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

ALFRED ROLLINGS,	CASE NO. 1:09-cv-01541-LJO-SKO PC
Plaintiff,	FINDINGS AND RECOMMENDATIONS
v.	RECOMMENDING DEFENDANT’S MOTION
WARDEN HARRINGTON,	TO DISMISS BE GRANTED
Defendant.	(Doc. 15)
	THIRTY-DAY OBJECTION PERIOD

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**Findings and Recommendations Addressing Motion to Dismiss**

**I. Procedural History**

Plaintiff Alfred Rollings, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on August 31, 2009. Pursuant to the Court’s screening order filed on January 28, 2011, this action is proceeding against Defendant Harrington on Plaintiff’s claim that while he was housed at Kern Valley State Prison, he was exposed to water contaminated with arsenic, in violation of his rights under the Eighth Amendment of the United States Constitution.

On May 9, 2011, Defendant filed a motion to dismiss for failure to exhaust. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b). In response, Plaintiff filed a motion on June 10, 2011, seeking to stay this action pending exhaustion. The Court denied Plaintiff’s motion for a stay on June 15, 2011, and ordered Plaintiff to file an opposition or a statement of non-opposition within thirty days. Plaintiff did not comply with or otherwise response to the order and Defendant’s motion is deemed

1 submitted.<sup>1</sup> Local Rule 230(l). For the reason that follows, the Court recommends that Defendant’s  
2 motion be granted.

3 **II. Legal Standard**

4 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with  
5 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner  
6 confined in any jail, prison, or other correctional facility until such administrative remedies as are  
7 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available  
8 administrative remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211, 127 S.Ct. 910, 918-19  
9 (2007); McKinney v. Carey, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required  
10 regardless of the relief sought by the prisoner and regardless of the relief offered by the process,  
11 Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819, 1825 (2001), and the exhaustion requirement  
12 applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516, 532, 122 S.Ct. 983, 992  
13 (2002).

14 The failure to exhaust in compliance with section 1997e(a) is an affirmative defense under  
15 which the defendants have the burden of raising and proving the absence of exhaustion. Jones, 549  
16 U.S. at 216; Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). The failure to exhaust is  
17 subject to an unenumerated Rule 12(b) motion, and in resolving the motion, the Court may look  
18 beyond the pleadings and decide disputed issues of fact. Morton v. Hall, 599 F.3d 942, 945 (9th Cir.  
19 2010); Wyatt, 315 F.3d at 1119-20. If the Court concludes that the prisoner has failed to exhaust,  
20 the proper remedy is dismissal without prejudice. Jones, 549 U.S. at 223-24; Lira v. Herrera, 427  
21 F.3d 1164, 1175-76 (9th Cir. 2005).

22 **III. Discussion**

23 The California Department of Corrections and Rehabilitation has an administrative grievance  
24 system for prisoner complaints, Cal. Code Regs., tit. 15 § 3084.1 (West 2011), and the process is  
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27 <sup>1</sup> Plaintiff was provided with notice of the requirements for opposing a motion to dismiss for failure to  
28 exhaust in an order filed on March 4, 2011. Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). (Doc. 11-  
1.)

1 initiated by submitting a CDCR Form 602 (Inmate/Parolee Appeal), id. at § 3084.2(a).<sup>2</sup> In order to  
2 satisfy section 1997e(a), California state prisoners are required to use this process to exhaust their  
3 claims prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 85-86, 126 S.Ct. 2378 (2006); McKinney,  
4 311 F.3d at 1199-1201.

5 Defendant contends that there is no evidence Plaintiff filed an appeal grieving his claim that  
6 he was exposed to contaminated water. In support of his motion, Defendant submits evidence that  
7 there is no record of an appeal on this issue at the institutional level or at the final level of appeal in  
8 Sacramento. (Doc. 15, Motion, Tarnoff Dec., ¶7 & Foston Dec., ¶5.) Plaintiff filed two appeals  
9 while at Kern Valley State Prison, but both appeals related to property issues. (Tarnoff Dec., ¶6.)

10 Defendant has met his burden as the moving party by demonstrating the absence of any  
11 evidence that exhaustion occurred, Wyatt, 315 F.3d at 1119, and the burden therefore shifts to  
12 Plaintiff to produce evidence demonstrating either exhaustion or the existence of circumstances  
13 excusing exhaustion, Sapp v. Kimbrell, 623 F.3d 813, 822-23 (9th Cir. 2010); Nunez v. Duncan, 591  
14 F.3d 1217, 1224 (9th Cir. 2010). Plaintiff's motion to stay this action was denied and Plaintiff failed  
15 to file an opposition or a statement of non-opposition thereafter. Accordingly, Defendant is entitled  
16 to dismissal based on Plaintiff's failure exhaust his administrative remedies.

17 **IV. Recommendation**

18 Based on the foregoing, the Court HEREBY RECOMMENDS that Defendant's motion to  
19 dismiss, filed May 9, 2011, be GRANTED and this action be dismissed, without prejudice, for  
20 failure to exhaust. 42 U.S.C. § 1997e(a); Fed. R. Civ. P. 12(b).

21 These Findings and Recommendations will be submitted to the United States District Judge  
22 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**  
23 **days** after being served with these Findings and Recommendations, the parties may file written  
24 objections with the Court. The document should be captioned "Objections to Magistrate Judge's  
25 Findings and Recommendations." The parties are advised that failure to file objections within the  
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27 <sup>2</sup> Emergency changes to the regulations became effective on January 28, 2011, but the availability of an  
28 administrative process for grieving conditions of confinement and the requirement that inmates file an appeal form to  
initiate the process remain unchanged.

1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
2 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 **Dated:** August 1, 2011

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE

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