

1 other than money damages and stating a claim that an agency or an officer or
2 employee thereof acted or failed to act in an official capacity or under color of legal
3 authority shall not be dismissed nor relief therein be denied on the ground that it is
4 against the United States or that the United States is an indispensable party. The
5 United States may be named as a defendant in any such action" 5 U.S.C.
6 § 702.

7 Agency action is subject to judicial review if it is "made reviewable by statute" or if it is a "final
8 agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Under
9 the APA, "[j]udicial review of agency action is generally allowed" except "to the extent that (1)
10 statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."
11 5 U.S.C. § 701; *Thomas Brooks Chartered v. Burnett*, 920 F.2d 624, 641 (10th Cir. 1990).
12 "There is a strong presumption that Congress intends judicial review of administrative action."
13 *Socop-Gonzalez v. INS*, 208 F.3d 838, 843 (9th Cir. 2000) (internal quotations omitted). Thus,
14 the "agency discretion" exception is a "very narrow" one that is applicable only in "rare" instances.
15 *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (citation omitted); *Thomas Brooks*, *supra*, 920 F.2d
16 at 642. There are two situations where the exception is properly invoked: (1) where a statute is
17 drawn in such broad terms that "a court would have no meaningful standard against which to judge
18 the agency's exercise of discretion" and thus there "is no law to apply";³⁰ and (2) where "the
19 agency's action requires 'a complicated balancing of a number of factors which are peculiarly
20 within [the agency's] expertise,' including the prioritization of agency resources, [the] likelihood
21 of success in fulfilling the agency's statutory mandate, and compatibility with 'the agency's overall
22 policies.'" *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) (quoting *Heckler*, *supra*, 470
23 U.S. at 830-31); *Burnett*, *supra*, 920 F.2d at 642.³⁰

24
25 ³⁰A court may also review an agency's failure to adhere to its own regulations. See *Socop*,
26 *supra*, 208 F.3d at 844 ("This court and others have recognized repeatedly that 'the Supreme
27 Court's holding in [*Heckler*] does not bar judicial review when an agency's regulation provides the
28 Court with law to apply" (citation omitted)); *Ellison v. Conner*, 153 F.3d 247, 251 (5th Cir. 1998)
("An agency's own regulations can provide the requisite 'law to apply'" (citation omitted));
Burnett, *supra*, 920 F.2d at 642. Plaintiffs argue that Air Force Instruction 32-7064 and

1 1. **Relevant Provisions Of The Sikes Act**

2 The Sikes Act mandates that "[t]he Secretary of Defense . . . carry out a program to provide
3 for the conservation and rehabilitation of natural resources on military installations." 16 U.S.C.
4 § 670a(a)(1)(A). "To facilitate the program," the statute provides that "the Secretary of each
5 military department shall prepare and implement an [INRMP] for each military installation in the
6 United States under the jurisdiction of the Secretary, unless [he or she] determines that the absence
7 of significant natural resources on a particular installation makes preparation of such a plan
8 inappropriate." 16 U.S.C. § 670a(a)(1)(B). The Secretary is responsible for preparing the INRMP
9 "in cooperation with the Secretary of the Interior, acting through the Director of the United States
10 Fish and Wildlife Service, and the head of each appropriate State fish and wildlife agency for the
11 State in which the military installation concerned is located." 16 U.S.C. § 670a(a)(2).

12 Pursuant to the statute, each INRMP must, "to the extent appropriate and applicable,
13 provide for . . . fish and wildlife management, land management, forest management, and fish-
14 and wildlife-oriented recreation; . . . [the] establishment of specific natural resource management
15 goals and objectives and time frames for proposed action; . . . [and the] enforcement of applicable
16 natural resource laws (including regulations). . . ." 16 U.S.C. § 670a(b).

17 The Sikes Act states specifically that, "[w]ith regard to the implementation and enforcement
18 of [ENRMPs] . . .

19 (1) neither [OMB] Circular A-76 nor any successor circular thereto applies to the
20 procurement of services that are necessary for that implementation and enforcement;
21 and

22 (2) priority shall be given to the entering into of contracts for the procurement of
23 such implementation and enforcement services with Federal and State agencies
24 having responsibility for the conservation or management of fish or wildlife." 16
25

26 Department of Defense Instruction 4715.3 provide additional standards, but have not attached these
27 instructions for the court's review. Consequently, on the record presently before it, the court
28 cannot evaluate whether these instructions constitute regulations that provide the "requisite law to
apply."

1 U.S.C. § 670a(d).

2 The Act also provides that, "[t]o the extent practicable using available resources, the Secretary of
3 each military department shall ensure that sufficient numbers of professionally trained natural
4 resources management personnel and natural resources law enforcement personnel are available
5 and assigned responsibility to perform tasks necessary to carry out this title, including the
6 preparation and implementation of [INRMPs]." 16 U.S.C. § 670e-2.

7 **2. Contracting Out Natural Resource Management Activities**

8 Defendants contend that the Sikes Act gives military departments discretion to determine
9 whether they should contract with private entities to perform natural resource management
10 functions. Consequently, they assert, the court lacks jurisdiction to adjudicate plaintiffs' claim that
11 the Air Force is violating the Act by contracting with outside vendors to perform INRMP-related
12 work and conservation management at Edwards AFB. Plaintiffs counter that the statute provides
13 "ample" standards for the court to apply in evaluating the contracting decisions that have been
14 made.³¹ Reviewing the parties' arguments, it is apparent that they fundamentally disagree as to
15 whether the Sikes Act contemplates or permits the use of outside contractors in connection with
16 natural resource management at military installations.

17 **a. Whether The Sikes Act Contemplates The Use Of Contractors**

18 Defendants contend that the statute expressly contemplates that military departments will
19 use outside contractors to satisfy their Sikes Act obligations. Citing the statutory reference to
20 "procurement of [the] services . . . necessary" to implement INRMPs (see 16 U.S.C.
21 § 670a(d)(1)), they assert that the language of the Act "plainly demonstrates that Congress expected
22 . . . contractors would be used."³² Defendants note as well the statutory requirement that federal
23 and state agencies responsible for conservation and natural resource management be given priority
24 in "entering into . . . contracts for the procurement of such implementation and enforcement
25 services." See 16 U.S.C. § 670a(d)(2). This reference, they urge, also demonstrates that the Act

26
27 ³¹See Pls.' Opp. at 9:16-17.

28 ³²See Defs.' Mot. at 14:7-10.

1 does not bar the use of contractors.

2 While conceding that there are "limited instances" in which the outsourcing of
3 implementation and enforcement services is statutorily authorized, plaintiffs allege that the Sikes
4 Act "prohibits the application of Circular A-76 to the procurement of natural resource management-
5 related services."³³ Defendants counter that, while the Sikes Act relieves military departments of
6 the obligation to comply with Circular A-76 when determining whether to use in-house personnel
7 or outside contractors, nothing in the statute prohibits reference to the Circular in making such
8 decisions.

9 The Sikes Act clearly appears to contemplate the use of some outside contractors, as it
10 provides specifically that federal and state natural resource management agencies are to receive
11 priority in connection with "the entering into of contracts for the procurement of . . .
12 implementation and enforcement services." The exemption from compliance with Circular A-76
13 does not compel a different conclusion. The Circular mandates that governmental agencies
14 compare the cost of performing commercial services in-house with the cost of contracting with
15 private sector entities to provide such services. Where a service "can be procured more
16 economically from a commercial source," the Circular requires that agencies outsource the project.
17 Office of Management and Budget Circular No. A-76 (August 4, 1983 (Revised 1999)), ¶ 5c. The
18 Sikes Act exempts military departments from performing such cost comparisons and from the
19 mandatory requirement that private sector entities be employed where they can provide necessary
20 services at a lower price. Defendants argue that the statute does not prohibit such cost
21 comparisons, however, nor preclude the retention of private contractors to implement and enforce
22 a given installation's INRMP.

23 Support for this view is found in House Report No. 99-129(I) regarding Public Law 99-561,
24 the 1986 legislation that amended the Sikes Act to add, *inter alia*, the Circular A-76 exemption
25 found in § 670a(d)(1). Discussing § 670a(d)(1), the report noted that the exemption was

26 *"not intended to restrict the authority of the Department of Defense to enter into*

27
28 ³³Complaint, ¶ 17.

1 *contracts for these services, but only to obviate the need for mandatory review and*
2 *contracting under this Circular or any successor directive. In the event that the*
3 *Department of Defense elects to provide these services through contract, the U.S.*
4 *Fish and Wildlife Service or the appropriate state fish and wildlife agency should*
5 *receive priority consideration for award of these contracts. This reflects the view*
6 *of the Committee that conservation of these resources is best accomplished by*
7 *ensuring that activities relating to fish and wildlife are undertaken by individuals*
8 *with professional competence in the management of these resources." H.R.Rep.*
9 *No. 99-129(I) (1985) (emphasis added).*

10 This legislative history is consistent with the statutory language; both indicate that Congress did
11 not intend to preclude military departments from entering into contracts with private entities for
12 the implementation and enforcement services. Nonetheless, other portions of the House Report
13 suggest that some restraint on outside contracting was intended:

14 "One factor which the Committee believes has affected fish and wildlife conservation
15 activities on military lands under the Sikes Act is the implementation of the Office
16 of Management and Budget (OMB) Circular A-76. . . . The Circular is intended to
17 provide for review of Federal Government activities and to promote private sector
18 contracting for those activities where feasible. Concerns were expressed at the
19 hearing that many fish and wildlife conservation-related activities were being
20 'contracted out.' While no specific problems with contracting activities were
21 identified at the hearings, the Committee is concerned that contracting out of fish
22 and wildlife activities based upon fiscal considerations alone may not be in the best
23 interest of the conservation resource. *While certain labor-intensive activities can be*
24 *performed effectively by the private sector, fish and wildlife management and policy*
25 *related activities are inherently governmental responsibilities which the Committee*
26 *believes are best handled by qualified individuals within the Department of Defense,*
27 *the Department of the Interior, or appropriate state agencies." H.R.Rep. No. 99-*
28 *129(I) (emphasis added).*

1 These comments support plaintiffs' view that contracting out should be limited in scope, and that
2 natural resource management and policy setting are "inherently governmental" responsibilities that
3 Congress intended to have military, Department of the Interior or state natural resource personnel
4 perform.³⁴

5 The statutory language reflects this Congressional intent. Section 670a(d)(2) specifically
6 provides that priority in awarding INRMP contracts be given to federal and state governmental
7 agencies responsible for the conservation and management of fish and wildlife. 16 U.S.C.
8 § 670a(d)(2). Additionally, § 670e-2 requires that, "to the extent practicable using available
9 resources," the military departments ensure that there are "sufficient numbers of professionally
10 trained natural resources management personnel and natural resources law enforcement personnel"
11 to perform tasks associated with the implementation and enforcement of the INRMPs. 16 U.S.C.
12 § 670e-2.

13 Defendants contend that the reference to "professionally trained natural resources
14 management personnel" does not clearly mandate the use of in-house natural resources personnel.
15 Section 670e-2 was added to the Sikes Act as part of the 1997 amendments. Those same
16 amendments deleted a provision previously in the statute, § 670a-1. Section 670a-1 required that
17 the military departments "ensure, to the extent feasible, that the services necessary for the
18 development, implementation, and enforcement of fish and wildlife management on each military
19 reservation . . . [were] provided by the Department of Defense personnel [with] professional
20

21 ³⁴In arguing that the Sikes Act does not permit the outsourcing of "inherently governmental"
22 natural resource management functions, plaintiffs rely on Congressman Don Young's July 17,
23 2000 letter to Secretary of Defense William Cohen. A single legislator's view of the intent and
24 import of a law, expressed after that law has been enacted, is not highly probative of Congressional
25 views at the time the legislation was passed. See *Bread Political Action Comm. v. Federal Election*
26 *Comm.*, 455 U.S. 577, 582, n. 3 (1982) ("We cannot give probative weight to these affidavits, . . .
27 because '[s]uch statements 'represent only the personal views of th[is] legislato[r], since the
28 statements were [made] after passage of the Act,'" (citations omitted)); *Quern v. Mandley*, 436
U.S. 725, 736, n. 10 (1978) ("Even if their import were clearer, as an expression of Congress'
understanding as to the scope of the pre-existing AFDC statute, such post hoc observations by a
single member of Congress carry little if any weight"). At least some support for Congressman
Young's views is found in the contemporaneous legislative history, however.

1 training in those services." 16 U.S.C. § 670a-1, repealed by Public Law 105-85, 111 Stat. 1629,
2 2021 (1997)). As the requirement is restated in § 670e-2, military departments are required to
3 "ensure that sufficient numbers of professionally trained natural resources management personnel
4 and natural resources law enforcement personnel are available and assigned responsibility to
5 perform tasks necessary to . . . the preparation and implementation of integrated natural resources
6 management plans." 16 U.S.C. § 670e-2.

7 Defendants contrast the prior statute's reference to "Department of Defense personnel who
8 have professional training" with the current reference to "professionally trained natural resources
9 management personnel," and argue that Congress' present focus is on the training and experience
10 of the individual managers rather than the identity of their employer. Looking at the legislative
11 history of the 1986 amendments, it appears Congress believed when it enacted § 670a-1 in 1986
12 that "fish and wildlife management on military lands [was] . . . a legitimate, in-house responsibility
13 of the Department of Defense and that management activities in this regard [should be] carried out
14 by professional, fish-and-wildlife management-trained personnel." H.R.Rep. 99-129(I). Coupled
15 with the House Committee's additional comment that governmental personnel employed either by
16 the military departments, the Department of the Interior, or appropriate state agencies should
17 handle overall natural resources management and policy setting, it appears that Congress was most
18 concerned that policy decisions be made by governmental personnel with experience in natural
19 resources management. There does not appear to have been any clear Congressional intent that
20 these functions be performed solely by Department of Defense personnel. There does appear to
21 have been a mandate that they not be contracted out to private sector entities, however.

22 **b. Whether Defendants' Decisions To Use Outside Contractors Are**
23 **Subject To Judicial Review Under The APA**

24 The Sikes Act does not explicitly preclude judicial review. Thus, whether the court may
25 judicially review defendants' decisions regarding outsourcing turns on whether the Sikes Act
26 provides a meaningful standard against which to evaluate the agency's exercise of discretion. See
27 *Newman, supra*, 223 F.3d at 943; *Thomas Brooks, supra*, 920 F.2d at 641.

28 The Sikes Act does not prohibit the use of outside contractors, although it does express a

1 preference for having management and enforcement decisions made by federal and/or state
2 governmental personnel. The statute, however, does not articulate any formula, method, or
3 guideline to be used in determining how many functions may properly be outsourced or how many
4 contractors may be employed. This is in contrast to the 1983 version of Circular A-76, which was
5 at issue in *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1992). The *Diebold* court held that
6 contracting decisions made pursuant to Circular A-76 were subject to judicial review, since ". . .
7 the Circular, in its cost comparison elements, deals in measurable components, . . . does not leave
8 to the discretion of the agency whether to do a cost comparison if contracting-out is proposed[, and
9 includes a] ten percent savings for conversion [that is] not a mere guideline." *Id.* at 801. The
10 *Diebold* court noted that numerous statutes referenced and/or incorporated portions of Circular A-
11 76 and that "derivative agency regulations" had been developed to implement its directive. *Id.* It
12 concluded:

13 "We are not called on to say whether the Circular, standing alone, would be
14 sufficient as a source of law, but it is clear that in the context of the whole regime
15 of statutes and regulations governing this dispute, the Circular functions as part
16 of the law to apply. Compliance or lack of compliance with its directives is evidence
17 of compliance or the lack thereof with the statutory directives in 41 U.S.C. § 401
18 et seq. and 10 U.S.C. § 2462. Thus, evidence that an agency did not follow
19 Circular A-76 cost calculation directives, that it did not include all costs made
20 necessary by contracting-out, and that the agency will not save the ten percent
21 required to justify the contracting-out decision could support a claim that the agency
22 was not complying with statutory directives. . . ." *Id.* at 801-02.

23 The Sikes Act, by contrast, mandates no particular procedure with respect to contracting decisions,
24 articulates no guidelines to be followed in making such decisions, and establishes no percentage
25 of total projects that should be maintained in-house or contracted out. Thus, there is no law for
26 the court to apply in determining whether too many tasks have been contracted out. See *Defense*
27 *Language Institute v. Federal Labor Relations Authority*, 767 F.2d 1398, 1401 (9th Cir. 1985)
28 ("[B]ecause [a prior version of] the Circular lack[ed] meaningful standards to guide management's

1 discretion, the Authority's review would confront the same difficulty that has led courts to hold
2 that judicial review of an agency's contracting-out determination and of the underlying studies and
3 cost estimates is unavailable. Determining the most efficient configuration of government
4 employees and resources or determining whether certain expenses are legitimate costs of an
5 in-house operation inevitably involve "questions of judgment requiring close analysis and nice
6 choices" which are properly committed to the informed discretion of management," citations
7 omitted); *Flint v. United States*, 906 F.2d 471, 476 (9th Cir. 1990) (there could be no judicial
8 review of the maximum price set by the Bureau of Reclamation for the use of artificially stored
9 ground water, since the relevant statute set a standard for the minimum, but not the maximum,
10 price to be charged, and there was thus "no meaningful standard for determining a maximum price
11 to be charged"); *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 581-83 (3d Cir.
12 1979) (the prior version of Circular A-76, which "explicitly recognize[d] that '[n]o specific
13 standard or guideline is prescribed for deciding whether savings are sufficient to justify
14 continuation of an existing Government commercial activity and [that] each activity should be
15 evaluated on the basis of the applicable circumstances," did not "provide rules or specifications
16 that would permit a court to adjudicate plaintiffs' disagreements with the formulas, factors, and
17 cost projections relied upon by the Army").

18 This is not the end of the inquiry, however. Plaintiffs assert that Department of Defense
19 Instruction 4715.3 and Air Force Instruction 32-7064 provide additional standards. Certain
20 secondary source materials available to the court suggest that Instruction 4715.3 prohibits the
21 contracting-out of management and conservation functions. See Lt. Col. Polcheck, "Contracting-
22 Out Initiative," 1998-Nov. ARMLAW 60, 60-61 & n. 16 (1998) ("Department of Defense Instruction
23 4715.3 states that functions regarding the management and conservation of natural and cultural
24 resources shall be not contracted"). Neither party provided copies of these instructions to the
25 court, and it is thus not possible to determine if they establish additional standards or guidelines
26 that give content to the relevant provisions of the Sikes Act. See *Socop, supra*, 208 F.3d at 844
27 (an agency's regulation can provide the "law to apply" for APA purposes).

28 Moreover, even on the record presently before the court, there are some provisions of the