

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

TERRY ALLEN SMITH,

Plaintiff,

vs.

C/O KAREN HORSWELL, C/O BRUCE
MILLER, and ASS. WARDEN JIM
SOLEMONSEN,

Defendants.

CV 20-45-H-DLC

ORDER

Before the Court is the Findings and Recommendation of United States Magistrate Judge John Johnston, entered on October 8, 2020. (Doc. 7.) Judge Johnston recommends that the Court dismiss Plaintiff Terry Allen Smith's Complaint (Doc. 2) for failure to state a claim. Smith does not object to the recommendation.

Absent objection, the Court reviews Judge Johnston's findings and recommendation for clear error. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Clear error is "significantly deferential" and exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States*

v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000) (citations omitted).

The Court finds no clear error here. In the first instance, the Court may not have read Smith's Complaint to allege a violation of the Takings Clause.

Nevertheless, it agrees with Judge Johnston's ultimate finding that the conduct alleged fails to implicate the Fifth Amendment. *See Vance v. Barrett*, 345 F.3d 1083, 1090 n.7 (9th Cir. 2003) (Where a prisoner complains that prison administrators acted without authority when they took his property, the claim "is more appropriately addressed under the Due Process Clause."). And, while the Court understands that Smith is frustrated by the outcome of his post-confiscation hearing and the subsequent appeal, nothing in his Complaint indicates that he was denied adequate procedural protections. *See Brewster v. Bd. of Ed. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). Thus, the Court agrees with Judge Johnston that Smith's claim under the Fourteenth Amendment's Due Process Clause fails as well.

Accordingly, reviewing for clear error and finding none, IT IS ORDERED that:

- (1) Judge Johnston's Findings and Recommendation (Doc. 7) is ADOPTED IN FULL, and this matter is DISMISSED for failure to state a claim;
- (2) The Clerk shall enter, by separate document, a judgment of dismissal

pursuant to Federal Rule of Civil Procedure 58;

(3) The Clerk of Court shall have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g); and

(4) The Court shall certify, pursuant to Federal Rule of Appellate Procedure 24(a)(4)(B), that any appeal of this disposition would not be taken in good faith.

DATED this 29th day of October, 2020.



Dana L. Christensen, District Judge
United States District Court