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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF CALIFORNIA  
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10 ROBERTO M. GARCIA,

11 Plaintiff,

12 vs.

13 M. JUAREZ,

14 Defendant.  
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Case No.1:12 cv 00750 AWI GSA PC

FINDINGS AND RECOMMENDATION  
THAT THIS ACTION BE DISMISSED FOR  
FAILURE TO STATE A CLAIM UPON  
WHICH RELIEF COULD BE GRANTED

OBJECTIONS DUE IN TWENTY DAYS  
16

17 Plaintiff is a state prisoner proceeding pro se in this civil rights action . The matter was  
18 referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local  
19 Rule 302.  
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21 By order filed May 10, 2013, the Court issued an order dismissing the operative  
22 complaint for failure to state a claim and directing Plaintiff to file an amended complaint within  
23 thirty days. Plaintiff has not filed an amended complaint.

24 In the May 10, 2013, order, the Court informed Plaintiff of the deficiencies in his  
25 complaint, and dismissed the complaint on the ground that Plaintiff had failed to state a claim  
26 upon which relief could be granted. Because Plaintiff has not filed an amended complaint, the  
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1 Court dismisses the claims made in the original complaint with prejudice for failure to state a  
2 claim upon which the Court could grant relief. See Lopez v. Smith, 203 F.3d 1122, 1127 (9<sup>th</sup> Cir.  
3 2007)(recognizing longstanding rule that leave to amend should be granted even if no request to  
4 amend was made unless the court determines that the pleading could not possibly be cured by the  
5 allegation of other facts); Noll v. Carlson, 809 F.2d 1446, 1448 (9<sup>th</sup> Cir. 1987)(pro se litigant  
6 must be given leave to amend his or her complaint unless it is absolutely clear that the  
7 deficiencies of the complaint could not be cured by amendment). See Ferdik v. Bonzelet, 963  
8 F.2d 1258, 1261 (9<sup>th</sup> Cir. 1992)(dismissal with prejudice upheld where court had instructed  
9 plaintiff regarding deficiencies in prior order dismissing claim with leave to amend).  
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12 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed for failure  
13 to state a claim upon which relief can be granted, and that this action count as a strike under 28  
14 U.S.C. §1915(g).

15 These findings and recommendations are submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of 28 U.S. C. § 636(b)(1)(B). Within twenty  
17 days after being served with these findings and recommendations, plaintiff may file written  
18 objections with the Court. Such a document should be captioned “Objections to Magistrate  
19 Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections  
20 within the specified time waives all objections to the judge’s findings of fact. See Turner v.  
21 Duncan, 158 F.3d 449, 455 (9<sup>th</sup> Cir. 1988). Failure to file objections within the specified time  
22 may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir.  
23 1991).  
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IT IS SO ORDERED.

**Gary S. Austin**

Dated: **June 14, 2013** \_\_\_\_\_/s/

UNITED STATES MAGISTRATE JUDGE