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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TYRONE M. CLARK,)	1:09-cv-00817-SKO-HC
)	
Petitioner,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS (DOC. 13)
v.)	AND DISMISSING THE ACTION
)	WITHOUT PREJUDICE
)	
H. A. RIOS, JR., Warden,)	ORDER DIRECTING THE CLERK TO
)	ENTER JUDGMENT AND CLOSE THE CASE
Respondent.)	
)	
)	

Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to the parties' consent,¹ the matter has been referred to the Magistrate Judge for all proceedings, including the entry of final judgment, pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73(b), and Local Rule 73-301. Pending before the Court is Respondent's motion to dismiss the action.

I. Procedural Summary

On May 8, 2009, Petitioner filed a petition for writ of

¹ Petitioner filed a signed, written consent form on June 12, 2009; Respondent Warden Hector A. Rios filed a written consent form signed by his authorized representative on October 13, 2009.

1 habeas corpus in which he challenged the execution of his
2 sentence pursuant to 28 U.S.C. § 2241. (Pet. p. 1.)² Petitioner
3 alleged that the Bureau of Prisons (BOP) denied his request of
4 February 26, 2009, for a transfer to a residential reentry center
5 (RRC) because Petitioner was not yet serving the last six (6)
6 months, or last ten (10) percent, of his sentence. Petitioner
7 alleged that the denial was improper because it conflicted with
8 18 U.S.C. § 3621, which permitted transfer at any point in a
9 prisoner's sentence. He also alleged that it was invalid under
10 standards of review set forth in the Administrative Procedure Act
11 (APA) that require consideration of the relevant factors set
12 forth in § 3621(b) in the exercise of discretion to determine
13 placement of a prisoner. (Pet. pp. 1-5.)³

14 Petitioner relies on the decision in Rodriguez v. Smith, 541
15 F.3d 1180 (9th Cir. 2008), in which the court determined that
16 regulations of the BOP (28 C.F.R. §§ 570.20 and 570.21) that
17 purported categorically to exclude consideration of prisoners for
18 placement in RRC's for more than the last six (6) months of their
19 sentences were contrary to the Congressional intent expressed in
20 18 U.S.C. § 3621(b), which provided for individualized
21 consideration of transfer and exercise of administrative
22

23 ²References to pages of filed documents are to the page numbers that are
24 automatically assigned by the Court's electronic filing system and appear in
the upper right-hand corner of the pages of filed documents.

25 ³ Petitioner alleged that the BOP's action conflicted with the Second
26 Chance Act and then sought consideration of a transfer "without reference to
the Second Chance Act." (Pet pp. 4-5.) Because these references are not
27 sufficiently specific to identify any precise statutory provision and are
essentially inconsistent, the Court agrees with Respondent (mot. pp. 2-3, n.
28 1) that the petition will be liberally construed to be seeking an order
compelling the BOP to consider Petitioner for a routine transfer to a RRC with
consideration of the factors set forth in 18 U.S.C. § 3621.

1 discretion based on specified factors. The Court in Rodriguez
2 affirmed the district court's grant of a writ of habeas corpus
3 ordering the BOP promptly to consider the prisoner for transfer
4 to an RRC with reference to the factors specified in § 3621(b).
5 541 F.3d at 1189. This is essentially the relief sought by
6 Petitioner here. (Pet p. 5.)

7 In response to the petition, Respondent served by mail on
8 Petitioner and filed on December 15, 2009, a motion to dismiss
9 the action. Petitioner did not file an opposition to the motion.
10 Respondent seeks dismissal of the petition for lack of standing
11 and absence of a liberty interest; mootness; inapplicability of
12 the APA; and Petitioner's failure to exhaust administrative
13 remedies.

14 II. Factual Background

15 Petitioner is serving a sentence of one hundred and ten
16 (110) months imposed in the Western District of Michigan on
17 February 22, 2005, for being a felon in possession of a firearm
18 (18 U.S.C. § 922(g)), and twelve months for possession of cocaine
19 base (21 U.S.C. § 844). His projected release date is July 13,
20 2012. (Decl. Orozco, ¶ 3, doc. 13-2, pp. 26-29.)

21 Petitioner was incarcerated in the United States
22 Penitentiary in Atwater, California (USP Atwater) from February
23 7, 2007, through May 21, 2009. He was then transferred to the
24 Federal Correctional Institution at Herlong (FCI Herlong), a
25 medium security facility, where he is presently designated.
26 (Decl. and cert. of records by Jesse Gonzalez, Executive
27 Assistant/Litigation Coordinator, Atwater, California, doc. 13-2,
28 pp. 2-3.)

1 With respect to Petitioner's claim concerning the failure of
2 the BOP to afford him the consideration mandated by § 3621,
3 Petitioner filed a request for administrative remedy on or about
4 March 17, 2009, concerning a transfer to a RRC for successful
5 reintegration. (Gonzalez decl. ¶ 4, att. 1, doc. 13-2, pp. 10-
6 11.) The warden responded on April 1, 2009, explaining that the
7 factors identified in 18 U.S.C. § 3621(b) would be considered at
8 a later date at a pre-release review, and denying the request.
9 (Id. p. 12.) Petitioner sought review by the western regional
10 director, who construed Petitioner's request as one seeking a
11 routine transfer to a RRC (as distinct from a pre-release
12 transfer) and remanded the matter to the warden to address the
13 request. (Id. pp. 13-18.) Petitioner was advised that if he was
14 dissatisfied with the response, he could appeal to the office of
15 the general counsel at a specified address within thirty (30)
16 calendar days. (Id. p. 18.) Petitioner did not appeal the
17 regional director's decision to remand the matter to the warden
18 to address the request as one for a routine transfer. (Decl.
19 Gonzalez, ¶ 4.)

20 On June 1, 2009, the warden reconsidered Petitioner's
21 request for a routine transfer to a RRC. The warden again denied
22 the requested relief. The warden found no extraordinary or
23 compelling re-entry needs, although Petitioner had prepared for
24 release financially, had completed the release preparation
25 program, had maintained clear institutional conduct since May
26 2008, and had been transferred to a medium security institution.
27 Petitioner was again advised of his right to appeal that decision
28 and did not appeal. (Id.; doc. 13-2 p. 19.) Although Petitioner

1 was transferred to FCI Herlong on May 21, 2009, he remained
2 incarcerated in facilities with the western region of the BOP,
3 and thus the pertinent database would have reflected all
4 administrative grievances filed by Petitioner while incarcerated.
5 (Id. at ¶ 5.) The case manager at FCI Herlong stated that the
6 pertinent database revealed that Petitioner had not filed any
7 requests for transfer since arriving at FCI Herlong. (Decl.
8 Orozco, ¶ 5.)

9 In addition, the pertinent records contain no indication
10 that Plaintiff requested a transfer at the team meeting held on
11 February 5, 2009, at USP Atwater. (Decl. Orozco, ¶ 4.)
12 Subsequently, BOP staff determined that Plaintiff's security
13 level could be changed from high to medium, and on April 1, 2009,
14 the institution itself requested a transfer for Plaintiff,
15 resulting in his transfer beginning May 28, 2009. (Id.) In June
16 2009, a program review of Petitioner's case was held, but
17 Petitioner did not request a transfer at that time despite the
18 discussion of later evaluation for RRC placement. (Id. ¶ 5.)

19 III. Motion to Dismiss

20 Title 28 U.S.C. § 2241 provides that writs of habeas corpus
21 may be granted by a district court within its jurisdiction only
22 to a prisoner whose custody is within enumerated categories,
23 including but not limited to custody under the authority of the
24 United States or custody in violation of the constitution, laws,
25 or treaties of the United States. 28 U.S.C. § 2241(a), (c)(1),
26 (3).

27 A district court must award a writ of habeas corpus or issue
28 an order to show cause why it should not be granted unless it

1 appears from the application that the applicant is not entitled
2 thereto. 28 U.S.C. § 2243. Rule 4 of the Rules Governing Section
3 2254 Cases (Rule 4) is applicable to proceedings brought pursuant
4 to § 2241. Rule 1(b) of the Rules Governing Section 2254 Cases.
5 Rule 4 permits the filing of "an answer, motion, or other
6 response," and thus authorizes the filing of a motion in lieu of
7 an answer in response to a petition. Advisory Committee Notes,
8 1976 Adoption and 2004 Amendments. This gives the Court the
9 flexibility and discretion initially to forego an answer in the
10 interest of screening out frivolous applications and eliminating
11 the burden that would be placed on a respondent by ordering an
12 unnecessary answer. Advisory Committee Notes, 1976 Adoption.
13 Rule 4 confers upon the Court broad discretion to take "other
14 action the judge may order," including authorizing a respondent
15 to make a motion to dismiss based upon information furnished by
16 respondent, which may show that a petitioner's claims suffer a
17 procedural or jurisdictional infirmity, such as res judicata,
18 failure to exhaust state remedies, or absence of custody. Rule
19 4, Advisory Committee Notes, 1976 Adoption.

20 The Supreme Court has characterized as erroneous the view
21 that a Rule 12(b)(6) motion is appropriate in a habeas corpus
22 proceeding. See, Browder v. Director, Ill. Dept. of Corrections,
23 434 U.S. 257, 269 n. 14 (1978). However, in light of the broad
24 language of Rule 4, it has been held in this circuit that motions
25 to dismiss are appropriate in cases that proceed pursuant to 28
26 U.S.C. § 2254 and present various procedural issues. O'Bremski
27 v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (a motion to dismiss
28 for failure to raise any issue of federal law, which was based on

1 the insufficiency of the facts as alleged in the petition to
2 justify relief as a matter of law, was evaluated under Rule 4);
3 White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (procedural
4 default in state court was appropriately the subject of a
5 motion); Hillery v. Pulley, 533 F.Supp. 1189, 1194 n. 12
6 (E.D.Cal. 1982) (after the trial court had determined that
7 summary dismissal was unwarranted, a motion to dismiss for
8 failure to exhaust state remedies was appropriately considered
9 after receipt of evidence pursuant to Rule 7(a) to clarify
10 whether or not the possible defect, not apparent on the face of
11 the petition, might preclude a hearing on the merits).

12 Here, the Respondent's filing of the motion to dismiss, and
13 the Court's consideration thereof, are appropriate. Respondent's
14 motion to dismiss is based on lack of subject matter
15 jurisdiction, mootness, failure to exhaust administrative
16 remedies, and lack of standing. A federal court is a court of
17 limited jurisdiction with a continuing duty to determine its own
18 subject matter jurisdiction and to dismiss an action where it
19 appears that the Court lacks jurisdiction. Fed. R. Civ. P.
20 12(h)(3); CSIBI v. Fustos, 670 F.2d 134, 136 n. 3 (9th Cir. 1982)
21 (citing City of Kenosha v. Bruno, 412 U.S. 507, 511-512 (1973));
22 Billingsley v. C.I.R., 868 F.2d 1081, 1085 (9th Cir. 1989).

23 Although Petitioner proceeds pursuant to § 2241, Respondent's
24 motion is similar in procedural posture to a motion to dismiss
25 for failure to exhaust state remedies or for state procedural
26 default in a proceeding undertaken pursuant to § 2254. The motion
27 before the Court is unopposed; the facts alleged in the petition
28 and reflected in the declarations supporting Respondent's motion

1 present no material factual disputes. Finally, Respondent has
2 not yet filed a formal answer.

3 The Court therefore exercises its discretion to review
4 Respondent's motion pursuant to its authority under Rule 4.

5 IV. Subject Matter Jurisdiction

6 Respondent argues that Petitioner seeks nothing more than to
7 challenge the BOP's exercise of discretion in identifying an
8 appropriate place of confinement for the Petitioner to serve his
9 sentence. Since the petition addresses nothing more than the
10 transfer of the site of Petitioner's service of his sentence, the
11 petition involves only conditions of confinement and does not
12 implicate a liberty interest, the fact or duration of his
13 confinement, or a violation of the Constitution or laws of the
14 United States. Thus, Respondent contends that this Court is
15 without subject matter jurisdiction over the controversy.

16 Relief by way of a writ of habeas corpus extends to a
17 prisoner in custody under the authority of the United States who
18 shows that the custody violates the Constitution, laws, or
19 treaties of the United States. 28 U.S.C. § 2241(c)(3). Although
20 a federal prisoner who challenges the validity or
21 constitutionality of his conviction must file a petition for writ
22 of habeas corpus pursuant to 28 U.S.C. § 2255, a federal prisoner
23 challenging the manner, location, or conditions of execution of a
24 sentence must bring a petition for writ of habeas corpus under 28
25 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861, 864-65 (9th
26 Cir. 2000).

27 In arguing that Petitioner is challenging not the fact or
28 duration of his confinement, but rather only the conditions of

1 his confinement, Respondent relies in part on Rodriguez v. Smith,
2 541 F.3d 1180, 1184-1186 (9th Cir. 2008), in which the court
3 characterized a RRC as a place of incarceration. Thus, contends
4 Respondent, Petitioner's request for relief concerns nothing more
5 than a transfer of the place of confinement as distinct from any
6 phenomenon affecting the fact or duration of the confinement.
7 However, in Rodriguez v. Smith, the court affirmed the district
8 court's grant of a writ of habeas corpus directing the BOP to
9 afford the petitioner individualized consideration as provided
10 for by statute. 541 F.3d at 1189. Although the question of
11 subject matter jurisdiction was not expressly raised in
12 Rodriguez, Respondent's jurisdictional assertion is fundamentally
13 inconsistent with the court's decision in that case.

14 Respondent's view of jurisdiction is not required by the
15 wording of the governing statute. Sections 2241(c)(1) and (3)
16 provide that the writ of habeas corpus extends to a prisoner who
17 "is in custody under or by color of" the authority of the United
18 states as well as to a prisoner who "is in custody in violation
19 of the Constitution or laws or treaties of the United States."
20 Unlike § 2255(a), which limits potential applicants to prisoners
21 "claiming the right to be released," § 2241 does not contain any
22 such exclusions or limitations. Petitioner's claim in the
23 instant case challenges the manner of execution of Petitioner's
24 sentence as being in violation of a specific federal statute and
25 thus comes within the express terms of § 2241.

26 The Court in Preiser v. Rodriguez, 411 U.S. 475 (1973) noted
27 that habeas relief was appropriate for federal prisoners who
28 claimed that a federal judge's action was contrary to federal

1 statute and resulted in unlawful confinement in the wrong
2 institution. 411 U.S. at 475 (citing In re Bonner, 151 U.S. 242,
3 involving a federal judge's sentencing of a federal prisoner to
4 time in a state custodial institution in violation of a federal
5 statute that prohibited a sentence to imprisonment in a state
6 penitentiary unless the term was to exceed a year; and Humphrey
7 v. Cady, 405 U.S. 504 (1972), involving a state prisoner's
8 challenge, based on unlawful commitment procedures as well as the
9 conditions of his confinement, to his commitment to a sexual
10 deviate facility for a potentially indefinite period of time).
11 The present case does not involve the functions of the sentencing
12 court, a possibility of immediate release, or any shortening of
13 the duration of confinement; thus it may not lie within the
14 "core" of habeas corpus. See, Preiser, 411 U.S. at 487-88;
15 Ramirez v. Galaza, 334 F.3d 850, 856 (9th Cir. 2003).

16 However, the scope of habeas corpus has not been
17 definitively limited to only the central, core function. See,
18 Preiser, 411 U.S. at 499 (declining to describe federal habeas
19 corpus categorically as unavailable to challenge conditions of
20 confinement, and citing Johnson v. Avery, 393 U.S. 483 (1969)
21 [habeas corpus available to control prison conditions that
22 restricted access to federal habeas corpus relief]).

23 Further, in addition to the obvious example of Rodriguez v.
24 Smith, the Court notes that decisions in other cases in this
25 circuit have extended the reach of § 2241 to matters related to
26 the manner of execution of sentence that were alleged to violate
27 federal statutory or Constitutional provisions but did not
28 involve a direct or immediate effect on the fact or duration of

1 confinement. See, Montano-Figueroa v. Crabtree, 162 F.3d 548,
2 549 (9th Cir. 1998) (permitting a federal prisoner to challenge
3 by way of § 2241 the BOP's policies concerning collection of
4 court-ordered fines alleged to violate not only federal statutes
5 entrusting supervision of fine collection to the federal courts
6 but also the separation of powers provided for in Article III of
7 the Constitution); United States v. Lemoine, 546 F.3d 1042, 1046
8 (9th Cir. 2008) (entertaining and resolving on a petition
9 pursuant to § 2241 a prisoner's challenge to the BOP's
10 requirement that a federal prisoner pay restitution at a higher
11 rate than ordered at sentencing pursuant to a federal statute).

12 Respondent relies on cases involving state prisoners in
13 which it was held that a prisoner has no constitutionally
14 protected liberty interest or expectation in confinement in any
15 particular facility, such as Meachum v. Fano, 427 U.S. 215, 223
16 (1976) (absent a provision of state law to the contrary, a
17 transfer of a state prisoner from a medium to a maximum security
18 prison did not implicate or infringe a liberty interest within
19 the meaning of the due process clause but rather was entrusted to
20 the discretion of prison administrators); Montayne v. Haymes, 427
21 U.S. 236, 242 (1976) (absent a state law to the contrary, a state
22 prisoner had no right to remain at any particular facility that
23 was protected by the due process clause); Olim v. Wakinekona, 456
24 U.S. 1005 (1983) (interstate prison transfer did not deprive a
25 prisoner of any interest protected by the due process clause, and
26 state law did not create a constitutionally protected liberty
27 interest).

28 However, § 2241 and 2254 involve different sovereign

1 interests. Further, the present suit concerns not the vague
2 parameters of due process, but rather an express, affirmative,
3 and specific federal statute governing the execution of sentence.
4 The points asserted here by Petitioner on the merits have been
5 considered and determined by the appellate court of this circuit
6 and have been resolved in Petitioner's favor in a proceeding
7 brought pursuant to § 2241.

8 Respondent points to cases from various district courts in
9 California, including this Court, that come to differing results
10 with respect to the issue of subject matter jurisdiction
11 presented in this case. (Mot. pp. 6-7.) The issue is not
12 straightforward. However, considering the statutes in question,
13 the state of the authorities, and the uncertainty concerning the
14 scope of the habeas remedy in circumstances such as the present,
15 the Court concludes that Respondent's view too narrowly defines
16 the range of cases subject to § 2241 and inflexibly treats two
17 categories of cases, namely, conditions suits and habeas actions
18 concerning the manner of execution of sentence, as necessarily
19 mutually exclusive phenomena. The Court concludes that
20 Petitioner's action is one to which habeas corpus may extend
21 because it concerns his custody under the authority of the United
22 States and an allegation that his custody is in violation of a
23 specific federal statute with respect to the execution of his
24 sentence.

25 The Court thus concludes that it has subject matter
26 jurisdiction over the action, and Respondent's motion to dismiss
27 for lack of subject matter jurisdiction will be denied.

28 ///

1 V. Personal Jurisdiction

2 Title 28 U.S.C. § 2241(a) provides that writs of habeas
3 corpus may be granted by the district courts "within their
4 respective jurisdictions." A writ of habeas corpus operates not
5 upon the prisoner, but upon the prisoner's custodian. Braden v.
6 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 494-495
7 (1973). A petitioner filing a petition for writ of habeas corpus
8 under 28 U.S.C. § 2241 must file the petition in the judicial
9 district of the petitioner's custodian. Brown v. United States,
10 610 F.2d 672, 677 (9th Cir. 1990). The warden of the
11 penitentiary where a prisoner is confined constitutes the
12 custodian who must be named in the petition, and the petition
13 must be filed in the district of confinement. Id.; Rumsfeld v.
14 Padilla, 542 U.S. 426, 446-47 (2004). It is sufficient if the
15 custodian is in the territorial jurisdiction of the court at the
16 time the petition is filed; transfer of the petitioner thereafter
17 does not defeat personal jurisdiction that has once been properly
18 established. Ahrens v. Clark, 335 U.S. 188, 193 (1948),
19 overruled on other grounds in Braden v. 30th Judicial Circuit
20 Court of Kentucky, 410 U.S. at 193, citing Mitsuye Endo, 323 U.S.
21 283, 305 (1944); Francis v. Rison, 894 F.2d 353, 354 (9th Cir.
22 1990).

23 Here, the declarations submitted by Respondent establish
24 that Petitioner was incarcerated within the district at the time
25 the petition was filed. Petitioner named Warden Hector A. Rios,
26 Jr., as the Respondent, and the evidence submitted by Respondent
27 reflects that H. A. Rios, Jr., was the warden at that time. (Doc.
28 13-2, pp. 12, 19.)

1 Accordingly, the Court concludes that it has jurisdiction
2 over the Respondent and that in considering the motion to dismiss
3 the petition, it acts within its jurisdiction within the meaning
4 of § 2241(a).

5 VI. Failure to Exhaust Administrative Remedies

6 Respondent argues that the petition should be dismissed
7 because Petitioner failed to exhaust his administrative remedies
8 before filing the petition.

9 Petitioner acknowledged the requirement of exhaustion of
10 administrative remedies (pet. pp. 5-6), but he did not allege
11 facts demonstrating that he exhausted his administrative remedies
12 before filing the petition. Instead, he asserted that exhaustion
13 should be excused where a petitioner might suffer irreparable
14 injury if required to exhaust, or where the administrative
15 remedies are ineffective or pursuit thereof futile. Petitioner
16 argues that based on the BOP's use of an invalidated policy, it
17 should be concluded that the remedy would have been futile or
18 ineffective. (Pet. pp. 5-7.)

19 As a "prudential matter," federal prisoners are generally
20 required to exhaust available administrative remedies before
21 bringing a habeas petition pursuant to 28 U.S.C. § 2241. Huang
22 v. Ashcroft, 390 F.3d 1118, 1123 (9th Cir. 2004) (quoting Castro-
23 Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001)); Martinez v.
24 Roberts, 804 F.2d 570, 571 (9th Cir. 1986). The exhaustion
25 requirement applicable to petitions brought pursuant to § 2241 is
26 judicially created and is not a statutory requirement; thus, a
27 failure to exhaust does not deprive a court of jurisdiction over
28 the controversy. Brown v. Rison, 895 F.2d 533, 535 (9th Cir.

1 1990), overruled on other grounds, Reno v. Koray, 515 U.S. 50,
2 54-55 (1995). If a petitioner has not properly exhausted his or
3 her claims, a district court in its discretion may either excuse
4 the faulty exhaustion and reach the merits, or require the
5 petitioner to exhaust the administrative remedies before
6 proceeding in court. Brown v. Rison, 895 F.2d 533, 535.
7 Exhaustion may be excused if the administrative remedy is
8 inadequate or ineffective, or if attempting to exhaust would be
9 futile or would cause irreparable injury. Fraley v. United
10 States Bureau of Prisons, 1 F.3d 924, 925 (9th Cir. 1993); United
11 Farm Workers of America v. Arizona Agr. Emp. Rel. Bd., 669 F.2d
12 1249, 1253 (9th Cir. 1982).

13 Factors weighing in favor of requiring exhaustion include
14 whether 1) agency expertise makes agency consideration necessary
15 to generate a proper record and reach a proper decision; 2)
16 relaxation of the requirement would encourage the deliberate
17 bypass of the administrative scheme; and 3) administrative review
18 is likely to allow the agency to correct its own mistakes and to
19 preclude the need for judicial review. Noriega-Lopez v.
20 Ashcroft, 335 F.3d 874, 880-81 (9th Cir. 2003) (citing Montes v.
21 Thornburgh, 919 F.2d 531, 537 (9th Cir. 1990)).

22 Here, Petitioner makes only a bare allegation of futility.
23 The record shows without contradiction that Petitioner began the
24 process of exhausting his remedies but then failed to continue
25 the process. None of the evidence provided by Respondent
26 supports an inference that completing the attempt to obtain
27 relief would have been futile; if anything, the evidence of
28 reconsideration by the prison authorities and ultimate transfer

1 warrants a contrary inference. Further, Petitioner's abandonment
2 of his administrative remedy does not appear to have been
3 necessary. Thus, to relax the requirement in this instance would
4 encourage deliberate bypass of the administrative scheme and may
5 tend to increase the likelihood of unnecessary judicial review.
6 This case is thus factually unlike the cases cited by Petitioner,
7 including Elwood v. Jeter, 386 F.3d 842, 843 n.1 (8th Cir. 2004)
8 (the government waived exhaustion and confirmed that an attempt
9 to exhaust would have been futile); Drew v. Meniffee, 2005 WL
10 525449 (S.D.N.Y. Mar. 4, 2005) (the government raised no issue of
11 exhaustion); Pinto v. Meniffee, 2004 WL 3019760, *3 (S.D.N.Y. Dec.
12 29, 2004) (BOP exhaustion not required where a directive of the
13 Department of Justice rendered futile any attempt to exhaust an
14 administrative remedy before the BOP); and Rodriguez v. Smith,
15 541 F.3d 1180 (9th Cir. 2008) (the court did not address
16 exhaustion of administrative remedies).

17 Accordingly, the Court finds that Petitioner failed to
18 exhaust his administrative remedies and concludes that his
19 failure to exhaust is not excused in this instance. The motion
20 to dismiss will therefore be granted.⁴ Because the failure to
21 exhaust administrative remedies is properly treated as a curable
22 defect, it should generally result in a dismissal without
23 prejudice. Cf., City of Oakland, Cal. v. Hotels.com LP, 572 F.3d
24 958, 962 (9th Cir. 2009).

25 VII. Disposition

26 Accordingly, it is ORDERED that:

27 _____
28 ⁴ In light of the disposition of this motion, the Court does not reach Respondent's contentions concerning the APA, mootness of the petition, or Petitioner's inability to demonstrate any injury in fact necessary for standing.

1 1) Respondent's motion to dismiss the action is GRANTED;

2 2) The petition for writ of habeas corpus is DISMISSED

3 WITHOUT PREJUDICE; and

4 3) The Clerk is DIRECTED to enter judgment and close the

5 case.

6

7 IT IS SO ORDERED.

8 **Dated: May 10, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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