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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

STANLEY SWENSON,
Plaintiff,

No. CIV S-08-1675-FCD-CMK

vs.

ORDER

SISKIYOU COUNTY, et al.,
Defendants.

_____ /

Plaintiff, who is proceeding pro se, brings this civil rights action. Pending before the court is plaintiff's motion to: (1) extend the discovery cut-off date; (2) compel production of documents; and (3) impose sanctions (Doc. 48).¹ A hearing was held on January 28, 2010, at 10:00 a.m. before the undersigned in Redding, California. Phillip B. Price, Esq., appeared on behalf of defendants and plaintiff appeared pro se.

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¹ The court addressed plaintiff's motion for an extension of the discovery cut-off date in an order issued on February 11, 2010.

1 **I. BACKGROUND**

2 **A. Plaintiff's Allegations**

3 Plaintiff names as defendants Siskiyou County, members of the Siskiyou County
4 Planning Commission, and others. He states that he owns an interest in real property situated in
5 Siskiyou County. The property is located “directly behind a gravel pit owned and operated by the
6 Defendant.” According to plaintiff, on August 3, 1966, the Siskiyou County Planning
7 Commission issued a use permit “allowing for the installation and operation of an asphalt hot
8 plant to manufacture aggregate and asphalt paving products.” He states that his predecessor-in-
9 interest began making use of the property consistent with the use permit and that the use permit
10 became a “vested property right which runs with the land.” He adds that the 1966 use permit
11 does not contain any termination provision.

12 Plaintiff claims that, on December 10, 2002, “[c]ounsel for the Plaintiff gave
13 written notice . . . to Rick Barnum as Director of the Siskiyou County Planning Department that
14 the property owners were going to move forward with a business plan consistent with the Use
15 Permit.” On February 13, 2003, the Planning Commission responded with a letter asserting that
16 the use permit was no longer valid. According to plaintiff, the “Planning Director’s decision was
17 made without any hearing, without legislative authority, and without any legislative body action
18 all in violation of Plaintiff’s due process rights relating to termination of a vested property right.”
19 Following the decision, Siskiyou County filed an appeal which was heard on May 4, 2005.² The
20 Planning Commission rejected the appeal and affirmed the determination that the 1966 use
21 permit was no longer valid. Plaintiff alleges that the appeal was heard over his objection because
22 the Planning Commission “lacked any authority to conduct the [May 4, 2005] hearing.” On May
23 24, 2005, plaintiff appealed to the Siskiyou County Board of Supervisors, which also affirmed
24 the Planning Commission’s determination regarding the use permit.

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26 ² Plaintiff does not state what happened between February 2003 and May 2005.

1 Plaintiff alleges in Count 1 a civil rights claim based on the determination that the
2 1966 use permit was not valid:

3 In declaring the Use Permit to be invalid based on Siskiyou County
4 Code § 10-6.2501, Siskiyou County by and through the Planning Director,
5 the Planning Commission, and the Board of Supervisors abused their
6 discretion and failed to proceed in the manner required by law in that the
7 termination of the Use Permit deprived Plaintiff of a vested property right.

8 He adds:

9 Termination of the Use Permit constitutes a taking of property
10 without just compensation in violation of Article I, Section 19 of the
11 California Constitution and the Fifth and Fourteenth Amendments of the
12 United States Constitution. The termination violated Plaintiff's procedural
13 and substantive due process rights

14 Plaintiff contends that, as a result of the determination that the use permit was no longer valid, he
15 has been "denied the use of the Property consistent with the Use Permit from September of 2000
16 through the entry of a final order July 13, 2007. . . ."³

17 In Count 2, plaintiff references an action he brought asking the Superior Court to
18 declare the 1966 use permit valid with respect to his property.⁴ According to plaintiff, defendants
19 interposed demurrers based on failure to exhaust administrative remedies because they ". . . did
20 not want the case heard . . . because [they] knew that a hearing concerning a Vested Use Permit
21 would necessarily result in the protection of Plaintiff's property rights." Plaintiff states that he
22 was told by the Siskiyou County Counsel – defendant Frank DeMarco – that ". . . the county
23 would rather fight Plaintiff in court in hopes of winning instead of taking on the masses of Mt.

24 ³ On July 20, 2007, the Siskiyou County Superior Court entered final judgment in
25 case no. SCCVSV-05-222 in which the state court granted plaintiff's petition for a writ of
26 mandate challenging the determination that the 1966 use permit was invalid. In the July 2007
judgment, the state court ordered:

That a Writ of Mandate issue commanding Defendant . . . County
of Siskiyou to refrain from denying Plaintiff's . . . right to exercise all
rights granted to his predecessor in interest . . . under that certain Use
Permit issued August 3, 1966

⁴ This is apparently a reference to his petition for a writ of mandate in Siskiyou
County Superior Court case no. SCCVSV-05-222

1 Shasta when they filed in court if Plaintiff was allowed to go forward.” Plaintiff adds:

2 . . . At that point Plaintiff asked Mr. DeMarco if that meant that the
3 county would rather squash Plaintiff’s property rights in court in hopes of
4 the court making a mistake in its final decision and finding against
5 Plaintiff. Mr. DeMarco said “I guess you could state it that way.”

6 According to plaintiff, defendants conspired to thwart his state court case even though they knew
7 the use permit was valid.

8 Plaintiff also asserts in Count 2 that his case also arises out of a civil action
9 against plaintiff filed in 2001 by the Siskiyou County District Attorney’s Office for damages
10 resulting from plaintiff’s sale of dirt dug from the property. He asserts that, through this lawsuit,
11 the “principal parties attempted to deprive Plaintiff of the vested right stated in Count 1 as a
12 method of getting revenge for his successful defense of the frivolous case.”⁵ He adds that the
13 2001 civil action “. . . was filed instead of a citation for an infraction in an attempt to get a larger
14 sum of money from Plaintiff.” The action was ultimately dismissed in 2002.

15 Finally, plaintiff asserts allegations concerning his application in 2000 for a use
16 permit and reclamation plan. Plaintiff states that objections were raised because of safety
17 concerns relating to a nearby railway underpass. He states that he and county officials agreed to
18 share the cost of a traffic study. According to plaintiff, the traffic study concluded that the
19 underpass was indeed too narrow and needed to be widened before plaintiff’s project could go
20 forward.⁶ Plaintiff claims that the “. . . engineer made findings, not on the basis of his
21 independent judgment, but on the basis of the undue and unlawful influence of the County and
22 the individuals named in this count of the complaint.” He does not, however, provide any
23 additional specificity supporting this assertion.

24 ⁵ The court notes that it is not possible that the civil lawsuit was brought against
25 plaintiff in order to retaliate against plaintiff for successfully defending against that lawsuit. For
26 this to be true, the plaintiffs to the civil lawsuit would have been required to know the outcome
of the case prior to bringing it.

⁶ Plaintiff does not state when the engineering study was concluded.

1 **B. Procedural History**

2 On November 21, 2008, the court issued findings and recommendations that
3 defendants' motion to dismiss be granted and that this action be dismissed with prejudice for
4 failure to state a claim. The court concluded that, as to Count 1, plaintiff could not state any
5 claim of denial of due process because he had access to adequate state court remedies. As to
6 Count 2, the court concluded that plaintiff could not state a Takings Clause claim because he was
7 never deprived of all the use or value of his property. In an order issued on March 3, 2009, the
8 District Judge declined to adopt the findings and recommendations. The court stated:

9 Upon review of the file, the court does not adopt the magistrate
10 judge's findings and recommendations with respect to plaintiff's § 1983
11 claims based upon alleged violations of his substantive due process rights
and the Takings Clause. The court adopts the magistrate judge's findings
and recommendations in all other respects.

12 * * *

13 Plaintiff's complaint alleges that defendants violated his
14 constitutional rights when the Siskiyou County Planning Director
informed him that a Use Permit relating to his property was no longer
15 valid. (Compl., filed July 21, 2008, ¶ 13). The Siskiyou County Planning
Commission and the Siskiyou County Board of Supervisors upheld this
16 position. (*Id.*, ¶¶ 18, 21). Taking plaintiff's allegations as true and
drawing all reasonable inferences therefrom, plaintiff has sufficiently set
17 forth a claim for a violation of his constitutional rights. The court cannot
determine as a matter of law on a motion to dismiss the nature of the
18 alleged taking or the nature of the government action. Nor can the court
determine, as a matter of law on the record before it, whether plaintiff
19 unsuccessfully attempted to obtain just compensation through State
procedures. Therefore, defendants' motion to dismiss these claims on the
20 bases relied upon by the magistrate judge is DENIED.

21 Defendants filed an answer to the complaint on March 31, 2009, and a scheduling order was
22 issued on May 22, 2009.

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1 privilege. According to defendants: “The fact that many of them are also irrelevant is a
2 secondary basis for not producing them.”⁷

3 1. Privilege

4 Of the discovery in dispute, plaintiff does not challenge the applicability of the
5 privileges in general, but specifically argues that the privileges do not apply “due to the Crime or
6 Fraud Exception.” Defendants concede that the privileges do not apply to communications or
7 work produce which further a criminal purpose. To invoke the crime or fraud exception, the
8 party seeking discovery must make a prima facie showing that there is a relationship between the
9 discovery sought and some kind of illegality. See United States v. Bauer, 132 F.3d 504 (9th cir.
10 1997).

11 Here, citing a decision by the state court in Siskiyou County Superior Court case
12 no. SCCVSV, plaintiff contends that the exception applies because defendants “‘committed an
13 error of law’ by denying his ‘constitutional right of due process.’”⁸ As defendants note, however,
14 the decision goes on to say:

15 As a correction and clarification of this court’s tentative ruling, the
16 court notes that its decision is based only on its determination that the
17 County committed an error of law, namely the County impermissibly
18 rendered its decision without instituting revocation proceedings to provide
19 the Plaintiff a fair hearing.

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20 ⁷ On March 22, 2010, defendants filed a “Notice of Waiver and Withdrawal of
21 Privileges Previously Claimed in Privilege Log and Amended Privilege Log.” In this filing,
22 defendants withdraw their privilege-based objections as to production of documents listed as nos.
23 184, 186, and 308 in the privilege log. Defendants produced document no. 186 – a May 10,
2005, minute order of the Siskiyou County Board of Supervisors – but continue to assert
objections based on relevance as to document nos. 184 and 308.

24 ⁸ The court may take judicial notice pursuant to Federal Rule of Evidence 201 of
25 matters of public record. See U.S. v. 14.02 Acres of Land, 530 F.3d 883, 894 (9th Cir. 2008).
26 Thus, this court may take judicial notice of state court records, see Kasey v. Molybdenum Corp.
of America, 336 F.2d 560, 563 (9th Cir. 1964), as well as its own records, see Chandler v. U.S.,
378 F.2d 906, 909 (9th Cir. 1967).

1 Defendants contend: “Assuming, arguendo, that ‘defendants committed an error of law’ and
2 denied plaintiff his constitutional right of due process, such actions do not constitute a crime or
3 fraud. This argument is persuasive. Because plaintiff cannot establish application of the crime
4 or fraud exception, and because he does not otherwise challenge the applicability of the attorney-
5 client and/or work product privileges, defendants’ privilege objections will be sustained and
6 plaintiff’s motion to compel will be denied to the extent plaintiff seeks to overcome such
7 objections.

8 2. Relevance

9 Defendants argue:

10 It is defendants’ position that plaintiff’s only issue remaining in the
11 case is whether there was a substantive due process violation as a result of
12 Wayne Virag’s letter of February 13, 2005 (Exhibit 4 to the complaint)
13 and its subsequent upholding by the Planning Commission and Board of
14 Supervisors and whether such amounted to a “taking” (there is also the
15 defensive issue as to whether plaintiff’s exhausted his administrative/
16 judicial remedies by an inverse condemnation action).

17 Since the Court did adopt the Magistrate Judge’s findings and
18 recommendations with respect to all other matters procedural due process
19 under Count 1 and all claims under Count 2 of plaintiff’s complaint are
20 gone. That includes claims regarding conspiracy, the civil enforcement
21 action by the District Attorney, and the prior use permit applications
22 including the railroad under-crossing issues. Consequently, discovery
23 relating to these old matters is not relevant to the subject matter of this
24 litigation and is not reasonably calculated to lead to the discovery of
25 relevant or admissible evidence. Consequently, defendants are relieved
26 from producing all documents relating to these old matters, regardless of
whether they are privileged or not. The discussion of privilege relating to
these documents is moot. The inquiry here should be limited only to those
documents relating to action of Wayne Virag shown by Exhibit 2 (1996
Use Permit), Exhibit 3 (letter from plaintiff’s attorney asking for legal
basis which would suggest operation under Use Permit unlawful), and
Exhibit 4 (Virag’s letter rendering the opinion that such use would be
unlawful) to the complaint.

23 Plaintiff argues that all issues remain in the action because defendants filed an answer as to all
24 claims alleged in the complaint, not just those claims defendants now assert are the only
25 remaining claims following the District Judge’s March 2009 order.

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