

1 staff determined that he should obtain a pre-release transfer to a residential re-entry center
2 (RRC) between 90 to 180 days prior to his projected release. (Answer, p. 2, Attach. 2, ECF
3 No. 10.) Petitioner objected and requested to serve the last 12 months of his sentence a RCC.
4 The staff's decision for 90 to 180 placement was upheld during Petitioner's institutional and
5 regional appeal. (Id., Attach. 3.)

6 On July 19, 2010, Petitioner filed the instant federal habeas petition. Petitioner appears
7 to make two arguments in his federal habeas petition. First, Petitioner argues that the BOP
8 policy with respect to analyzing an inmate's request to transfer to an RRC before Petitioner's
9 sentence has twelve months remaining is in conflict with the Second Chance Act. (See Pet.
10 at p. 9-20.) Second, Petitioner argues Respondent failed to consider the individual factors in
11 determining Petitioner's eligibility for the RCC program. (Id.) Respondent filed an answer to
12 the petition on February 16, 2011.

13 **II. EXHAUSTION**

14 Petitioner failed to exhaust his final appeal before filing the instant petition. The
15 exhaustion prerequisite for filing a § 2241 petition is judicially created and is not a statutory
16 requirement. See *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990). Thus, "[b]ecause
17 exhaustion is not required by statute, it is not jurisdictional." *Brown*, 895 F.2d at 535. If a
18 petitioner has not properly exhausted his claims, the district court, in its discretion, may either
19 "excuse the faulty exhaustion and reach the merits or require the petitioner to exhaust his
20 administrative remedies before proceeding in court." *Id.* Exhaustion may be excused if
21 pursuing the administrative remedy would be futile. See *Fraley v. United States Bureau of*
22 *Prisons*, 1 F.3d 924, 925 (9th Cir. 1993). Factors weighing in favor of requiring exhaustion
23 include whether: (1) agency expertise makes agency consideration necessary to generate a
24 proper record and reach a proper decision; (2) relaxation of the requirement would encourage
25 the deliberate bypass of the administrative scheme; and (3) administrative review is likely to
26 allow the agency to correct its own mistakes and to preclude the need for judicial review. See
27 *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 880-81 (9th Cir. 2003).

28 While the undersigned is aware of the reasons to defer judgment even if this matter is

1 not yet exhausted, the recent opinions from the Ninth Circuit in *Sacora v Thomas*, 628 F.3d
2 1059 (9th Cir. 2010) and *Reeb v. Thomas*, 636 F.3d 1224, 1226 (9th Cir. 2011) weigh in favor
3 of deciding this case now rather than delay its resolution.

4 **III. APPLICABLE STANDARD OF HABEAS CORPUS REVIEW**

5 Writ of habeas corpus relief extends to a person in custody under the authority of the
6 United States. See 28 U.S.C. § 2241. Relief is available if a federal prisoner can show he is
7 "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
8 § 2241(c)(3). Petitioner's claims are proper under 28 U.S.C. § 2241 and not 28 U.S.C. § 2255
9 because they concern the manner, location, or conditions of the execution of petitioner's
10 sentence and not the fact of petitioner's conviction or sentence. See *Tucker v. Carlson*, 925
11 F.2d 330, 331 (9th Cir. 1991) (stating that a challenge to the execution of a sentence is
12 "maintainable only in a petition for habeas corpus filed pursuant to 28 U.S.C. § 2241"). Venue
13 is proper in this District as Petitioner is challenging the execution of his sentence at Taft
14 Correctional Institution, which is within the Eastern District of California.

15 **IV. STATUTORY AND REGULATORY BACKGROUND**

16 In *Sacora v Thomas*, 628 F.3d 1059 (9th Cir. 2010), petition for cert filed, (U.S. May 16,
17 2011) (No. 10-10580), the Ninth Circuit laid out the relevant statutory background applicable
18 in this case:

19 Two statutory provisions govern the BOP's authority to place inmates in
20 its custody in RRCs: 18 U.S.C. §§ 3621(b) and 3624(c). Section 3621 governs
21 the authority of the BOP to designate a prisoner's placement in general while he
22 or she is in the BOP's custody. In the context RRCs, this section governs the
23 BOP's authority in cases where a prisoner who has more than a year left to
24 serve of his or her prison sentence requests a transfer to such a facility. [FN 2]

25 [FN 2] That governing statute provides:

26 The Bureau of Prisons shall designate the place of the prisoner's imprisonment.
27 The Bureau may designate any available penal or correctional facility that meets
28 minimum standards of health and habitability established by the Bureau . . . that
the Bureau determines to be appropriate and suitable, considering —

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;
- (4) any statement by the court that imposed the sentence -
 - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 - (B) recommending a type of penal or correctional facility as appropriate; and

1 (5) any pertinent policy statement issued by the Sentencing Commission
2 pursuant to section 994(a)(2) of title 28.
3 The Bureau may at any time, having regard for the same matters, direct the
4 transfer of a prisoner from one penal correctional facility to another
5 18 U.S.C. § 3621(b).

6 Sacora, 628 F.3d at 1061-62.

7 On April 14, 2008, five days after the [Second Chance Act] went into
8 effect, BOP officials issued a memorandum (the "April 14 Memorandum")
9 explaining the changes to the law and setting forth guidance to BOP staff about
10 how to administer the law. On October 21, 2008 . . . the BOP issued the
11 regulations required by the statute

12 Substantively, the regulations: (1) define the terms "community
13 confinement" and "home detention"; (2) provide that inmates may be designated
14 to community confinement as a condition of prerelease custody for a period not
15 to exceed 12 months and to home detention for a period not to exceed the
16 shorter often percent of the inmate's term of imprisonment or six months; and
17 (3) provide that inmates will be considered for community confinement in an
18 manner consistent with § 3621(b) on an individual basis, with placements of
19 sufficient duration to provide the greatest likelihood of successful reintegration
20 into the community.

21 Sacora, 628 F.3d at 1063 (footnote omitted).

22 On November 14, 2008, BOP officials issued another memorandum (the
23 "November 14 Memorandum") [*9] which provides guidance to BOP staff when
24 considering inmate requests for transfers to RRCs before the final 12 months of
25 the inmate's sentence. It notes that "[i]nmates are legally eligible to be placed
26 in an RRC at any time during their prison sentence[s]," and that "[s]taff cannot,
27 therefore, automatically deny an inmate's request for transfer to a RRC."
28 Instead, "inmate requests for RRC placement must receive individualized
consideration." The memorandum further notes that "[t]elling an inmate that
he/she is ineligible for RRC placement is the same as automatically denying the
inmate from even being considered for such placement, and is not in accord with
Bureau policy." However, as in the April 14 Memorandum, the November 14
Memorandum advises BOP staff that "a RRC placement beyond six months
should only occur when there are unusual or extraordinary circumstances
justifying such placement, and the Regional Director concurs."

Id. at 1064.

22 **V. ANALYSIS OF PETITIONER'S CLAIMS**

23 **A. The BOP Policy Does Not Violate the Second Chance Act**

24 First, Petitioner appears to challenge the BOP's policy regarding transfers of prisoners
25 to RRCs prior to the final twelve months of a prisoner's sentence. Petitioner contends that
26 Respondent's interpretation of the Second Chance Act conflicts with the individualized factors
27 set forth under 18 U.S.C. § 3621(b). For the following reasons, this argument is without merit.

28 In Sacora, the Ninth Circuit specifically analyzed the current BOP policy with respect

1 to inmates requesting a transfer to a RRC prior to their final twelve months of imprisonment.
2 The Court specifically found that the BOP's policy did not violate the Second Chance Act by
3 explaining that:

4 The . . . policy set forth in the November 14 Memorandum is consistent
5 with § 3621(b) . . . Petitioners argue, however, that the policy as set forth in the
6 November 14, Memorandum is contrary to our decision in Rodriguez v. Smith,
7 541 F.3d 1180 (9th Cir. 2008). We disagree.

8 In Rodriguez, we held that the prior version of the regulations codified at
9 28 C.F.R. §§ 570.20 and 570.21 was invalid, because it "categorically exclude[d]
10 inmates from RRC eligibility without considering the mandatory factors
11 articulated in § 3621(b)." 541 F.3d at 1187. No such problem exists here.
12 Although the November 14 Memorandum does set forth a presumption that
13 RRC placements of longer than six months should occur only "when there are
14 unusual or extraordinary circumstances justifying such placement[] and the
15 Regional Director concurs," the Memorandum also admonishes BOP staff that
16 they "cannot . . . automatically deny an inmate's request for transfer to a RRC"
17 because "[i]nmates are legally eligible to be placed in an RRC at any time during
18 their prison sentence[s]." The memorandum also reminds the BOP staff that
19 they "must individually consider the request, just as they would any other request
20 for lower security transfer." Further, the memorandum reminds the staff that
21 when they review an inmate's transfer request, they should review the five
22 factors set forth in 18 U.S.C. § 3621(b) that, we noted in Rodriguez, are
23 "mandatory." Rodriguez, 541 F.3d at 1187. Accordingly, we conclude that the
24 BOP's policy as set forth in the November 14 Memorandum does not violate the
25 SCA.

26 Sacora, 628 F.3d at 1068. For the reasons outlined above in Sacora, Petitioner's challenge
27 to the BOP's current policy is without merit. The policy does not violate the Second Chance
28 Act, and Petitioner's claim is denied.

19 **B. The Court Lacks Jurisdiction to Consider Individualized Determinations
20 Regarding RCC Placement**

21 Petitioner asserts that BOP's denial of his transfer request was arbitrary and capricious
22 under 5 U.S.C. § 706(2) (A) of the Administrative Procedure Act (APA). However, this Court
23 lacks jurisdiction to hear Petitioner's claim.

24 The APA provides a cause of action for persons suffering a legal wrong because of
25 adverse agency action, and agency actions can be held unlawful when those actions are
26 arbitrary, capricious, or an abuse of discretion. 5 U.S.C. §§ 702, 706(2) (A); Reeb v. Thomas,
27 636 F.3d 1224, 1226 (9th Cir. 2011).

28 The Ninth Circuit recently determined that 18 U.S.C. § 3625 precludes judicial review
under the APA of certain individualized determinations by the BOP. Reeb, 636 F.3d at 1226-

1 27. In Reeb, the petitioner challenged the BOP's decision to expel him from an intensive drug
2 treatment program for federal inmates know as the Residential Drug Abuse Program (RDAP).
3 As the Reeb court discussed, the BOP has broad statutory discretion over the entire RDAP
4 program under 18 U.S.C. § 3621(e), and inmates who successfully complete RDAP are
5 eligible for a up to a one year sentence reduction. Id. at 1225. The petitioner in Reeb
6 contended the BOP lacked a rational basis for expelling him from RDAP under § 706(2)(A) of
7 the APA. Id. at 1227-28.

8 The Reeb court concluded that it lacked jurisdiction to hear the claim, holding that 18
9 U.S.C. § 3625 unambiguously specified that judicial review under the APA was precluded.
10 Section 3625 states that the APA does not apply to decisions relating to imprisonment
11 governed by U.S.C. § 3621. Specifically, the court stated:

12 To find that prisoners can bring habeas petitions under 28 U.S.C. § 2241
13 to challenge the BOP's discretionary determinations made pursuant to 18 U.S.C.
14 § 3621 would be inconsistent with the language of 18 U.S.C. § 3625.
15 Accordingly, any substantive decision by the BOP to admit a particular prisoner
16 into RDAP, or to grant or deny a sentence reduction for completion of the
17 program, is not reviewable by the district court. The BOP's substantive decisions
18 to remove particular inmates from the RDAP program are likewise not subject
19 to judicial review.

20 Reeb, 636 F.3d at 1227.

21 Reeb is also instructive with regard to determinations to the RCC. Like the RDAP
22 program, the BOP administers under § 3621(e), the BOP in this case has the sole authority
23 to make RRC placement determinations under § 3621(b). And, like the RDAP determination
24 in Reeb, the BOP's decision to deny Petitioner's RRC transfer request in this case is a
25 substantive, discretionary determination by the BOP. Therefore, like the RDAP decisions in
26 Reeb, RRC placement decisions are properly left to the BOP's discretion.

27 Accordingly, the BOP's substantive, discretionary RRC decision adverse to Petitioner
28 is not reviewable in the district court pursuant to § 706(2)(A) of the APA. Reeb, 636 F.3d at
1227; see also Binford v. Thomas, 2011 U.S. Dist. LEXIS 50242 (D. Or. May 10, 2011). Thus,
this Court lacks jurisdiction to review an individualized determination regarding Petitioner's
RCC placement. As this Court lacks jurisdiction to review Respondent's determination,

1 Petitioner is not entitled to habeas relief and the claim is denied.¹

2 **VI. RECOMMENDATION**

3 For the reasons discussed herein, the Court RECOMMENDS that the Petition for Writ
4 of Habeas Corpus be DENIED.

5 These findings and recommendations are submitted to the United States District Court
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule
7 304 of the Local Rules of Practice for the United States District Court, Eastern District of
8 California. Within thirty (30) days after being served with a copy, any party may file written
9 objections with the Court and serve a copy on all parties. Such a document should be
10 captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the
11 objections shall be served and filed within fourteen (14) days (plus three days if served by
12 mail) after service of the objections. The Court will then review the Magistrate Judge's ruling
13 pursuant to 28 U.S.C. § 636 (b)(1)(c). The parties are advised that failure to file objections
14 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*
15 *Ylst*, 951 F.2d 1153 (9th Cir. 1991).

16
17 IT IS SO ORDERED.

18 Dated: September 12, 2011

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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¹ Respondent, in his answer, asserts that the Petition should be considered moot as Petitioner has already received all the relief he could be afforded if granted relief in the form of a hearing addressing the individual consideration of his placement in an RCC. However, as described herein, this Court does not have authority to review such determinations, and need not address whether the present claim is moot.