BABAK NAFICY, ESQ., SBN 177709
LAW OFFICES OF BABAK NAFICY
9800 S. La Cienega
Fifth Floor
Inglewood CA 90301
Tel: 310-348-8495
Fax: 310-348-8762

G. Alan Perkins, *Pro hac vice*
Hill Gilstrap Perkins & Trotter
1 Information Way, Suite 200
Little Rock, AR 72202
Tel: 501-603-9000
Fax: 501-603-0556

Counsel for Plaintiffs,
PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY ("PEER"),
and MARK HAGAN and WANDA DEAL in their
individual capacities and as members of PEER

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

_____

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	)	Civil No. CV 00-0613
UNITED STATES AIR FORCE and F. WHITTEN PETERS, in his official capacity as SECRETARY OF THE UNITED	)	**PLAINTIFFS' MEM** **OPPOSITION TO M**
STATES AIR FORCE	)	

DEFENDANTS)

)

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I.

INTRODUCTION

The Plaintiffs in this case, 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, brought this action to require the United States Air Force to comply with the provisions of the Sikes Act, 16 U.S.C. §§ 670, et seq. in the conservation and management of natural resources at Edwards Air Force Base ("Edwards AFB"), California. Plaintiffs also seek a declaratory judgment pertaining to the interpretation of the Sikes Act, as it applies to the conservation and management of natural resources on Edwards AFB and military installations, generally. This case is one of first impression in the federal courts. To counsel's knowledge, there are no federal court decisions addressing the Sikes Act, and no other cases have been initiated regarding the Sikes Act. The Sikes Act is the primary statutory mandate for the conservation and management of natural resources on the more than 25 million acres of public land on United States military installations. Initially enacted in 1949 as the Sikes Bill, the Sikes Act has gone through a number of changes. See the Summary of Statutory Background in the Complaint, ¶¶ 10-18.

The Sikes Act, as amended, serves to advance two primary goals: (1) to ensure the wise stewardship and management of natural resources on the approximate 25 million acres of lands on military installations in the United States for the public benefit; and (2) to ensure that the Department of Defense ("DOD") and the military departments maintain a work force of government employees with adequate qualifications to plan and implement a program of integrated natural resources management on military installations for the benefit of the public. Congress established a clear public policy that contracting out the planning or implementation of integrated natural resources management was not in the best long-term interest of the public.

Edwards Air Force Base is a significant land area containing animal and plant species and habitats of national importance, including endangered and threatened species. See Complaint, ¶¶ 22-29. Edwards AFB is situated on approximately 301,000 acres in the Antelope Valley of southern California. Notwithstanding its natural resource attributes, the base has supported defense aviation activities that have included bombing and gunnery practice, aircraft test and evaluation, rocket engine and propellent testing, and aeronautical research and flight testing. Approximately 90 percent of the base acreage remains undeveloped. The Sikes Act was passed by Congress to deal with the interactions between significant natural resources and military activities on such installations.

The Air Force does not want a court to review its poor performance under the Sikes Act at Edwards AFB. In fact, Defendants argue that the Court has no jurisdiction over the claims and that the Sikes Act basically is just too hard for a court to understand, anyway. Defendants have moved to dismiss the Complaint for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), and lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). However, Defendants have failed to satisfy the requirements under either provision. As more particularly set out below, Defendants' motion should be denied.

II.

PROPER STANDARD OF REVIEW

For purposes of a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the complaint is construed in the light most favorable to plaintiff and all material allegations of the complaint are deemed true. *See Cooper v. Pickett*, 137 F.3d 616, 623 (9th Cir. 1997), *as amended on denial of rehearing and rehearing en banc*. A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989). "The question therefore is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 at 9172 (2d ed. 1990).

Because this is a case of first impression in the federal courts, this Court should be particularly slow to deny plaintiffs an opportunity to present the merits of the case. "The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme . . . ." *Id.* at 9173.

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), "the complaint will be construed broadly and liberally . . . . In addition, the pleading will be read as a whole with any relevant specific allegations found in the body of the complaint taking precedence over the formal jurisdictional allegation, and with all uncontroverted factual allegations being accepted as true." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 at 9012 (2d ed. 1990).

Defendants' motion to dismiss should be denied. As demonstrated more particularly below, plaintiffs' complaint clearly presents a claim upon which relief can be granted, and the court certainly has subject matter jurisdiction over this suit.

III.

ARGUMENT

A. This Case is Not a Personnel Action Preempted by the CSRA

Because Defendants are unable to defend the Sikes Act claims in the Complaint directly, they attempt to paint the complaint as a personnel action and argue that this Court has no jurisdiction. This ploy is nothing but a red herring, pure and simple. The Defendants attempt to convince this Court that this is a personnel action by "summarizing" the complaint into self-serving categories. *See* Defendants' Memorandum at 4. A simple reading of the Complaint, however, shows that Defendants' characterization is way off base. Defendants assert that the Court lacks jurisdiction over the so-called "personnel" claims because these claims are pre-empted by the Civil Service Reform Act, 5 U.S.C. §§ 1201, et seq. ("CSRA"). True enough, the Merit Systems Protection Board ("MSPB") is authorized to review adverse employment actions including removal, suspension for more than 14 days, reduction in grade, reduction in pay, and a furlough of 30 days or less.

See 5 U.S.C. § 7512 (1)-(5). The problem is – this case doesn't involve any of those actions.

Defendants next argue that even if Plaintiffs' claims were not preempted, the Court would still lack jurisdiction over them because Hagan and Deal have failed to exhaust their administrative remedies as required by the CSRA. Of course, this is really just another way to make the same argument. Defendants assert that Congress required exhaustion in the CSRA, and there is no jurisdiction over personnel claims. "Any employee or applicant for employment adversely affected or grieved by final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." 5 U.S.C. § 7703(a)(1). Where Congress specifically mandates, exhaustion is required. *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992); *Reid v. Engen*, 765 F. 2d 1457, 1462 (9th Cir. 1985). Defendants contend that the individual plaintiffs are challenging personnel actions taken against them, and must first pursue administrative procedures. The argument has no merit because this is not a personnel action.

What is this case really about? The complaint sets forth several violations of the Sikes Act with considerable particularity. These violations include, but are not limited to, the contracting out of natural resource management and implementation functions; failure to maintain sufficient numbers of professionally trained natural resource management personnel and natural resources law enforcement personnel to carry out the requirements of the Sikes Act; failure to properly prepare and implement the Integrated Natural Resources Management Plan (INRMP); unlawful application of OMB Circular A-76 to downsize the natural resource management staff at Edwards AFB, and transfer of those responsibilities to contractors; failure to give priority for entering into of contracts to federal and state conservation or management agencies; failure to reach a "mutual agreement" with the U.S. Fish & Wildlife Service and the California Department of Fish and Game regarding the INRMP; failure to properly establish and implement the required elements of the INRMP; failure to ensure the continued employment of sufficient numbers of USAF employees including Hagan and Deal's positions; failure to comply with the Clean Water Act (33 U.S.C. §§ 1251, et seq.); and failure to comply with the Endangered Species Act (16 U.S.C. §§ 1531, et seq.). Indeed, the Air Force's Sikes Act violations affect natural resource personnel, but that is a symptom of the larger violations.

Plaintiffs agree that the MSPB generally has authority to review adverse actions taken against employees which include a removal; a suspension for more than 14 days; a reduction in grade; a reduction in pay; and a furlough of 30 days or less. *See* 5 U.S.C. § 7512. The Ninth Circuit has held that "[t]he CSRA provides a comprehensive scheme for administrative and judicial review of federal personnel actions and practices." *See Russell v. U.S. Dept. of the Army*, 191 F.3d 1016, 1019 (9th Cir. 1999) (APA review of FMLA claims preempted by CSRA) citing *Veit v. Heckler*, 746 F.2d 508, 510, 511 (9th Cir. 1984) (District court lacked authority to review public employee's challenge to employment decision). In *Veit*, the court acknowledged that the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all. *See Veit* at 511.

In this case, however, Plaintiffs Hagan and Deal do not challenge a removal, suspension, reduction in grade or pay, or furlough. *See* 5 U.S.C. § 7512. Instead, the complaint establishes that the Air Force routinely is violating several provisions of the Sikes Act, and only one such violation deals with the elimination, or potential elimination, of positions in which Hagan and Deal have an interest. Far from the central issue here, the potential effect on employment is a symptom or side-effect of the Defendants' violations of the Sikes Act. The real import of the Sikes Act and the Complaint is the ultimate damage to natural resources when professional natural resources managers are eliminated. That is the issue the Air Force desperately wants to avoid.

This case is not a personnel action, as Defendants allege, even though some allegations in the complaint pertain to the elimination of natural resource personnel on staff at Edwards AFB. The claims do not amount to a personnel grievance over loss of employment, but instead are included as a part of the larger proof that the Defendants are in violation of the Sikes Act. Therefore, this challenge does not fall under the jurisdiction of the MSPB.

B. Federal Courts Have Jurisdiction Over Contracting/Personnel Issues in this Context

Federal court review of issues related to government contracting has been allowed in other similar cases. *See International Assoc. of Firefighters, Local F-100 v. United States Dept. of the Navy,* 536 F. Supp. 1254 (D.R.I. 1982). In *International Assoc. of Firefighters*, a union of federal civil service employees who performed fire fighting services at naval installations challenged the Navy's decision to resolicit bids from private contractors to provide fire fighting services. The union alleged that the Navy's illegal decision to resolicit bids increased competition for its members' jobs, placing them in economic jeopardy. *Id*. at 1264. The court found that the Plaintiffs had standing to challenge the agency's action under the Armed Services Procurement Act ("ASPA") and the Defense Acquisition Regulations ("DAR"). Specifically, the court found that the provisions of the ASPA mandating free and full competition arguably protect the interests of civil service employees who allege they are injured by an agency's failure to follow ASPA and DAR procurement procedures. *Id*. at 1265. The court still found this to be true after acknowledging that Congress had deleted a specific provision from the ASPA which would have allowed suits by government employees. *Id.*

Federal employees also have standing to challenge the constitutionality of a statute granting preference in awarding contracts to private firms because such preference deprived the civilian employees who had been performing such work the opportunity to compete for the contract. *See American Federation of Government Employees, AFL-CIO v. United States*, 104 F. Supp. 2d 58, 69 (D.D.C. 2000).

Another suit was allowed by the National Air Traffic Controllers Association, MEBA, AFL-CIO ("NATCA") and two individual air traffic controllers against the Department of Transportation ("DOT") and the Administrator of the Federal Aviation Administration ("FAA"). *See National Air Traffic Controllers Assn., MEBA, AFL-CIO v. Pena*, 944 F. Supp. 1337 (N.D. Ohio 1996). The suit was brought to challenge the FAA's decision to

privatize operations at Level 1 air traffic control towers. *Id*. at 1340. Plaintiffs alleged that if the FAA completes privatization of their jobs in violation of applicable regulations (specifically OMB Circular A-76 and its supplement), the Plaintiffs would be injured by the loss of government employment, wages and benefits. *Id*. at 1342. The FAA filed a motion to dismiss the case for lack of jurisdiction, asserting that Plaintiffs lacked standing under Article III, failed to exhaust administrative remedies, and that the case was not ripe for review. Similar to the case at bar, the employees in *Pena* had not yet been fired. *Id*. at 1343. The court found that the injury to the employees was imminent because the FAA's privatization plan did not merely contemplate the contracting out process, but affirmatively required it. *Id*. at 1345. The court stated that "while an allegation of possible future injury does not satisfy the requirements of Article III, an allegation of threatened injury that is 'certainly impending' does constitute injury in fact, and does meet the constitutional threshold." *Id* at 1342. The Plaintiffs' injury was caused by the FAA's alleged failure to comply with Circular A-76's prohibitions against contracting out certain activities. Therefore, the court found that the employees had standing under Article III.

In another case, civilian employees of the Army were allowed to challenge the Army's decision to privatize food service operations in an action akin to a "disappointed bidder" suit. *See Diebold v. United States*, 947 F.2d 787 (6th Cir. 1991). In none of these cases did the court find the CSRA controlling, or require the employees to exhaust administrative remedies. Based on these cases, it is apparent that employee challenges to federal contracting have been allowed under the general Article III standing requirements, without going before the MSPB or exhausting administrative remedies. Therefore, the plaintiffs here should be allowed to challenge the Sikes Act violations by the Air Force that may have an incidental effect on their employment.

C. This Case is Ripe for Judicial Review

Defendants incorrectly contend that the Court also lacks jurisdiction over claims regarding down-sizing and the possible termination of Deal because they are not ripe. An action is ripe if (1) the issues presented are fit for judicial decision, and (2) the parties would suffer undue hardship if court considerations were withheld. *See American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). Defendants argue that no removal action has been taken against Deal, and that it is not clear whether any future decisions will impact either Hagan or Deal's positions. Therefore, Defendants claim that the Court's exercise of jurisdiction over what amounts to a hypothetical future layoff is premature. However, these arguments miss the mark.

The injuries outlined in the Complaint are detailed and specific. Many have already occurred. Nevertheless, Defendants here, like the defendant in *National Air Traffic Controllers Association, MEBA, AFL-CIO v. Pena, supra*, argue that the plaintiff's injuries are not ripe for review because they are speculative. *Pena* at 1346. The court in *Pena* looked at the following three factors in order to determine whether the action was ripe for review: (1) the likelihood that the alleged harm will actually occur; (2) the likelihood that the factual record is sufficient to produce a fair adjudication; and (3) the hardship to the parties if judicial relief is denied at this stage. *Pena* at 1347.

First the *Pena* Court found that many employees had already lost their jobs and the others "need not wait until they have lost their jobs to challenge the privatization plan." *Pena* at 1347. The Court found the factual record sufficiently developed for adjudication because all the decisions relating to contracting out service had occurred and the plan was currently being implemented. *Id*. at 1347. The Court found the hardship factor was met because "withholding judicial relief until every affected employee loses his or her job would cause hardship to plaintiffs, for whom careers are at stake." *Id*. at 1347.

As stated in the Complaint, the majority of natural resource management functions at Edwards Air Force Base already are being conducted by contractors. Complaint, ¶ 34. Other positions, including Wanda Deal's, have been slated for elimination in the near future. Complaint, ¶ 35. These allegations must be taken as true at this stage of the proceedings. Thus, there is no question that the alleged harm will come to pass. Deal, Hagan and others, will be affected by loss of employment, or change in the nature of employment, due to Defendants' illegal contracting activities, in violation of the Sikes Act. Furthermore, the natural resources will suffer from the lack of adequate management. These are the very evils the Sikes Act sought to prevent.

D. Congress Did Not Commit to Agency Discretion the Option to Violate the Sikes Act

The decisions to contract out natural resource management functions in violation of the Sikes Act is not an action committed to agency discretion. The Sikes Act provides ample standards for a court to apply. Furthermore, Air Force and Department of Defense regulations supply additional applicable standards. Defendants argue, however, that natural resource contracting decisions are committed to agency discretion, and that the Sikes Act contains no measurable standard. A fair review of the Sikes Act provisions themselves demonstrate the fallacy in Defendants' argument.

The Sikes Act provides that "[t]he Secretary of Defense *shall* carry out a program to provide for the conservation and rehabilitation of natural resources on military installations." 16 U.S.C. § 670a(a)(1)(A) (emphasis added). "To facilitate the program, the secretary of each military department shall prepare and implement an integrated natural resources management plan for each military installation in the United States under the jurisdiction of the Secretary, unless the Secretary determines that the absence of significant natural resources on a particular installation makes preparation of such a plan inappropriate." 16 U.S.C. § 670a(a)(1)(B).

> The Secretary of a military department shall prepare each integrated natural resources management plan for which the Secretary is responsible in cooperation with the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, and the head of each appropriate State fish and wildlife agency for the State in which the military installation concerned is located. [T]he resulting plan for the military installation shall reflect the mutual agreement of the parties

> concerning conservation, protection, and management of fish and wildlife resources.

16 U.S.C. § 670a(2). The purpose of the program includes providing for the conservation of natural resources on military installations and multipurpose use of the resources. 16 U.S.C. § 670a(3).

The requirements of the integrated natural resources management plan are set forth in detail. Each plan "shall, to the extent appropriate and applicable, . . . provide for fish and wildlife management, land management, forest management, and fish and wildlife-oriented recreation; establishment of specific natural resource management goals and objectives and time frames for proposed action; enforcement of applicable natural resource laws (including regulations)[.]" 16 U.S.C. § 670(b).

The Sikes Act mandates certain elements as to how the INRMPs are to be implemented and enforced. "Neither Office of Management and Budget Circular A-76 nor any successor circular thereto applies to the procurement of services that are necessary for that implementation and enforcement[.]" 16 U.S.C. § 670(d). Priority must also "be given to the entering into of contracts for the procurement of such implementation and enforcement services with Federal and State agencies having responsibility for the conservation or management of fish and wildlife." 16 U.S.C. § 670(d).

The Sikes Act explicitly provides that "the Secretary of each military department shall ensure that sufficient numbers of professionally trained natural resources management personnel and natural resources law enforcement personnel are available and assigned responsibility to perform tasks necessary to carry out this title, including the preparation and implementation of integrated natural resources management plans." 16 U.S.C. § 670e- 2 (emphasis added).

Despite this specific language, Defendants assert in this litigation that the Sikes Act does not provide any standards to apply to a natural resource decision. Defendants' tune has changed since it argued before Congress that "the cooperative agreements set up by the [Sikes] Act have been an effective means of coordinating wildlife programs and outdoor recreation opportunities on Defense lands. The most efficient way to carry out these programs on public lands is exemplified by the mechanisms set up by the Sikes Act." *Wetlands Act and Sikes Act Reauthorizations: Hearings on H.R. 1203 and H.R. 1202 Before the Subcomm.on Fisheries and Wildlife Conservation and the Env't of the House Comm. on Merchant Marine and Fisheries*, 99th cong. 319 (1985) (statement of Paul Johnson, Deputy Assistant Secretary for Installations and Housing, Dep't of the Army).

Carl J. Schafer, Jr., Deputy Assistant Secretary of Defense testified before the Subcommittee on Environmental Pollution of the Senate Environment and Public Works Committee on September 18, 1986 and made the following statement:

> For more than 20 years, the cooperative program established by the Sikes Act has facilitated our efforts to protect, improve, and

> manage fish and wildlife under DOD stewardship. In consonance with military missions, many outstanding wildlife and endangered species conservation programs are carried out on our installations. We attribute this fact to the cooperation and assistance we get from the U.S. Fish and Wildlife Service and state agencies, as well as to the 300 professional natural resources managers employed by DOD. Since we are responsible for managing almost 25 million acres of natural resources, we rely heavily on cooperation and assistance from other federal agencies and the states to help us do that job satisfactorily. The cooperative agreements, set up by the Sikes Act, have been an effective means of coordinating wildlife programs and outdoor recreation opportunities on defense lands. The most efficient way to conduct these programs on public lands is exemplified by the mechanism set up by the Sikes Act.

Extending and Amending the Sikes Act and Establishing the Bayou Sauvage Nat'l Wildlife Refuge: Hearings on S. 1352, H.R. 1202, and S. 2741 Before the Subcomm. On Envtl. Pollution of the Comm. on Env't and Public Works, 99th Cong. 40 (1986) (statement of Carl J. Schafer, Jr., Deputy Assistant Secretary of Defense).

Perhaps the most convincing, however, is the recent statement of the Honorable Don Young, U.S. House of Representatives, who has been the primary sponsor for Sikes Act legislation for 20 years. In a July 17, 2000 letter to William S. Cohen, Secretary of the Department of Defense, Congressman Young voiced his frustration at continuing violations of the Sikes Act "despite the clear language . . . ."

> Despite the clear language of the Sikes Act Amendments of 1986 and 1997, it appears that the Department of Defense (DOD) continues to ignore the wishes of Congress and its own policy guidance (DOD Instruction 4715.3). DOD has targeted over 2,800 'natural resource services' positions at 164 Army, Navy, and Marine Corps installations for cost comparison or direct conversion under OMB Circular A-76, and many similar positions are under consideration within the Air Force. It appears that this list includes natural resources management functions that are inherently governmental and prohibited from outsourcing by the Sikes Act.

July 17, 2000 letter from Honorable Don Young to Honorable William S. Cohen, a copy of which is attached as Exhibit A. Plaintiffs respectfully submit that if they are sorely wrong about the meaning of the Sikes Act (as Defendants claim), the sponsor of this legislation in Congress is also in the dark.

E. Requirements for Judicial Review Under APA are Met

The Administrative Procedure Act ("APA") provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. The APA applies unless the "statutes preclude judicial review; or agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1-2). Defendants dispute Plaintiffs' interpretation of the Sikes Act regarding contracting. However, as Defendants are forced to concede, on a motion to dismiss under Rule 12(b)(6) all material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff.

In support of their argument Defendants cite *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 714 (1985). In *Heckler*, the Court found that an agency's decision not to take enforcement action is a decision traditionally committed to agency discretion, and the Court did not believe that Congress intended to change that tradition by enacting the APA. The Court goes on to say, however, that "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." 470 U.S. at 833.

Just this year, the Ninth Circuit held that "*Heckler* does not preclude this court from reviewing the [Board of Immigration Appeals'] decision not to reopen" an immigration case. *Socop-Gonzalez v. Immigration and Naturalization Serv.*, 208 F.3d 838, 844 (9th Cir. 2000). Just as the Defendants in the present suit, the Defendants in *Socop-Gonzalez* "relied on Heckler to argue that this court may not review the [agency's] decision because there is no 'meaningful standard' by which to evaluate its exercise of discretion." *Id.* at 843. The Court further stated that there is a presumption in favor of judicial review of administrative action. *Id.* This presumption can be overcome only by clear and convincing evidence of a contrary congressional intent. *Id.* The circumstance in which an administrative decision is not reviewable is rare and only exists where the statute is so broad that there is no law to apply. *Id.* Simply because 'a statute contains discretionary language does not make agency action unreviewable.' *Id.* at 844. "This court and others have recognized repeatedly that 'the Supreme Court's holding in [*Heckler*] does not bar judicial review when an agency's regulation provides the Court with law to apply.'" *Id.*

The Defendants also cite *Defense Language Institute v. Federal Labor Relations Authority*, 767 F.2d 1398 (9th Cir. 1985), in which the Court held that Circular A-76 lacked meaningful standards to guide management's discretion in whether it should obtain goods and services from the private sector or government personnel. This case addresses only the lack of standards contained in Circular A-76, which should not be used by Defendants. Defendants assert that "[i]f Circular A-76 and its supplemental handbook are inadequate to provide the necessary 'law to apply' for judicial review, the Sikes Act certainly is not sufficient." There is no logic in this claim. Simply because one regulation does not have meaningful standards to apply, does not mean that no regulation or law would have meaningful standards to apply.

Finally, Defendants mention two other cases cited by the court in the *Defense Language Institute* decision as authority that judicial review is unavailable in this instance. *See American Federation of Government Employees, Local 2017 v. Brown*, 680 F.2d 722

(1982) and *Local 2855, American Federation of Government Employees v. United States*, 602 F.2d 574 (3d Cir. 1979). A later Sixth Circuit case discounted a lower court's reliance on those two cases where the lower court concluded "that a contracting-out decision was 'committed to agency discretion by law.'" *Diebold v. United States*, 947 F.2d 787, 807 (6th Cir. 1991). The court held

> The analysis in these cases is not applicable to the case before us . . . because upon close inspection it is clear that the two cases apply the old loose and incomplete version of Circular A-76, prior to its revision. Thus neither of these cases nor the cases cited therein persuade us to take the view that contracting out, under current law, is committed to agency discretion.

Diebold, 947 F.2d at 807.

In *Diebold*, the court considered whether, under the APA, a decision to contract-out dining hall operations at Fort Knox is an action committed to agency discretion by law. The complainants alleged that the Army miscalculated the comparative costs of in-house versus outside operation of its dining halls and in doing so violated the statutes and regulations governing contracting-out. *Id.* at 789. The Court began its analysis with the "presumption that this privatization decision, an agency action within the meaning of the APA, is reviewable under the [APA] unless we find that the action is 'committed to agency discretion by law.'" *Id.* at 789. The Court conducted a careful review of the history of OMB Circular A-76 and determined that in its current form, "there are standards guiding this agency action and our review of the action." *Id* at 790. The court discounted earlier court of appeals cases which "dealt with early, less formal, and highly discretionary versions of Circular A-76 . . . ." *Id.*

Finally the *Diebold* Court stated that the United States Supreme Court has not even "had occasion to consider a wrongful privatization case under the APA." *Id.* at 809. The court notes that none of the three principal cases in which the Supreme Court has discussed the 'committed to agency discretion' exception are on point. *Id.* "Close attention to these cases reveals the accuracy of the Court's statement in *Heckler v. Chaney* that this exception to APA review 'remains a narrow one.'" *Id.* "The two decisions which found agency action unreviewable because committed to agency discretion by law dealt with special situations - prosecutorial discretion and national security." *Id*., citing *Heckler v. Chaney*, 470 U.S. 821 (1985) and *Webster v. Doe*, 486 U.S. 592 (1988).

"[W]here Congress commands the agency to act there is law to apply and a court, pursuant to the standards of the APA, may review whether the agency acted in accordance with Congress' wishes." *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642 (10th Cir. 1990). Congress, through the Sikes Act, commanded Defendants to act. Defendants were commanded to "carry out a program to provide for the conservation and rehabilitation of natural resources on military installations." The Secretary of each military department was ordered to develop and implement an INRMP for each military installation. This was to be done in cooperation with the Secretary of the Interior, acting

through the United States Fish and Wildlife Service and the State fish and wildlife agency. The contents of each plan were specifically outlined by Congress, as well as the means for implementing and enforcing the cooperative plans. Finally, each military department was commanded to "ensure that sufficient numbers of professionally trained natural resources management personnel and natural resources law enforcement personnel are available and assigned responsibility to perform tasks necessary to carry out this title." 16 U.S.C. § 670e-2.

As the facts of the complaint indicate, Defendants have failed to comply with the Sikes Act in many respects. Defendants have failed to staff the necessary natural resource management personnel and are continually contracting out inherently governmental functions which should be performed in-house. Defendants have failed to prepare the necessary INRMP, in the manner as required by Congress and their own regulations, and have failed to act cooperatively with state and federal fish and game agencies.

The Defendants' reliance on the very narrow exception to judicial review in *Heckler* is misplaced. The motion to dismiss should be denied because the Sikes Act contains specific provisions with regard to the natural resource functions demanded to be undertaken by the military agencies.

F. Final Agency Action has Occurred

The Complaint sets forth that an INRMP was prepared, primarily by a contractor, and is now being modified by a contractor. Complaint ¶ 36. The INRMP itself states Edwards AFB's intent "that most of the projects will be accomplished by contractors," and there is no provision in the INRMP for offering natural resource-related contracts to either the United States Fish & Wildlife Service or California Fish and Game Department as required by the Sikes Act. Complaint ¶ 36. Once again, the Court must take as true the material allegations of the complaint. Although defendants argue that no INRMP has been completed, this argument is irrelevant.

Defendants cite three cases in support of their argument that no final agency action has been taken in this case with regard to the INRMPs. In *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), the Court ruled that final agency action had not occurred because the action complained of was taken by the President, and the President is not an agency within the meaning of the Act. 505 U.S. at 796. The court in *Franklin* stated that to determine whether an agency action is final, one factor to be considered is whether its impact is 'direct and immediate' and directly affects 'day to day business.' 505 U.S. at 796-97. This case adds little to Defendants' argument because there is no dispute in the present action that the party being sued is an agency within the meaning of the APA.

Defendants cite *Franklin* for the proposition that agency action is not final if it is only tentative or constitutes a preliminary step. Defendants' Memorandum, p. 24. The *Franklin* Court stated that "[t]he core question is whether the agency has completed its decision making process, and whether the result of that process is one that will directly

affect the parties." 505 U.S. at 797. The Defendants in the present suit instituted a clear policy in favor of contracting out natural resource management functions, and have already contracted out significant numbers of those functions to contractors. Complaint ¶ 37. The result of the contracting out process is the loss of and change in employment to natural resource professionals like Deal and Hagan, and the other continued violations of the Sikes Act, which ultimately injure the natural resources on Edwards Air Force Base.

Defendants cite a Ninth Circuit decision in which the court held that EPA listing decisions do not constitute final agency action. *Hecla Mining Co. v. United States Environmental Protection Agency*, 12 F.3d 164, 165 (1993). Clearly, this case is distinguishable on its facts. The case before this Court is not merely a challenge to a listing decision by the USAF. Plaintiffs are challenging Defendants' continued violations of the Sikes Act, including its failure to follow the Sikes Act with regard to preparation and implementation of the INRMP.

Finally, Defendants cite a case to support its contention that agency action subject to notice and comment is not final. *See Action on Smoking and Health v. Dept. of Labor*, 28 F.3d 162 (D.C. Cir. 1994). In that case the court concluded that an Occupational Safety and Health Administration's ("OSHA") proposal to regulate environmental tobacco smoke ("ETS") in omnibus indoor air quality rule making, instead of in a separate ETS proceeding, was not a final agency action. *See Id.* at 165. This case differs from the present action because the Defendants have not merely proposed contracting out of natural resource management functions but have already taken such action.

Defendants' choice not to follow the Sikes Act in developing and implementing the INRMP and to contract out natural resource management responsibilities is a final agency action. *See Sierra Club v. Peterson*, 185 F.3d 349, 367 (5th Cir. 1999). In *Sierra Club*, the court held that "the Forest Service took final action when it authorized timber sales stemming from even-aged management in direct contravention of the statutes and regulations that govern Forest Service action." *Id.* at 372. The court stated that the Forest Service's *decision not to follow its own regulations* amounted to an adjudication and review was allowed under the APA. *Id.* at 368.

> When the Forest Service elected not to follow those regulations, it undertook a final agency action *for the purposes of the inventorying and monitoring that the regulations prescribed*. Failure to follow those regulations is what the Appellees challenged.

Id. at 371.

Defendants' decision not to follow the provisions of the Sikes Act was a final agency action, clearly affecting the rights of the plaintiffs. Therefore, the action is reviewable by the Court under the APA. Of course, the allegations in the Complaint must be taken as true and construed in the light most favorable to the plaintiffs on a Motion to Dismiss. *See Communications Telesystems Intern. v. California Public Utilities Com'n*, 14 F.

Supp. 2d 1165, 1167 (N.D. Cal. 1998). Taking the allegations in the Complaint as true, Defendants' contention that no final agency action has been taken with regard to the INRMP is just plain false. Therefore, Defendants' motion to dismiss must be denied.

IV.

CONCLUSION

Plaintiffs deserve their day in court. The Sikes Act, first enacted in 1949, has evolved over the last 50 years to include a number of specific provisions, which are mandatory requirements for military agencies. The unique and valuable natural resources found on Edwards AFB are threatened because the Air Force has chosen to ignore the commands of Congress. For the reasons set forth above, this Court should allow this case to move forward for the proper development of the record and a decision on the merits.

Respectfully submitted,

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G. Alan Perkins
Hill Gilstrap Perkins & Trotter
1 Information Way, Suite 200
Little Rock, Arkansas 72202

Tel: 501- 603-9000
Fax: 501-603-0556

Babak Naficy, Esq., SBN 177709
Law Offices of Babak Naficy
9800 S. La Cienega, Fifth Floor
Inglewood CA 90301
Tel: 310-348-8495
Fax: 310-348-8762

Dan Meyer, General Counsel
Public Employees for
Environmental Responsibility
(PEER)
2001 S. Street, NW, Suite 570
Washington, D.C. 20009
Tel: 202- 265-7337
Fax: 202-265-4192

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, G. Alan Perkins, certify that I have served the foregoing pleading upon the following attorney of record by mailing a copy of the same to the following on this 17th

November, 2000, upon:

Alejandro N. Mayorkas, United States Attorney
Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division
Lawrence E. Kole, Assistant United States Attorney
Alarice Medrano, Assistant United States Attorney
Room 7516 Federal Building
300 North Los Angeles Street
Los Angeles, CA 90012

G. Alan Perkins