



1 Thus, when a prisoner plaintiff has had three or more prior actions dismissed for one of the  
2 reasons set forth in the statute, such “strikes” preclude the prisoner from proceeding in forma  
3 pauperis unless the imminent danger exception applies. Dismissals for failure to exhaust  
4 available administrative remedies generally do not count as “strikes” unless the failure to exhaust  
5 is clear on the face of the complaint. See Richey v. Dahne, 807 F.3d 1202, 1208 (9th Cir. 2015).  
6 Dismissed habeas petitions do not count as “strikes” under § 1915(g). See Andrews v. King, 398  
7 F.3d 1113, 1122 (9th Cir. 2005). Where, however, a dismissed habeas action was merely a  
8 disguised civil rights action, the district court may conclude that it counts as a “strike.” See id. at  
9 n.12.

10 When in forma pauperis status is denied, revoked, or otherwise unavailable under  
11 § 1915(g), the proper course of action is to dismiss the action without prejudice to re-filing the  
12 action upon pre-payment of fees at the time the action is re-filed. In Tierney v. Kupers, the Ninth  
13 Circuit reviewed a district court’s screening stage dismissal of a prisoner civil rights action after  
14 finding under § 1915(g) that the plaintiff was not entitled to proceed in forma pauperis. See 128  
15 F.3d 1310 (9th Cir. 1998). Notably, the district court dismissed the entire action rather than  
16 simply providing the plaintiff an opportunity to pay the filing fee. The Ninth Circuit held that the  
17 plaintiff’s case was “properly dismissed.” Id. at 1311. Similarly, in Rodriguez v. Cook, the  
18 Ninth Circuit dismissed an inmate’s appeal in a prisoner civil rights action because it concluded  
19 that he was not entitled to proceed in forma pauperis on appeal pursuant to the “three strikes”  
20 provision. See 169 F.3d 1176 (9th Cir. 1999). Again, rather than providing the inmate appellant  
21 an opportunity to pay the filing fee, the court dismissed the appeal without prejudice and stated  
22 that the appellant “may resume this appeal upon prepaying the filing fee.”

23 This conclusion is consistent with the conclusions reached in at least three other  
24 circuits. In Dupree v. Palmer, the Eleventh Circuit held that denial of in forma pauperis status  
25 under § 1915(g) mandated dismissal. See 284 F.3d 1234 (11th Cir. 2002). The court specifically  
26 held that “the prisoner cannot simply pay the filing fee after being denied IFP status” because  
27 “[h]e must pay the filing fee at the time he *initiates* the suit.” Id. at 1236 (emphasis in original).  
28 The Fifth and Sixth Circuits follow the same rule. See Adepegba v. Hammons, 103 F.3d 383 (5th

1 Cir. 1996); In re Alea, 86 F.3d 378 (6th Cir. 2002).

2 In this case, plaintiff has had three prior actions dismissed as frivolous and/or for  
3 failure to state a claim. Those actions are: Trujillo v. Sherman, No. 1:14-CV-1401-BAM;  
4 Trujillo v. Ruiz, 1:14-CV-0975-SAB; and Cruz v. Gomez, 1:15-CV-0895-EPG. A review of  
5 plaintiff's complaint in the current action does not reflect any allegations of imminent danger of  
6 serious physical injury.

7 Based on the foregoing, the undersigned recommends that:

- 8 1. Plaintiff's motion for in forma pauperis status (ECF No. 7) be denied; and
- 9 2. This action be dismissed without prejudice to re-filing upon pre-payment of  
10 the filing fee.

11 These findings and recommendations are submitted to the United States District  
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
13 after being served with these findings and recommendations, any party may file written objections  
14 with the court. Responses to objections shall be filed within 14 days after service of objections.  
15 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.  
16 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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18  
19 Dated: October 3, 2019



20 DENNIS M. COTA  
21 UNITED STATES MAGISTRATE JUDGE