



1 **A. PLAINTIFF’S ALLEGATIONS**

2 Plaintiff is currently incarcerated at Valley State Prison (“VSP”), in Chowchilla, California,  
3 where the events at issue occurred.

4 Plaintiff is a Native American inmate at VSP. He alleges that on June 9, 2013, Defendant  
5 Ladd directed and supervised a search of the Native American sweat lodge. Plaintiff states that  
6 without a fully-equipped sweat lodge, he cannot perform his religious practice.

7 The search was conducted by Defendants Musselman, Hernandez, Moor, Lee and Watson.  
8 Plaintiff alleges that during the search, Defendants destroyed sacred religious artifacts “with malice  
9 aforethought and willful intent.” ECF No. 8, at 4. The destroyed artifacts included the fire pit, sacred  
10 mound, prayer ties and “nests of baby migratory birds.” ECF No. 8, at 4. Plaintiff alleges that  
11 Defendants killed the birds, and told Plaintiff that if he did not like it, he should stay out of prison.

12 Plaintiff alleges that Defendants’ actions deprived him of his right to practice his sacred  
13 religious rituals in full and substantially burdened his right to practice his religious beliefs. The sweat  
14 lodge had to be reconstructed and blessed by Elders, a process which took months to complete.

15 Based on these facts, Plaintiff alleges a violation of the First Amendment.

16 **B. LEGAL STANDARD**

17 The failure to exhaust is subject to a motion for summary judgment in which the court may  
18 look beyond the pleadings. Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014). If the Court  
19 concludes that Plaintiff has failed to exhaust, the proper remedy is dismissal without prejudice. Jones,  
20 549 U.S. at 223-24; Lira v. Herrera, 427 F.3d 1164, 1175-76 (9th Cir. 2005).

21 Defendants bear the burden of proof in moving for summary judgment for failure to exhaust,  
22 Albino, 747 F.3d at 1166, and must “prove that there was an available administrative remedy, and that  
23 the prisoner did not exhaust that available remedy,” id. at 1172. If Defendants carry this burden, the  
24 burden of production shifts to Plaintiff “to come forward with evidence showing that there is  
25 something in his particular case that made the existing and generally available administrative remedies  
26 effectively unavailable to him.” Id. This requires Plaintiff to “show more than the mere existence of a  
27 scintilla of evidence.” In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing  
28 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)). “If the undisputed

1 evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is  
2 entitled to summary judgment under Rule 56.” Albino, 747 F.3d at 1166. However, “[i]f material  
3 facts are disputed, summary judgment should be denied, and the district judge rather than a jury should  
4 determine the facts.” Id.

5 **C. APPEALS PROCESS**

6 The California Department of Corrections and Rehabilitation has an administrative grievance  
7 system for prisoners to appeal any departmental decision, action, condition, or policy having an  
8 adverse effect on prisoners’ welfare. Cal. Code Regs. tit. 15, § 3084.1. In order to satisfy section  
9 1997e(a), California state prisoners are required to use this process to exhaust their claims prior to  
10 filing suit. Woodford v. Ngo, 548 U.S. 81, 85-86, 126 S.Ct. 2378 (2006); McKinney v. Carey, 311  
11 F.3d 1198, 1199-1201 (9th Cir. 2002).

12 To exhaust available remedies during the relevant time period, an inmate must proceed through  
13 three formal levels of review unless otherwise excused under the regulations. Cal. Code Regs. tit. 15,  
14 § 3084.5. The appeal must be submitted within thirty calendar days of (1) the occurrence of the event  
15 being appealed; (2) upon first having knowledge of the event; or (3) upon receiving an unsatisfactory  
16 departmental response to an appeal. Cal. Code Regs. tit., § 3084.8(b). An inmate is not required to  
17 seek resolution at the informal level, but they must continue to secure review at all three formal levels  
18 of review, culminating in a third-level decision. Cal. Code Regs. tit. 15, § 3084.7

19 **D. UNDISPUTED FACTS<sup>2</sup>**

20 After the June 9, 2013, search of the sweat lodge, Plaintiff submitted Appeal Log No. VSP-A-  
21 13-01351 to the First Level of Review. This was Plaintiff’s only non-healthcare appeal submitted  
22 between June 9, 2013, and October 3, 2013, the date he filed this action. Wynn Decl. ¶ 10.

23 In the appeal, Plaintiff named all six Defendants and complained about the destruction of the  
24 sweat lodge. He alleged that the sacred elements and religious artifacts were destroyed, and that this  
25

---

26 <sup>2</sup> Plaintiff did not oppose the motion, and therefore did not provide his own statement of undisputed facts or a response to  
27 Defendants’ statement of undisputed facts. In his First Amended Complaint, he simply states that he exhausted his  
28 administrative remedies.

1 placed an extreme burden on his right to practice his religion. Wynn Decl., Ex. B. Plaintiff requested  
2 monetary damages in the amount of \$500,000.00 for the relocation and construction of a new lodge.  
3 Plaintiff also requested punitive damages. Wynn Dec., Ex. B.

4 The appeal was received at the First Level of Review on June 27, 2013. Wynn Decl. ¶ 10, Ex.  
5 B. Also on June 27, 2013, the appeal was rejected under California Code of Regulations, title 15, §  
6 3084.6(b)(13), because it was incomplete. Plaintiff had not completed Sections A and B, but had  
7 instead referred to a continuation page (a 602A). The Appeals Coordinator told Plaintiff that Sections  
8 A and B had to be completed for the appeal to be processed, and that if he ran out of room, he could  
9 attach a 602A. It was not permissible for Plaintiff to write “see 602A” in Section A and B instead of  
10 completing the sections with relevant information. Wynn Decl. ¶10, Ex. B.

11 The Appeals Coordinator also told Plaintiff that the appeals system did not provide for the  
12 issuance of monetary awards for damages, and that the inclusion of such a request precluded the  
13 processing of his appeal. Plaintiff was told that if he wanted to have his concern addressed, he would  
14 have to amend his appeal and remove this disqualifying element. Wynn Decl. ¶ 10, Ex. B.

15 There is no indication that Plaintiff corrected the deficiencies or resubmitted this appeal to any  
16 level of review. Wynn Decl. ¶10; Briggs Decl. ¶ 5. Therefore, Plaintiff never received a First, Second  
17 or Third Level decision on the appeal. Wynn Decl. ¶ 10; Briggs Decl. ¶ 5.

18 **E. DISCUSSION**

19 It is undisputed that after the rejection at the First Level, Plaintiff did not resubmit the appeal.  
20 Defendants therefore carried their burden of showing that Plaintiff did not properly exhaust.

21 The burden now shifts to Plaintiff. However, Plaintiff has not filed an opposition or disputed  
22 Defendants facts. Although Plaintiff indicates in his First Amended Complaint that he completed the  
23 exhaustion process, ECF No. 8, at 2, he cannot defeat summary judgment with a legal conclusion,  
24 unsupported by factual evidence.

25 Plaintiff has therefore failed to present any evidence to either dispute Defendants’ facts or  
26 provide evidence to excuse the exhaustion requirement.

27 ///

28 ///

1 **F. CONCLUSION AND RECOMMENDATION**

2 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 3 1. Defendants’ motion to dismiss, filed February 20, 2015, be GRANTED; and  
4 2. This action be DISMISSED WITHOUT PREJUDICE for Plaintiff’s failure to exhaust.

5 These Findings and Recommendations will be submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days**  
7 after being served with these Findings and Recommendations, the parties may file written objections  
8 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and  
9 Recommendations.” A party may respond to another party’s objections by filing a response within  
10 **fourteen (14) days** after being served with a copy of that party’s objections. The parties are advised  
11 that failure to file objections within the specified time may waive the right to appeal the District  
12 Court’s order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

13  
14 IT IS SO ORDERED.

15 Dated: May 14, 2015

/s/ Dennis L. Beck  
16 UNITED STATES MAGISTRATE JUDGE