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

JAMES E. BOWELL,

Plaintiff,

No. CIV S-10-0397 JAM DAD P

vs.

CALIFORNIA DEPARTMENT
OF CORRECTIONS, et al.,

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. By order filed November 3, 2010, the United States Marshal was ordered to serve process on defendants. No defendant has appeared in the action. On December 10, 2010, plaintiff filed a motion for declaratory judgment, by which he seeks an order from the court declaring that he has satisfied the administrative exhaustion requirement of 42 U.S.C. § 1997e(a) with respect to the claims on which this action is proceeding. Exhaustion of administrative remedies is an affirmative defense, Wyatt v. Terhune, 315 F.3d 1108, 1119 ((th Cir. 2003), and ““defendants have the burden of raising and proving the absence of exhaustion.”” Id. (quoted in Brown v. Valoff, 422 F.3d 926, 936 (9th Cir. 2005). For that reason, the

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1 court will not reach the question of whether plaintiff has satisfied the administrative exhaustion
2 requirement unless and until it is placed in issue by one or more of the defendants in this action.

3 Accordingly, IT IS HEREBY ORDERED that plaintiff's December 10, 2010
4 motion for declaratory judgment is denied without prejudice.

5 DATED: January 3, 2011.

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9 DALE A. DROZD
10 UNITED STATES MAGISTRATE JUDGE

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