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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christopher D. Moore- Backman,

Plaintiff,

vs.

United States of America,

Defendant.

No. CV 09-397-TUC-RCC

ORDER

On June 28, 2010, the Honorable Bernardo P. Velasco, United States Magistrate Judge, filed a Report and Recommendation ("Recommendation"), (Doc. 15), in this action pursuant to Local Civil Rule 72.2. Rules of Practice of the U.S. District Court for the District of Arizona. The Recommendation advised the Court to **GRANT** Defendant's Motion to Dismiss, (Doc. 6), pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

On August 5, 2010, the Court granted Plaintiff's Motion for Extension of Time to File Objections to the Report and Recommendation.(Doc. 16). On August 13, 2010, Plaintiff filed his objections to the Recommendation. (Doc. 20).

Plaintiff argues that the Recommendation should not adopted because the Magistrate Judge did not adjudicate the motion to dismiss on the "grounds asserted by the United States or briefed by the parties." Objections at 2. Specifically, Plaintiff alleges that the Magistrate Judge could not dismiss his claim for lack of subject matter jurisdiction, for his failure to file

1 an administrative claim for refund with the Treasury Secretary before filing this lawsuit,
2 because the United States did not assert this issue in their motion. Plaintiff also alleges that
3 the Magistrate Judge's conclusion that he failed to state a claim for relief under the Free
4 Exercise Clause or Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.*
5 was erroneous.

6 After a thorough and de novo review of the record and appropriate case law, the
7 Court disagrees with Plaintiff's assertion that the Magistrate Judge could not dismiss this
8 case based on an issue not raised by the parties because lack of subject matter jurisdiction
9 can be raised at any time by any party or **by the court**. *See* Fed.R.Civ.P. 12(h); *Attorneys*
10 *Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 594-95 (9th Cir.1996). Furthermore,
11 the Court agrees with Magistrate Judge's reasoning in the alternative theory for dismissing
12 this case. The Court considers the Recommendation (Doc. 15) to be thorough and well-
13 reasoned and will ADOPT the Recommendation of Magistrate Judge Velasco. Therefore,
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15 **IT IS HEREBY ORDERED** that the Court adopts Magistrate Judge Velasco's
16 Report and Recommendation (Doc. 15).

17 **IT IS FURTHER ORDERED** that the Defendant's Motion to Dismiss is **Granted**.
18 (Doc. 6). The Clerk of the Court shall close this case.

19 DATED this 24th day of August, 2010.

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23 **Raner C. Collins**
24 **United States District Judge**
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