be successful in achieving the dismissal of these claims based on Plaintiff’s
11 failure to exhaust administrative remedies, which is a jurisdictional prerequisite to filing suit.

12 For these reasons, the United States’ motion to stay discovery pending resolution of its
13 motion to dismiss is granted.

14 **C. The Tribal Defendants**

15 The Tribal Defendants argue that discovery should be stayed while the court resolves the
16 threshold issue of sovereign immunity. They argue that tribal sovereign immunity extends to
17 them, as agents and officers of the Tribe, as they were acting in their official capacities and
18 within the scope of their authority.

19 Plaintiff argues that pursuant to *Lewis v. Clarke*, 581 U.S. 155 (2017), when claims are
20 asserted against a tribal employee in his or her individual capacity for a tort committed within the
21 scope of employment, the employee is the real party in interest and tribal sovereign immunity is
22 not implicated.

23

1 In their reply brief, the Tribal Defendants argue that the facts are distinguishable from
2 those in *Lewis v. Clarke*.

3 The Tribal Defendants' motion is potentially dispositive of the claims asserted against
4 them, and it can be decided without conducting additional discovery. However, the court has
5 taken a preliminary peek at the Tribal Defendants' motion to dismiss, and the court is not
6 convinced that the Tribal Defendants are likely to succeed on their argument that the court lacks
7 subject matter jurisdiction over the claims asserted against them on the basis of tribal sovereign
8 immunity.

9 A tribe has sovereign immunity from suit. *Lewis v. Clarke*, 581 U.S. 155, 157 (2017)
10 (“Indian tribes are generally entitled to immunity from suit.”). “[W]hen a defendant timely and
11 successfully invokes tribal sovereign immunity, [the court] lacks subject matter jurisdiction.”
12 *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 908 (citations omitted).

13 The court is not convinced the Tribal Defendants will succeed on their motion to dismiss
14 on the basis that the court lacks subject matter jurisdiction over these claims because the Washoe
15 Tribe's sovereign immunity extends to them.

16 In *Lewis v. Clarke*, the plaintiffs were driving on an interstate in Connecticut when a
17 vehicle driven by Clarke struck their vehicle. Clarke was an employee of the tribe's gaming
18 authority, and he was transporting customers from a tribal casino back to their homes. *Lewis*, 581
19 U.S. at 160. The plaintiffs sued Clarke in his individual capacity in state court. *Id.* Clarke filed a
20 motion to dismiss for lack of subject matter jurisdiction on the basis of tribal sovereign immunity
21 because he was acting within the scope of his employment with the tribe when the accident
22 occurred. *Id.*

23

1 The Supreme Court granted certiorari to determine, as is pertinent here, “whether the
2 sovereign immunity of an Indian tribe bars individual-capacity damages against tribal employees
3 for torts committed within the scope of their employment[.]” *Id.* at 161.

4 Preliminarily, the Supreme Court noted the fact that a plaintiff has not named the
5 sovereign itself (the tribe), is not determinative of whether sovereign immunity applies. *Id.* at
6 161-62 (citations omitted).

7 Next, the Supreme Court reiterated that when a person is sued in his individual or
8 personal capacity, the lawsuit “seek[s] to impose *individual* liability upon a government officer
9 for actions taken under color of state law.” *Id.* at 162 (citations and quotation marks omitted,
10 emphasis original). In that case, the real party in interest “is the individual, not the sovereign.”
11 *Id.* at 163. “Defendants in an official-capacity action may assert sovereign immunity[.]” while
12 “[a]n officer in an individual-capacity action ... may be able to assert *personal* immunity
13 defenses[.]” *Id.* (citation omitted, emphasis original). These general principles apply in the
14 context of tribal sovereign immunity. *Id.*

15 The Court then pointed out that Clarke was sued for negligence arising out of a tort that
16 occurred on an interstate in Connecticut. The lawsuit was brought against a tribal employee who
17 was operating a vehicle within the scope of his employment, but on state lands. Clarke was not
18 sued in his official capacity, but he was sued “to recover for his personal actions[.]” *Id.* In that
19 case, the judgment would not operate against the tribe. The Court determined this was the case
20 even if there was an indemnification provision as the inquiry rests on “who may be legally bound
21 by the court’s adverse judgment, not who will ultimately pick up the tab.” *Id.* at 165.

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1 “[A]lthough tribal sovereign immunity is implicated when the suit is brought against
2 individual officers in their official capacities, it is simply not present when the claim is made
3 against those employees in their individual capacities.” *Id.* at 167-68.

4 In *Acres Bonusing, Inc. v. Martson*, 17 F.4th 901 (9th Cir. 2021), a tribe sued Acres
5 Bonusing, Inc. (ABI) and its owner in tribal court over a dispute regarding a casino gaming
6 system. ABI subsequently sued various tribal defendants, including the tribal judge and his law
7 clerks, lawyers representing the tribe, and as other tribal officials, in federal court. *Acres*, 17
8 F.4th at 905. The district court dismissed the case, finding that sovereign immunity applied to all
9 of the defendants. *Id.*

10 The question presented in *Acres* was whether the lawsuit for damages against tribal
11 official defendants in their individual capacities should have been dismissed on tribal sovereign
12 immunity grounds. *Id.* at 907. The Ninth Circuit answered that question in the negative, and the
13 court reversed the district court’s decision. *Id.* at 908. The Ninth Circuit relied on *Lewis* as well
14 as its own prior cases decided in line with *Lewis*. *Id.* at 908-910 (citing *Pistor v. Garcia*, 791
15 F.3d 1104 (9th Cir. 2015); *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013)). It
16 reiterated the fact that a tribal employee acting within the scope of his or her employment is
17 insufficient to invoke the protections of sovereign immunity. *Id.* at 909 (citation omitted).

18 The Ninth Circuit discussed its decision in *Pistor v. Garcia*, where gamblers at a tribal
19 casino who were handcuffed and detained in an interrogation room and had property taken from
20 them sued the chief of the tribal police department, the general manager of the casino, and a
21 tribal gaming office inspector for damages under state tort law and for constitutional claims
22 under section 1983. *Id.* at 909-910 (citing *Pistor*, 791 F.3d at 1108-09.) In *Pistor*, the Ninth
23 Circuit held that tribal sovereign immunity did not extend to the claims against the tribal

1 defendants because they “were sued in their individual rather than their official capacities, [and]
2 any recovery [would] run against the individual tribal defendants rather than the tribe.” *Pistor*,
3 791 F.3d at 1108. The tribe itself was not being sued, and the plaintiffs were not seeking money
4 from the tribal treasury. Like *Lewis*, the court found that even if the tribe had agreed to
5 indemnify the tribal officers such that it would ultimately pay for any liability attributed to the
6 tribal officers, that would “not make the officer immune that liability.” *Id.* at 1114 (citation and
7 quotation marks omitted).

8 Next, the Ninth Circuit discussed its earlier decision in *Maxwell v. County of San Diego*,
9 where tribal employees were sued for damages for allegedly providing inadequate medical care.
10 The Ninth Circuit again held that tribal sovereign immunity did not apply where the tribal
11 paramedics were sued in their individual capacities for money damages. *Acres*, 17 F.4th at 910
12 (citing *Maxwell*, 708 F.3d at 1089).

13 Based on *Lewis*, *Pistor*, and *Maxwell*, the Ninth Circuit concluded in *Acres* that tribal
14 sovereign immunity did not bar the suit against the tribal defendants sued in their *individual*
15 capacities for money damages. *Id.* “Any relief ordered by the district court will not require [the
16 tribe] to do or pay anything.” As such, the tribe was not the real party in interest and there was no
17 tribal sovereign immunity. *Id.*

18 Here, Westbrook, Leonard, Hall, and Burk are each sued in their individual capacities for
19 damages. (ECF No. 59 at 5 ¶¶ 25-28.) The FAC contains detailed factual allegations about each
20 of the Tribal Defendants’ involvement and conduct that Plaintiff claims is actionable, such that
21 this is not a case where the Plaintiff is trying to assert liability of the tribe on the basis of
22 vicarious liability.

23

1 The Tribal Defendants argue that *Lewis* is distinguishable because the allegations
2 implicate the tribe’s ability to govern itself, the conduct took place on tribal land, and the Tribal
3 Defendants in this case were engaged in official duties.

4 The Ninth Circuit, however, rejected these same arguments in *Acres*. It first addressed the
5 district court’s determination that the defendants were “functioning as the Tribe’s officials or
6 agents when the alleged acts were committed,” and the defendants’ argument that sovereign
7 immunity extended to tribal officials when “they act in their respective official capacities and
8 within the scope of the authority the Tribe lawfully may confer upon them.” *Acres*, 17 F.4th at
9 910. *Acres* reiterated its conclusion in *Pistor*: “tribal defendants sued in their *individual*
10 capacities for money damages are not entitled to sovereign immunity, even though they are sued
11 for actions taken in the course of their official duties.” *Id.* (quoting *Pistor*, 791 F.3d at 1112).

12 The argument was asserted in *Acres* that sovereign immunity applied because the conduct
13 allegedly occurred in tribal court and was “part of the Tribe’s inherently sovereign functions”
14 such that “adjudicating [the] dispute would require the court to interfere with the tribe’s internal
15 governance.” *Id.* at 911 (citation omitted). The Ninth Circuit rejected this reasoning, concluding
16 the tribal sovereign immunity analysis does not “turn on a freestanding assessment of whether
17 the suit related to tribal governance in some way.” *Id.* “The tribal sovereign immunity inquiry ...
18 does not revolve around whether issues pertaining to tribal governance would be touched on in
19 the litigation.” *Id.* The Ninth Circuit explained, “if that were the test, we would seemingly end up
20 applying tribal sovereign immunity whenever a tribal employee was acting within the scope of
21 her employment—which is precisely what the Supreme Court in *Lewis* said not to do.” *Id.*

22 The Ninth Circuit pointed out that in *Pistor*, a suit against tribal police and gaming
23 officials, involving allegations that were related to “a core function of the sovereign,” and “could

1 well involve consideration of the tribe’s law enforcement practices[.]” *Id.* Yet, sovereign
2 immunity did not extend to the tribal officials in that case.

3 The Ninth Circuit also dismissed the argument that *Lewis* created special rules for
4 “garden variety” torts. *Id.*

5 The court is also not persuaded by the Tribal Defendants’ argument that *Lewis* is
6 distinguishable because the conduct at issue took place on tribal land, but the conduct in *Pistor*
7 took place in a tribal casino, and the conduct in *Acres* took place in a tribal court.

8 The Tribal Defendants may have personal immunity defenses to which they may avail
9 themselves, *Acres*, 17 F.4th at 914 (citation omitted), but it does not appear that they will be
10 successful in achieving dismissal of the claims asserted against them on the basis of tribal
11 sovereign immunity.

12 For these reasons, the Tribal Defendants’ motion to stay discovery pending resolution of
13 their motion to dismiss is denied.

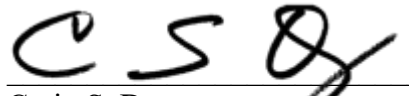
14 **III. CONCLUSION**

15 The motion to stay discovery filed by the United States (ECF No. 71) pending resolution
16 of its motion to dismiss is **GRANTED**.

17 The motion to stay discovery filed by the Tribal Defendants (ECF No. 64) pending
18 resolution of its motion to dismiss is **DENIED**.

19 **IT IS SO ORDERED.**

20 Dated: September 3, 2024

21 
22 Craig S. Denney
23 United States Magistrate Judge