Sikes Act that are sufficiently definite to permit judicial review of agency compliance with them. One such is the requirement that priority in contracting be given to federal and state governmental agencies. "Priority" has a common, unambiguous meaning, such that a court can determine whether an agency has granted priority to governmental agencies in contracting out natural resources management functions. That this is so is confirmed by the fact that courts in other contexts have found the term "priority" or "preference" sufficiently definite to permit meaningful judicial review. See *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989) ("It is beyond doubt that the district court in this instance possessed jurisdiction to determine whether HHS violated federal statutes in terminating CALC's grant. 42 U.S.C. § 9836(c)(1) clearly states that HHS shall give a previously designated agency priority in funding unless the Secretary finds the agency fails to meet program requirements"); *Green v. United States*, 8 F.Supp.2d 983, 997 (W.D.Mich. 1998) (deciding whether an agency's decision not to give plaintiffs preference for a farm loan as required by the Code of Federal Regulations was "arbitrary, capricious, or an abuse of discretion," and assuming without discussion that the matter could be judicially reviewed under the APA).

Similarly, the statutory requirement that the military departments shall, "to the extent practicable using available resources, . . . ensure that sufficient numbers of professionally trained natural resources management personnel and natural resources law enforcement personnel are available" to assist in implementation and enforcement of an INRMP is sufficiently definite to permit judicial review. As noted earlier, this provision appears to require that there be an adequate number of trained natural resource managers employed by the military departments, the Department of Interior and/or state environmental agencies involved in management and policy-making decisions surrounding the INRMP. While defendants argue that the "to the extent practicable" qualilfier renders this directive too discretionary to permit judicial review, the case law suggests otherwise. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-13 (1971), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99 (1977) (statutory reference to "feasible and prudent alternative" provided adequate "law to apply," and judicial review of the statute was appropriate); *Newman*, *supra*, 223 F.3d at 943 (statutory use of the term "reliable

information" did not preclude judicial review); *Socop, supra,* 208 F.3d at 844-45 (in the immigration context, the phrase "exceptional situations" was sufficiently definite to permit judicial review since it is similar to the "exceptional circumstances" standard used throughout the immigration code); *Greene v. USA Dep't of Defense*, 1989 WL 150560, * 2 (E.D.N.Y. Dec. 5, 1989) ("Although the applicable statute accords broad discretion to the Secretary of Defense and military services to propound regulations governing the provision of dental care to retirees, it does provide guidelines to the extent that it states that such services may be granted subject to ['the availability] of space and [facilities and the capabilities of the medical and dental staff']").

These provisions, therefore, provide sufficient standards governing the exercise of agency discretion that defendants' actions can be evaluated against them, and a determination made as to whether Sikes Act violations have occurred. Whether additional standards governing the exercise of discretion exist depends on the nature and content of the agency regulations that have been promulgated to guide those charged with implementing the statutory mandate. Given the dearth of authority regarding proper interpretation of the Sikes Act, the court directs the parties to submit copies of Department of Defense Instruction 4715.3 and Air Force Instruction 32-7064 for its review so that it may evaluate the availability of judicial review on as full a record as possible. The parties may provide further briefing regarding the impact of these regulations on the availability of APA review if they wish. Finally, to the extent that there is additional legislative history available regarding either the 1986 or 1997 amendments of the Sikes Act, the court directs the parties to provide copies of, and/or citations to, such history so that it may be considered as well. Pending receipt of these additional materials, the court will defer any decision regarding defendants' jurisdictional challenge to the contracting-out claims contained in plaintiffs' complaint.

3. INRMPs

The Sikes Act requires that the Secretary of Defense prepare and implement an INRMP for each military installation unless there is an "absence of significant natural resources" on the land. Plaintiffs contend that the Edwards AFB INRMP has not been properly prepared and implemented, that it does not contain required elements, and that defendants have failed to reach "mutual agreement" with USFWS and CDFG regarding it. Defendants challenge the court's jurisdiction

to hear these claims on the basis that there is no final INRMP and thus no final agency action that is subject to APA review. The Supreme Court has held that

> "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process, [that is,] it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Under this standard, an agency action is "final" if it "has direct and appreciable legal consequences." *Id.* at 178.

Plaintiffs assert that they have alleged that the Edwards AFB INRMP is final, and that this allegation must be accepted as true for purposes of ruling on defendants' jurisdictional challenge. As noted earlier, Rule 12(b)(1) challenges may be facial or factual. Here, plaintiffs have attached an August 1997 INRMP to their opposition, and invited the court's consideration of it.[35] Defendants, in turn, have relied on the August 1997 INRMP in support of their motion to dismiss. The challenge is thus a "factual"one, which allows the court to consider evidence extrinsic to the complaint, and to "determine the facts to evaluate for itself the merits of jurisdictional claims." See *Valdez, supra*, 837 F. Supp. at 1067.

The 1997 amendments to the Sikes Act did not take effect until November 1997. See Public Law 105-85, 111 Stat. 1629. These amendments require that the Secretary of Defense cooperate with the USFWS and "the head of each appropriate State fish and wildlife agency for the State in which the military installation concerned is located." See 16 U.S.C. § 670a(a)(2). They identify specific issues that must be addressed in the INRMPs, and provide for a period of public comment before an INRMP is adopted. 16 U.S.C. § 670a(b), 16 U.S.C. § 670a, Historical and Statutory Notes, "Review for Preparation of Integrated Natural Resources Management Plans." In passing the 1997 amendments, Congress acknowledged that the military departments were on schedule to complete approximately 60% of the mandated INRMPs prior to October 1, 1997, and also that

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[35]See Pls.' Opp., Ex. B.

many of these plans had been "prepared consistent with the criteria established" in the amendments. See H.R. Conf. Rep. 105-340 (1997). The conferees stated their intention that existing plans satisfying the requirements set forth in the amendments "should not be subject to renegotiation or reaccomplishment." Nonetheless, the legislation required that, in the case of an existing cooperation plan, the military department "complete negotiations with the Secretary of the Interior and the heads of the appropriate State agencies regarding changes to the plan that are necessary for the plan to constitute an [INRMP]" on or before November 18, 2001. Public Law 105-85, 111 Stat. 1629, 2020 (National Defense Authorization Act for Fiscal Year 1998, § 2905(c)(2)). A Department of Defense guideline concerning existing INRMPs states that

> "[t]hose INRMPs that were complete on or before November 18, 1997; that were prepared in cooperation with appropriate FWS and State fish and wildlife officials; and that meet the substantive requirements of the SAIA, need not be reaccomplished simply because they were not subject to public review, but may remain in effect until review is required in accordance with the SAIA." Major Teresa Hollingsworth, *The Sikes Act Improvement Act of 1997: Examining The Changes For The Department of Defense*, 46 AIR FORCE LAW REVIEW 109, 140 (1999) (quoting Memorandum from the Deputy Undersecretary of Defense (Environmental Security) to the Deputy Assistant Secretaries of the Army, Navy, and Air Force and the Director of the Defense Logistics Agency, Subject: Implementation of Sikes Act Improvement Amendments (September 21, 1998)).

According to this guideline, so long as the input of USFWS and the appropriate state agency has been obtained, and the substantive requirements of the 1997 amendments are met, the plan need not be submitted for public comment. Where such input had not been obtained, however, "negotiations," as mandated by § 2905(c) of the National Defense Authorization Act for Fiscal Year 1998, must occur before the plan can be considered final.

Plaintiffs allege that defendants have failed to meet with USFWS and CDFG in connection with preparation of the INRMP. Neither party has submitted any evidence regarding this subject for the court's review. Consequently, plaintiffs' allegation stands uncontroverted and must be

accepted as true.

Assuming defendants did not meet with USFWS or CDFG prior to finalizing the August 1997 INRMP, it is not a final document for purposes of the 1997 amendments. Consequently, it cannot constitute final agency action subject to review under the APA.[36] See *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("To determine when an agency action is final, we have looked to, among other things, whether its impact 'is sufficiently direct and immediate' and has a 'direct effect on . . . day-to-day business.' An agency action is not final if it is only 'the ruling of a subordinate official,' or 'tentative.' The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties" (citations omitted)); *Hecla Mining Co. v. EPA*, 12 F.3d 164, 166 (9th Cir. 1993) ("In this case, the final agency decision that will require action on the part of Hecla is the issuance of a final NPDES permit. Until such a permit is issued there is no definitive statement on the EPA's position and no rules are established with which immediate compliance is required").

Accordingly, plaintiffs have failed to meet their burden of establishing that the court has subject matter jurisdiction of their claims alleging that the Edwards AFB INRMP violates the Sikes Act. These claims are, consequently, dismissed without prejudice.

D. Claims Regarding Downsizing And Elimination Of Plaintiffs' Positions

1. Exhaustion Of Remedies

Defendants assert that plaintiffs' final set of claims – regarding the downsizing of Edwards' in-house natural resources staff and the possible loss of plaintiff Deal's position – are outside this court's subject matter jurisdiction because plaintiffs' exclusive remedy for adverse personnel actions is found in the Civil Service Reform Act ("CSRA") and claims under that statute must be

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[36]Although INRMPs can be completed earlier, the deadline for submission of INRMPs pursuant to the 1997 amendments is November 2001. See 16 U.S.C. § 670a, Historical and Statutory Notes, "Review for Preparation of Integrated Natural Resources Management Plans" (INRMPs must be completed three years after the Secretary of Defense submits a report to Congress, which is due one year after enactment of the Sikes Act on November 18, 1997); Public Law 105-85, 111 Stat. 1629, 2020 (National Defense Authorization Act for Fiscal Year 1998, § 2905(c)) .

adjudicated before the Merit System Protection Board ("MSPB"). Plaintiffs counter that federal courts have routinely held that federal employees and their associations have standing to contest decisions outsourcing in-house services or functions without exhausting administrative remedies.

Plaintiffs first cite *International Association of Firefighters v. United States Department of the Navy*, 536 F.Supp. 1254 (D.R.I. 1982), in which a firefighters union sued the Navy after it invited bids from private contractors to provide firefighting services, contending that its members would suffer economic injury if defendants accepted the private bids. *Id.* at 1261. The court found that the alleged loss was not speculative, as five bids were lower than the in-house cost of performing the services, and held that plaintiffs had standing because their competitive interests were within the "zone of interests" protected by the Armed Services Procurement Act ("ASPA"), as that statute was designed to ensure "full and fair competition" in the procurement of government services. *Id.* at 1261-62, 1265.

In *National Air Traffic Controllers Association v. Pena*, 944 F.Supp. 1337 (N.D.Ohio 1996), air traffic controllers challenged the Federal Aviation Administration's decision to contract with private firm to provide air traffic control services at various facilities, charging that the FAA had violated Circular A-76's cost comparison requirement. *Id.* at 1340-41. While plaintiffs were to have the right to transfer to another facility if services at their location were privatized, and were also to have a right of first refusal regarding employment by the private contractor, the court found that transfer was a potentially adverse action, and that there was no guarantee they would not lose certain benefits if they chose to leave government service and become employees of the contractor. *Id.* at 1342-43. The court rejected defendants' argument that the harm was speculative and contingent, noting that many employees had already lost their jobs through privatization, and that the FAA's privatization plan did not merely contemplate contracting out, but affirmatively required it. *Id.* at 1343-44, 1345. The evidence, it stated, demonstrated the existence of an "actual, specific plan" that was "already underway and certain to continue." *Id.* at 1345.

Similarly, in *American Federal of Government Employees v. United States*, 104 F.Supp.2d 58 (D.D.C. 2000), the Air Force declared an intent to award civil-engineering contracts to private firms owned by Native Americans without completing the cost comparisons required by Circular

A-76 and the Defense Appropriations Act. *Id.* at 61. The department relied on a section of the appropriations bill that deleted the cost comparison requirement if the firm with which the department proposed to contract was majority-owned by Native Americans. *Id.* at 62. Plaintiffs' suit challenged the constitutionality of this provision. The court found that they lacked standing as respects one contract with a Native American firm because they were to receive a right of first refusal regarding employment with the contractor, and thus had demonstrated only speculative future harm. *Id.* at 68. It determined, however, that plaintiffs had demonstrated standing based on their loss of the right to compete for continued federal employment. *Id.* at 68-69. The court reasoned that, but for the statutory preference afforded Native American firms, plaintiffs' in-house bid would have received equal consideration with all others. *Id.* at 69.[37]

The rule to be derived from these cases is that plaintiffs may generally sue outside the framework created by the CSRA, and without first exhausting administrative remedies, if their action alleges that an entire class of positions has been or will be adversely affected by a contracting decision.[38] Here, plaintiffs assert that a class of positions – natural resources management employees – have been adversely affected by defendants' actions. They allege that defendants have been outsourcing natural resources management tasks in violation of the Sikes Act, and that they will continue to do so. The statutory requirement that the military departments ensure that there are a "sufficient number[ ] of professionally trained natural resources management personnel and natural resources law enforcement personnel . . . available" to assist in preparation and implementation of the INRMP (16 U.S.C. § 670c-2) demonstrates that their interests lie within the "zone of interests" protected by the statute.

Assuming other prerequisites to APA review are met, plaintiffs may sue to enforce this statutory mandate. They cite no authority suggesting that the court has jurisdiction to grant the

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[37]Plaintiffs also cite *Diebold*, *supra*. *Diebold* did not specifically address plaintiffs' standing to bring suit, however. Rather, it focused on whether the statutes and regulations governing contracting out provided a meaningful standard that would support judicial review under the APA.

[38]Defendants accept this characterization of the case law. (See Reply to Opposition to Defendant's Motion to Dismiss ("Defs.' Reply") at 11:10-12.)

relief they seek regarding their individual positions, however. This type of relief appears to fall squarely within the exclusive jurisdiction of the MSPB, and the court concludes that it lacks jurisdiction to enter an order prohibiting Deal and/or Hagan's termination or transfer.

2. Ripeness

Defendants next maintain that plaintiffs' downsizing claims are not ripe because Deal's position has not yet been terminated and it is unclear whether Deal's or Hagan's positions will be impacted at all.

An action is ripe if (1) it is fit for judicial decision, and (2) the parties will suffer hardship without judicial review. See *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). "Determination of ripeness is closely related to determination of standing — 'whether the harm asserted has matured sufficiently to warrant judicial intervention.'" *National Air Traffic Controllers*, *supra*, 944 F.Supp. at 1346 (citing *Warth v. Seldin*, 422 U.S. 490, 499, n. 10 (1975)).

In *National Air Traffic Controllers*, the court considered three factors in evaluating whether the controversy was ripe: "(1) the likelihood that the harm alleged by plaintiffs will ever come to pass; (2) the likelihood that the factual record is sufficiently developed to produce a fair adjudication; and (3) the hardship to the parties if judicial relief is denied at this stage." *Id.* at 1347. The court held that, although some employees had not yet lost their jobs, the elimination of their positions was "certainly impending," and the privatization plan "ensure[d]" the loss of their employment. Consequently, it held, their claims were ripe. *Id.*

Here, plaintiffs allege that defendants have already contracted out numerous natural resources responsibilities in violation of the Sikes Act. They allege that Deal's position has been "slated" for elimination as an "over hire" position, which constitutes an "impending" loss. Based on these allegations, the court concludes that plaintiffs' claims seeking to enforce the statutory mandate that there be sufficient numbers of natural resources personnel to implement and enforce the INRMP are ripe for adjudication.

E. Violation Of The Clean Water And Endangered Species Acts

Certain allegations in plaintiffs' complaint appear to assert that defendants have violated the

Clean Water and Endangered Species Acts. Defendants contend that, to the extent plaintiffs seek to plead claims under these statutes, they have failed to meet the notice requirements. See 33 U.S.C. § 1365(b)(1)(A) (no citizen may initiate suit under the Clean Air Act "prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator. . ."); 16 U.S.C. § 1540(g)(2)(B) (no action under the Endangered Species Act may be commenced "prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned"). Because they have not satisfied these notice requirements, plaintiffs may not seek relief directly under the Clean Air and Endangered Species Acts.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is granted in part and denied in part. Plaintiffs' claims asserting the inadequacy of the INRMP prepared for Edwards AFB are dismissed because the evidence before the court does not demonstrate that a final INRMP has been prepared, and there is thus no final agency action that can be challenged under the APA. As respects plaintiffs' claims regarding the outsourcing of implementation and enforcement services, the parties are directed to submit copies of Department of Defense Instruction 4715.3 and Air Force Instruction 32-7064 for the court's review on or before January 8, 2001, as well as briefs of no more than fifteen (15) pages addressing the impact that those instructions have on the agency discretion exception to APA review. To the extent additional legislative history regarding either the 1986 or 1997 amendments to the Sikes Act exists, the parties are directed to provide copies of, and/or citations to, such history by January 8, 2001 as well. The individual plaintiffs' request for an order prohibiting their termination or transfer is stricken, as the court lacks jurisdiction to enter such an order. Similarly, plaintiffs may not seek relief for violation of the Clean Water and Endangered Species Acts, as they have not met the notice requirements imposed by those statutes.

DATED: December 18, 2000

Margaret M. Morrow

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE