UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANIMAL WELFARE INSTITUTE; and WILDLIFE PRESERVES, INC.,

Plaintiffs,

v.

KELLY FELLNER, in her official capacity as Acting Superintendent of FIRE ISLAND NATIONAL SEASHORE, and the UNITED STATES NATIONAL PARK SERVICE, an agency of the U.S. Department of the Interior,

Defendants.

Civil Action No.: 2:17-cv-06952-SJF-AYS

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO PARTIALLY DISMISS PLAINTIFFS' AMENDED COMPLAINT OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Animal Welfare Institute ("AWI") and Wildlife Preserves, Inc. ("WP"), by and through their undersigned attorneys, hereby submit this Memorandum in Opposition to Defendants' Motion to Partially Dismiss Plaintiffs' Amended Complaint, or, Alternatively, for Partial Summary Judgment (the "Motion").

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Rules

Regulations

Other Authorities

I. PRELIMINARY STATEMENT

This action seeks to protect the land conveyed to the United States in 1966, pursuant to deed restrictions that require the land to be maintained in its natural state, operate as a preserve and sanctuary, and prohibit the killing or disruption of any flora or fauna. Over the past 50 years that Defendants have owned and operated the land, Defendants acknowledged and honored the deed restrictions numerous times.

In 2016, however, Defendants adopted the White-Tailed Deer Management Plan and Final Environmental Impact Statement ("the Plan"), which violates the deed restrictions by authorizing the killing of deer through sharpshooting, as well as capture and euthanasia on the protected land to achieve a target deer density. The Plan further permits the erection of an exclusion fence on the protected land. The Plan orders that deer would be driven out of the fenced-in area, and that any deer found within the fence would be removed by direct reduction such as sharpshooting or capture and euthanasia.

After learning of the Plan, WP, the original grantor who established the deed restrictions, sent numerous letters to Defendants reminding them of their obligations pursuant to the deed restrictions. Defendants ignored those communications and, as a result, Plaintiffs filed this suit. Instead of abiding by the deed restrictions and following the applicable law, however, Defendants have doubled down on the Plan by filing this Motion and including numerous arguments—including arguments relying on law ruled unconstitutional by New York's highest court—in an effort to extinguish the deed restrictions so as to do what they please on the protected land, including killing deer. As more fully detailed below, however, all of Defendants' arguments are without merit and, as a result, the Court should reject them. Accordingly, the Court should deny the Motion.

II. FACTUAL BACKGROUND

A. Establishment Of Fire Island National Seashore

Fire Island National Seashore (FINS) was established in September 1964 "for the purpose of conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, New York, which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population." 16 U.S.C. § 459e; FINS 000489, 000606.[1] FINS encompasses nearly 19,600 acres of land, including the approximately 44 acre Sunken Forest Preserve. FINS 000489, 000571, Kelly Decl., Exhibit 1.

B. Conveyance Of Sunken Forest Lands

On June 29, 1955, WP conveyed multiple tracts of property ("WP Tracts") to Sunken Forest Preserve, Inc. ("SFPI"). The WP Tracts make up a substantial portion of what is known as the Sunken Forest Preserve ("Sunken Forest") within FINS. Compl. at ¶ 27. The deed conveying the WP Tracts ("1955 Deed") contained a specific restriction (the "1955 Deed Restriction") that the WP Tracts were to be maintained in their natural state and used as a wildlife sanctuary. A true and correct copy of the 1955 Deed is attached to the Kelly Decl. as Exhibit 2. Specifically, the 1955 Deed provided:

> This conveyance is made subject to the express condition and limitation that the premises herein conveyed shall be maintained in their natural state and operated as a preserve for the maintenance of wildlife and its natural habitat undisturbed by hunting, trapping, fishing or any other activity that might adversely affect the

[1] References to "FINS OXXXXX" are to the Administrative Record, a complete copy of which Defendants filed with the Clerk of the Court on August 1, 2018. Docket No. 21. True and correct copies of excerpts of the Administrative Record on which Plaintiffs rely in support of their Memorandum in Opposition to the Defendants' Motion to Dismiss are attached as Exhibit 1 to the Declaration of Catherine Pastrikos Kelly, dated October 26, 2018 ("Kelly Decl.").

> environment or the animal population, and for scientific and educational purposes incidental to such maintenance and operation. Should the premises cease to be used solely for the above purposes, or should any activities be engaged thereon that would, adversely affect the flora or the fauna then the title of the grantee shall cease and determine and shall revert and vest in the grantor, the said reversion and vesting to be automatic and not requiring any re-entry.

Id. at ¶ 28.

On May 9, 1966, SFPI conveyed the WP Tracts, as well as a separate parcel, which had been deeded to it by a private individual, to the United States via deed ("1966 Deed" and together with the 1955 Deed, the "Deeds"). *Id.* at ¶ 29. A true and correct copy of the 1966 Deed is attached to the Kelly Decl. as Exhibit 3. The 1966 Deed included the same restrictions (the "1966 Deed Restriction" and together with the 1955 Deed Restriction, the "Deed Restrictions") as the 1955 Deed. In particular, the 1966 Deed states:

> All of the premises shall always be maintained in their natural state and operated solely as a sanctuary and preserve for the maintenance of wildlife and its natural habitat, undisturbed by hunting, trapping, fishing or any other activities that might adversely affect the environment or the flora or fauna or said premises; and for scientific and educational purposes incidental to such maintenance and operation.

Id. at ¶ 31.

The 1966 Deed references and incorporates the reversion language of the 1955 Deed. In fact, the U.S. Attorney General sent a letter to Stewart Udall, Secretary of the Interior, on March 15, 1967 (the "U.S. Attorney General Letter") acknowledging and confirming the Deed Restrictions. Specifically, the U.S. Attorney General Letter states:

> The title evidence and accompanying data disclose valid title to be vested in the United States of America subject to the rights and easements noted in Schedule A attached hereto, which your Department has advised will not interfere with the proposed use of the land.

1966 Deed at 13, Kelly Decl. Exhibit 3.

Schedule A to the U.S. Attorney General Letter, states:

> The title is subject to the following:
>
> 4. The condition, limitation and reverter as contained in Liber 3918, page 429, as noted at item 12, Schedule B of the title policy.

Id. at 14.

"Liber 3918, page 429" refers to the 1955 Deed. 1955 Deed at 1, Kelly Decl. Exhibit 2. Schedule A further states:

> It should be noted that the express consent of Congress should be obtained for the expenditure of funds for the erection of improvements of a nature subject to the disposal provisions of the Federal Property and Administrative Services Act of 1949, as amended, when such improvements are proposed to be erected upon any portion of the above land which is subject to a possibility of reverter.

1966 Deed at 15, Kelly Decl. Exhibit 3.

C. Management Of Deer On Fire Island National Seashore

The National Park Service ("NPS") previously conducted two deer hunts in the 1980s but specifically excluded the WP Tracts because of the Deed Restrictions. In 1981, NPS permitted a deer hunt on FINS but specifically excluded the WP Tracts. Transcript of TRO at 79:6-8, *Allen v. Hodel*, 1989 WL 8143 (E.D.N.Y. 1998) (No. 88 Civ. 3901) ("*Allen* TRO Transcript"), true and correct excerpts of which are attached to the Kelly Decl. as Exhibit 4.

In addition, from December 1988 to January 1989, NPS considered options for managing deer numbers by conducting an "experimental research hunt" to assess the condition of the deer. FINS 019417, 000578, Kelly Decl. Exhibit 1. The hunt, which was conducted in cooperation with the New York State Department of Environmental Conservation, included both an archery and firearms component and resulted in the killing of 60 deer. FINS 000578, 019424, Kelly Decl. Exhibit 1. NPS specifically excluded the WP Tracts from that hunt after WP reminded NPS of the Deed Restrictions. *Allen* TRO Transcript at 29:1-19, Kelly Decl. Exhibit 4; Transcript of Hearing

at 67-69, *Allen v. Hodel*, 1989 WL 8143 (E.D.N.Y. 1998) (No. 88 Civ. 3901) ("*Allen* Hearing Transcript"), true and correct excerpts of which are attached to the Kelly Decl. as Exhibit 5.

D. Fire Island National Seashore White-Tailed Deer EIS And Management Plan

In June 2011, NPS published a notice in the Federal Register announcing its intent to prepare an Environmental Impact Statement ("EIS") for a "Deer and Vegetation Management Plan" for FINS. Compl. at ¶ 32. In 2014, NPS published a notice in the Federal Register announcing the availability of a Draft Environmental Impact Statement ("DEIS") for the White-tailed Deer Management Plan on FINS. *Id.* at ¶ 33. The next notice, in 2015, provided notice of the availability of the "Final White-Tailed Deer Management Plan and Environmental Impact Statement, Fire Island National Seashore, New York." *Id.* at ¶ 36. NPS published the Record of Decision ("ROD") for the "White-Tailed Deer Management Plan for Fire Island National Seashore" on April 28, 2016 (the "Plan"). *Id.* at ¶ 37.

In the ROD, NPS outlined the Plan, which included the killing of deer through sharpshooting or capture and euthanasia, to achieve a target deer density. *Id.* at ¶ 38. The Plan further authorized the erection of an exclusion fence around 44 acres of maritime holly, much of which is contained in the WP Tracts. *Id.* at ¶ 39. The Plan ordered that deer would be driven out of the fenced-in area. *Id.* Any deer found within the fence would be removed by direct reduction methods such as sharpshooting or capture and euthanasia. *Id.*

III. STANDARDS OF REVIEW

A. Legal Standard Under F.R.C.P. 12(b)(1)

"Determining the existence of subject matter jurisdiction is a threshold inquiry[,] and a claim is properly dismissed . . . under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d

Cir. 2008) (citation and internal quotations omitted), *aff'd*, 561 U.S. 247 (2010). In defending against a Rule 12(b)(1) motion, the plaintiff bears the burden of proving the court's jurisdiction by a preponderance of the evidence. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). A Rule 12(b)(1) motion may be either facial or fact-based. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). "When the Rule 12(b)(1) motion is facial . . . the plaintiff has no evidentiary burden. *Id.* (citations omitted). The court must determine whether the plaintiff has "allege[ed] facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue," "accept[ing] as true all material [factual] allegations of the complaint . . . and draw[ing] all reasonable inferences in favor of the plaintiff[.]" *Id.* at 56–57 (internal quotations omitted). Alternatively, where jurisdictional facts are disputed, the "court has the power and the obligation to consider matters outside the pleadings," such as affidavits, documents, and testimony, to determine whether jurisdiction exists. *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003) (quoting *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999)). However, "plaintiffs are entitled to rely on the allegations in the Pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing." *Carter*, 822 F.3d at 57.

B. Legal Standard Under F.R.C.P. 12(b)(6)

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell A. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is considered plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In deciding a motion to dismiss pursuant to Rule 12(b)(6),

the Court must accept as true all material factual allegations in the complaint, and all reasonable inferences must be drawn in the plaintiff's favor. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The Court should not dismiss the complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The Court's function is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Festa v. Local 3 Int'l Brotherhood of Electrical Workers*, 905 F.2d 35, 37 (2d Cir. 1990). In its analysis, the court may refer "to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in [a] plaintiff[']s] possession or of which [a] plaintiff[ ] had knowledge and relied on in bringing suit." *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). "If, on a motion to dismiss under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). Whether the Court should convert or decide the motion to dismiss on the pleadings alone is a discretionary decision. *See Friedl v. City of New York*, 210 F.3d 79, 83 (2d Cir. 2000) (explaining that a district court may choose between conversion or exclusion of extra-pleading materials presented in response to a 12(b)(6) motion).

C. Legal Standard Under F.R.C.P. 12(b)(7)

Under Rule 12(b)(7), an action must be dismissed for failure to join an indispensable party under Rule 19, which establishes a two-part test for making such a determination. Fed. R. Civ. P. 12(b)(7); *see also Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000). *First*, the court must determine whether an absent party is required under Rule 19(a). *Viacom*, 212 F.3d at 724.

Second, if the absent party is required, and if the absent party cannot be joined for jurisdictional or other reasons, the court must determine if the absentee is indispensable under Rule 19(b). *Id.* at 725. If the court determines that the absent party is indispensable, the action should be dismissed. *Id.* Under Rule 19(a), a person is "required" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

The second prong of this inquiry turns on whether the non-party's absence will impair or impede its ability to protect its interests. Fed. R. Civ. P. 19(a)(1)(B)(i); *see also MasterCard Int'l, Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 386-87 (2d Cir. 2006). The Second Circuit has held: "[i]t is not enough under Rule [19(a)(1)(B)(i)] for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under Rule [19(a)(1)(B)(i)] are only those parties whose ability to protect their interests would be impaired *because of* that party's absence from the litigation." *MasterCard*, 471 F.3d at 386-87 (emphasis in original). "[A]n absentee is unlikely to be a necessary party if there is another party in the suit with virtually identical interests who would be advancing virtually the same legal and factual positions." *Federal Ins. Co. v. SafeNet, Inc.*, 758 F. Supp. 2d 251, 258 (S.D.N.Y. 2010) (citation and internal quotations omitted).

If an entity is required under Rule 19(a) but cannot be joined, the court must determine whether that entity is indispensable based on the factors set forth in Rule 19(b). *Jonesfilm v. Lion Gate Int'l*, 299 F.3d 134, 139 (2d Cir. 2002). Rule 19(b) sets forth the following factors:

> (1) to what extent a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Fed. R. Civ. P. 19(b).

The Second Circuit has instructed district courts to take a "flexible approach" to the Rule 19(b) analysis, finding that "very few cases should be terminated due to the absence of nondiverse parties unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible." *Jaser v. New York Property Ins. Underwriting Assoc.*, 815 F.2d 240, 242 (2d Cir. 1987); *see also CP Solutions PTE, Ltd. v. Gen. Elec. Co.*, 553 F.3d 156, 159 (2d Cir. 2009).

IV. ARGUMENT[2]

A. The Court Has Jurisdiction Over This Action Because The United States Is Not A Required Party Pursuant To Rule 12(b)(7).

The Court should deny Defendants' Motion pursuant to Rule 12(b)(7) because the United States is not a "required" party under Rule 19(a). The United States does not meet the definition of "required" because: (1) the Court is able to accord complete relief between Plaintiffs and Defendants; (2) the United States' ability to protect its interests is not impeded because it has similar interests as, and is adequately represented by, the named Defendants; and (3) there is no indication that an existing party would be subject to a substantial risk of incurring double, multiple,

[2] Defendants reserved the right to argue that Plaintiffs' APA and NEPA claims are barred by the doctrines of res judicata and collateral estoppel pursuant to the memorandum and order and judgment entered in *Friends of Animals v. Fellner*, No. 16 CV 6006, Docket Nos. 49, 50 (E.D.N.Y. July 24, 2018) (on appeal to 2d Cir., 0:18-cv-02481). Although a full argument is not appropriate here, Plaintiffs claims under NEPA here are different and broader than those raised by Friends of Animals.

or otherwise inconsistent obligations if the United States is not named. *See* Fed. R. Civ. P. 19(a)(1). Under the second prong of the Rule 19(a) analysis, the United States' ability to protect its interest is not impeded by its non-party status because its interests are "virtually identical" to those of the Defendants, and the United States "would be advancing virtually the same legal and factual positions." *See Federal Ins. Co*, 758 F. Supp. 2d at 258. This is evidenced by the arguments Defendants raised in their motion to dismiss.

As support for its argument that the United States is a required party, Defendants rely heavily on the following language from the Quiet Title Act ("QTA"): "The United States may be named a party in any civil action brought by any person to quiet title to lands claimed by the United States." 28 U.S.C. § 2409a(a). Notably, however, the statute simply states that the United States "may" be named, not that the United States *must* be named. Thus, naming the United States as a party is discretionary—not mandatory. *Rastelli v. Warden, Metro. Corr. Ctr.*, 782 F.2d 17, 23 (2d Cir. 1986) ("The use of a permissive verb—'may review' instead of 'shall review'—suggests a discretionary rather than mandatory review process.") (citation omitted). Additionally, Defendants cite to no governing Second Circuit case law in support of their argument on this point. Therefore, the Court should deny Defendants' Motion on this ground.

Even if the Court finds that the United States is a required party, Plaintiffs respectfully request that the Court permit Plaintiffs to file a Second Amended Complaint, instead of dismissing the Amended Complaint ("the Complaint"). Courts disfavor dismissal if the necessary party can be joined without creating jurisdictional concerns. *Greenberg v. Cross Island Indus., Inc.*, 522 F. Supp. 2d 463, 467 (E.D.N.Y. 2007). "[F]ederal courts are reluctant to dismiss an action on grounds of non-joinder and, instead, will order the necessary party joined if that person is subject to service of process and joinder will not deprive the court of jurisdiction." *Id.*; *see also World Omni Fin.*

Corp. v. Ace Capital Re, Inc., 2002 WL 31016669, at *2 (S.D.N.Y. Sept. 10, 2002). Here, the United States can be joined without depriving the Court of jurisdiction. Therefore, the Court should permit the filing of a second amended complaint that names the United States as a defendant. A proposed Second Amended Complaint is attached to the Kelly Decl. as Exhibit 6.

B. The Court Has Subject Matter Jurisdiction Over The First, Second And Third Claims.

Defendants argue that the Court does not have subject matter jurisdiction over Plaintiffs' First, Second and Third Claims because: (1) Plaintiffs failed to plead that Defendants waived sovereign immunity; (2) Plaintiffs failed to plead the jurisdiction of this Court; (3) the QTA does not apply because title to the Sunken Forest is not in dispute; and (4) restrictive covenants are not enforceable under the QTA. These arguments should be rejected.

1. Plaintiffs properly pled Defendants' waiver of sovereign immunity.

Plaintiffs properly pled that Defendants waived sovereign immunity for the First, Second and Third Claims because paragraph 5 of the Complaint alleges the Court has jurisdiction pursuant to the QTA, 28 U.S.C. §§ 2409-2410 *et seq.* The QTA waives Defendants' sovereign immunity in any action to "adjudicate a disputed title to real property in which the United States claims an interest[.]" 28 U.S.C. § 2409a. For jurisdiction under this statute, the Court must determine: (1) the United States claims an interest in the property at issue; and (2) there is a disputed title to real property. *See Leisnoi, Inc. v. United States*, 170 F.3d 1188, 1191 (9th Cir. 1999).

Here, the First, Second and Third Claims relate to the title dispute over the WP Tracts. Specifically, those Claims request: (1) a declaratory judgment regarding whether the WP Tracts immediately reverted to WP as a result of Defendants' enactment of the Plan; (2) that the Court eject Defendants from the WP Tracts, allow WP to recover possession of the WP Tracts, and order Defendants to execute a deed for the WP Tracts in favor of WP; and (3) that the Court rule that the

Plan violates the Deed Restrictions and order that NPS is prohibited from executing the Plan on the WP Tracts. It is undisputed that Defendants claim an interest in the WP Tracts because the 1966 Deed conveyed title to the United States, and both prior to and during this litigation, NPS, an agency of the United States government, has repeatedly asserted that it did not violate the Deed Restrictions and that the United States continues to own the WP Tracts. Plaintiffs contend the opposite: because Defendants violated the Deed Restrictions through enactment of the Plan, the WP Tracts revert to WP. This gives rise to disputed title, which satisfies the second element of the inquiry. Therefore, Plaintiffs satisfied both prongs of the legal inquiry and, thus, properly pled Defendants' waiver of sovereign immunity.

2. Plaintiffs properly pled that the Court has subject matter jurisdiction.

The Court also has subject matter jurisdiction over this action. Although Defendants have launched a facial attack, this attack fails because the Complaint sufficiently alleges a basis for the Court to exercise subject matter jurisdiction over the First, Second and Third Claims pursuant to 28 U.S.C. 1346(f). *See Carter*, 822 F.3d at 56 ("facial attacks" require the court merely to determine if plaintiff sufficiently alleged a basis of subject matter jurisdiction). That statute affords the Court with "exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C. 1346(f). The Complaint sets forth numerous factual allegations establishing a dispute over title to the WP Tracts, real property in which Defendants claim an interest, including: (1) WP conveyed the WP Tracts pursuant to a deed restriction that would result in reversion of ownership if it were violated, Compl. at ¶¶ 27-31; (2) the WP Tracts were subsequently conveyed to the United States subject to those Deed Restrictions, *id.*; (3) NPS breached the Deed Restrictions by enacting the Plan, causing the WP Tracts to revert to WP, *id.* at ¶¶ 32-43; and (4) Defendants admit the Deed

Restrictions exist, but denied that the Plan violates them, *id.* at ¶ 47. Thus, Plaintiffs sufficiently alleged claims over which the Court has subject matter jurisdiction. Nevertheless, to the extent the Court determines that Plaintiffs' allegations do not establish subject matter jurisdiction, Plaintiffs respectfully request that they be allowed to amend the Complaint to include 28 U.S.C. 1346(f) as a basis for subject matter jurisdiction.[3]

3. The QTA applies because title to the Sunken Forest is in dispute.

Defendants argue that the First, Second and Third Claims should be dismissed for lack of subject matter jurisdiction because Defendants have not implemented the Plan—they have only authorized it—and, therefore, title to the Sunken Forest is not in dispute and the QTA does not apply. Defendants also argue that they have not triggered the Deed Restrictions because: (1) once implemented, the Plan will not violate the Deeds as Defendants have determined that the Plan would benefit the wildlife and vegetation in the Sunken Forest; and (2) Defendants' Plan, which involves the killing of wildlife, is distinguishable from hunting. The Court should reject these arguments for three reasons.

First, title to the Sunken Forest is in dispute because Defendants' enactment of the Plan represents NPS's final agency action, which is sufficient to give rise to a title dispute. *See Bennett v. Spear*, 520 U.S. 154 (1997); *Role Models America, Inc. v. White*, 317 F.3d 327 (D.C. Cir. 2003); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999). The government made a similar argument to the one Defendants make here in *Role Models America, Inc. v. White*,

[3] The liberal mandate of Fed. R. Civ. P. 15(a) is that leave to amend should be freely given when justice so requires. *Prescription Plan Service Corp. v. Franco*, 552 F.2d 493, 498 (2d Cir.1997). The Supreme Court has emphasized that amendment should be permitted and has stated that refusal to grant leave without justification is "inconsistent with the spirit of the Federal Rules." *Rachman Bag Co. v. Liberty Mutual Insurance*, 46 F.3d 230, 235 (2d Cir.1995) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

which involved a challenge to the Secretary of Defense's decision to convey a parcel of property. The government contended that its action was not "final" because the Secretary of Defense had not yet conveyed the parcel to PenMar. The D.C. Circuit Court held that "[t]o be final, an action need not be the last administrative [action] contemplated by the statutory scheme." *Role Models*, 317 F.3d at 331–32. Instead, the court stated "the question is whether the agency has impose[d] an obligation, denie[d] a right, or fixe[d] some legal relationship . . . ." *Id.* at 331 (citation and internal quotation omitted). Applying this standard, the court held that it had no doubt the government's action was final because by publishing the ROD, the government obligated itself to convey the property to PenMar. *See id.*

Similarly, here, Defendants published a ROD for the Plan, which constitutes final agency action. *Gov't of Province of Manitoba v. Zinke*, 849 F.3d 1111, 1115 (D.C. Cir. 2017) ("The issuance of a ROD constitutes final agency action.") As a result, Defendants have imposed an obligation on themselves and fixed a legal relationship to enact the Plan.[4] Therefore, Defendants' argument that the Court does not have subject matter jurisdiction because Defendants have not implemented the Plan should be rejected.

Second, Defendants' argument that they have not triggered the Deed Restrictions because the Plan will benefit wildlife and vegetation should be rejected because this reasoning violates the Deeds. The WP Tracts were granted to Defendants under the specific restriction that the land be

[4] Indeed, CEQ's 40 Most Frequently Asked Questions Concerning CEQ's National Environment Policy Act Regulations at ¶ 34d states that "agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisions and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein." (citing 46 Fed. Reg. 18,026 (March 23, 1981).

maintained in its "natural state and operated as a preserve for the maintenance of wildlife and its natural habitat undisturbed by hunting, trapping, fishing or any other activity that might adversely affect the environment or the animal population." Compl. at ¶ 49. Contrary to Defendants' argument, the Deeds do not permit Defendants to maintain an ecosystem at the expense of certain species. Rather, they require that Defendants allow the land to exist undisturbed in its natural state. The Plan, however, violates the Deed Restrictions because it disturbs the natural state of the land and adversely affects the animal population by killing, capturing and driving deer out of the WP Tracts.

Finally, Defendants argue that the Deed Restrictions have not been triggered because NPS's killing of wildlife under the Plan is distinguishable from hunting, and that, even if it is hunting, the Organic Act, which established NPS, gives NPS broad discretion to implement its directives, and the FINS Enabling Act, which established FINS, "mandates" hunting. These arguments are unpersuasive. First, the Deeds do not just restrict hunting—they require that the land be maintained in its *natural state*, operated as a *preserve* and remain as a *sanctuary* for wildlife, undisturbed by any activity that may adversely affect the flora or fauna. The Plan, however, orders sharpshooting, capture, and euthanasia, among other things, to reduce the number of deer in the WP Tracts. Those acts directly contradict the language in the Deeds requiring that the land be managed to allow wildlife to remain undisturbed in its natural state, as a preserve or as a sanctuary for wildlife.

Second, the Enabling Act does not grant an unconstrained right to hunt. Despite Defendants' characterization that hunting on FINS is "mandatory," the plain language of the Enabling Act requires that any hunting within FINS be "in accordance with the laws of New York." *See United States v. Knauer*, 707 F. Supp. 2d 379, 388 (E.D.N.Y. 2010) (interpreting similar

language in the Enabling Act for Gateway National Recreation Area: "Knauer's conduct was legal only if it was in accordance with state law . . . .").[5] The FINS Enabling Act, 16 U.S.C. § 459e(4), states:

> The Secretary shall permit hunting, fishing, and shellfishing on lands and waters under his administrative jurisdiction within the Fire Island National Seashore in accordance with the laws of New York and the United States of America, except that the Secretary may designate zones where, and establish periods when, no hunting shall be permitted for reasons of public safety, administration, or public use and enjoyment. Any regulations of the Secretary under this section shall be issued after consultation with the Conservation Department of the State of New York.

16 U.S.C. § 459e(4) (emphasis added).

New York broadly defines "hunting" as "pursuing, shooting, killing or capturing (other than trapping as defined in subdivision 11) wildlife, except wildlife which has been lawfully trapped or otherwise reduced to possession, and includes all lesser acts such as disturbing, harrying or worrying, whether they result in taking or not, and every attempt to take and every act of assistance to any other person in taking or attempting to take wildlife." N.Y. Envtl. Conserv. Law § 11-0103 (10) (McKinney 2015).

The activities contemplated in the Plan constitute hunting under New York Law. Here, as stated above, the Plan provides that deer on the WP Tracts will be driven out of the fenced-in area and any deer found within the fence would be removed by direct reduction such as sharpshooting or capture and euthanasia. Compl. at ¶ 39. Thus, there is no doubt that those activities in the Plan constitutes "hunting" pursuant to New York state law.

In any event, the Enabling Act provides that hunting must be in accordance with New York law, which includes *New York real property law*—not only New York hunting law. Indeed, NPS

[5] Interestingly, in *Knauer*, the government argued that this similar statutory language *prohibited* hunting. 707 F. Supp. 2d at 382-83.

has long recognized the Deed Restrictions and has modified prior hunts to avoid a violation. *See Allen* TRO Transcript at 29:1-19, Kelly Decl. Exhibit 4; *Allen* Hearing Transcript at 69:3-7, Kelly Decl. Exhibit 5; Letter, dated September 1, 2016, from K. Christopher Soller to Anita Shotwell, a true and correct copy of which is attached to the Kelly Decl. at Exhibit 9.

Further, even NPS's commentary explaining 36 C.F.R. § 2.2(b), which is the regulation associated with the FINS Enabling Act, contradicts Defendants' argument. That commentary states, "[t]he injury, harassment or taking of wildlife in those park areas classified as natural or historical areas is prohibited." General Regulations for Areas Administered by the National Park Service, 47 Fed. Reg. 11,598-01 (March 17, 1982). Although "natural area" is not defined, the WP Tracts cannot be deemed anything else because they were granted to NPS under the explicit condition that they "be maintained in their natural state and operated as a preserve for the maintenance of wildlife and its natural habitat" (the 1955 Deed) and "always be maintained in their natural state and operated solely as a sanctuary and preserve for the maintenance of wildlife and its natural habitat" (the 1966 Deed). Thus, the Enabling Act, its regulations and NPS's commentary explaining the regulations do not grant an unconstrained right to hunt, and NPS has no right to violate the Deed Restrictions based on the language of the Enabling Act.

Accordingly, Defendants' argument that the First, Second and Third Claims should be dismissed for lack of subject matter jurisdiction should be rejected.

4. Defendants' argument that a restrictive covenant fails to call into question title to or ownership of property misconstrues the law.

Defendants argue that the Court lacks subject matter jurisdiction because restrictive covenants fail to dispute title or the ownership of a property and, therefore, the Deed Restrictions are unenforceable under the QTA. This argument is not supported by any law cited by Defendants. In particular, Defendants cite *McMaster v. United States* for this proposition. 177 F.3d 936 (11th

Cir. 1999). In that case, however, a beneficiary of a trust sued the United States regarding restrictive covenants on land owned by the United States pursuant to the QTA. *Id.* Plaintiff asserted that the United States violated the restrictive covenants and that the land reverted to the grantor. *Id.* The court ruled, however, that it did not have subject matter jurisdiction because the trust did not convey the land to the United States. Instead, the trust conveyed the land to a non-profit organization pursuant to a deed that did not contain any restrictive covenants. The restrictive covenants only appeared in the deed for the transfer of land from the non-profit to the United States. *Id.* at 941. Thus, the disputed land could never revert to the plaintiff. As a result, the court held that the QTA could not apply because the dispute did not call into question the ownership of real property vis-à-vis the two parties. *Id.* at 942. Therefore, Defendants' argument misconstrues the holding in *McMaster* and should be rejected.

Here, both Deeds include restrictive covenants, which require that the property in question revert to WP if Defendants violate the Deed Restrictions. Defendants have done so through enactment of the Plan. Thus, the QTA applies because the dispute calls into question the ownership of the WP Tracts vis-à-vis WP and Defendants.

In any event, Defendants' argument that a restrictive covenant does not call into question ownership of a property fails based on their own admissions. Specifically, Schedule A to the U.S. Attorney General Letter states that: "express consent of Congress should be obtained for the expenditure of funds for the erection of improvements . . . when such improvements are proposed to be erected upon any portion of the [WP Tracts] which is subject to a possibility of reverter." 1966 Deed at 15, Kelly Decl. Exhibit 3. In other words, the U.S. Attorney General Letter cautions that Congress' approval is needed to improve the WP Tracts because the WP Tracts could revert to WP, and, presumably, the government would not want to improve land for the benefit of the

grantor. *Id.* Thus, the U.S. Attorney General Letter acknowledges that restrictive covenants call into question ownership of a property because it cautioned how the United States should handle improvements on such property.

Accordingly, the Court should reject Defendants' arguments because the complaint states a viable claim over which this Court has subject matter jurisdiction.

C. Plaintiffs' Requested Relief Is Appropriate Under The QTA.

Defendants argue that the QTA precludes the relief sought pursuant to Plaintiffs' First, Second and Third claims, such that ejectment, permanent injunction, and declaratory judgment are unavailable as remedies. Although courts have interpreted the QTA to preclude an automatic reversion of interest, *see, e.g.*, *United States v. Mottaz*, 476 U.S. 834 (1986), the QTA provides that, if a final determination is adverse to the United States, "the United States nevertheless *may* retain possession or control of the real property or any part thereof *as it may elect*, upon payment . . . of an amount . . . which the district court . . . shall determine to be just compensation." 28 U.S.C.A. § 2409a(b) (emphasis added). The use of the word "may" indicates that a reversion of ownership is still a possibility if the United States so chooses. As a result, courts have found that the request for reversion is not fatal to a complaint. For example, in *Fulcher v. United States*, the Fourth Circuit Court of Appeals reversed and remanded a case dismissed by the district court for failure to state a claim because of plaintiff's request for reversion of ownership. 632 F.2d 278, 280 (4th Cir. 1980). The Fourth Circuit found:

> The district court held that Fulcher could not divest the government of its title. It intimated that his only remedy was an action for compensation presumably in the Court of Claims. Accordingly, it dismissed the action under Rule 12(b)(6) for failure to state a claim. We agree with the district court that Fulcher cannot obtain title to the property or its possession. We conclude, however, that he can maintain this action. If he is not barred by the statute of limitations and if he prevails on the merits of his claim, he will be entitled to compensation. We therefore vacate the order of dismissal and remand the case for further proceedings.

Id.

Therefore, Plaintiffs' First, Second, and Third claims should not be dismissed for failure to state a claim.

Defendants also claim that the QTA bars Plaintiff's Third Claim for a declaration that the Plan violates the Deed Restrictions, and for an injunction prohibiting NPS from executing the Plan on the WP Tracts. Defendants, however, provide no support for this proposition, other than to argue that the QTA prohibits a "preliminary injunction." 28 U.S.C.A. § 2409a (c). Plaintiffs, however, are not requesting a preliminary injunction. Rather, Plaintiffs are requesting a declaratory judgment and *permanent* injunction, which is a permitted remedy under the QTA.

Defendants' argument regarding declaratory judgment appears to conflate remedies with causes of action. The U.S. Supreme Court has held "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *United States v. Mottaz*, 476 U.S. 834, 841 (1986). Therefore, plaintiffs asserting a cause of action relating to disputed title pursuant to the Declaratory Judgment Act, and not the QTA, have been rebuffed by the courts. *See Block v. North Dakota ex rel. Bd. Of Univ. and School Lands*, 461 U.S. 273 (1983), *Rosette, Inc. v. United States*, 141 F.3d 1394 (10th Cir. 1998). These cases stand for the proposition that to obtain a declaration regarding title to property in which the United States claims an interest, plaintiffs must plead the declaratory judgment action under the QTA, instead of circumventing the QTA by pleading only under the Declaratory Judgment Act. *See Rosette*, 141 F.3d at 1396. Indeed, if the courts did not have the authority to declare which party had the lawful interest in property under the QTA, then the courts would be of little value in resolving such disputes, which is contrary to Congress's clear intent. Accordingly, Plaintiffs have properly pled under the QTA.

D. Plaintiffs' QTA Claim Is Timely Because The Twelve-Year Statute Of Limitations Began To Run In 2014.

The Court has subject matter jurisdiction over Plaintiffs' second claim to eject Defendants and recover possession of the WP Tracts because the QTA's twelve-year statute of limitations began to run in 2014, not 1966 or 1975 as Defendants assert. The QTA provides: "[a]ny civil action under this section . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). The twelve-year statute of limitations is jurisdictional in nature. *Czetwertynski v. United States*, 514 F.Supp.2d 592, 596 (S.D.N.Y. 2007) (citing *United States v. Mottaz*, 476 U.S. 834, 843 (1986)).

"The 'should have known' prong of this test is governed by a test of reasonableness: when would a reasonable person have known that the United States claimed an interest in the property in question." *Id.* (citation omitted). In interpreting the meaning of "claim of the United States," courts have held that for the statute of limitations to begin running, it "is not enough that the government asserts 'some interest—any interest—in the property.'" *NE 32nd Street, LLC v. United States*, 896 F.3d 1240, 1243 (11th Cir. 2018) (quoting *Werner v. United States*, 9 F.3d 1514, 1519 (11th Cir. 1993)). Rather, the United States must assert an interest that is "'adverse[ ]' to the interest asserted by the plaintiff." *Id.* (quoting *Werner*, 9 F.3d at 1519) (citing *Kane Cty. v. United States*, 772 F.3d 1205, 1216 (10th Cir. 2014) (the statute of limitations begins to run when there "is a reasonable awareness that the Government claims some interest adverse to the plaintiff's . . . . As a public right-of-way can generally peaceably coexist with an underlying ownership interest, the United States must provide a county or state with sufficient notice of the United States' claim of a right to exclude the public."); *Michel v. United States*, 65 F.3d 130, 132 (9th Cir. 1995)

(explaining that the plaintiffs' "claim of access to roads and trails across [government property] did not accrue until [they] knew or should have known the government claimed the exclusive right to deny their historic access to the trails and roads").

Therefore, "if the interests asserted by the parties are capable of peaceful coexistence . . . then the clock will not run. In contrast, adversity arises if the government asserts a *new* interest that is fundamentally incompatible with the interest asserted by the plaintiff or "seeks to expand [a preexisting] claim." *Id.* (emphasis in original). *See also Kootenai Canyon Ranch, Inc. v. U.S. Forest Serv.*, 338 F. Supp. 2d 1129, 1133 (D. Mont. 2004) ("the issue is not the government's mere claiming of an interest, but the scope of the interest claimed"); *Southwest Four Wheel Drive Ass'n v. Bureau of Land Mgmt.*, 271 F. Supp. 2d 1308 (D.N.M. 2003) (challenge of closure of tracks within Wilderness Study Area under QTA was untimely because "designation [of the area as a Wilderness Study Area] put Plaintiffs and the public on notice in 1980 that BLM claimed all of the area and did not recognize any alleged rights-of-way, thus triggering the 12 year limitations period for challenging that finding").

Plaintiffs' second claim arising under the QTA is timely because the twelve-year statute of limitations began to run, at the earliest, on August 11, 2014, the date that NPS published notice of the availability of the DEIS, which indicated that its preferred management plan was to reduce the deer population through a combination of sharpshooting, capture and euthanasia of individual deer, including on WP Tracts, as well as to fence a section of the WP Tracts to exclude deer. The April 2016 ROD adopted this preference, and outlined a plan that approved the killing of deer on the WP Tracts, as well as on other areas of FINS by sharpshooting or capture and euthanasia. The ROD further authorized an exclusion fence to be erected around 44 acres of maritime holly, much of which is contained in the WP Tracts. *See* Compl. at ¶¶ 33-39.

Thus, the DEIS provided notice to Plaintiffs that, for the first time, Defendants were asserting an interest in the WP Tracts adverse to Plaintiffs' interest. Adversity arose because, by demonstrating intent to go forward with lethal control of deer and fencing on the WP Tracts, Defendants asserted a new interpretation of the Deed Restrictions, which expanded the Defendants' claim to the WP Tracts in a manner "that [was] fundamentally incompatible with the interest asserted by the plaintiff." *See NE 32nd Street*, 896 F.3d at 1243. This new interpretation expanded the Defendants' claim because it increased the types of activities that, in Defendants' view, could lawfully take place on the WP Tracts. This new interpretation is fundamentally incompatible with the Deed Restrictions, which require the WP Tracts to "be maintained in their natural state and operated as a preserve for the maintenance of wildlife and its natural habitat" and to "always be maintained in their natural state and operated solely as a sanctuary and preserve for the maintenance of wildlife and its natural habitat[.]" *See* Deeds, Kelly Decl. Exhibits 2, 3. Therefore, publication of the 2014 DEIS triggered the twelve-year statute of limitations, and Plaintiffs' claim is timely.

Defendants argue that the statute of limitations as it relates to hunting in FINS began to run in either 1966, when SFPI conveyed the WP Tracts to the United States, or in 1975 upon publication of a Final Environmental Impact Statement ("FEIS") that Defendants allege allowed hunting to occur in FINS. These arguments are not persuasive because neither of these events evidenced an affirmative intent by Defendants to expand their claim in the WP Tracts by allowing lethal deer management in the WP Tracts specifically. Although the statute that established FINS in 1964 stated that "the Secretary shall permit hunting . . . within FINS in accordance with the law of New York and the United States of America . . . ." 16 U.S.C. § 459e-4, this provided the Secretary with authority to determine the location and timing of any hunting to be allowed within

FINS. There is no evidence, however, that lethal deer management, including hunting, has *ever* taken place on the WP Tracts. It was not until 2014, when Defendants published the DEIS, that Defendants indicated an intent to allow lethal management in the WP Tracts.[6] Instead, lethal management, including hunting, occurred only on other areas within FINS. Furthermore, Defendants provide no evidence that the 1975 FEIS permitted lethal deer management in the WP Tracts specifically. Therefore, neither the 1964 Act nor the 1975 FEIS provided notice of Defendants' intent to expand its claim in the WP Tracts to allow lethal deer management, and as such, neither event triggered the statute of limitations.

Notably, while the "research hunt" conducted in December 1988 and January 1989, which gave rise to the *Allen* action, originally included the WP Tracts, NPS removed the WP Tracts from the hunt prior to its commencement after WP reminded NPS of the Deed Restrictions. *Allen* Hearing Transcript at 67-69, Kelly Decl. Exhibit 5. Therefore, the statute of limitations was not triggered in 1988 because the removal of the WP Tracts nullified any possible assertion by Defendants that their interest in the WP Tracts was adverse to the interest asserted by the Plaintiffs,[7] and mooted any possible case and controversy arising under the Deeds.

Defendants also argue that the statute of limitations as it relates to fencing began to run in 1966, upon execution of the 1966 Deed between SFPI and the United States. Alternatively, Defendants' rely on an exchange in the *Allen* Hearing Transcript to argue that WP was made aware of fencing in the WP Tracts in 1988, thus triggering the statute of limitations. As discussed below,

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[6] As will be discussed later in this section, although in December 1988 Defendants announced that they would allow deer hunting in various areas of FINS, including on the WP Tracts, Defendants subsequently reversed that decision based on the Deed Restrictions.

[7] Although Defendants allege that in December 1988 "WPI chose to enforce its alleged deed restriction as against NPS" *see* Motion at 35, this is an inaccurate characterization. Plaintiffs in the *Allen* action did not raise any claims relating to the Deed Restrictions, as such claims would have been moot upon the defendant's decision to remove the WP Tracts from the hunt.

however, neither of these arguments are persuasive because Defendants provide no evidence that fencing was constructed on the WP Tracts or that WP was aware of any fencing such that Plaintiffs would be on notice that Defendants were expanding their interest in the WP Tracts in a manner that was adverse to the interest asserted by Plaintiffs. The only notice that Defendants provided of an intent to fence the WP Tract was in the 2014 DEIS, which triggered the statute of limitations. Therefore, Plaintiffs' claim is timely.

E. The Doctrine Of Res Judicata Does Not Preclude A Challenge To Killing Deer On The WP Tracts Because The 1988 Hunt Specifically Excluded The WP Tracts.

Defendants claim that the current litigation is barred by the doctrine of res judicata because the claims raised in the Complaint either were, or could have been, litigated in *Allen*. However, *Allen* never touched on the enforceability of the Deed Restrictions because, as stated above, the hunt that was proposed in 1988 specifically excluded the WP Tracts. Therefore, Defendants fail to meet the four elements necessary to invoke res judicata.

Res judicata, or claim preclusion, "evokes the common law principles of judicial economy and comity." *Channer v. Department of Homeland Sec.*, 527 F.3d 275, 279 (2d Cir. 2008). Provided the parties have had a full and fair opportunity to litigate the matter, "[a] final judgment on the merits of an action bars the same parties or their privies from relitigating issues that were or could have been raised in that action." *Id.* (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1463 (2d Cir. 1996)). A party seeking to invoke the doctrine of res judicata must meet the following four elements: (i) an earlier action resulted in an adjudication on the merits; (ii) the prior adjudication was made by a court of competent jurisdiction; (iii) that earlier action involved the same parties or those in privity with them; and (iv) the prior adjudication involved the same cause of action. *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007); *see also In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985). "To ascertain whether two

actions spring from the same transaction or claim, we look to whether the underlying facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations[.]" *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000) (internal quotations omitted).

Defendants are unable to establish the fourth element because the claims raised in the instant action were not raised, and could not have been raised, in *Allen*, and because *Allen* involved a different cause of action. The *Allen* complaint did not state a claim regarding the Deed Restrictions, nor could such a claim have been raised, because the WP Tracts were removed from the 1988 hunt. *Allen*, 1989 WL 8143, at *7 ("The Sunken Forest area, which involves a question of reverter to private ownership if hunting is permitted, is not involved in any way in the proposed hunts.").

In *Allen*, three year-round residents of Fire Island and WP brought suit against NPS and others to stop a proposed deer hunt on FINS. Amended Complaint at 1, *Allen v. Hodel*, 1989 WL 8143 (E.D.N.Y. 1998) (No. 88 Civ. 3901) ("Allen Amended Complaint"), a true and correct copy of which is attached to the Kelly Decl. as Exhibit 7. In testimony opposing a temporary restraining order, the then Superintendent of FINS, Noel J. Pachta, testified:

> THE COURT: Sunken Forest area, which says the land reverts to private land if hunting is permitted.
> MR. PACHTA: Yes.
> THE COURT: Which may create a problem of losing the land if hunting is permitted.
> MR. PACHTA: Yes, I understand that.
> THE COURT: Well, that puts another complexion on the case.
> MR. PACHTA: Except that, on advise of my counsel today I removed that section from the hunt.
> THE COURT: This section?
> MR. PACHTA: Yes. There will be no hunting of animals in that Sunken Forest area.
> THE COURT: This is the area that Robert L. Perkins, Junior, head of the Wild Life [sic] Preserves Inc. donated?
> MR. PACHTA: Yes, sir.

> THE COURT: And you have taken all of the Wild Life [sic] Preserves Inc. land out of the hunt?
> MR. PACHTA: Yes.

Allen TRO Transcript at 29:1-19, Kelly Decl. Exhibit 4; *see also Allen* Hearing Transcript at 69:3-7, Kelly Decl. Exhibit 5 ("That's why as I very often do when I get threatening letters from attorneys in making promises, that information is conveyed to my regional solicitor who at that point through discussion – then we made a decision to remove that portion of Sunken Forest for now."). *See also Allen* Hearing Transcript at 76:10-16, 173:12-17, Kelly Decl. Exhibit 5.

In fact, there is evidence that hunting has *never* been permitted on the WP Tracts. At a hearing on January 5, 1989, Judge Platt stated that, according to the "Park Commission," the only prior deer hunt in FINS was in 1981. Transcript of Trial at 37:16-18, 36:16-17, *Allen v. Hodel*, 1989 WL 8143 (E.D.N.Y. 1998) (88 Civ. 3901) ("*Allen* Trial Transcript"), true and correct excerpts of which are attached to the Kelly Decl. at Exhibit 8. Superintendent Pachta testified at the Dec. 19, 1988 *Allen* hearing that the WP Tracts had also been excluded from the 1981 hunt.[8]

Because there was no hunting on the WP Tracts during the 1981 or 1988 hunts, Plaintiffs did not, and could not, assert a cause of action in *Allen* for violation of the Deed Restrictions. *See Legnani v. Alitalia Linee Aeree Italiane, S.p.A.*, 400 F.3d 139, 141 (2d Cir. 2005) ("Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by res judicata regardless of whether they are premised on facts representing a continuance of the same course of conduct.") (quoting *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 383 (2d Cir. 2003) (internal quotations omitted)). Because this

[8] *Allen* Hearing Transcript at 79:6-8, Kelly Decl., Exhibit 5 ("Q. Was the 1981 deer hunt conducted either on or in proximity to any part of Sunken Forest? A. No.").

claim was not and could not have been brought in *Allen*, and *Allen* involved a different cause of action, Plaintiffs' claim is not barred now by res judicata.

F. Collateral Estoppel Does Not Preclude A Challenge To The Proposed Fence Because Defendants Have Failed To Prove The Necessary Elements Of This Doctrine.

Defendants argue that, because WP had prior notice of "fencing" in the area of the Sunken Forest, yet failed to challenge the fencing in the *Allen*, WP is barred by collateral estoppel from arguing against the fencing proposed in the Plan. However, Defendants have failed to meet the four elements necessary to invoke collateral estoppel.

The bar of collateral estoppel, also known as issue preclusion, applies only if: "(1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and actually decided; (3) there was full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *In re PCH Assocs.*, 949 F.2d 585, 593 (2d Cir. 1991). The party raising collateral estoppel bears the burden of showing the identical issue was presented in the previous case while the party opposing collateral estoppel must show the absence of a full and fair opportunity to litigate the issue in the prior proceeding. *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995).

Defendants' contention that Plaintiffs' claims are barred by collateral estoppel are wrong for four reasons. *First*, the issues in the *Allen* proceeding and the present case are not identical. The issue litigated in *Allen* was NPS's decision to permit the hunting of deer on land located within FINS, as discussed above in Section E. *Allen* Amended Complaint at 1, Kelly Decl. Exhibit 8. The litigated issue did not involve fencing on the WP Tracts. In contrast, the issue in the present case involves a specific decision contained in the 2016 ROD to fence a portion of the Sunken Forest, including the WP Tracts, to drive deer out of the fenced area, and to kill any deer found to remain in the fenced area, which was not an issue in *Allen*. Compl. at ¶ 39.

Second, the issue of fencing on the WP Tracts was not actually litigated, or actually decided, in the *Allen* proceeding. The Complaint in *Allen* did not challenge any proposed fencing, and the *Allen* Court issued no decision on the subject of fencing. *See Allen* Amended Complaint, Kelly Decl. Exhibit 8. Furthermore, Plaintiffs are specifically challenging the decision on fencing made in the 2016 ROD, which is an issue that would have been impossible to litigate in 1988.

Third, there was not a full and fair opportunity to litigate the issue of fencing on the WP Tracts in the *Allen* proceeding. NPS's decision in 1988 to allow public hunting on certain areas of FINS was not accompanied by any decision regarding fencing on the WP Tracts. Instead, it was the 2016 ROD that set forth NPS's decision to fence the WP Tracts, which Plaintiffs clearly would not have had a full and fair opportunity to litigate in 1988. In support of its argument on this point, Defendants rely on the following exchange in the Dec. 19, 1988 hearing transcript to argue that WP was aware of fencing in the WP Tracts at that time:

> [HOCHMAN – COUNSEL FOR WP]: Are you familiar with that particular parcel of land donated in the deed. [sic]
> [PACHTA]: Yes.
> [HOCHMAN]: Do you know it's [sic] boundaries?
> [PACHTA]: Some of the original sporadic[9] fencing has been removed. We, in fact, treat that, the whole area from the Sailor's Haven Visitors Center to the boundary of Oaklyville [sic] and Point of Woods, we treated that whole area as the Sunken Forest which includes, certainly, the area that was donated.

Allen Hr'g Tr. at 75:11-19, Kelly Decl. Exhibit 5.

Nowhere in this exchange, or anywhere in the hearing transcripts, does Superintendent Pachta specifically refer to fencing that was constructed as part of the 1966 Cooperative Agreement, or fencing that was specifically erected on the WP Tracts. Thus, Defendants have not provided any evidence that WP had actual notice of the fence's placement in the Sunken Forest or

[9] Defendants' recounting of this exchange in their Motion omits the word "sporadic."

knowledge of the terms of the 1966 Cooperative Agreement, such that there was a full and fair opportunity to litigate the issue of fencing on the WP Tracts in *Allen*. Even if the Court finds that Defendants have proven the third element, for issue preclusion to apply, Defendants must prove not simply one, but all *four* elements of the test for Plaintiffs' claims to be barred, which they have failed to do.

Lastly, the issue of fencing on the WP Tracts was not necessary to support a valid and final judgment on the merits in *Allen* because fencing on the WP Tracts was unrelated to the Court's final judgment on the legality of the 1988 public hunt. Defendants have therefore failed to prove all four elements of collateral estoppel, and thus the Court should reject Defendants' attempt to dismiss Plaintiffs' claims on this ground.

G. Plaintiffs' Fifth Claim Should Not Be Dismissed Because Plaintiffs Have Alleged A Claim Upon Which Relief Can Be Granted.

Plaintiffs' Fifth Claim should not be dismissed pursuant to Rule 12(b)(6) because the complaint "contains sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). Plaintiffs' Fifth Claim asserts that NPS's decision to permit the lethal control of deer in FINS violates the Organic Act and its implementing regulations because NPS did not identify the legal authority under which it will pursue lethal deer control and has not satisfied the statutory requirements to permit lethal deer control. Compl. at ¶¶ 83-85.

Under the Organic Act, NPS is allowed to "provide for the destruction of such animals and plant life as may be detrimental to the use of any System unit." Compl. at ¶ 20 (citing 54 U.S.C. § 100752 (former 16 U.S.C. § 3)). Plaintiffs' Fifth Claim argues that NPS has failed to comply with the Organic Act because NPS did not meet these statutory criteria by establishing that deer are "detrimental to the use" of FINS in its decision making documents. Compl. at ¶¶ 83-85. Through

this allegation, Plaintiffs have stated "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A claim is considered plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Plaintiffs have pled sufficient facts to draw a reasonable inference that Defendants are liable for violation of the Organic Act and its implementing regulations, such that dismissal pursuant to Rule 12(b)(6) is unwarranted.

H. WP Is Entitled To Enforce The Deed Restrictions.

The Deed Restrictions are valid and WP is entitled to enforce them. Defendants argue, however, that Plaintiffs' claims must be dismissed because: (1) Plaintiffs have not demonstrated that the Deed Restrictions were intended to run with the land; (2) Plaintiffs have failed to plead that they fall within one of the three classes of covenants in New York; and (3) WP's reversionary interest was extinguished pursuant to New York law. These arguments should be rejected for three reasons.

First, Defendants' argument that there are no facts and no express language in the Deeds indicating that the Deed Restrictions were intended to run with the land sufficient to allow WP to assert them now is contrary to the language of the Deeds. According to New York law, including language that the buyer or grantee, and its "successors and assigns" promises to be bound by the deed restriction is sufficient to establish that the deed restriction runs with the land. *Harrison v. Westview Partners, LLC*, 79 A.D.3d 1198, 1201 (3d Dep't 2010). Contrary to Defendants' argument, both Deeds specifically state that the successors of the buyer or grantee were subject to the Deed Restrictions. Specifically, the 1955 Deed states:

> WITNESETH, that the party of the first part, in consideration of Two and no/hundredths ($2.00) Dollars, lawful money of the United States, and other good and valuable consideration paid by the party of the second part, does hereby grant

> and release unto the party of the second part, *its successors and assigns forever*, subject to the express condition and limitation hereinafter set forth.

See 1955 Deed at 1, Kelly Decl. Exhibit 2 (Italicized emphasis added. Underline emphasis in original).

In addition, the 1966 Deed states:

> WITNESSETH, that the party of the first part, in consideration of ONE dollar, lawful money of the United States, and other good and valuable consideration paid by the party of this second part, does hereby grant and release unto the party of the second party *and successors and assigns of the party of the second part* forever all those pieces or parcels of land with the buildings and improvements thereon erected, situate, lying and being on the Great South Beach (sometimes called Fire Island Beach, Town of Brookhaven, County of Suffolk, State of New York . . . . This conveyance is expressly made subject to the following two conditions: (1) That all of the premises hereby conveyed shall always be maintained in their natural state and operated solely as a sanctuary and preserve for the maintenance of wild life and its natural habitat, undisturbed by hunting, trapping, fishing or any other activities that might adversely affect the environment or the flora or fauna of said premises[.]

See 1966 Deed at 1, 9, Kelly Decl. Exhibit 3 (emphasis added).

Thus, pursuant to New York law, the Deed Restrictions run with the land because the Deeds specifically provide that the buyer and its successors and assigns are bound by them. Indeed, Defendants admitted in the U.S. Attorney General Letter that the Deed Restrictions run with the land. Specifically, the U.S. Attorney General Letter acknowledges that the Deed Restrictions in both Deeds restrict the United States' use of the Sunken Forest and concedes that if the United States violates such restrictions, that the land would revert to the grantor. Thus, Defendants' arguments here are without merit.

Second, Defendants' argument that the Complaint should be dismissed because Plaintiffs failed to plead that they fall into one of three classes of allowable restrictive covenants is without merit. Specifically, Defendants cite *Korn v. Campbell*, in which the New York State Court of Appeals enumerated three types of scenarios where restrictive covenants may be enforced by

people other than the grantor or covenantee. 192 N.Y. 490, 495 (N.Y. 1908). As a threshold issue, the *Korn* categories are immaterial because WP is the original grantor. Furthermore, the three categories outlined by *Korn* in 1908 are not dispositive—the court itself stated, "[w]e do not mean to intimate that special circumstances may not exist in which a case not within the three classes above referred to may present considerations which would justify the enforcement of such a covenant in a court of equity." *Id.* at 498. As a result, in the time since *Korn* was decided, the New York Court of Appeals has held that restrictive covenants exist in situations not within the three categories above. For example, in *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank*, the Court of Appeals held that a plaintiff who did not fit into any of the three *Korn* categories and who was not in privity of contract or estate with the defendant was entitled to enforce a deed restriction. 278 N.Y. 248 (N.Y. 2006). In addition, other New York courts have created additional categories of scenarios in which parties lacking *any* privity can enforce restrictive covenants. *Nature Conservancy v. Congel*, 253 A.D.2d 248, 251 (4th Dep't 1999) (citing *Vogeler v. Alwyn Improvement Corp.*, 247 N.Y. 131, 135–137, 159 N.E. 886 (N.Y. 1928)); *Zamiarski v. Kozial*, 18 A.D.2d 297, 299 (N.Y. App. Div. 1963). For example, New York courts have adopted the view that an owner of neighboring land, for whose benefit a restrictive covenant is imposed by a grantor, may enforce the covenant as a third party beneficiary. *See Zamiarski*, 18 A.D.2d at 299. Thus, New York courts are no longer limited to the three classes enumerated in *Korn*.

In any event, "[t]he owner of the land intended to be benefited ha[s] the right to enforce the covenant[.]" *Nature Conservancy*, 253 A.D.2d at 251 (citing *Vogeler v. Alwyn Improvement Corp.*, 247 N.Y. 131, 135–137 (N.Y. 1928)). Here, WP was the owner of the land intended to be benefited and, thus, has the right to enforce the covenant. Even if WP is considered a beneficiary to the 1966 Deed and not the grantor, WP is still entitled to recover because SFPI intended to

benefit WP through the inclusion in the 1966 Deed of the same deed restriction as the 1955 Deed. *See id.* (citing *Zamiarski*, 18 A.D.2d at 301).

Third, Defendants' argument that WP's right of reacquisition of the WP Tracts was "extinguished in accordance with New York law" relies on law that the New York Court of Appeals ruled to be *unconstitutional*. In particular, Defendants argue that because WP did not re-record its reversionary interest within 27 to 30 years after the creation of that interest pursuant to New York Real Property Law 345 ("RPL 345"), WP's right of reacquisition is "extinguished." Thus, Defendants' argument is directly contrary to New York law.

RPL 345(1) states:

> a condition subsequent or special limitation restricting the use of land and the right of entry or possibility of reverter created thereby shall be extinguished and become unenforceable, either at law or in equity, and if the condition has been broken or the reverter has occurred the right of entry therefor shall become unenforceable and the possessory estate resulting from the occurrence of the reverter shall be extinguished, unless within the time specified in this section a declaration of intention to preserve it is recorded as provided in this section, and notwithstanding the recording of such declaration, unless thereafter, within the times specified in this section, renewal declarations are recorded as provided in this section. Such extinguishment shall occur at the end of the period in which the declaration or renewal declaration may be recorded.

RPL 345(1) (McKinney).

RPL 345(4) states that the initial declaration may be recorded "not less than twenty-seven years nor more than thirty years after the condition subsequent or special limitation described therein was created[.]" The New York Court of Appeals held in *Board of Education v. Miles*, however, that RPL 345(4) was unconstitutional because:

> the reverter had not matured at the time when the statute prescribed that it became barred, nor could anyone have known prior to the cut-off date who would be parties in interest at the time when the reverter took effect. If subdivision 4 of section 345 of Real Property Law be valid under these circumstances, at least it would be necessary for unascertained persons, perhaps not even in being, to have recorded a

> declaration of intention to preserve a reverter which would not take effect in enjoyment until an indefinite future time.

259 N.Y.S.2d 129 (1965).

In *Miles*, a reversionary interest created in 1854 did not mature until after the September 1, 1961 deadline for recording interests created more than 27 years prior to the enactment of RPL 345. Therefore, the Court ruled that RPL 345 is unconstitutional as applied to deeds executed prior to September 1, 1961. *See id*; *Order of Teachers of Children of God, Inc. v. Trustees of Estate Belonging to Diocese of L.I.*, 260 A.D.2d 356, 357 (2d Dep't 1999).

Thereafter, the court in *Long v. Pompey Hill Volunteer Fire Dep't., Inc.* also held that RPL 345(4) was unconstitutional because it required plaintiffs to file a declaration of intention prior to the cut-off date of a determination of who would be parties in interest. 143 Misc. 2d 408 (Supreme Court Onondaga Cty 1989). The court reasoned, "[s]ince the deed was recorded in 1949, the declaration would have had to have been filed not later than 1979, prior to the discontinued use of P-1 which was the triggering event for the reverter to take effect." Therefore, pursuant to *Miles*, the *Long* court found RPL 345(4) unconstitutional. *Long* was affirmed by the New York Appellate Division Fourth Department without decision. *Long v. Pompey Hill Volunteer Fire Dep't, Inc.*, 167 A.D.2d 976 (4th Dep't 1990).

In our case, the 1955 Deed transferred the WP Tracts prior to September 1, 1961. Therefore, pursuant to *Miles*, the 1955 Deed did not need to comply with RPL 345. Similarly, pursuant to *Long*, RPL 345 is unconstitutional as applied to the 1966 Deed because RPL 345 would require the declaration of intention to be filed in 1988, prior to the triggering event for the reverter to take effect, which occurred in 2014.

Defendants' arguments that WP should have nevertheless recorded its deed when Defendants took possession of the land because hunting is permitted on FINS and because NPS

issued an FEIS in 1975 permitting hunting of fauna misses the point because, as stated above, neither of those events triggered the Deed Restrictions.

Finally, Defendants reliance on *Roman Catholic Diocese of Brooklyn v. Christ The King Regional High School* is misplaced because that case does not even mention or consider *Miles*, which is binding precedent. 149 A.D.3d 994, 996 (2d Dep't 2017).

Therefore, the Deed Restrictions are valid and Plaintiffs are entitled to enforce them. Accordingly, Defendants' Motion should be denied.

V. CONCLUSION

Accordingly, for all of the above reasons, Plaintiffs respectfully request that the Court deny the Motion.

Dated: October 26, 2018

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