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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES ROY MCNEIL,

Plaintiff,  
vs.

No. 2:08-cv-02432 MCE KJN PS

INTERNAL REVENUE SERVICE,  
Defendant.

FINDINGS AND RECOMMENDATIONS

Presently before the court is defendant’s motion to dismiss plaintiff’s compliant on the ground that the court lacks subject matter jurisdiction because plaintiff has failed to establish that the United States has waived its sovereign immunity as to plaintiff’s claim for a tax refund.<sup>1</sup> (Dkt. No. 19.) Plaintiff, who is proceeding without counsel and in forma pauperis, did not file an opposition to defendant’s motion to dismiss. This matter was submitted on the briefs and record on December 3, 2009. (Dkt. No. 22.) For the reasons stated below, the undersigned recommends that defendant’s motion be granted and that plaintiff’s complaint be dismissed.

I. BACKGROUND

On October 14, 2008, plaintiff James Roy McNeil filed his complaint in this

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<sup>1</sup> This action proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1), and was reassigned by an order entered February 9, 2010 (Dkt. No. 24).

1 action seeking a federal tax refund (Dkt. No. 1).<sup>2</sup> Plaintiff alleges that from January 1999  
2 through June 1999, he performed work for a contractor named Steve Relaford at a company  
3 named OTTO Services. (Pl.’s Compl. at 3 (Dkt. No. 1).) He further alleges that the Internal  
4 Revenue Service (“IRS”) failed to issue to him a refund of federal taxes that he alleges he  
5 overpaid for the 1999 tax year. (Id.) Plaintiff also alleges that he complained to the IRS in  
6 writing, but that the IRS did not respond to his correspondence. (Id. at 3.) Plaintiff demands a  
7 monetary award of \$3,000. (Id. at 4.)

8 Defendant filed the motion to dismiss at issue seeking to dismiss plaintiff’s  
9 complaint on the ground that the court lacks subject matter jurisdiction because plaintiff has  
10 failed to establish that the United States waived its sovereign immunity as to plaintiff’s claim.<sup>3</sup>  
11 (Defs.’ Notice of Mot. & Mot. to Dismiss at 2 (Dkt. No. 19).) With its motion, defendant  
12 submitted additional evidence: (1) a declaration from IRS Advisory Insolvency Quality Advisor  
13 Michael Norris; (2) plaintiff’s federal tax return for the year 1999, dated January 27, 2009 (Norris  
14 Decl., Ex. 1 at 1-2); and (3) a letter from plaintiff to the IRS, dated January 27, 2009 (Norris  
15 Decl., Ex. 1 at 3).<sup>4</sup>

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17 <sup>2</sup> Plaintiff’s complaint was filed on a form entitled “Complaint by a Prisoner Under the  
18 Civil Rights Act, 42 U.S.C. § 1983.” (Dkt. No. 1 at 1.) Although plaintiff is currently  
19 incarcerated in California State Prison and used this form to allege his claim, plaintiff’s  
20 complaint alleges that his claim is entirely unrelated to his incarceration. (Pl.’s Compl. at 2.)  
21 His lawsuit seeks a refund of allegedly overpaid taxes and does not allege any violation of 42  
22 U.S.C. § 1983.

23 <sup>3</sup> In its motion to dismiss, defendant contends that although plaintiff named the IRS as a  
24 defendant in his complaint, the United States is the proper defendant because plaintiff’s  
25 requested relief, if granted, would result in a judgment that would expend itself on the public  
26 treasury or restrain the federal government from action or interfere with public administration.  
(See Mem. of P. & A. in Supp. of Def.’s Mot. to Dismiss at 1 n.1 (citing Dugan v. Rank, 372  
U.S. 609, 620 (1963)).) Defendant is correct that the United States is the proper defendant in an  
action seeking the recovery of a civil tax refund. See, e.g., Grossman v. Comm’r of Internal  
Revenue, 687 F. Supp. 1401, 1402 (N.D. Cal. 1987) (citing 26 U.S.C. 7422(f)(1)), aff’d, 85 F.2d  
1289 (9th Cir. 1988).

<sup>4</sup> Plaintiff’s January 27, 2009 letter to the IRS appears to be a cover letter accompanying  
plaintiff’s 1999 tax return that demands an “income tax check” in an unspecified amount.

1 According to defendant's evidence, on February 3, 2009, the IRS received  
2 plaintiff's Form 1040 Individual Tax Return for the 1999 tax year, which was dated January 27,  
3 2009, after plaintiff filed the operative complaint in this action. (Norris Decl. ¶ 3 & Ex. 1 at 2.)  
4 The 1999 tax return reports "wages, salaries, tips, etc." in the amount of "320.00 A week";  
5 taxable refunds, credits, or offsets of state and local income taxes in the amount of \$124,500; and  
6 an Individual Retirement Account distribution of \$4,995. (Norris Decl. ¶ 3 & Ex. 1 at 1.) The  
7 entry fields for both taxable income and the claimed refund amount are blank. (*Id.*) Mr. Norris  
8 also declared that based on his review of information contained in the IRS's Integrated Data  
9 Retrieval System ("IDRS"): (1) plaintiff "had \$633.00 in federal taxes withheld for the 1999 tax  
10 year," (2) the IRS did not receive a federal tax return or claim for refund for plaintiff for the 1999  
11 tax year aside from plaintiff's February 3, 2009 submission, and (3) there is no IDRS record of  
12 federal income tax payments for the 1999 tax year made for plaintiff within three years of the  
13 IRS's receipt of plaintiff's February 3, 2009 submission. (Norris Decl. ¶¶ 4-5.)

14 As stated above, plaintiff did not file an opposition to defendant's motion to  
15 dismiss and, thus, has not rebutted or supplemented defendant's evidence.

## 16 II. LEGAL STANDARDS

17 Defendant's motion seeks dismissal of plaintiff's complaint for lack of subject  
18 matter jurisdiction on the ground that plaintiff has not established that the United States waived  
19 its sovereign immunity as to plaintiff's claim for a tax refund. To confer subject matter  
20 jurisdiction in an action against a sovereign, there must exist (1) "statutory authority vesting a  
21 district court with subject matter jurisdiction," and (2) "a waiver of sovereign immunity."

22 Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007).<sup>5</sup> Because the

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24 (Norris Decl., Ex. 1 at 3.) As with the complaint, the letter states that plaintiff worked for Steve  
25 Relaford and Otto Services. (*Id.*)

26 <sup>5</sup> Congress has provided statutory authority vesting district courts with subject matter  
jurisdiction over civil actions for internal-revenue tax refunds, 28 U.S.C. § 1346(a)(1), and

1 United States is a sovereign, it is immune from suit unless it has expressly waived its immunity  
2 and consented to be sued. See Dunn & Black, P.S. v. United States, 492 F.3d 1084, 1087-88 (9th  
3 Cir. 2007). The United States Supreme Court has “frequently held . . . that a waiver of sovereign  
4 immunity is to be strictly construed, in terms of scope, in favor of the sovereign.” Dep’t of the  
5 Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999). Moreover, the waiver cannot be implied, but  
6 must be “unequivocally expressed” in the statutory text. Id.; accord Harger v. Dep’t of Labor,  
7 569 F.3d 898, 903 (9th Cir. 2009). The party asserting a waiver of sovereign immunity bears  
8 “the burden of establishing that its action falls within an unequivocally expressed waiver of  
9 sovereign immunity by Congress. . . .” Dunn & Black, P.S., 492 F.3d at 1088.

10 When considering a motion to dismiss for lack of subject matter jurisdiction  
11 pursuant to Federal Rule of Civil Procedure 12(b)(1), the district court is not restricted to the face  
12 of the pleadings and “may review any evidence, such as affidavits and testimony, to resolve  
13 factual disputes concerning the existence of jurisdiction.” McCarthy v. United States, 850 F.2d  
14 558, 560 (9th Cir. 1988) (collecting cases), cert. denied, 489 U.S. 1052 (1989); see also Warren  
15 v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (“A jurisdictional challenge  
16 under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic  
17 evidence.”). Accordingly, the court may consider the evidence submitted by defendant in support  
18 of its motion to dismiss to the extent it aids resolution of this jurisdictional dispute.

### 19 III. DISCUSSION

20 Defendant first argues that plaintiff’s complaint should be dismissed as  
21 prematurely filed because plaintiff failed to meet the conditions and limitations that Congress  
22 placed on the government’s waiver of sovereign immunity. (See Mem. of P. & A. in Supp. of  
23 Def.’s Mot. to Dismiss at 4-6.) Specifically, defendant asserts that plaintiff’s action was

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25 defendant does not argue otherwise. Defendant only challenges whether the United States has  
26 waived its sovereign immunity in this case.

1 commenced prematurely because “[p]laintiff first filed his purported claim for refund (his 1999  
2 tax return) on February 3, 2009, after commencing this action.” (Id. at 6.)

3           As noted above, the United States is immune from suit unless it consents to waive  
4 its sovereign immunity, and “[t]he terms of the United States’ consent to be sued in any court  
5 define that court’s jurisdiction to entertain the suit.” Hodge v. Dalton, 107 F.3d 705, 707 (9th  
6 Cir. 1997) (citing Lehman v. Nakshian, 453 U.S. 156, 160 (1981)). The Supreme Court has held  
7 that “[l]ike a waiver of immunity itself, . . . “limitations and conditions upon which the  
8 Government consents to be sued must be strictly observed and exceptions thereto are not to be  
9 implied.” Lehman, 453 U.S. at 160-61.

10           Although 28 U.S.C. § 1346(a)(1) waives the sovereign immunity of the United  
11 States with respect to suits seeking recovery of a tax refund, Imperial Plan, Inc. v. United States,  
12 35 F.3d 25, 26 (9th Cir. 1996), that waiver is subject to conditions. One such condition is that  
13 “[n]o suit [for refund] . . . shall be maintained in any court . . . until a claim for refund or credit  
14 has been duly filed with the Secretary [of the Treasury], according to the provisions of law in that  
15 regard, and the regulations of the Secretary established in pursuance thereof.” 26 U.S.C.  
16 § 7422(a); see also United States v. Clintwood Elkhorn Mineral Co., 553 U.S. 1, 128 S. Ct. 1511,  
17 1515 (2008) (citing 26 U.S.C. § 7422(a) and stating that “a claim for a refund must be filed with  
18 the Internal Revenue Service (IRS) before suit can be brought”). In addition, no suit may  
19 proceed under 26 U.S.C. § 7422(a) before the expiration of six months from the date of filing the  
20 administrative claim required under Section 7422(a), unless the Secretary renders a decision  
21 within that time. See 26 U.S.C. § 6532(a)(1).<sup>6</sup>

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22           <sup>6</sup> In its entirety, 26 U.S.C. § 6532(a)(1) states:

23           (a) Suits by taxpayers for refund.--

24                   (1) General rule.--No suit or proceeding under section 7422(a) for  
25                   the recovery of any internal revenue tax, penalty, or other sum,  
26                   shall be begun before the expiration of 6 months from the date of

1 Here, plaintiff filed his complaint on October 28, 2008. (Dkt. No. 1.) It was not  
2 until February 3, 2009, however, that the IRS received plaintiff's informal demand for a refund,  
3 and plaintiff has submitted no other claim for a refund to the IRS. (See Norris Decl. ¶¶ 3-4 &  
4 Ex. 1 at 1.) Plaintiff's informal demand consisted of a cover letter and a partially completed tax  
5 return for the 1999 tax year, neither of which demanded a specific refund amount. (Norris Decl.,  
6 ¶ 3 & Ex. 1 at 2-3.) The court makes no finding as to whether plaintiff's February 3, 2009  
7 submission to the IRS constituted a "claim for refund . . . duly filed with the Secretary [of the  
8 Treasury], according to the provisions of law in that regard, and the regulations of the Secretary  
9 established in pursuance thereof." 26 U.S.C. § 7422(a). This is because under the plain language  
10 of 26 U.S.C. § 7422(a), Plaintiff was required to file an administrative claim with the IRS prior  
11 to filing his lawsuit in federal court. He did not. Accordingly, plaintiff filed his complaint  
12 prematurely and thus failed to meet one of the conditions of the waiver of sovereign immunity by  
13 the United States. As a result, this court lacks subject jurisdiction over plaintiff's complaint.

14 Because the court concludes that the court lacks subject matter jurisdiction based  
15 on plaintiff's failure to meet the conditions of the government's waiver of sovereign immunity, it  
16 does not address defendant's alternate argument regarding why the court lacks subject matter  
17 jurisdiction over this action. (See Mem. of P. & A. in Supp. of Def.'s Mot. to Dismiss at 6-7.)

18 IV. CONCLUSION

19 For the foregoing reasons IT IS HEREBY RECOMMENDED that defendant's  
20 motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction be granted and that  
21 the complaint be dismissed. Although the court would lack subject matter jurisdiction over this  
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23 filing the claim required under such section unless the Secretary  
24 renders a decision thereon within that time, nor after the expiration  
25 of 2 years from the date of mailing by certified mail or registered  
26 mail by the Secretary to the taxpayer of a notice of the  
disallowance of the part of the claim to which the suit or  
proceeding relates.

1 action if this recommendation of dismissal is adopted by the United States District Judge  
2 assigned to the case, nothing in these findings and recommendations would preclude plaintiff  
3 from filing a timely action for a tax refund that otherwise meets all of the conditions necessary to  
4 effect a waiver of the government's sovereign immunity.

5           These findings and recommendations are submitted to the United States District  
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
7 days after being served with these findings and recommendations, any party may file written  
8 objections with the court and serve a copy on all parties. Such a document should be captioned  
9 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
10 within the specified time may waive the right to appeal the District Court's order. Turner v.  
11 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir.  
12 1991).

13 DATED: February 24, 2010

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16 KENDALL J. NEWMAN  
17 UNITED STATES MAGISTRATE JUDGE  
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