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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

LUCIO CORRAL RODRIGUEZ,  
individually and as Successor in Interest to  
the decedents, MARICRUZ CORRAL,  
IVAN ALEXANDER CORRAL, and  
LUCIO ANTHONY CORRAL,

Plaintiff,

v.

COUNTY OF STANISLAUS; CITY OF  
MODESTO; CITY OF RIVERBANK;  
STATE OF CALIFORNIA; AMTRAK  
CALIFORNIA; BURLINGTON  
NORTHERN SANTA FE RAILWAY; and  
DOES 1 to 200,

Defendants.

) 1:08-cv-00856 OWW GSA

)  
) **SUMMARY DECISION FOLLOWING**  
) **EVIDENTIARY HEARING REGARDING**  
) **PLAINTIFF’S MOTION FOR ISSUE AND**  
) **EVIDENTIARY SANCTIONS**

) (Document 159)

**RELEVANT PROCEDURAL BACKGROUND**

On July 1, 2010, Plaintiff filed a Motion for Issue and Evidentiary Sanctions Against the County of Stanislaus for its failure to produce traffic counts concerning Claribel Road, the area of the accident giving rise to this litigation. (Doc. 159.) On July 23, 2010, the County of Stanislaus filed its opposition to the motion. (Doc. 177.) A supplemental declaration in support of the opposition was filed July 29, 2010. (Doc. 178.) Thereafter, on July 30, 2010, Plaintiff filed his reply to the opposition. (Doc. 181.)

1 On August 2, 2010, Magistrate Judge Gary S. Austin vacated the hearing and took the  
2 motion under submission pursuant to Local Rule 230(g). On September 28, 2010, Magistrate  
3 Judge Austin issued an order setting the matter for an evidentiary hearing before the undersigned  
4 because a number of inconsistencies existed that required further inquiry before Plaintiff's  
5 motion could be decided. (Doc. 191.)

6 An evidentiary hearing was held on October 13, 2010. Joseph W. Carcione appeared on  
7 behalf of Plaintiff Lucio Corral Rodriguez, Danilo J. Becerra appeared on behalf of the remaining  
8 and related Plaintiffs, and Eric D. Farrar appeared on behalf of Defendant County of Stanislaus.  
9 Additionally, Public Works Director Matthew Joseph Machado testified on behalf of Defendant  
10 County. (See Doc. 194.) The Court found Mr. Machado to be a credible witness. Finally, at the  
11 request of Plaintiff's counsel, the Court has subsequently reviewed the transcript of the  
12 Deposition of William Cardoza, taken March 31, 2010. There is no evidence that the alleged  
13 documents exist.

14 Plaintiff seeks an order imposing a number of issue and evidentiary sanctions against  
15 Defendant County of Stanislaus for its failure to produce traffic counts and documents relevant to  
16 the intersection of Claribel Road and Terminal Avenue as previously ordered by the Court.  
17 (Doc. 159 at 1-2, 8.) Defendant County of Stanislaus opposes the motion, arguing that it has  
18 complied with this Court's orders to the extent possible and that such sanctions would greatly  
19 prejudice the County in its defense of this action. More particularly, the County contends its  
20 records retention policy provides for a retention period of five years, and therefore it is simply  
21 unable to comply with Plaintiff's requests. (Doc. 177.) In reply, Plaintiff contends the County's  
22 unsupported references to a document retention policy are insufficient to prevent the sanctions  
23 Plaintiff seeks. (Doc. 181.)

24 ***Rule 37 of the Federal Rules of Civil Procedure***

25 Plaintiff seeks issue and evidentiary sanctions as specifically provided for in Rule  
26 37(b)(2)(A)(i) and (ii) of the Federal Rules of Civil Procedure:

27 *For Not Obeying a Discovery Order.* If a party or a party's officer,  
28 director, or managing agent - or a witness designated under Rule 30(b)(6) or  
31(a)(4) - fails to obey an order to provide or permit discovery, including an order

1 under Rule 26(f), 35, or 37(a), the court where the action is pending may issue  
2 further just orders. They may include the following:

- 3 (i) directing that the matters embraced in the order or other designated  
4 facts be taken as established for purposes of the action, as the  
5 prevailing party claims; [and]  
6 (ii) prohibiting the disobedient party from supporting or opposing  
7 designated claims or defenses, or from introducing designated  
8 matters in evidence . . . .

9 There is no requirement that the failure to respond to an order compelling discovery be  
10 willful before sanctions may be imposed. *Lew v. Kona Hosp.*, 754 F.2d 1420, 1426 (9th Cir.  
11 1985). Sanctions are appropriate where a party or someone under the party's control is guilty of  
12 failing to produce documents or things as ordered by the court. *Wanderer v. Johnston*, 910 F.2d  
13 652, 657 (9th Cir. 1990). The court may order the matters at issue or other designated facts to be  
14 "established" for purposes of the action. *Insurance Corp. of Ireland, Ltd. v. Compagnie des*  
15 *Bauxites de Guinee*, 456 U.S. 694, 695, 102 S.Ct. 2099, 2100 (1982). The court may also order  
16 that the disobedient party be precluded from supporting or opposing designated claims or  
17 defenses, or from introducing designated matters into evidence. *Von Brimer v. Whirlpool Corp.*,  
18 536 F.2d 838, 844 (9th Cir. 1976).

### 19 ***Summary of Testimony***

#### 20 **The Testimony of Matthew Joseph Machado**

21 At the evidentiary hearing of October 13, 2010, Matthew Joseph Machado, Director of  
22 Public Works for the County of Stanislaus, was sworn and testified. In summary, Mr. Machado  
23 testified that the County's Public Works Department has a records retention policy of five years.  
24 He did not have an explanation for County employee Andrew Malizia's reference to a three-year  
25 retention time period. Mr. Machado explained that, while he has been employed by the County  
26 for approximately three and a half years, he understood the records retention policy had been in  
27 effect for some time. He could not explain why his department was able to produce some  
28 relevant documentation that was clearly outside the five year records retention policy period -  
some documents were decades old - other than to indicate that when a division within the  
department reorganized or required more space, documents could be destroyed as a part of that  
process. Mr. Machado stated that the managers of those divisions would be responsible for such

1 an undertaking. Mr. Machado also testified that the County did not keep any record or log  
2 regarding the documents it destroyed.

3 When asked about specific documents produced in discovery, for example, Mr. Machado  
4 stated that a 2006 traffic count regarding certain “legs” of the intersection at Claribel Road and  
5 Terminal Avenue could be incomplete as it is reasonable to assume a proper traffic count would  
6 have included all four “legs” of the intersection, rather than merely the two or three referenced in  
7 the documents produced by the County. Ultimately however, Mr. Machado informed the Court  
8 that the County searched every file cabinet and every drawer in the department to comply with its  
9 discovery obligations and the Court’s orders. No evidence was adduced to dispute this  
10 testimony.

### 11 FINDINGS OF FACT

12 1. Mr. Machado’s testimony established that a good faith and reasonably diligent  
13 search was conducted for the records Plaintiff seeks; however, certain documents could not be  
14 located, including, but not limited to, traffic counts or studies, as-built drawings and construction  
15 documents regarding the intersection at Claribel Road and Terminal Avenue;

16 2. There is no evidence of wrongful or intentional destruction of records that existed  
17 or were known to exist regarding the relevant subject matter. Rather, the County’s method for  
18 maintaining records in the Public Works Department is informal and imprecise which led to the  
19 non-culpable loss or destruction of relevant documents.

20 3. The County Public Works Department does not retain an inventory, index or log  
21 with regard to the documents it does destroy. No testimony was elicited that that is done to  
22 prevent the retention or to encourage document destruction;

23 4. There is no evidence the Stanislaus County Board of Supervisors has ever adopted  
24 the informal document or records retention policy employed by the Public Works Department as  
25 is required by California Government Code section 26202;

26 5. No specific evidence was adduced that the documents sought by Plaintiff existed  
27 at the time of the request for production and/or were intentionally withheld or destroyed.  
28

1 **CONCLUSION AND ORDER**

2 The evidence supports the finding that the County made a good faith effort to produce the  
3 documents sought by Plaintiff, and such documents as were located, were in fact produced.  
4 There is no evidence or basis to believe other documents exist that have not been produced. To  
5 the extent other documents may have existed as referenced by Mr. Cardoza, the documents  
6 apparently no longer exist and/or not within the Department of Public Works files and/or records.  
7 There is no log or index kept that could be used to trace their existence and/or subsequent  
8 destruction.

9 Plaintiffs' Motion for Issue and Evidentiary Sanctions Against the County of Stanislaus  
10 is DENIED.

11  
12 IT IS SO ORDERED.

13 **Dated:** November 1, 2010

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE