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F.#2017V03223

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ANIMAL WELFARE INSTITUTE; and
WILDLIFE PRESERVES, INC.,

Plaintiffs,

-against-

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 United States Department of the Interior,

Defendants.

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Civil Action No.
17 CV 6952

(Feuerstein, J.)
(Shields, M.J.)

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

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PRELIMINARY STATEMENT

Defendants 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 United States Department of the Interior ("Defendants" or "NPS"), by their attorney, Richard P. Donoghue, United States Attorney for the Eastern District of New York, James H. Knapp, Assistant United States Attorney, of counsel, respectfully submit this memorandum of law in support of Defendants' motion to dismiss Plaintiffs' Animal Welfare Institute ("AWI") and Wildlife Preserves Inc. ("WPI"), First, Second, Third and Fifth Claims for Relief, as set forth in their amended complaint ("Am. Compl.").

As Defendants will demonstrate, Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction; failure to state a claim; and failure to name a necessary party, pursuant to Rules 12(b)(1),[1] (b)(6) and (b)(7) of the Federal Rules of Civil Procedure. Additionally, should the Court consider the documents that accompany Defendants' motion for purposes of analyzing Plaintiffs' failure to state a claim, the Court must convert the motion to one for partial summary judgment pursuant to Rule 56[2] of the Federal Rules of Civil Procedure. Defendants also move to dismiss Plaintiff' WPI's claims in accordance with the doctrine of *res judicata*.

[1] In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may refer to evidence outside pleadings, such as affidavits or documents. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)(citing *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986)).

[2] "If, on a motion 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." Fed. R. Civ. P. 12(d); *see Bethpage Water Dist. v. Northrop Grumman Corp.*, No. 13 CV 6362, 2014 WL 6883529 at *4 (E.D.N.Y. Dec. 3, 2014) (Feuerstein, J.).

In 1955, WPI conveyed several tracts of land to non-party Sunken Forest Preserve, Inc. ("SFPI"). The land makes up a substantial portion of the globally rare ecosystem known as the Sunken Forest Preserve within the Fire Island National Seashore, in Suffolk County, New York (the "Sunken Forest"). In 1966, SFPI conveyed the Sunken Forest, plus an additional tract of land a private individual had previously deeded to SFPI, to the United States of America.

Plaintiffs' First Claim seeks a Declaratory Judgment that Defendants' "White-Tailed Deer Management Plan for the Fire Island National Seashore," approved as modified by a Record of Decision issued by the NPS in April 2016 (the "Plan"), violates what Plaintiffs characterize as "deed restrictions" set forth in the 1955 and 1966 deeds. The Second Claim seeks ejectment of the NPS from the Sunken Forest, as well as reversion of title to the Sunken Forest to WPI, because of the Plan's alleged violations of the "deed restrictions." In the Third Claim, Plaintiffs seek a permanent injunction precluding the NPS from implementing the Plan in the Sunken Forest. The Fourth Claim alleges the Plan violates the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA") and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321.[3] Finally, the Fifth Claim alleges that the Plan's call for lethal control of deer violates the National Park Service Organic Act of 1916, 16 U.S.C. § 1 (the "Organic Act").

In seeking this relief, Plaintiffs invoke the APA; 28 U.S.C. § 1331 (the Federal Question statute); 28 U.S.C. §§ 2201, 2202 (the Declaratory Judgment and Injunctive Relief statutes); 28 U.S.C. §§ 2409 and 2410 (what Plaintiffs refers to as the "Quiet Title and other actions where the

[3] Due to page limit constraints, Defendants reserve their right to argue that Plaintiffs' APA and NEPA claims are barred by the doctrines of *res judicata* and *collateral estoppel* pursuant to this Court's memorandum and order and judgment entered in *Friends of Animals v. Fellner et al.*, No. 16 CV 6006, Docket Nos. 49, 50 (E.D.N.Y. July 24, 2018). *See Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (the Supreme Court "confirmed that, 'in certain limited circumstances,' a non-party may be bound by a judgment because [it] was 'adequately represented by someone with the same interest who [wa]s a party' to the suit.")

U.S. has an interest") to challenge the United States of America's title to the Sunken Forest and the NPS's implementation of the Plan at FINS.

As set forth herein, Defendants will demonstrate that Plaintiffs have: 1) failed to identify an appropriate source of subject-matter jurisdiction for certain of their claims; 2) failed to properly allege a cause of action as to others; 3) failed to name a necessary party, to wit, the United States of America, to the action; 4) and have exceeded the statute of limitations period within which to bring suit. In addition, WPI attempts to re-litigate issues on which it has previously been heard, or failed to previously raise. For these deficiencies and others, Plaintiffs' First, Second, Third and Fifth Claims for Relief should be dismissed in their entirety with prejudice.[4]

FACTUAL BACKGROUND

A. Fire Island National Seashore

Congress established Fire Island National Seashore in September 1964 ("FINS" or "Seashore" or "Park") "[f]or 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.[5] The Seashore encompasses 19,579 acres of upland, tidal, and submerged lands along a 26-mile stretch of the 32-mile barrier island–

[4] Defendants do not waive and specifically reserve their right to assert any affirmative defense(s) and/or counter-claims against Plaintiffs in a responsive pleading to Plaintiffs' surviving claims for relief, if any.

[5] References to "FINS 0XXXXX" are to the Administrative Record, a complete copy of which the government filed with the Clerk of the Court on August 1, 2018. Docket No. 21. Excerpts of the Administrative Record on which Defendants rely in support of its motion have been provided to the Court in the accompanying "mini-Administrative Record."

part of a much larger system of barrier islands and bluffs stretching from the City of New York to the eastern end of the south Fork of Long Island at Montauk Point. FINS 000489. The Park consists of an extensive dune system, centuries-old maritime forests, and solitary beaches. *Id.* Also on Fire Island, within the boundary of the Seashore, are 1,381 acres of federally designated wilderness, the Light House Annex and the William Floyd Estate, home of one of New York's signers of the Declaration of Independence. *Id.*

Interspersed within the Seashore are 17 private residential communities established before the Seashore's authorization. *Id.* Resort development on Fire Island began as early as 1855, with a number of the communities having been established prior to the Great Depression. *Id.* While the Fire Island communities lie within the administrative boundary of the Seashore, the Seashore has limited authority over them and does not directly manage them. *Id.* Some Fire Island communities are legally incorporated as independent governmental entities with elected officials, and others have legal ties to towns and other communities on Long Island. *Id.* The Seashore's enabling legislation includes provisions for private land to be retained or developed if zoning requirements are met. *Id.* No hard-surfaced roads connect the Fire Island communities, either to each other or to Long Island. *Id.* They are accessible mainly by passenger ferry or private boat. *Id.* Off-road vehicle use is restricted within the boundary of the Seashore on Fire Island. *Id.* Without paved roads and with limited traffic, the Fire Island communities have retained much of their original character. *Id.* Some of the Fire Island communities have hotels or facilities for overnight guests, while others are strictly residential. *Id.* There are approximately 4,100 developed properties on Fire Island with approximately 300 residents living on Fire Island year-round. *Id.* The number of year round residents has slowly and steadily declined in recent years. Vehicle access is limited to year-round residents, contractors and other

service providers (utilities, fuel, garbage, etc.); all vehicles crossing federal lands must have an NPS driving permit. *Id.* During the summer season, the population of Fire Island swells to approximately 30,000, with an additional two to three million visitors. FINS 000490.

Together with the Fire Island communities, government agencies, and other partners, the Seashore conserves, preserves, and protects for the use and appreciation of current and future generations relatively unspoiled and undeveloped beaches, dunes, and other natural features and processes. *Id.* These include Fire Island's larger landscape and its surrounding marine environment. *Id.* These resources possess high natural and aesthetic values to the nation as examples of great natural beauty and wilderness in close proximity to large concentrations of urban population. *Id.* The Seashore also conserves, preserves and protects the historic structures, cultural landscapes, museum collections and archeological resources associated with the Seashore, including the Fire Island Light Station and the William Floyd Estate. *Id.* Finally, the Seashore preserves the primitive and natural character of the Otis Pike Fire Island High Dune Wilderness and protects its wilderness character. *Id.*

B. The White-tailed Deer Overpopulation Problem on Fire Island National Seashore

Prior to the establishment of the Seashore in 1964, very few deer occupied Fire Island. FINS 000456. Experts believe it is likely the early deer population expanded from the remote natural areas on the eastern side of the Fire Island to the western side, as deer were attracted to artificial food sources (e.g., gardens, garbage, lawns) in the Fire Island communities. *Id.*; 019427-019428. Since the late 1960s, the white-tailed deer population at the Park has expanded, leading to severe negative impacts on vegetation and cultural landscapes and an increase in undesirable human-deer interactions. FINS 000453.

By the 1970's and 1980's, the deer population had become established in Fire Island communities due to high survival rates and the availability of high-quality habitats. FINS

000456. By contrast, according to Seashore staff, few if any deer occupied the William Floyd Estate, the Eastern end of FINS, when the property was donated to the NPS in 1976. FINS 000456.

Seashore staff have been working to understand and address issues linked to the deer population on Fire Island for 30 years. FINS 000453. As a result, the Seashore began to take steps toward better understanding the population and impacts on Seashore resources. FINS 000456. Concerns were initially focused around a noticeable increase in the number of deer within the Fire Island communities and the incidence of Lyme disease among Fire Island residents. FINS 000453. Impacts of deer browsing on vegetation were also among the major concerns. *Id.* In the mid-1980s, researchers documented a substantial decline in the diversity and abundance of key plant species in the Sunken Forest, one of the Seashore's rarest plant communities. *Id.* More recently, Seashore staff have turned their attention to the threat posed by deer to native vegetation in other natural zones of the Seashore and the cultural landscape of the William Floyd Estate. *Id.*

Over the decades, deer abundance has been estimated using different techniques. Underwood, H.B., *White-tailed Deer Ecology and Management on Fire Island National Seashore (Fire Island National Seashore Synthesis Paper)*, Technical Report NPS/NER/NRTR 2005-022, Boston, MA (hereinafter "Underwood 2005"). FINS 019429-019430; FINS 000456. The deer population peaked in the mid-1990s, when the deer density on Fire Island exceeded 257 deer per square mile in some areas. FINS 000456.

The Seashore has undertaken studies to understand the population dynamics of deer on Fire Island and the William Floyd Estate. FINS 000577. One study examined the number of deer on Fire Island from 1983 through 1988 using aerial helicopter surveys. *Id.* Park officials

utilized this methodology through 1998. *Id.* Results from aerial surveys found that by 1991, the deer population increased annually between 11% and 43% for areas on the western side of Fire Island near the Fire Island communities, while the population in the Fire Island Wilderness on the eastern side of Fire Island remained relatively unchanged. *Id.* In another study conducted during the late 1980's, 20 deer (11 males, 9 females) were fitted with radio-telemetry collars to track and analyze their movements across the Seashore. *Id.* In general, deer maintained high fidelity to home ranges with an average of 1.5 miles movement distance across the Seashore, with longer movements attributed to young males. *Id.* During another study, on vector hosts of Lyme disease, one marked deer travelled approximately 3 miles from the Fire Island Lighthouse Tract to Point O'Woods. *Id.* Between 1995 and 2005, the Park conducted hundreds of individual counts throughout the Seashore, Robert Moses State Park and the William Floyd Estate. FINS 019417. Deer population estimates varied widely across the Park based on data compiled in 2013 and 2014. FINS 000457; 000579; 000581. For example, surveys estimated that deer at the William Floyd Estate numbered 84, which correlated to approximately 93 deer per square mile. FINS 000579. The Fire Island Wilderness (i.e., Otis Pike Wilderness Area) was home to 62 deer, or approximately 36 per square mile; and Davis Park counted 19 deer, or a density of approximately 265 per square deer mile (eastern sections of the Seashore). *Id.* The survey found similar population fluctuations in the western sections of the Seashore: 93 deer with a density of approximately 264 deer per square mile at Kismet-Lonelyville; and 27 deer at Sailor's Haven/Sunken Forest, or approximately 112 deer per square mile. *Id.*

C. 1988-89 Deer Hunt on Fire Island National Seashore

In December 1988 and January 1989, NPS "conducted a limited deer hunt on several units of" FINS. FINS 019417; *see Allen v. Hodel*, No. 88 CV 3901, 1989 WL 8143 *10 (E.D.N.Y. Jan. 11, 1989). NPS undertook this action in coordination and cooperation with the

New York State Department of Environmental Conservation. FINS 019417. WPI was among the parties that contested the 1988-89 hunt at issue in *Allen*. *See, e.g.*, Exhibits C and D, attached to the Declaration of James H. Knapp, Assistant United States Attorney, dated August 31, 2018 ("Knapp Decl.") (preliminary injunction denied by Judge Weinstein following a hearing on Dec. 16, 1988); *see also* Plaintiffs' Amended Complaint, 88 CV 3901, Docket No. 29. The hunt, which the court permitted to proceed, consisted of five days of archery hunting in December 1988 and eight days of firearms hunting in January 1989. FINS 019417, 019424. The hunt yielded a total of 60 deer. FINS 019424.

The Court dismissed all claims brought by Plaintiffs in favor of the NPS as moot by memorandum and order issued February 3, 1993, and a judgment entered on February 3, 1993. 88-CV-3901, Docket No. 50-51. Knapp Decl., Exhibits E and F. The Court also denied Plaintiffs' request to file a "second amended complaint for prospective relief banning all future deer hunts on Fire Island [as] purely speculative." *Id.* at 6. However, the Court noted throughout the case that FINS enabling legislation mandates hunting. *See* 16 U.S.C. § 459e; *see also e.g.*, Knapp Decl., Exhibit G (Transcript of Hearing before the Honorable Thomas C. Platt, December 19, 1988 ("Dec. 19, 1988 hearing")). "The statute enacted by Congress and which has been on the books according to the legislative history since 1964 mandates the Secretary [of the Interior] shall permit hunting . . . on lands and waters under his administrative jurisdiction within Fire Island National Seashore." Knapp Decl., Exhibit G, "Dec. 19, 1988 hearing at 168, ln. 4-8; "The rules, the presumptive rule is that hunting shall be permitted by Congress." *Id.* at ln 15-16; "I begin with the premise that this is a Congressional problem . . . ." *Id.* at 167, ln 22-23.

D. Vegetation Analysis

The Park's enabling legislation mandates that the Secretary of the Interior "shall administer and protect the FINS with the primary aim of conserving the natural resources located there [and that t]he area known as the Sunken Forest Preserve shall be preserved from bay to ocean in as nearly its present state as possible." 16 U.S. Code § 459e–6(a); FINS 000606. Thus, Seashore staff and experts have long monitored vegetation data at permanent plots at the Sunken Forest. FINS 000605. Over the ensuing decades, scientists have observed vegetative changes at the Sunken Forest due to high deer density. *Id.*; 000571; 000605. In the mid-1980's, "researchers documented a significant decline in plant species and abundance of the Sunken Forest . . . ." FINS 005530. In recent years, scientists observed that many "[vegetation] species have dramatically declined in abundance or have been altogether extirpated from the area by deer browse." FINS 000571. This is significant because the Sunken Forest is a globally rare, old-growth maritime holly forest. FINS 000493. In addition, the Park is home to seven species of rare plants, two of which have been categorized as vulnerable or imperiled under a ranking system established by NatureServe, a non-profit conservation organization. FINS 000569, 000572. Seashore staff have observed deer foraging on one of these rare plants. FINS 000572.

In the last six years, similar analyses have begun in maritime forests (similar to the Sunken Forest) at Talisman, Blue Point and the deciduous forests at the William Floyd Estate. FINS 000568; 000605; 005530. The preliminary data suggests that deer browse has affected vegetation diversity and density in these rare maritime forests as well. *Id.* Park officials have determined that:

> [a]t current levels, deer browsing in the Sunken Forest and other vegetated areas of the Seashore is reducing the abundance and diversity of native vegetation, including important understory species. In some areas, current levels of browsing appear to be creating conditions for an increase in undesirable species. The loss

> of native vegetation and overall change in the vegetation communities could result in impacts on other wildlife species, such as ground-nesting birds and small mammals using these areas for food and shelter.

FINS 005530-005531.

E. Relevant Chain of Title to the Sunken Forest

The amended complaint purports to challenge, *inter alia*, the United States of America's title to the Sunken Forest. *See, e.g.*, Am. Compl. ¶ 55-66. However, the United States of America is not a party to this action. By way of brief background, in June 1955, WPI conveyed several tracts of land to non-party SFPI (the "1955 deed"). *See* Am. Compl. ¶ 27. *See also* Knapp Decl., Exhibit H. The 1955 deed provides, in pertinent part:

> [t]his 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 activities that might adversely affect the 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 in thereon that would adversely affect either the flora or the fauna, then the title of the grantee shall cease and determine and shall revert to and vest in the grantor, the said reversion and vesting to be automatic and not requiring any re-entry. Am. Compl., ¶ 28.

The 1955 deed conveyed the entirety of WPI's interest in the Sunken Forest to SFPI. *Id.*

Subsequently, in May 1966, SFPI conveyed the Sunken Forest, plus an additional tract of land, to the United States of America. *See* Am. Compl. ¶ 29; *see also* Knapp Decl., Exhibit I.

The 1966 deed contained, in pertinent part, the following language:

> [t]hat 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; and for scientific and educational purposes incidental to such maintenance and operation.

Id.; *see also* Am. Compl., ¶ 31. The 1966 deed conveyed the entirety of the interest held by SFPI to the United States of America. See Knapp Decl., Exhibit I. The 1966 deed did not contain the reversionary interest or right of entry as set forth in the 1955 deed. *Id.*

In February 1966, prior to SFPI's conveyance of the Sunken Forest to the United States of America, SFPI and the NPS entered into a Cooperative Agreement. *Id.* The Cooperative Agreement included the same language as the 1966 deed and, *inter alia*, the additional proviso that:

> . . . to assist the [NPS] in maintaining the property conveyed to it under this Agreement as a sanctuary, the primeval portion of the Sunken Forest and certain additional parts of the Preserve adjacent thereto and in the vicinity thereof shall be *fenced* as soon as possible with a chain link fence . . . with three strands of barbed wire above the same with gates to accommodate pedestrians . . . .

Id. (emphasis added).

Among its recitals, the Cooperative Agreement referenced the terms of the 1955 deed, including the reversionary interest agreed by and between WPI and non-party SFPI. *Id.*, at p. 2. Among its terms, the Cooperative Agreement set forth:

> [t]he deed to be delivered in accordance with the terms of his Agreement shall be in the form of a New York Bargain and sale [sic] deed, without title covenants, such as is attached hereto as Schedule B [the escrow agreement for the Sunken Forest fence], and shall be duly executed and acknowledged so as to convey to Service the fee simple of the above described premises, free of all encumbrances except as herein stated and shall contain the conditions set forth in Schedule A hereto attached.

Id., at p. 5.

The Cooperative Agreement also included the above-referenced escrow agreement through which SFPI donated $3,500 to the NPS to be held in escrow "specifically for application to the partial cost of the fencing operation . . . ." *Id.* At some point subsequent to the 1966 conveyance, SFPI ceased to "operat[e]." *See* Am. Compl. ¶ 30.

PROCEDURAL HISTORY

Plaintiffs filed a complaint with this court on December 1st, 2017, which they subsequently amended on April 16, 2018. Docket Nos. 1, 17. The amended complaint, in sum, requests that this court: 1) quiet title to the Sunken Forest; 2) permanently enjoin the NPS from implementing the Plan in the Sunken Forest; and 3) set aside the Plan because it violates the APA and NEPA.

Specifically, Plaintiffs' First Claim seeks a Declaratory Judgment that Defendants' Plan violates the terms of the 1955 and 1966 deeds. The Second Claim seeks ejectment of the NPS from the Sunken Forest, as well as reversion of title to the Sunken Forest to WPI, because of the Plan's alleged violations of the deed restrictions. In the Third Claim, Plaintiffs seek a permanent injunction precluding Defendants from implementing the Plan in the Sunken Forest. The Fourth Claim alleges that the Plan violates the APA and NEPA. Finally, Plaintiffs' Fifth Claim alleges that the Plan's call for lethal control of deer violates the Organic Act.

LEGAL BACKGROUND

A. Sovereign Immunity and Limits to The Quiet Title Act

Plaintiffs attempt to invoke the Quiet Title Act to contest the United States of America's title to the Sunken Forest. *See* Am. Compl. at ¶¶ 6, 27-31, 55-75. However, Plaintiffs' attempt is flawed, lacks a basis in either law or fact, and thus must be rejected. It is axiomatic that the

United States, as sovereign, is immune from suit except insofar as Congress has waived that immunity. *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273 (1983) (emphasis added) When such waiver is made, the courts have determined that the language surrendering sovereign immunity must be strictly construed in favor of the United States. *See United States v. Sherwood*, 312 U.S. 584 (1914); *Price v. United States*, 174 U.S. 373, 375-76 (1899) ("It is an axiom of our jurisprudence. The government is not liable to suits unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.").

The Quiet Title Act extends a limited waiver of sovereign immunity "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). It is the "*exclusive* means by which adverse claimants [may] challenge the United States' title to real property." *Block*, 461 U.S. 273, 287 (1983) (emphasis added).

The majority opinion delivered by Mr. Justice White in *Block* is instructive for purposes of the present case:

> The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied.

461 U.S. at 287.

Several conditions that must be "strictly observed" limit the Quiet Title Act's waiver of sovereign immunity. *Block*, 461 U.S. at 287. A court cannot exercise subject-matter jurisdiction over a claim against the United States to quiet title unless: 1) the United States claims an interest to the property at issue; and 2) there is disputed title to real property. 28 U.S.C.§ 2409a(a), (d).

See Leisnoi, Inc. v. United States, 170 F.3d 1188, 1191 (9th Cir. 1999) (citing 28 U.S.C. § 2409(a), (d)). The disputed title requirement "permit[s] adjudications only when the title or ownership of real property is in doubt." *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993). Moreover, plaintiffs must "'claim a property interest to which title may be quieted.'" *Friends of Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165, 1174 (E.D. Cal. 2007) (quoting *Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001)).

In addition, the Quiet Title Act provides that "[t]he *United States* may be named as a party defendant . . . ." 28 U.S.C. § 2409a(a) (emphasis added). *See Alaska Dep't of Nat. Res. v. United States*, 816 F.3d 580, 584 (9th Cir. 2016) ("The State [of Alaska] had to name the United States as a defendant because it holds an interest . . . and recognition of . . . rights-of-way would impair the United States' interest."). Put simply, "[a] proceeding against property in which the United States has an interest is a suit against the United States." *State of Minnesota v. United States*, 305 U.S. 382, 386 (1939) (citations omitted). Accordingly, the United States must be a defendant to a Quiet Title Act action.

The Quiet Title Act provides a 12-year statute of limitations in which to bring civil actions against the United States. 28 U.S.C. § 2409a(g).[6] "When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity. Accordingly, although [courts] should not construe such a time-bar provision unduly restrictively, [courts] must be careful not to interpret it in a manner that would 'extend the waiver

[6]Compare 28 U.S.C. § 2401(a) "[e]xcept as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

beyond that which Congress intended.'" *Block*, 461 U.S. at 287 (quoting *United States v. Kubrick*, 444 U.S. 111, 117-118 (1979)).

For purposes of the Quiet Title Act, a plaintiff's cause of action accrues "on the date that the plaintiff or his successor in interest knew or should have known of the claim of the United States." 28 U.S.C. 2409a(g). Courts impose a standard of objective reasonableness in determining when a plaintiff "should have known" of the rise of their cause of action. *See, e.g., Vincent Murphy Chevrolet Co., Inc. v. United States*, 766 F.3d 449 (11th Cir. 1983); *Werner v. United States*, 9 F.3d 1514 (11th Cir. 1993); *George v. United States*, 672 F.3d 942 (10th Cir. 2012).

A plaintiff "should have known" of the availability of their cause of action when the United States asserts a claim allegedly adverse to the plaintiff's. Courts have "consistently declined to require affirmative adverse government action to initiate the limitations period – let alone to keep an initiated period running." *F.E.B. Corp. v. United States*, 818 F.3d 681, 692 (11th Cir. 2016). *See Wisconsin Valley Imp. Co. v. United States*, 569 F.3d 331, 335-36 (7th Cir. 2009). Thus, when a plaintiff has notice, actual or constructive, of action by the United States adverse to their property interest, the timer for the limitations period begins to run. *F.E.B. Corp.*, 818 F.3d at 692; *George*, 672 F.3d at 944. As discussed below, Plaintiffs' claims herein exceed the Quiet Title Act's 12 year statute of limitations by many years and should be dismissed.

B. The National Park Service Organic Act of 1916 and the FINS Enabling Act

1. The National Park Service Organic Act of 1916

Plaintiffs contend that Defendants' Plan violates the Organic Act. *See* Am. Compl. at ¶¶ 82-85. Plaintiffs' contention is, however, without merit as the Plan adheres to and is consistent with both the Organic Act and FINS' enabling legislation. Congress created the NPS when it

passed the Organic Act. *See* 16 U.S.C. § 1. The Organic Act provides that the "fundamental purpose" of the NPS is "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of" those resources "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a) (former 16 U.S.C. § 1).[7] NPS's mandate is to "promote and regulate the use of the National Park System by means and measures that conform to th[at] fundamental purpose." *Id.* As such, NPS may not exercise its authorities "in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress. 54 U.S.C. § 100101(b)(2) (former 16 U.S.C. § 1a-1). However, "[b]ecause the Organic Act is silent as to the specifics of park management," NPS has "especially broad discretion" to implement the Organic Act's mandates. *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000).

The Organic Act, consistent with this philosophy, specifically provides that the Secretary of the Interior "may also provide in his discretion for the destruction of such animals and such plant life as may be detrimental to the use of any said parks, monuments or reservations." *Id.* at § 3. Congress further provided that "each area within the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area," in this case, the FINS enabling statute. *Id.* at 1.2(d); 16 U.S.C. § 459e.

The Organic Act further grants the Secretary authority to "make and publish such regulations as he may deem necessary or proper for the use and management of the parks . . .

[7] Congress recodified the 1916 legislation and certain other provisions relating to the NPS in Title 54 of the United States Code, effective December 19, 2014. Pub. L. 113-287, 128 Stat, 3094. *See* NPS, *Technical Edits*, 80 Fed. Reg. 36474 (June 25, 2015).

under the jurisdiction of the [NPS]." *Id.* In accordance with this general grant of authority, the NPS promulgated regulations that generally prohibit "hunting" within the national park system. 36 C.F.R. § 2.2(b). The regulations further provide, however, that the general prohibition on "hunting" set forth in the regulations, "shall not be construed to prohibit administrative activities conducted by the [NPS], or its agents, in accordance with approved general management and resource management plans." *Id.* at § 1.2(d). A.

2. FINS Enabling Act

Congress established FINS in 1964 "[f]or 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. In so doing, Congress mandated that:

> the Secretary shall permit hunting . . . on lands and waters under his administrative jurisdiction within Fire Island National Seashore in accordance with the law 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.

16 U.S.C. § 459e-4; *see also* 36 C.F.R. § 2.2(b)(1)("[h]unting shall be allowed in park areas where such activity is specifically mandated by Federal statutory law.); *Allen*, 1989 WL 8143, at *10 (Fire Island residents and WPI's application a for preliminary injunction to stop NPS research hunt at FINS denied); *see also United States v. Knauer*, 707 F. Supp. 2d 379, 385-86, 385 n.7 (E.D.N.Y. 2010) (identifying Fire Island's enabling act as one that mandates hunting). Because hunting is not a discretionary activity under the statute, 33 C.F.R. § 2.2(b)(1)—which does not require the Secretary to make any findings before allowing hunting—applies. 33 C.F.R.

§ 2.2(b)(1) ("Hunting shall be allowed in park areas where such activity is specifically mandated by Federal statutory law.").

C. New York Real Property Law

1. Fees on Limitation v. Restrictive Covenants

Plaintiffs further contend that Defendants' Plan violates "deed restrictions" set forth in the 1955 and 1966 deeds, which they characterize as "restrictive covenants." Am. Compl. ¶¶ 40-43, 55-75. However, Plaintiffs erroneously conflate several distinct restrictions on the use of land as "restrictive covenants," and the potential consequences that may flow from violations thereof. Under New York law, deeds which restrict the use of land in some way generally fall into two categories: a fee on limitation (sometimes called a fee simple determinable) or a restrictive covenant. A fee on limitation is created when a conveyance of land: 1) creates an estate in fee simple and; 2) provides that the estate created be extinguished upon the occurrence of some future event. Restatement (First) of Property § 44 (Am. Law Inst. 1936); *see also* N.Y. Est. Powers & Trusts Law § 6-4.5. It is important to note that the reversionary interest, also referred to as a possibility of reverter, to the original grantor in a conveyance of a fee on limitation is not itself an estate in land, and that so long as the condition remains unbroken the right of possession remains wholly with the grantee. *See Trustees of Calvary Presbyterian Church of Buffalo v. Putnam*, 249 N.Y. 111, 115-16 (N.Y. 1928).

Conversely, when language in a conveyance does not indicate some explicit right to claim possession of land after the occurrence of a condition (*i.e.* a possibility of reverter or a right of entry), but creates an express stipulation on the use of that land, such a conveyance creates a restrictive covenant. A covenant is formed when: 1) it appears that the grantor and grantee intend the covenant to run with the land and bind successors; 2) the covenant "touches

and concerns" (affects the use of) the land and; 3) there is privity between the party asserting the benefit of the covenant and the one burdened by it, as well as privity between the two parties that formed the agreement. *See Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 255 (Ct. App. 1938). Restrictive covenants are interpreted strictly against the party enforcing them but in accordance with the intent of the parties who entered into the deed. *See, e.g., Bull v. Burton*, 227 N.Y. 101, 111 (Ct. App, 1919). The law has traditionally despised restraints on alienability and covenants in general. *See, e.g., Witter v. Taggart*, 78 N.Y.2d 234, 237 (Ct. App. 1991) ("[T]he law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them."); *Petrello v. White*, 507 Fed. Appx. 76, 2013 WL 141727 *2 (2d Cir. 2013).

Separately, as is the case in the law of contracts, a third-party beneficiary may not seek to enforce a restrictive covenant unless it can demonstrate that the covenant was intended to benefit it. *See Zamiarski v. Kozial*, 239 N.Y.S.2d 221, 225 (4th Dept. 1963) ("The law of New York now seems to be in accord with the majority view . . . that a donee beneficiary may recover in an action at law, merely upon a showing that the promise intended to make a gift to him of the benefit of the promise."). *But see* Restatement (First) of Property § 541 cmt. e (Am. Law Inst. 1944) ("It must be shown that the benefit [to the third party] was one of the things bargained for between the promisee and promisor. . . . [i]n the absence of specific language pointing out the intended beneficiaries of the promise, . . . the proof must rest almost entirely or in large part upon the reasonable inferences from the circumstances under which the promise was made"); *Glass v. Del Duca*, 57 N.Y.S.3d 507, 509 (2d Dept. 2017). New York law imposes a six-year statute of limitations to bring suit after the breach of a covenant. N.Y. CPLR § 213(2) (McKinney 2004).

The New York State Court of Appeals has identified three "classes of cases" in which a restrictive covenant may be enforced by someone other than the grantor or covenantee: 1) a uniform restriction imposed by a common grantor as part of a general plan or scheme for the benefit of all the grantees in a real estate subdivision or development may be enforced by all such grantees against each other; 2) a covenant imposed for the benefit of the grantor's remaining land may be enforced by the grantor against any grantees of the restricted land; and 3) mutual covenants between the owners of adjoining lands producing corresponding benefits to such owners may be enforced by the owners or their assigns against each other. *Korn v. Campbell*, 192 N.Y. 490, 495-96 (Ct. App. 1908). Those three classes have not been rigidly applied, and owners of estates for whom the covenant was intended to benefit may be entitled to enforce them, upon a showing that the covenant was intended to benefit their own land. *Nature Conservancy v. Congel*, 689 N.Y.S.2d 317, 319-20 (4th Dept. 1999).

2. The Possibility of Reverter and Right Entry Must, in Most Circumstances, Be Renewed Under New York Law

Mindful that the law traditionally despises restraints on alienability and covenants, in 1958, the New York Legislature passed a statute requiring the grantor holding a fee on limitation with a possibility of reverter to file a "declaration of intention to preserve" his future interest within 27 to 30 years of its creation, or have it be extinguished. *See* N.Y. Real Prop. § 345(1), (4);[8] *see also Roman Catholic Diocese of Brooklyn v. Christ the King Reg'l High School*, 53 N.Y.S. 3d 85, 88 (2d Dept. 2017) (Reversionary interest created in 1976 conveyance

[8] In addition, Real Property Law § 345(4) requires the filing of "[a] renewal declaration . . . after the expiration of nine years and before the expiration of ten years from the date when the [initial] declaration was recorded . . . ." R.P.L. § 345(4).

"extinguished pursuant to Real Property Law § 345 as a result of the [Grantor's] undisputed failure to comply with the recording requirements." (citations omitted)).

Section 345, as enacted, included a provision "that if the date when such condition subsequent or special limitation [*i.e.*, the reversionary interest] was created prior to September [1, 1931], the declaration [of intention to preserve the interest] may be recorded on or before September [1, 1961]." *See* N.Y. Real Prop. § 345(4). In 1965, the New York Court of Appeals examined § 345(4) as applied to an 1854 conveyance that included reversionary clause. *Board of Ed. of Central School Dist. No. 1 v. Miles*, 15 N.Y.2d 364, 372; 259 N.Y.S.2d 129, 136 (Ct. App. 1965). In *Miles*, the heirs of the grantor sought to enforce a reversionary clause upon a breach that occurred in April 1962, *i.e.*, after the September 1, 1961 statutory recording deadline imposed by § 345(4). *Id*. There, the court held:

> without ruling upon the constitutionality of the other portions of section 345 of the Real Property Law or marketable title acts in general, about which we express no opinion, we consider the particular portion of section 345 of the Real Property Law *which applies to the facts of this case* to be constitutionally invalid.

Miles, 15 N.Y.2d at 372; 259 N.Y.S.2d at 136 (emphasis added).

The Court continued that "[n]o such question could arise in regard to conveyances delivered *after* the adoption of the statute . . . .") (emphasis added). *Id.* As applied to facts presented in *Miles*, "[t]he . . . court reasoned, *inter alia*, that Real Property Law § 345(4) could not be upheld as a Statute of Limitations, because the *act* which had triggered the reversion did not occur until *after* the applicable recording deadline. [In other words, Miles heirs' reversionary interest, created prior to September 1931, did not mature until April 1962, several months after the statute's September 1, 1961 deadline.] Although the *Miles* court left open the possibility that Real Property Law § 345 could validly operate as a Statute of Limitations to reverter provisions

which were mature and enforceable *before* the statute purported to extinguish them." *Order of Teachers of Children of God, Inc. v. Trustees of Estate Belonging to Diocese of Long Island*, 687 N.Y.S.2d 684, 685 (2d Dept. 1999) (emphasis added). As will be discussed more fully below, the situation left open by the New York Court of Appeals are the precise facts presented here.

STANDARD OF REVIEW

A. Lack of Subject-Matter Jurisdiction

A court must dismiss claims under Federal Rule of Civil Procedure 12(b)(1) when it determines that it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990). "A case is properly dismissed for lack of subject matter jurisdiction . . . when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The plaintiff bears the burden of proving jurisdiction. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994).

A Rule 12(b)(1) motion may present a facial or factual challenge to subject matter jurisdiction. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). A facial challenge "requires the court to review whether the allegations on the face of the plaintiffs' complaint allege facts sufficient to invoke the jurisdiction of the district court." *Precision Assocs., Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42, 2011 WL 7053807, at *33 (E.D.N.Y. Jan. 4, 2011) (citing *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 887 n.15 (2d Cir. 1996)). When the defendant presents a factual challenge, "the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings. . . ." *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999). *See also Kamen*, 791 F.2d at 1010–11) (explaining that a Rule 12(b)(1) motion cannot be converted into one for summary judgment).

B. Failure to Join a Necessary Party

A court may dismiss claims when plaintiffs fail to join a necessary party. Fed. R. Civ. P. 12(b)(7), 19. Courts apply a two-part test in deciding whether to dismiss claims pursuant to a Rule 12(b)(7) motion. *Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1123 (2d Cir. 1990). First, a court determines whether a party is necessary under Rule 19. *Id.* A party is indispensable when:

> 1) in the person's absence complete relief cannot be accorded among those already parties, or 2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may [] as a practical matter impair or impede the person's ability to protect that interest . . . .

Id. (citing Fed. R. Civ. P. 19(a)). Second, when a party is necessary but joinder is infeasible because it will deprive the court of jurisdiction:

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc., 102 F.3d 677, 681–82 (2d Cir. 1996) (citing Fed. R. Civ. P. 19(b)).

C. Dismissal in Accordance with the Doctrines of *Res Judicata* and *Collateral Estoppel*

The doctrines of *res judicata* and *collateral estoppel* "protect[s] parties from having to relitigate identical claims or issues and . . . promote[s] judicial economy." *Purcell v. City of New York*, No. 18 CV 3979, 2018 WL 3733941 at *3 (E.D.N.Y. Aug. 6, 2018) quoting *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir.

1998). Subsequent litigation is barred by the doctrine of *res judicata* if: "1) the previous action involved an adjudication on the merits; 2) the previous action involved the [parties] or those in privity with them; [and] 3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Id.* "*Collateral Estoppel* bars a party from raising a specific factual or legal issue in a second action when the party had a full and fair opportunity to litigate the issue in a prior proceeding." *Id.*

D. Failure to State a Claim Upon Which Relief May Be Granted

When a plaintiff has failed to adequately state a claim upon which relief may be granted, the courts are empowered to dismiss that plaintiff's complaint at the pleading stage. Fed. R. Civ. P. 12(b)(6). To successfully state a claim, a plaintiff must offer "enough facts to state a claim to relief that is plausible on its face." *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Generally, a court must hold factual allegations within a complaint as true, but "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . [Courts] are not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Complaints are generally construed liberally, "accepting all factual allegations as true, and drawing all *reasonable* inferences in the plaintiff's favor." *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d. Cir. 2008) (emphasis added).

In ruling on a Rule 12(b)(6) motion, a court may consider "documents incorporated by reference in the complaint" or documents "where the complaint relies heavily upon [their] terms and effect, thereby rendering the document[s] integral to the complaint." *DiFolco v. MSNBC*

Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010) (internal quotation marks and citation omitted). Should the Court determine that it will not exclude and consider "matters outside the pleadings" on such a motion, "the motion must be treated as one for summary judgment under Fed. R. Civ. P. 56." *Bethpage Water Dist.*, 2014 WL 6883529 at *4.

ARGUMENT

A. Plaintiffs' First, Second And Third Claims Must Be Dismissed For Lack Of Subject Matter Jurisdiction

Plaintiffs' First, Second and Third claims, to the extent they may be read to allege claims under the Quiet Title Act, should be dismissed for lack of subject matter jurisdiction. The Quiet Title Act, 28 U.S.C. § 2409a, is the "*exclusive* means by which [WPI may] challenge the United States of America's title to [the Sunken Forest]." *Block*, 461 U.S. 273 (1983) (emphasis added).[9] In addition, while the Quiet Title Act waives sovereign immunity, it does not itself confer jurisdiction on the district court. *See Prater v. United States*, 612 F.2d 157, 158, (5th Cir. 1980). It is 28 U.S.C. § 1346(f) which confers district courts with original and exclusive jurisdiction to hear claims arising under the Quiet Title Act. 28 U.S.C.A. § 1346(f) ("The district courts shall have 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.").

In *Block*, the State of North Dakota, much like Plaintiffs here, initially "invoked 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. §§ 2201-2202 (declaratory judgment and further relief) and 5 U.S.C. §§ 701-706 (the judicial review provisions of the [APA], 5 U.S.C. §§ 551 *et seq.* . . . but did not mention the Q[uiet] [T]itle [A]ct." *Id.* at

[9] Plaintiffs invoked 28 U.S.C. § 2409 (Partition actions involving the United States) and 28 U.S.C. § 2410 (Actions affecting property on which United States has lien), neither of which is applicable here or otherwise confer subject matter jurisdiction on this Court. *See* Am. Compl., ¶¶ 5-6.

278. Subsequently, "the District Court [like here] required the State to amend its complaint to recite a claim thereunder." *Id.; see* Docket No. 16. However, unlike here, "the State [of North Dakota] complied." *Id.* Accordingly, to the extent Plaintiffs' First (Declaratory Judgment) and Second (Ejectment/Action to Recover Possession of the Sunken Forest) and Third (permanently enjoin Defendants from implementing the Plan in the Sunken Forest) claims may be read to contest the United States of America's title to the Sunken Forest, each must be dismissed for lack of subject matter jurisdiction for failure to plead the jurisdiction of this Court and a waiver of sovereign immunity. *Id.*

1. Plaintiffs' challenge to the United States of America's title to the Sunken Forest fails because they failed to name the United States of America, as title-holder to the Sunken Forest, as a Defendant and necessary party under the Quiet Title Act

Next, Plaintiffs' First, Second and Third claims should be dismissed for Fed. R. Civ. P. 12(b)(7), 19 for failing to name the United States of America as a party to its claim under the Quiet Title Act. The United States of America, *i.e.*, the title-holder to the Sunken Forest, is a necessary and indispensable party to a claim under the Quiet Title Act. It is the United States of America that holds, and has held since 1966, title to the Sunken Forest; not the NPS, not the Department of the Interior, and not former FINS superintendent Soller or acting superintendent Fellner. *See* Knapp Decl., Exhibit I.

Federal agencies are not the "functional equivalent" of the United States. *Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982) ("Government agencies do not merge into a monolith; the United States is an altogether different party from either the F.B.I. or the Department of Justice."). Consequently, Plaintiffs cannot bring a Quiet Title Act action against a federal agency or federal official instead of the United States. *Petroff v. Schafer*, No. 08-CV-1971, 2009 WL 891024, at *1 (D. Ariz. Apr. 1, 2009) (holding that the "proper [d]efendant" in a

Quiet Title Act action was the United States—not the U.S. Department of Agriculture, U.S. Forest Service, and federal officials); *see also Gardner v. Stager*, 892 F. Supp. 1301, 1302 (D. Nev. 1995) (explaining that a Quiet Title Act suit "is a suit against the United States directly"). Furthermore, as the Ninth Circuit reasoned in *Alaska Department of Natural Resources*, the United States is an indispensable party to this action because it holds an interest in the Sunken Forest and an adverse ruling could impair that interest. 816 F.3d at 584; *see also* Fed. R. Civ. P. 19(a). Thus, Plaintiffs' omission warrants immediate dismissal of all claims that purport to challenge the United States of America's title to the Sunken Forest.

Even if the relief Plaintiffs seek was possible, which it is not for many reasons as will be discussed, the absence of the United States of America as a party-defendant ensures that "complete relief cannot be accorded" and the Court cannot "in equity or good conscience proceed among the parties before it." *ConnTech. Dev. Co.*, 103 F.3d at 681-82. Thus, the Court lacks subject matter jurisdiction and Plaintiffs' First, Second and Third claims must be dismissed.

2. Even if Plaintiffs' had properly named the United States of America as a Defendant, the Court lacks jurisdiction over Plaintiffs' First, Second and Third claims under the Quiet Title Act because title to the Sunken Forest is not in dispute.

In addition, granting Plaintiffs a second amendment of the complaint to add the United States as a party would be futile and not cure the jurisdictional deficiency because there is no disputed title to the Sunken Forest—another necessary condition for the United States to consent to suit under the Quiet Title Act. *See Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975) (affirming dismissal of a case under Rule 19(b) because the United States was a

necessary party to action but did not consent to be sued under the Quiet Title Act). Thus, this Court lacks jurisdiction and Plaintiffs' claims must be dismissed.

The United States of America does not waive its sovereign immunity under the Quiet Title Act—and, consequently, a court does not have jurisdiction—unless disputed title exists. *Leisnoi*, 170 F.3d at 1191. Courts "read narrowly the requirement that the title at issue be 'disputed.'" *Mills v. United States*, 742 F.3d 400, 405 (9th Cir. 2014). For an action to proceed under the Quiet Title Act, "title or ownership of real property [must be] in doubt." *Cadorette*, 988 F.2d at 223. "[A]ctions of the United States that merely produce some ambiguity regarding a plaintiff's title are insufficient to constitute 'disputed title.'" *Kane Cty., Utah v. United States*, 772 F.3d 1205, 1212 (10th Cir. 2014). In addition, plaintiffs bringing a Quiet Title Action must "have title or color of title to land in which the United States also claims an interest." *Claxton v. Small Bus. Admin.*, 525 F. Supp. 777, 784 (S.D. Ga. 1981) (internal quotation marks and citation omitted) (citing *Prater*, 612 F.2d at 159; *see also Borough of Maywood v. United States*, 679 F. Supp. 413, 418 (D.N.J. 1988) (explaining that the plaintiff could not assert a Quiet Title Act claim because it did not have right or title to the property).

a. The 1955 deed creates a fee on limitation whereas the 1966 deed establishes a restrictive covenant.

The United States is not in violation of the terms set forth in either the 1955 deed or the 1966 deed. As discussed above, courts, as a general proposition, disfavor forfeiture provisions. *Post v. Weil*, 115 N.Y. 361, 366-68 (N.Y. 1889); *Witter*, 78 N.Y.2d at 237. In evaluating such provisions, courts look to the "form, nature, and purpose" of a clause when determining whether it creates a restrictive covenant, fee on limitation, or other defeasible property interest. *Munro v. Syracuse, Lake Shore & N. R.R. Co.*, 200 N.Y. 224, 230-31 (4th Dept. 1910). The technical

terms used to describe the clause "bear[] upon the intention of the parties" but are not determinative. *Graves v. Deterling*, 120 N.Y. 447, 456 (2nd Dept. 1890). Rather, the existence of a forfeiture provision and its language control. *Id.*

Courts find that a clause creates a fee on limitation when it stipulates that title automatically reverts upon the occurrence of an event. *Nichols v. Haehn*, 187 N.Y.S.2d 773, 778 (4th Dept. 1959). In contrast, a condition subsequent—another defeasible property interest—provides a right of entry after the contingency occurs. *Munro*, 200 N.Y. at 230-31.

Here, the 1955 deed between WPI and non-party SFPI refers to the clause providing a right of reverter as both a "condition" and a "limitation." *See* Knapp Decl., Exhibit H at 5. The 1955 deed further provides that the reversion is "automatic" and does "not requir[e] any re-entry." *Id.* Because the 1955 deed provides for automatic reversion, the clause creates a fee on limitation. *See Suffolk Bus. Ctr., Inc. v. Applied Dig. Data Sys., Inc.*, 78 N.Y.2d 383, 387-88 (explaining that the forfeiture provision is "one of the clearest and strongest manifestations" of the parties' intent).

By contrast, where a clause imposes obligations on the grantee but is silent as to a right of reversion or a right of entry, such as with the 1966 deed, courts hold that it establishes a restrictive covenant. *Post*, 115 N.Y. at 366-68. Here, the 1966 deed between non-party SFPI and the United States of America does not contain a reverter provision. *See* Knapp Decl., Exhibit I at 9. As a result, the 1966 deed created a restrictive covenant—despite the clause being called a condition. *Post*, 115 N.Y. at 371 ("[I]f the only reason for construing a clause [as a condition subsequent] is in the technical words which have been used, the court may disregard them in performing the office of interpretation.").

b. The United States of America has not violated the fee on limitation in the 1955 deed because the event on which reverter is conditioned has not occurred.

Here, title to the Sunken Forest has not reverted to WPI because the event on which reverter is predicated has not occurred.[10] The 1955 deed provides that title automatically reverts to WPI when the Sunken Forest "cease[s] to be used solely for the [described] purposes, or should any activities *be engaged in* thereon that would adversely affect either flora or the fauna." *See* Knapp Decl., Exhibit H at 5 (emphasis added).

First, according to this provision, the activity must be ongoing for reversion to occur. As Plaintiffs acknowledge, Defendants have only authorized deer population control and the construction of an exclusion fence. Am. Compl. ¶¶ 38–39, 57, 64, 71. Defendants have not implemented the Plan. *Id.* at ¶ 39 ("[D]eer would be driven out of the fenced-in area and any deer found within the fence would be removed . . . ."); *Id.* at ¶ 72 ("[I]f the NPS begins implementing the Plan, it will kill deer on the WP Tracts and erect a fence . . . ").

To the extent that the activities approved in the Plan would violate the fee on limitation, the activities have not occurred. Therefore, Defendants have not breached the fee on limitation. The United States of America thus retains "whole title" to the Sunken Forest. *Vail v. Long Island R. Co.*, 106 N.Y. 283, 287 (N.Y. 1887) ("The possibility of reverter . . . is not an estate in land . . . ."); *c.f. Trustees of Calvary Presbyterian Church of Buffalo*, 249 N.Y. 111, 115 ("[A]s long as the conditions [subsequent] existed unbroken, all interest in the estate remained out of the grantor and his heirs.").

[10] For the limited purpose of this argument only, Defendants do not dispute that the fee on limitation set forth in the 1955 deed is valid and remains enforceable.

Additionally, the NPS's killing of wildlife under a comprehensive management plan, such as is contemplated by the Plan in the Sunken Forest (through sharpshooting or capture and euthanasia), is distinguishable from hunting. *See WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1192 (10th Cir. 2013) ("The primary purpose of hunting is not for controlling a population of detrimental animals but for food and sport. Because the purpose of the NPS's plan is to control the population of the park's elk and their effect on vegetation, it is distinguishable from hunting . . . ."). The objectives of the Plan, as set forth in the ROD, do not call for hunting in the Sunken Forest. FINS 000004-000005. The objectives include:

> manag[ing] a viable white-tailed deer population in the Seashore that is supportive of the other objectives of the plan; [which includes *inter alia*] within the Sunken Forest, maintain the character of the globally rare maritime holly forest, as stated in the Seashore's enabling legislation, by fostering the regeneration of key canopy constituent tree species and a reasonable representation of herbs and shrubs that made up the Sunken Forest's vegetative composition when the Seashore was established [in 1964].

Id.; *see also WildEarth Guardians*, 703 F.3d at 1192.

In addition, per the terms of the 1955 deed (and the 1966 deed), Defendants have since 1966, "maintain[ed] . . . and operate[ed]" the Sunken Forest, "in [its] natural state . . . as a preserve for the maintenance of wildlife and its natural habitat undisturbed by hunting . . . or any other activities that might adversely affect the environment or the animal population, and for scientific and educational purposes incidental to such maintenance and operation." Because Defendants have not violated the fee on limitation set forth in the 1955 deed, there is "no doubt" that the United States of America retains ownership of the Sunken Forest. *See McMaster v. United States*, 177 F.3d 939, 942 (11th Cir. 1999). Plaintiffs cannot establish disputed title—a necessary condition for jurisdiction under the Quiet Title Act. *Id.* Moreover, the future existence of disputed title—which is speculative here as Defendants, following their

comprehensive "hard look" that complied with NEPA,[11] found that the deer management and fence building activities would benefit FINS's wildlife and vegetation, FINS 000063-000069, and thereby not violate the fee on limitation—cannot provide the Court with jurisdiction. *See Alaska v. United States*, 201 F.3d 1154, 1165 (9th Cir. 2000) ("There may well be a dispute at some time . . . . But whatever dispute there may be, it has not yet occurred."). Consequently, Defendants' respectfully submit that Plaintiffs' First, Second and Third claims should be dismissed for lack of subject matter jurisdiction.

c. The restrictive covenant set forth in the 1966 deed is not enforceable under the Quiet Title Act because title to the Sunken Forest is not in dispute.

As discussed in section above, a court only has jurisdiction over a Quiet Title Act claim when disputed title exists and title to the Sunken Forest is not in dispute. *McMaster*, 177 F.3d at 939. The Quiet Title Act requires disputed title because the typical remedy is to provide one landowner with a declaration of title. *LaFargue v. United States*, 4 F. Supp. 2d 580, 586 (E.D. La. 1998); *Cadorette*, 988 F.2d at 223 (citing *Nevada v. United States*, 463 U.S. 110, 143§44 (1983)) ("[A] 'quiet title' action is, generally speaking, an *in personam* proceeding, the purpose of which is to determine which named party has superior claim to a certain piece of property."). But, as demonstrated herein, Defendants' Plan (and their historical and current maintenance and operation of FINS) does not give rise to a dispute to the United States of America's title to the Sunken Forest.

[11] *See Friends of Animals*, ". . .far from being arbitrary, NPS made a reasoned determination based upon the data and expert recommendations which were available to them at the time the EIS was being developed." 16 CV 6006, Memorandum and Order, July 24, 2018 at 36-37.

Plaintiffs here seek to enforce the restrictive covenant set forth in the 1966 deed—and the 1955 deed to the extent that Plaintiffs construe the fee on limitation as a restrictive covenant—under the Quiet Title Act. However, restrictive covenants "fail[] to call into question either the title to or the ownership of [property]"; therefore they are not enforceable under the Quiet Title Act. *McMaster*, 177 F.3d at 941–42 (holding that the court did not have jurisdiction to enforce a no-hunting restrictive covenant under the Quiet Title Act); *see also Ginsberg v. United States*, 707 F.2d 91, 93 (4th Cir. 1983) (explaining that disputed title does not include situations "where the disagreement between the parties arises from the contractual obligations created by the terms of the lease allegedly breached by the United States" because such a dispute "hardly casts doubt on the title or ownership of property"). Moreover, as the Eleventh Circuit held, courts do not have jurisdiction over claims seeking to enforce restrictive covenants because they do not involve disputed title. *McMaster*, 177 F.3d at 941–42. Accordingly, Defendants respectfully submit that Plaintiffs' First, Second and Third Claims should be dismissed for lack of subject matter jurisdiction.

3. WPI's claims to enforce its alleged reversionary interest and right of entry must be dismissed because they are untimely under the Quiet Title Act

WPI's claim(s) to enforce its alleged reversionary interest and right of entry must be dismissed for lack of subject matter jurisdiction because, as discussed herein, such a claim(s) is untimely by decades. The statute of limitations under the Quiet Title Act is 12 years from the date that a plaintiff knew or should have known of government conduct adverse to their property interest. *See Block*, 461 U.S. at 282-84 (discussion of Congress' 1972 enactment of QTA, its legislative history and statute of limitations); 28 U.S.C § 2409a(g).

a. WPI's claim, if any, to enforce its reversionary interest and right of entry over hunting at FINS, arose in 1966, yet it inexplicably waited until 1988 to enforce its rights

As discussed, Congress established FINS in 1964. *See* 16 U.S.C. § 459e. In so doing, Congress mandated 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; *see also* 36 C.F.R. § 2.2(b)(1)("[h]unting shall be allowed in park areas where such activity is specifically mandated by Federal statutory law.); *Allen*, 1989 WL 8143 at *10.

The "[1972] compromise . . . bill [that] became [the QTA]" created a "retroactive twelve-year" statute of limitations, *i.e.* dating back to 1960. *Block*, 461 U.S. at 284. Congress established FINS in 1964 and included the "shall permit hunting" language in FINS' enabling legislation. *See* 16 U.S.C. § 459e. Two years later SFPI conveyed the Sunken Forest to the United States of America. Therefore, WPI has been on notice since 1966 that the United States of America took title to the Sunken Forest and knew, or should have known, that it did so under a congressional mandate that hunting shall occur at FINS. Under the Quiet Title Act's 12 year statute of limitations, WPI had until 1978 to enforce its rights, yet it took no action.

WPI also knew or should have known its rights, if any, were in jeopardy in the mid-1970's. As Judge Platt discussed in *Allen*, NPS announced its intent to hold a deer hunt on the Seashore in 1975:

> In or around 1975, NPS issued a draft environmental impact statement for the Park, which was made available to the public. Comments received from the public regarding the draft were taken into account in preparing a final environment statement [sic] (EIS). The Management Objectives section of the EIS states that the Park is *to be managed in accordance with the legislative mandate* to preserve Fire Island's natural resources while providing diverse recreational opportunities.

1989 WL 8143 at *1 (emphasis added). The EIS issued by NPS in 1975 gave notice that the NPS intended to permit deer hunting at FINS, per its "legislative mandate." *Id.*; *see also* 16 U.S.C. § 459e. Accordingly, under the Quiet Title Act's 12-year statute of limitations, WPI had until 1987 to enforce its rights, yet it took no action.

However, it was not until December 1988 that WPI chose to enforce its alleged deed restriction as against NPS,[12] 22 years after the United States of America took title to the Sunken Forest and 13 years after the NPS issued the EIS in 1975, when NPS announced a research hunt of white-tailed deer at FINS. *See Allen*, 1989 WL 8143. That effort failed. *Id.* WPI, among other parties, argued unsuccessfully in *Allen* at several hearings in this Court before Judge Thomas C. Platt that NPS could not conduct and oversee a hunt of white-tailed deer at FINS. *Id.*; *see also* Knapp Decl., Exhibit E. The hunt occurred during December 1988 and January 1989, when 60 deer were killed and removed from the Seashore through bow-and-arrow and firearms hunting. FINS 019424. The matter was the subject of several interlocutory appeals denied by the United States Court of Appeals for the Second Circuit. *See Allen*, 1989 WL 8143; *see also* Knapp Decl., Exhibit E.

WPI waited over twenty years before initially seeking to enforce its alleged rights over hunting at FINS, an effort that failed before Judge Platt in *Allen*. It then waited almost 30 additional years to bring the instant action to enforce its rights. For this reason, WPI's claims must be dismissed as untimely.

[12] Plaintiffs did not name the United States of America as a defendant in *Allen* either.

b. WPI's claim, if any, to enforce its reversionary interest and right of entry over the Plan's call for fencing of the Sunken Forest, arose in 1966, yet it inexplicably waited more than 50 years to enforce its rights

As discussed above, the Quiet Title Act 12-year statute of limitations precludes any claim by WPI over the Plan's call for fencing of the Sunken Forest. *See Block*, 461 U.S. at 282-84 (discussion of Congress' 1972 enactment of QTA, its legislative history and statute of limitations); 28 U.S.C § 2409a(g). In 1966, SFPI conveyed the Sunken Forest to the United States of America with the proviso that the Sunken Forest be fenced in. *See* Knapp Decl., Exhibit I. Therefore, WPI has been on notice since 1966 and knew or should have known that the NPS would fence in the Sunken Forest. *See* Block, 461 U.S. at 282-84. And under the Quiet Title Act's 12-year statute of limitations, WPI had until 1978 to enforce its rights, yet it took no action for nearly 40 years when it filed the instant action.

Even if this Court was to accept the specious notion that WPI had no knowledge of the fencing of the Sunken Forest in the late 1960's, WPI received actual notice of the fencing during the December 1988 hearing conducted by Judge Platt in *Allen*. At the hearing, which occurred prior to the March 1989 filing of the amended complaint, Edward Hochman, then-counsel for WPI, questioned a FINS official during which the previous fencing of the Sunken Forest was discussed. *See* Knapp Decl., Exhibit G at 75. In response to a question posed by Mr. Hochman as to "the exact boundaries" of the "particular parcel of [the Sunken Forest] land donated" by WPI, the FINS official testified, "[s]ome of the original 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 areas that was donated." *Id.* at ln. 11-19. WPI knew in late 1988 that the NPS fenced in the Sunken Forest, yet it took no action to enforce its rights.

The *Allen* plaintiffs' (including WPI) amended complaint specifically referenced the 1955 deed, but did not seek to enforce the so-called "deed restrictions" over the issue of fencing of the Sunken Forest as WPI now does herein. *Id.* Indeed, the *Allen* amended complaint was wholly silent as to fencing, the 1966 deed and its provisions, and makes no reference to the cooperative agreement through which NPS erected the fence, in accordance with the terms of the 1966 deed.

WPI, whether it was aware of the fence at the time NPS erected it per the terms of the 1966 deed, certainly had notice of it in 1988 and failed to raise it as claim, as it could have during the pendency of the *Allen* case and during the nearly 30 years since *Allen* was dismissed. Therefore, WPI's claim as to the fencing of the Sunken Forest has long since been extinguished by the Quiet Title Act's 12-year statute of limitations and should be dismissed with prejudice.

4. Congress did not waive the United States of America's sovereign immunity for the equitable relief Plaintiffs seek under the Quiet Title Act, thus Plaintiffs' claims for such relief should be dismissed

Even if Plaintiffs had pled the subject matter jurisdiction of this Court under the Quiet Title Act, their First, Second and Third claims must fail because the Quiet Title Act provides, in pertinent part, that:

> [t]he United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be 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. § 2409a(b); and "[n]o preliminary injunction shall issue in any action brought under the [Quiet Title Act]." 28 U.S.C. § 2409a(b). Thus, insofar as Plaintiffs' First, Second

and Third claims seek, *inter alia*: 1) "a Declaratory Judgment" through which "the [Sunken Forest] immediately reverted to [WPI] as a result of enactment of the Plan, *see* Am. Compl., ¶ 59; 2) "eject[ment] of NPS from the [Sunken Forest] and allow [WPI] to recover possession of the [Sunken Forest], *Id.*, ¶ 66; and 3) that "the Court rule that the Plan violates the the deed restrictions on the [Sunken Forest] and order that the NPS is prohibited from executing [sic] the Plan" in the Sunken Forest," *Id.*, ¶ 66, the Quiet title Act specifically precludes such relief. For these and the many reasons set forth previously herein, Plaintiffs' First, Second and Third claims should be dismissed.

B. WPI'S Claims Must Be Dismissed In Accordance With The Doctrine of Res Judicata

1. WPI's challenge to the Plan's use of deer hunting is precluded by the doctrine of *res judicata*

WPI's claims pertaining the hunting of deer at FINS should be dismissed in accordance with the doctrine of *res judicata* because the claims it raises in the amended complaint either were, or could have been, litigated in *Allen* during the late 1980s and early 1990s. *Purcell v. City of New York*, 2018 WL 3733941 at *3. Much like its flawed and failed attempt in *Allen*, WPI again challenges Defendants' authority to permit deer hunting on FINS. Am. Compl., *passim*.

Here, the doctrine of *res judicata* should shield Defendants "from having to relitigate [whether hunting is permitted on FINS, the] identical claims [and] issues [raised by WPI in *Allen* thirty years ago]." *Purcell*, 2018 WL 3733941 at *3. WPI's claims here should be barred by Judge Platt's 1989 decision in *Allen* because: "1) [*Allen*] involved an adjudication on the merits, [*i.e.*, that FINS enabling legislation mandates hunting at FINS; 2) [*Allen*] involved the [same parties as the instant litigation]; [and] 3) the claims asserted [herein] were, or could have been, raised in [*Allen*]." *Id.*

Although not formally appearing on the docket sheet as a party, WPI was among the plaintiffs that challenged the National Park Service's deer hunt in 1988. *See e.g.*, Knapp Decl., Exhibits C, at p. 13; 27-30; D.

> All plaintiffs are year-round residents of Fire Island . . . [where] defendants plan to permit the hunting of deer, except Wildlife Preserve, Inc. which is a New Jersey non-for-profit corporation which in 1955 ceded property to defendants which property is part of the proposed hunting grounds.

See Knapp Decl., Exhibit D at 1, 3 (¶ 4).

The *Allen* plaintiffs', including WPI, filed their amended complaint in March 1989. *Id.* It specifically references the 1955 deed, but does not seek to enforce the so-called "deed restrictions" upon which Plaintiffs now seek relief and is wholly silent as to the 1966 deed and its provisions. *Id.* WPI's attempt to relitigate the identical claims it previously lost in *Allen* must be rejected and dismissed with prejudice. *Purcell*, 2018 WL 3733941 at *3.

2. WPI's challenge to the Plan's use of exclusion fencing around the Sunken Forest is precluded by the doctrine of *collateral estoppel*

WPI "had a full and fair opportunity to litigate the issue [of fencing of the Sunken Forest] in *Allen*" nearly 30 years ago, but failed to do so. *Collateral estoppel* should bar it from doing so now. *Purcell*, 2018 WL 3733941 at *3 quoting *Transaero, Inc.*, 162 F.3d at 731. "*Collateral Estoppel* bars a party from raising a specific factual or legal issue in a second action when the party had a full and fair opportunity to litigate the issue in a prior proceeding." *Id.*

The *Allen* amended complaint made no claim about, or reference to, the fencing NPS erected in accordance with the terms of the 1966 deed and cooperative agreement, despite having actual notice of the fence's placement in the Sunken Forest. Prior to filing the amended complaint, Edward Hochman, then-counsel for WPI, questioned a FINS official during the

December 1988 hearing before Judge Platt. The fence built to enclose the Sunken Forest in the 1960s was specifically discussed. See Knapp Decl., Exhibit G at 75. WPI did not complain then, but does so now. In response to a question posed by Mr. Hochman as to "the exact boundaries" of the "particular parcel of [Sunken Forest] land donated" by WPI, the FINS official testified, "[s]ome of the original 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 are as the Sunken Forest which includes, certainly, the areas that was donated." *Id.* at ln. 11-19.

WPI, whether it was aware of the fence at the time NPS erected it per the terms of the 1966 deed, certainly had notice of it in 1988 and failed to raise it as claim, as it could have in *Allen*. Its failure to raise the issue in Allen, precludes it from raising it now in accordance with the doctrine of *collateral estoppel*. *Purcell*, 2018 WL 3733941 at *3.

C. Plaintiffs' Claims Must Be Dismissed For Failure To State A Claim Because: 1) They Are Not Third-Party Beneficiaries To The 1966 Deed Between Non-Party SEPI And The United States Of America; And 2) The Reversionary Interest WPI Seeks To Enforce Has Expired

Plaintiffs First, Second, Third and Fifth claims fail to adequately state a claim upon which relief may be granted because each claim fails to offer "enough facts to state a claim to relief that is plausible on its face." Fed. R. Civ. P. 12(b)(6); *Starr*, 592 F.3d at 321.

1. Plaintiffs Are Not Third-Party Beneficiaries to the 1966 deed, or a restrictive covenant, if one exists, between non-party SFPI and the United States of America

Plaintiffs cannot demonstrate that they are an intended third-party beneficiary of the 1966 deed between non-party SFPI and the United States of America. Unlike future interests in real property, which account for some future right of possession, covenants restrict the use of the land conveyed. The New York State Court of Appeals has identified three conditions which must be

met in order for a covenant to run with land, such that one party may bind a successor to whom they were not the original grantor. Such a covenant is formed when: 1) it appears that the grantor and grantee intend the covenant to run with the land and bind successors; 2) the covenant "touches and concerns" (affects the use of) the land and; 3) there is privity between the party asserting the benefit of the covenant and the one burdened by it, as well as privity between the two parties that formed the agreement. *See Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 255 (1938). New York courts interpret restrictive covenants strictly against the party enforcing them but in accordance with the intent of the parties who entered into the deed. *See, e.g., Bull v. Burton*, 227 N.Y. 101, 111 (1919).

Here, Plaintiffs assert that the similar language between the 1955 and 1966 conveyances is sufficient to satisfy the requirement that the covenant was intended to run with the land. However, Plaintiffs allege no facts to indicate that the pact made between WPI and non-party SFPI in 1955 was intended to bind successors in interest. Cases finding a covenant to run with the land have discussed conveyances expressly stipulating that the covenant shall bind the grantee's heirs, successors, and assigns. *See, e.g., 328 Owners Corp. v. 330 West 86 Oaks Corp.*, 865 N.E.2d 1228, 1234 (N.Y. 2007). No such express stipulation is present here. Even if this court were to examine the inferences surrounding the conveyance, the importance of land protection is part-and-parcel to the goals of the parties making the conveyances, and there is nothing in the language of either deed suggesting that some future party may not remove the stipulation requiring land protection at some future date.

Moreover, WPI has failed to plead that they fall into one of the three classes of cases defined by the New York Court of Appeals in *Korn*, nor have they shown that the restrictive covenant was intended to benefit them. Rather, Plaintiffs rely on *Congel*, 689 N.Y.S.2d 317, for

the general proposition that restrictive covenants imposing the condition to keep property in its "natural state" are enforceable. *See* Am. Compl., ¶ 26. However, *Congel* is readily distinguishable from the present case. Congel owned land adjacent to "Buffer Lands," an area near the town of DeWitt, New York intending to construct buildings which would have violated a restriction to keep land in its "natural state." *Congel*, 689 N.Y.S. 2d at 319-20. The Court of Appeals permitted a preliminary injunction because the plaintiff in *Congel* owned land adjacent to the defendant's and could demonstrate that the contested restriction in Congel's deed was designed to benefit it. *Id.* Plaintiffs' amended complaint here suggests that the Court of Appeals simply found the restrictive covenant to be enforceable, but the issue on appeal in that case was whether plaintiffs could enforce the covenant as third-party beneficiaries *and* owners of property adjoining the land encumbered by the restrictive covenant, not whether the covenant *itself* was enforceable. *See Congel*, 689 N.Y.S. 2d at 319-20 (emphasis added).

Plaintiffs' amended complaint alleges no facts that establish WPI's continued enjoyment of the covenant was part of the 1966 conveyance made to the United States of America by non-party SFPI. Nor does WPI fall into one of the categories defined in *Korn* because: 1) WPI and SFPI conveyed the entirety of their respective interest in the land at issue, and thus the restriction was not "part of a general plan or scheme for the benefit of all grantees in a real estate subdivision;" 2) the grantors of both deeds conveyed the entirety of their interest, and thus it is impossible that the covenant was made to benefit a grantor's "remaining land" because no land remained following the conveyances and; 3) this was not a covenant between owners of adjoining lands for their reciprocal benefit. *Korn*, 192 N.Y. at 495-96. WPI no longer owns any land intended to be benefitted by the restrictive covenant, and it has not shown that it was an intended beneficiary to the promise made between non-party SFPI and the United States of

America. *See Glass*, 57 N.Y.S.3d at 509 ("It must be shown that the benefit [to the third party] was one of the things bargained for between the promisee and promisor . . . . In the absence of specific language pointing out the intended beneficiaries of the promise, . . . the proof must rest almost entirely or in large part upon the reasonable inferences from the circumstances under which the promise was made.")

WPI's sole factual assertion is that the language between the 1955 and 1966 conveyances is similar. *See* Am. Compl. ¶27-28, ¶49. However, again, such language was germane to the ideological goals of both WPI and SFPI (and to the United States of America as evidenced by the NPS maintain and operating the Sunken Forest as a nature preserve for over half-a-century). Nothing in this language suggests that WPI's continued ability to enforce the covenant was bargained for between the United States of America and SFPI. Indeed, a uniform requirement among restrictive covenants is that they contain language binding heirs, successors, and assigns, or at the very least there be some reasonable inference that such intent was contained within the deed. *See, e.g., Congel*, 689 N.Y.S. 2d 317, 319-20; *Niagra Mohawk Power Corp. v. Allied Healthcare Products, Inc.*, 29 N.Y.S.3d 568 (N.Y. App. Div. 2016) (finding that an admission in a prior settlement agreement that the covenant at issue was intended to bind successors was sufficient to establish the parties' intent to bind subsequent purchasers.); *328 Owners Corp.*, 8 N.Y.3d at 383 (upholding a covenant containing the phrase "shall run with the land."). Plaintiffs offers little to demonstrate that the covenant made in the 1955 conveyance entitled them to bind a subsequent purchaser/donee when it was not a party to the subsequent conveyance.

Plaintiffs simply presume they can enforce the covenant because of the similarity in language between the 1955 and 1966 deeds, but this does not establish that it was actually intended, or even that the benefit was meant to be continued as a gift to them. *See Zamiarski*,

239 N.Y.S.2d at 225; *Glass*, 57 N.Y.S.3d at 509. Therefore, this Court should dismiss the claims related to the enforcement of the 1966 covenant, if one even exists, for a failure to state a claim.

2. WPI's alleged reversionary interest and right of entry was extinguished in accordance with New York law

Even if this Court were to find that the 1955 deed's reversionary interest and right of entry was at one time enforceable, it did not run with the land per terms of the 1966 deed and, in any event, has long since expired and thus, does not encumber the Sunken Forest.

New York Real Property Law § 345 provides that a party seeking to preserve a reversionary interest in land must re-record that interest within 27 to 30 years after the creation of that reversionary interest. *See* N.Y. Real Prop. § 345(1)(4). Should the party holding the possibility of reverter fail to renew their future interest in an estate, that possibility of reverter is extinguished. *Id.* A reversionary interest, often called the possibility of reverter, is created when a conveyance: 1) creates an estate in fee simple; and 2) provides that the right of possession reverts to the grantor upon the satisfaction of some subsequent condition.

The New York Appellate Division, Second Department, applied section 345 to a case similar to the one presently at bar. In *Roman Catholic Diocese of Brooklyn*, plaintiff sought to assert a possibility of reverter after the premises it conveyed to defendant ceased to be used as a Catholic high school. Plaintiff there had failed to adhere to the recording requirements of section 345 and therefore, the court found, the possibility of reverter had been extinguished and that part of their claim was subsequently dismissed. *Id.*, 53 N.Y.S. at 88.

In order for WPI to have maintained the possibility of reverter it claims here, it would, by statutory imposition, have had to renew that interest between 1982 and 1985. WPI will argue, however, the constitutional infirmity of section 345, as applied to it, because WPI conveyed the

Sunken Forest to non-party SFPI in 1955, prior to the statute's enactment. *Miles*, 15 N.Y.2d at 372. But *Miles* is distinguishable from the facts before this Court. In *Miles*, the New York Court of Appeals examined § 345(4) as applied to an 1854 conveyance which included a reversionary clause. *Id.* The heirs of the grantor sought to enforce the provision upon a breach of the clause that occurred in April 1962, *after* section 345's September 1, 1961 statutory filing deadline for reversionary interests created prior to September 1, 1931. *Id.*

Here, WPI's conveyance to non-party SFPI occurred *after* September 1, 1931. Indeed, the Appellate Division, Second Department, recognized that the "Miles court left open the possibility that Real Property Law § 345 could validly operate as a Statute of Limitations to reverter provisions [in conveyances that preceded enactment of the statute] which were mature and enforceable *before* the statute purported to extinguish them." (Emphasis added). *Order of Teachers of Children of God, Inc.*, 687 N.Y.S.2d 684. The exception contemplated by the *Miles* court is present here. Under section 345, WPI's 1955 conveyance to non-party SFPI, with a right of reversion and right of entry, would have required WPI to reassert its future interest initially between 1982 and 1985. WPI's future interest matured and became enforceable in 1966 when SFPI conveyed the Sunken Forest to the United States (to be folded into FINS jurisdiction) with constructive notice that, as of 1964, FINS had been established with a statutory mandate that the "the Secretary shall permit hunting . . . on lands and waters under his administrative jurisdiction within Fire Island National Seashore . . . ." *See* 16 U.S.C. § 459e-4. As such, WPI had 19 years to comply with section 345's recording requirements, yet failed to do so.

Even if the Court were to find too attenuated that WPI's future interest matured in 1966, it unquestionably matured in 1975 when NPS issued an EIS in which it stated that "[FINS] [wa]s to be managed in accordance with the legislative mandate to preserve [FINS] natural resources,"

i.e., preserve the flora by permitting hunting of the fauna. The EIS issued with 10 years remaining for WPI to comply with section 345, yet it failed to do so. Put simply, WPI's reversionary interest and right of entry should be "extinguished pursuant to Real Property Law § 345 as a result of [its] undisputed failure to comply with the recording requirements." *Roman Catholic Diocese of Brooklyn*, 53 N.Y.S. at 88.

Because WPI failed to properly record its reversionary interest and right of entry, it is extinguished and no longer valid. As such, Defendants' respectfully submit that this court must dismiss all claims regarding WPIs' reversionary interest and right of entry in accordance with New York law and failure to state claim pursuant to Fed. R. Civ. P. 12(b)(6).

CONCLUSION

As set forth herein, Defendants respectfully submit that Plaintiffs' First, Second, Third and Fifth claims of the amended complaint should be dismissed for lack of subject matter jurisdiction; failure to state a claim; and failure to name a necessary party, pursuant to Rules 12(b)(1), (b)(6) and (b)(7) of the Federal Rules of Civil Procedure. Defendants submit further that dismissal is warranted in accordance with the doctrines of *res judicata* and *collateral estoppel*. Finally, should the Court consider the documents that accompany Defendants' motion

in support the aspects of this motion that Plaintiffs cannot state a claim, the Court must convert, and respectfully should grant, the motion as one for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

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