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CENTRAL DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY ("PEER"), MARK HAGAN, in his individual capacity and as a member of PEER, and WANDA DEAL, in her individual capacity and as a member of PEER,

Plaintiffs,

v.

UNITED STATES AIR FORCE, and F. WHITTEN PETERS, in his official capacity as SECRETARY OF THE UNITED STATES AIR FORCE,

Defendants.

CASE NO. CV 00-06133 MMM (RZK)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

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In their complaint in this action, plaintiffs Public Employees for Environmental Responsibility ("PEER"), Mark Hagan and Wanda Deal allege that defendants are violating the Sikes Act, 16 U.S.C. §§ 670 et seq., which addresses the management of natural resources on military installations. Hagan and Deal are civilian employees of defendant United States Air Force and are the natural resource manager and assistant natural resource manager, respectively, at

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1 Edwards Air Force Base ("AFB").<sup>1</sup> Hagan and Deal are members of PEER,<sup>2</sup> a nonprofit  
2 organization that "supports public natural resource employees in seeking a higher standard of  
3 environmental ethics and scientific integrity within their respective governmental agencies [and]  
4 supports the responsible conservation and management of natural resources on military lands."<sup>3</sup>  
5 Plaintiffs allege, *inter alia*, that defendants have violated the Sikes Act by (1) assigning contractors  
6 to perform natural resource management tasks that should be performed by the natural resource  
7 management staff at Edwards AFB; (2) failing to ensure the continued employment of natural  
8 resource management personnel, including Hagan and Deal; (3) illegally applying Office of  
9 Management and Budget Circular No. A-76 ("Circular A-76") to transfer natural resource jobs to  
10 outside contractors; (4) failing properly to implement the Integrated Natural Resources  
11 Management Plan ("INRMP"); (5) failing to give priority to federal and state conservation agencies  
12 when entering into contracts for the implementation and enforcement of the INRMP; (6) failing  
13 to reach mutual agreement with the United States Fish & Wildlife Service ("USFWS") and  
14 California Department of Fish and Game ("CDFG") regarding the INRMP; and (7) violating the  
15 Clean Water and Endangered Species Acts.

16 Defendants contend that the court does not have subject matter jurisdiction to hear the  
17 action, and additionally that plaintiffs fail to state a claim on which relief can be granted.  
18 Specifically, defendants assert that Deal's claim that she will be terminated because of their natural  
19 resource policies is preempted by the Civil Service Reform Act ("CSRA"), which delegates review  
20 of adverse employment actions to the Merit System Protection Board. Additionally, they maintain  
21 that Deal has not exhausted administrative remedies, and that her claim is not ripe because her  
22 position has not been eliminated. Defendants also assert that their decision to contract out various  
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24 <sup>1</sup>See Complaint, ¶¶ 6, 7, 20, 21. While defendants take issue with certain of plaintiffs'  
25 allegations, the court must accept the allegations as true for purposes of ruling on defendants' Rule  
26 12(b)(6) motion to dismiss. See *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.  
1996).

27 <sup>2</sup>See Complaint, ¶¶ 6, 7, 20, 21.

28 <sup>3</sup>*Id.*, ¶¶ 5, 19.

1 aspects of natural resource management at Edwards AFB is not subject to judicial review under  
2 the Administrative Procedure Act ("APA") because it is a matter committed to the agency's  
3 discretion. Defendants argue that the Sikes Act does not bar the use of outside contractors, and  
4 that, while military agencies are not required to compare in-house and contractor costs pursuant  
5 to Circular A-76, they are not prohibited from doing so or from hiring contractors. Indeed,  
6 defendants contend, the express language of the Sikes Act contemplates and permits the use of  
7 contractors. As respects plaintiffs' claims regarding the INRMP, defendants maintain they have  
8 not prepared and adopted a final INRMP, and thus that there is no final agency action subject to  
9 review under the APA.

10 Plaintiffs counter that Deal's claim does not involve a personnel action, but rather violations  
11 of the Sikes Act that "may have an incidental effect" on Hagan's and/or Deal's positions.<sup>4</sup> Thus,  
12 they assert, the CSRA is inapplicable and no need to exhaust administrative remedies exists.  
13 Plaintiffs contend the court has jurisdiction under the APA to hear their Sikes Act claims because  
14 federal courts have reviewed similar government contracting decisions in the past, and the decision  
15 to contract out natural resource management is not discretionary with the agency. Finally,  
16 plaintiffs note that they have alleged the preparation of a final INRMP, and thus that the court must  
17 assume there has been final agency action that is subject to review.

18 On its face, the Sikes Act permits the use of outside contractors in implementing and  
19 enforcing the provisions of an INRMP. It requires, however, that defendants give priority to  
20 governmental agencies in entering into such contracts, and that they ensure the availability of a  
21 sufficient number of natural resource management personnel to prepare and implement the plan.  
22 Thus, while defendants' decision to use contractors is not subject to judicial review under the APA,  
23 it appears that the court may review whether defendants have granted priority in contracting to  
24 government agencies and whether they have taken steps to ensure that there are a sufficient number  
25 of natural resources management personnel. Whether additional standards governing the exercise  
26 of discretion exist depends on the nature and content of the agency regulations that have been  
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28 <sup>4</sup>See Plaintiffs' Memorandum in Opposition to Motion to Dismiss ("Pls.' Opp.") at 8:4-6.

1 promulgated to guide those charged with implementing the statutory mandate. In order properly  
2 to evaluate whether adequate standards exist to permit meaningful review of defendants' actions  
3 under the APA, the court will require copies of Department of Defense Instruction 4715.3 and Air  
4 Force Instruction 32-7064, as well as briefing regarding these regulations. Pending receipt of these  
5 additional materials, the court will defer any decision regarding defendants' jurisdictional challenge  
6 to the contracting-out claims contained in plaintiffs' complaint.

7 As respects the INRMP for Edwards AFB, the evidence before the court does not support  
8 plaintiffs' allegation that defendants have completed a final INRMP as required by the 1997  
9 amendments to the Sikes Act. Thus, there is no final agency decision that is subject to review  
10 under the APA, and this claim must be dismissed.

11 Finally, while plaintiffs may, under the Sikes Act, sue to remedy the effect of defendants'  
12 decision to outsource aspects of natural resources management on the class of agency employees  
13 to which they belong, they may not seek relief regarding their individual positions. Additionally,  
14 plaintiffs may not seek relief for violation of the Clean Water and Endangered Species Acts, as  
15 they have not met the notice requirements imposed by those statutes.

## 16 17 I. FACTUAL BACKGROUND

18 Located on 301,000 acres in the Mojave Desert,<sup>5</sup> Edwards AFB supports a variety of  
19 "ecologically sensitive plant [and animal] species."<sup>6</sup> The base has been the site of defense aviation  
20 activities since the 1930's; approximately 90% of its acreage remains undeveloped so as not to  
21 interfere with the various testing activities in which its military personnel engage.<sup>7</sup> To date, such  
22 activities have had little direct impact on the natural resources of the base.<sup>8</sup> Plaintiffs allege,  
23 however, that the Edwards AFB has recently begun to solicit and accept more "ground-disturbing"

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25 <sup>5</sup>See Complaint, ¶¶ 22, 25.

26 <sup>6</sup>*Id.*, ¶¶ 26-27.

27 <sup>7</sup>*Id.*, ¶¶ 22-23.

28 <sup>8</sup>*Id.*, ¶ 23.

1 activities, such as tank maneuvers, commercial racing events, and movie filming.<sup>9</sup>

2 The Conservation Branch of Edwards' Environmental Management Directorate is charged  
3 with "conservation and management of threatened and endangered species, fish and wildlife,  
4 wetlands and water . . . , grazing and cropland, forestry, research, pest management, and outdoor  
5 recreation activities."<sup>10</sup> Natural resource management personnel also work with other organizations  
6 to ensure compliance with natural resources regulations, including USFWS and CDFG.<sup>11</sup>

7 Hagan and Deal are allegedly the only full-time employees at Edwards AFB with natural  
8 resource management responsibilities.<sup>12</sup> The Conservation Branch Chief provides administrative  
9 oversight, while some Edwards AFB employees, with minimal natural resource training,  
10 participate in natural resource management activities.<sup>13</sup> Plaintiffs contend that employees with no  
11 natural resource management training make important natural resource and planning decisions at  
12 Edwards AFB, and that their choices are often not prudent.<sup>14</sup> They also assert that the base  
13 employs no natural resource law enforcement personnel.<sup>15</sup>

14 Plaintiffs contend that, because of these staffing decisions, natural resource management  
15 at the base is, for the most part, performed by outside contractors.<sup>16</sup> They assert that defendants  
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19 <sup>9</sup>*Id.*, ¶ 24.

20 <sup>10</sup>*Id.*, ¶¶ 30-31.

21 <sup>11</sup>*Id.*, ¶ 31.

22 <sup>12</sup>*Id.*, ¶ 33. Hagan and Deal have worked at Edwards AFB for thirteen and fourteen years,  
23 respectively. (*Id.*, ¶¶ 20, 21.)

24 <sup>13</sup>*Id.*, ¶ 33.

25 <sup>14</sup>*Id.*, ¶ 34.

26 <sup>15</sup>*Id.*

27 <sup>16</sup>*Id.*, ¶ 34. Plaintiffs' complaint details a number of allegedly significant responsibilities  
28 that have been assigned to contractors. (*Id.*, ¶¶ 39-40.)

1 have illegally transferred jobs to contractors in reliance on OMB Circular A-76,<sup>17</sup> and cite as an  
2 example the fact that most of Deal's responsibilities have been assigned to contractors.<sup>18</sup> In fact,  
3 Deal's position has allegedly been designated an "over hire" position, and is "slated for elimination  
4 in the near future."<sup>19</sup>

5 Plaintiffs contend that the INRMP for Edwards AFB was "planned, prepared, and compiled  
6 primarily by a contractor," and that it is currently being revised by a contractor.<sup>20</sup> The present  
7 version states that contractors will perform most tasks.<sup>21</sup> Plaintiffs assert that neither USFWS nor  
8 CDFG has been offered any natural resources contracts by the base.<sup>22</sup> They also maintain that,  
9 over the course of the past ten years, an ever increasing number of natural resource management  
10 responsibilities have been transferred to an "in house" engineering and technical support services  
11 contractor.<sup>23</sup> Plaintiffs assert that Edwards AFB management uses contractors because they are  
12 willing to comply with management's demands even if it requires violation of the INRMP or  
13 environmental regulations.<sup>24</sup> They also allege that natural resource management employees have  
14 been harassed for attempting to ensure that contractors comply with biological opinions and federal  
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17 <sup>17</sup>*Id.*, ¶ 51; Memorandum of Points and Authorities in Support of Defendants' Motion to  
18 Dismiss ("Def's. Mot."), Ex. 1. Circular A-76 mandates that, when government agencies are  
19 required to perform commercial activities, they must compare the cost of performing the functions  
20 in-house with that of contracting with outside vendors. It further states that "[c]ertain functions are  
21 inherently Governmental in nature, being so intimately related to the public interest as to mandate  
22 performance only by Federal employees." (*Id.*, ¶ 5b.)

21 <sup>18</sup>See Complaint, ¶ 35.

22 <sup>19</sup>*Id.*, ¶ 35.

23 <sup>20</sup>*Id.*, ¶ 36.

24 <sup>21</sup>*Id.*

25 <sup>22</sup>*Id.*

26 <sup>23</sup>*Id.*, ¶ 37.

27 <sup>24</sup>*Id.*, ¶ 42.

1 and state environmental laws.<sup>25</sup>

2 Plaintiffs allege that these actions constitute violations of the Sikes Act,<sup>26</sup> and that a recent  
3 audit of the natural resource management program at Edwards AFB documented such violations.<sup>27</sup>  
4 They allege as well that the base has failed to comply with the Clean Water and Endangered  
5 Species Acts.<sup>28</sup> On the basis of such allegations, plaintiffs seek declaratory and injunctive relief,  
6 including an order prohibiting Hagan and Deal's transfer or termination.<sup>29</sup>

## 8 II. DISCUSSION

### 9 A. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(1)

10 A party asserting that the court lacks subject matter jurisdiction of an action may raise the  
11 issue by filing a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. When  
12 such a motion is brought, plaintiffs bear the burden of establishing that the court has subject matter  
13 jurisdiction. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc.*  
14 *v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

15 A Rule 12(b)(1) challenge may be facial (i.e., based solely on the allegations in the  
16 complaint) or factual (i.e., based on extrinsic evidence presented for the court's consideration).  
17 See *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (challenge based on  
18 extrinsic evidence); *Thornhill Publishing Co. v. General Tel. & Electronics*, 594 F.2d 730, 733  
19 (9th Cir. 1979) (facial attack). Where facial, the court must accept the allegations set forth in the  
20 complaint as true. See *Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D.Cal. 1993), *aff'd.*,  
21 56 F.3d 1177 (9th Cir. 1995). Where factual, the court may weigh the evidence presented in order

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23 <sup>25</sup>*Id.*, ¶ 38.

24 <sup>26</sup>*Id.*, ¶¶ 49-60.

25 <sup>27</sup>*Id.*, ¶ 44.

26 <sup>28</sup>*Id.*, ¶¶ 45-46.

27 <sup>29</sup>*Id.*, ¶¶ 64-65.

1 to determine the facts and evaluate whether it has power to hear the case. See *Roberts v.*  
2 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

### 3 B. Standard Governing Motions To Dismiss Pursuant To Rule 12(b)(6)

4 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.  
5 Fed.R.Civ.Proc. 12(b)(6). A court may not dismiss a complaint for failure to state a claim "unless  
6 it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which  
7 would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). See also *Moore v.*  
8 *City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989); *Haddock v. Board of Dental Examiners*,  
9 777 F.2d 462, 464 (9th Cir. 1985) (stating that a court should not dismiss a complaint if it states  
10 a claim under any legal theory, even if plaintiff erroneously relies on a different theory). In other  
11 words, a Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal  
12 theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v.*  
13 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

14 In deciding a motion to dismiss for failure to state a claim, the court's review is limited to  
15 the contents of the complaint. See *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996);  
16 *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995).  
17 The court must accept all factual allegations in the complaint as true, and must construe them and  
18 draw all reasonable inferences from them in favor of the nonmoving party. See *Cahill v. Liberty*  
19 *Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir.  
20 1995) (citing *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)); *NL Indus. Inc.*  
21 *v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). It need not, however, accept as true unreasonable  
22 inferences or conclusory legal allegations cast in the form of factual allegations. See *Western*  
23 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

### 24 C. Jurisdiction Under The APA

25 The APA provides that

26 "[a] person suffering legal wrong because of agency action, or adversely affected  
27 or aggrieved by agency action within the meaning of a relevant statute, is entitled  
28 to judicial review thereof. An action in a court of the United States seeking relief