No. 22-36002

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB,
Plaintiffs–Appellees,

v.

DEBRA HAALAND, Secretary of the Department of the Interior, et al.,
Defendants,

and

WESTMORELAND ROSEBUD MINING LLC and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400,
Intervenor-Defendants–Appellants.

On Appeal from the United States District Court for the District of Montana
District Court No. 1:19-cv-00310-SPW-TJC
Honorable Susan P. Watters, District Judge

WESTMORELAND ROSEBUD MINING LLC AND THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400's OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Defendants Appellants state that:

- Westmoreland Rosebud Mining LLC, formerly known as Western Energy Company, is owned by Westmoreland Mining, LLC, which is not a publicly held corporation. No other publicly held corporation has an ownership interest in Westmoreland Rosebud Mining LLC.
- The International Union of Operating Engineers, Local 400 is a not-for-profit organization, is not a publicly held corporation, and is not owned by any publicly held corporation.

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APA	Administrative Procedure Act
EIS	Environmental Impact Statement
ER	Excerpts of Record
MEIC	Montana Environmental Information Center
NEPA	National Environmental Policy Act
Office of Surface Mining	U.S. Office of Surface Mining, Reclamation and Enforcement
Union	International Union of Operating Engineers, Local 400
Westmoreland	Westmoreland Rosebud Mining LLC

INTRODUCTION

The Court must decide whether Plaintiffs can manufacture a controversy for litigation by dispatching a lawyer and board member to drive past a proposed project site on private lands, over 360 highway-miles from their homes, where neither documented any pre-existing interest. The limits of standing do not stretch that far. Plaintiffs must prove that a member actually lives, works, or recreates regularly in the vicinity of the challenged action. Here, prior to their opposition to Westmoreland Rosebud Mining LLC's ("Westmoreland") Area F expansion, these Plaintiffs had no interest in recreating near the proposed mining. Their orchestrated eleventh-hour drive-bys do not establish a concrete and particularized injury. Because Plaintiffs lack standing, this case is not properly before the Court. Accordingly, the Court should reverse and remand with instruction to the District Court to dismiss the case.

In addition, this case asks the Court to reaffirm an Article III judge's obligation to review a magistrate judge's findings and recommendations de novo. Here, contrary to clear language in the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), and in violation of the constitutional rights of Westmoreland and the International Union of Operating Engineers, Local 400 (the "Union"), the District Court reviewed some of Westmoreland's and the Union's objections under a lesser, clear error standard. The District Court did so after deeming certain

objections "improper" on bases untethered from the Magistrates Act or court rules. The District Court applied the incorrect standard; therefore, if the Court does not remand with instructions to dismiss, then the Court should reverse and remand with instructions to apply the statute's de novo review standard.

JURISDICTION STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) and the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291.

This is an appeal from the final order of the U.S. District Court for the District of Montana dated September 30, 2022, which determined as a final matter that two of five Plaintiffs below had standing to pursue the case. The District Court's decision is reported as *Montana Environmental Information Center v. Haaland*, 2022 U.S. Dist. LEXIS 179417, 2022 WL 4592071 (D. Mont. Sept. 30, 2022).

Plaintiffs filed a motion to dismiss this appeal, alleging that the Court lacks jurisdiction under the administrative remand rule because the District Court's remanded decision, in their view, was not a final appealable order. App. Dkt. 9. But, as Westmoreland and the Union argued, the issues of standing and the standard of review applied by the District Court under the Federal Magistrates Act

are separable legal questions. Any challenge on those bases will be lost forever if not appealed now, making them final appealable decisions. App. Dkt. 17. The motions panel declined to dismiss the appeal, without prejudice to Plaintiffs renewing their arguments in their answering brief. App. Dkt. 20.

The notice of appeal in this case, No. 22-36002, was timely filed on November 28, 2022, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B)(ii) & (iii). *See* 4-ER-0699–702.

ISSUES PRESENTED FOR REVIEW

1. Did Plaintiffs have standing to challenge the Rosebud Area F Mine Plan where their declarants' alleged interests in driving by Area F were orchestrated *after* the mine plan was proposed in order to manufacture standing to pursue this case?

2. Did the District Court violate the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), and Article III of the Constitution, by applying a clear error standard of review for objections to the Magistrate Judge's findings and recommendations on cross-motions for summary judgment?

STATEMENT OF THE CASE

I. Background Facts

A. The Mine Plan and Area F

This case involves Westmoreland's Rosebud Mine (the "Mine"), a surface coal mine near Colstrip in east-central Montana. 1-ER-0040. *See* Figure 1 below:

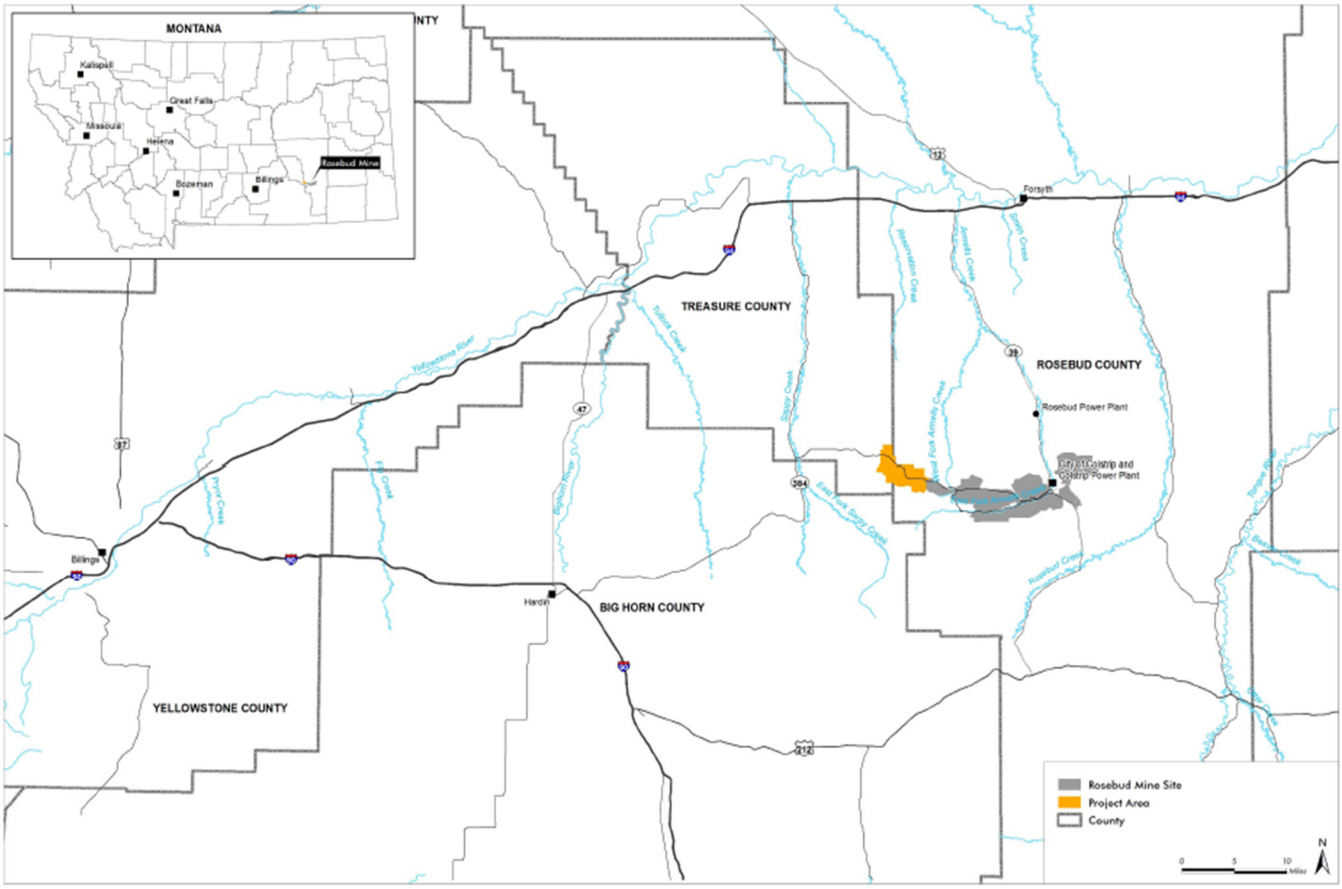

Figure 1. Source 4-ER-0631.

The Mine has operated since 1968 and, except for a small portion of one expansion (Area C), all prior expansions were in the East Fork Armells Creek drainage basin (the "East Fork"), separated by a divide from the West Fork Armells Creek drainage basin (the "West Fork"). 4-ER-0636, 0640, 0658. Rosebud coal is combusted locally at the Colstrip and Rosebud Power Plants in Colstrip, Montana. 4-ER-0629.

In 2011, Westmoreland submitted an application to the U.S. Office of Surface Mining, Reclamation and Enforcement ("Office of Surface Mining") to expand the Mine into previously leased lands known as Area F.[1] 1-ER-0040–41. Area F is located on approximately 6,500 acres of *private lands* within the larger, nearly 100,000-acre West Fork drainage. *See* 4-ER-0597, 0647–49 (Area F is on private land); 4-ER-0646 (describing West Fork drainage). As depicted on the following map in Figure 2, Area F is west of previous mining operations, and farther from the town of Colstrip and the north-south Montana Highway 39. Figure 2 shows in dark blue the entirety of the Armells Creek drainage. The West Fork, East Fork, and area below the confluence of the two are divided by light blue lines.

[1] If Area F was not permitted, coal mining would continue at other areas of the Mine. 4-ER-0642. And the power plants could continue to operate. 4-ER-0650.

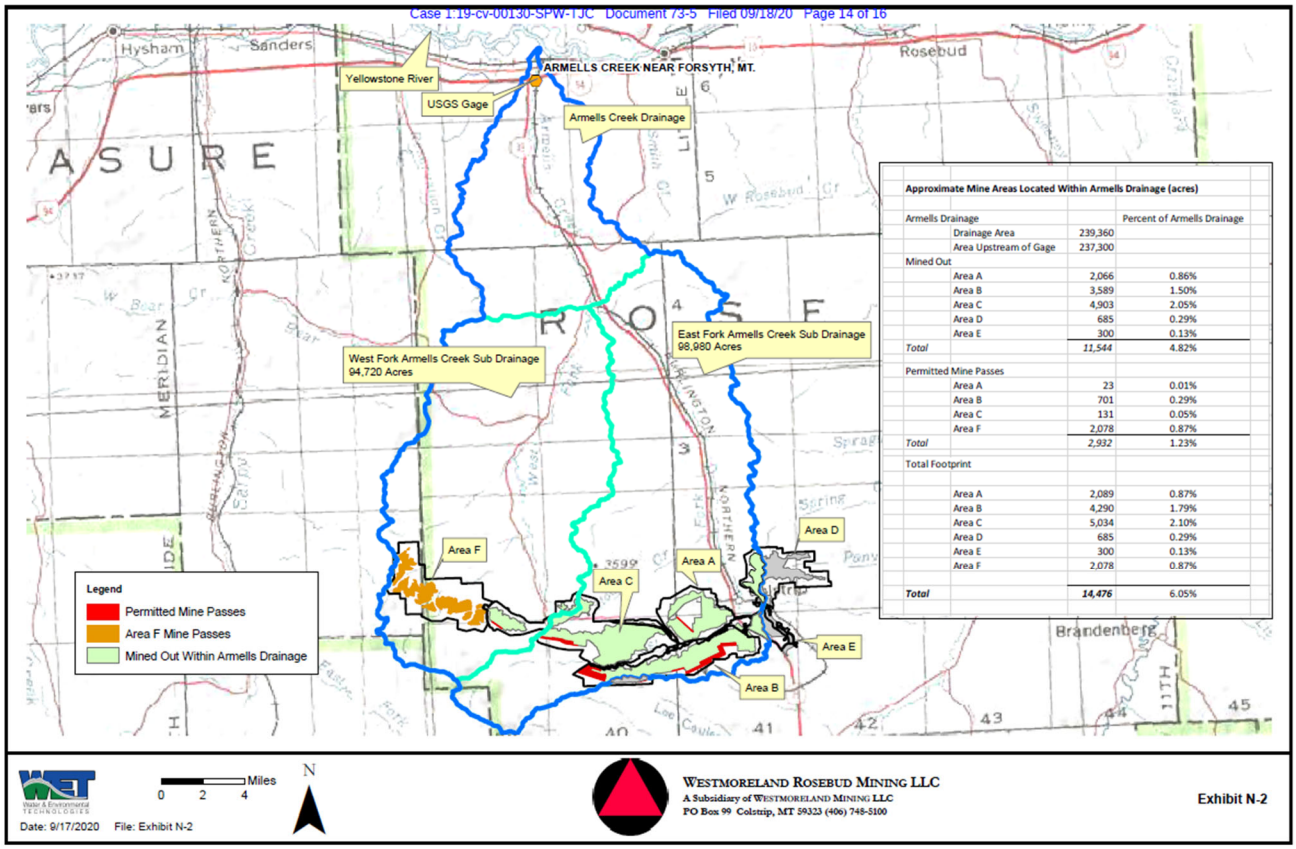

Figure 2. Source: 4-ER-0698.

The larger West Fork drainage is primarily owned by private landowners, with a few scattered and isolated parcels of public land. 4-ER-0645. Given the lack of lands open to public use, very little opportunity exists for public hunting, hiking, or other recreating in the West Fork drainage. *See* 4-ER-0647 ("There are no public easements, trails, or recreation facilities within the [direct effects] analysis area."); 3-ER-0282. The only access to view Area F is to travel the Armells Creek Road through the West Fork. To do so, a person can leave Highway 39 and travel west from Colstrip approximately twelve miles along a gravel county road, drive alongside the current mining operation and reclamation

areas in Mine Areas A and C, and cross over the geographic divide between the East Fork and West Fork drainages. 4-ER-0597, 0645; *see also* Figure 3 below (Area F depicted in orange on map). The West Fork drainage is not visible from the town of Colstrip, other areas of the Mine,[2] or the East Fork drainage. *See* 4-ER-0656–57 (the "nature of the topography" "excludes views of the project area from Colstrip," and other Mine areas).

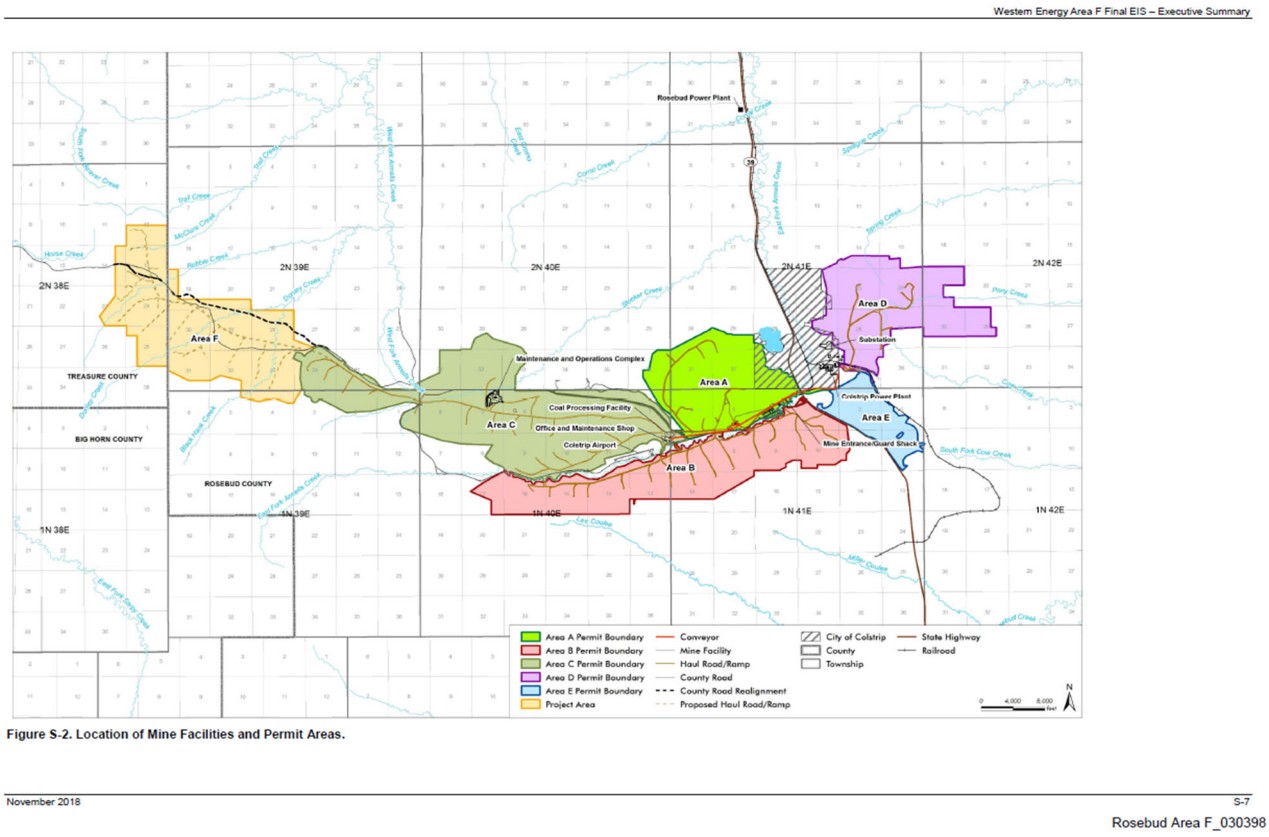

Figure 3. Source 4-ER-0603.

[2] A small portion of Area C is in the upper reaches of the West Fork drainage, but Plaintiffs do not claim to have viewed Area F from Area C. *See* Figures 1 and 2.

In November 2018, the Office of Surface Mining issued the final Environmental Impact Statement ("EIS") for Area F, under the National Environmental Policy Act ("NEPA"). 1-ER-0041. In June 2019, after eight years of environmental review, the Office of Surface Mining issued a Record of Decision approving the expansion. 1-ER-0042. In November 2019, Plaintiffs challenged the Record of Decision in U.S. District Court. 4-ER-0502–33.

B. Plaintiffs' Alleged Interest in the West Fork and Area F

Five plaintiffs joined in the original challenge to Area F: Montana Environmental Information Center ("MEIC"); Sierra Club; WildEarth Guardians; Indian People's Action; and 350 Montana. The District Court ruled that only two—MEIC and the Sierra Club—demonstrated standing. *See infra* at Statement of the Case § II. Two individuals, both of whom are members of both organizations, submitted declarations in support of these organizations' standing.

1. Mr. Derf Johnson

Mr. Derf Johnson lives over 360 highway-miles and five hours from Area F in Helena, Montana. 3-ER-0306. After law school, Mr. Johnson became an environmental advocate. *Id.* He "abhor[s] the practice of coal mining" and, as a lawyer for MEIC for 10 years, he has worked to end it. 3-ER-0306, 0311. Mr. Johnson alleges a personal interest in the vast reaches of "southeastern Montana prairie and forests," having hunted, fished, and driven through some

unspecified parts of "southeastern Montana." 3-ER-0307. "As part of the duties of [his] employment" opposing every aspect of the Rosebud Mine operations over the past decade, Mr. Johnson regularly travels to "the Colstrip region" to meet with members, view the Colstrip power plant, and view areas of the Mine that can be seen from public roads. *Id*.

Prior to 2019, Mr. Johnson does not claim any interest in and did not travel through the West Fork drainage near Area F. In September 2019, *after the Office of Surface Mining approved the challenged Area F Mine Plan*, MEIC assembled a delegation consisting of three attorneys for MEIC (one of whom was Mr. Johnson) and Mr. Gilbert, MEIC's other declarant. This group drove along the public county road through the West Fork drainage for the express purpose of viewing Area F. 3-ER-0307.[3] In May 2020, apparently for purposes of this litigation and *six months after this case was initially filed*, Mr. Johnson returned to drive by Area F, where he alleges experiencing "shock[] and disgust[]" from viewing mining in precisely the location where he came to view it. 3-ER-0308. Finally, in March 2021, Mr. Johnson returned to the Colstrip area for another drive-through. This time he did not enter or even approach the West Fork drainage (where Area F is

[3] Mr. Johnson does not state precisely what month he traveled to Area F, but per Mr. Gilbert's declaration and the attached photos, their joint trip was in September 2019 (3-ER-0311, 3-ER-0442 (Dep. Tr. 77:2-6)), three months after the Record of Decision approving Area F.

located). Instead, he remained in the *East Fork* drainage and drove along Armells Creek at a location somewhere below the confluence of the West and East Forks of the Creek, at least 15 miles from Area F. 3-ER-0309.[4]

Mr. Johnson claims he plans to continue traveling to "Southeastern Montana" to spend time on a friend's ranch, and that he will also swing by the Mine to "view the current status of the Area F expansion." 3-ER-0310.

2. Mr. Steven Gilbert

Mr. Steven Gilbert, like Mr. Johnson, lives over 360 highway-miles from Area F in Helena, Montana. 3-ER-0293. He is on the board of MEIC and has long been a standing declarant in MEIC litigation opposing previous permits and activities at the Rosebud Mine. Based on a number of declarations and deposition testimony, in his past decades of work (Mr. Gilbert is retired) and recreation in the Colstrip area, Mr. Gilbert's recreational interest has been in other areas of southeastern Montana. 3-ER-0295–96. Conspicuously absent from Mr. Gilbert's prior testimony is mention of his use and enjoyment of the *West* Fork drainage,

[4] None of MEIC's declarations claim that Area F can be viewed from the East Fork drainage or Colstrip. Thus, MEIC can hardly claim to have met its burden to show injury arising from Area F based on visits to the East Fork drainage without evidence that the mine expansion at issue could be seen. Although not relevant in this case, Westmoreland and the Union do not concede that Plaintiffs have ever established standing to challenge Mine activities in the East Fork drainage, as those visits were similarly orchestrated in previous years to challenge prior mine expansions.

even when specifically asked. 3-ER-0390–93; 3-ER-0404–06 (disclaiming interest in West Fork).

By contrast, in this case Mr. Gilbert now recalls generally that he has visited the West Fork during the past 50 years of work and recreation, which has taken him all over Montana, including Southeastern Montana. 3-ER-0295–96. Specific to Southeastern Montana, between 1977 and 1986 (35-45 years ago), he claims to have hunted in the area, 3-ER-0295, although deposition testimony in MEIC's state administrative challenge to Area F indicates he last hunted in 2007, and that his hunt was limited to a ranch south and east of Colstrip (in the opposite direction from Area F) and north of Colstrip, with both locations at least 15 miles from Area F. 3-ER-0417, 0421, 0424–27 (Dep. Tr. 19:3-9; 25: 9-18; 28:16–31:25), 3-ER-0444 (Dep. Tr. 101:8–20). In the last 15 years, he says that he drove around Colstrip for work, recreation, or as a board member of conservation organizations, during which he *visited* (presumably, drove through) the West Fork at unspecified times. 3-ER-0295–96.

As the Office of Surface Mining advanced its NEPA review of Area F, Mr. Gilbert began targeted drives through the West Fork drainage.

- In 2017, long *after the Office of Surface Mining had noticed its intent to prepare an EIS* and just before the draft EIS for Area F was released for

public review and comment, Mr. Gilbert claims to have driven "into Area F." 3-ER-0296.

- In 2018, *after the draft EIS was released*, and MEIC submitted comments reflecting its intention to challenge the Mine expansion, Mr. Gilbert drove through Area F again. *Id*. In deposition testimony as part of MEIC's state administrative challenge of Area F, Mr. Gilbert admitted the trip was specifically intended to establish standing.

  > Q: Why did you want to document that you were in that area [near Area F]?
  >
  > Gilbert: It was in anticipation of the MEIC challenge.
  >
  > Q: *And is it fair to say to demonstrate standing in this proceeding?*
  >
  > Gilbert: *I suppose so*.

  3-ER-0441 (Dep. Tr. 70:19-25) (emphasis added).

- In 2019, Mr. Gilbert was with the MEIC lawyers that traveled to Area F, again, for the purposes of this litigation, and presumably, with the specific intent to establish standing. *Id*.; 3-ER-0442 (Dep. Tr. 77:2-9).

- Finally, in 2020, *after the case was filed*, Mr. Gilbert claims to have traveled the county road from Colstrip through the ongoing mine operations to view the new activity in Area F, precisely where he knew it could be viewed. 3-ER-0296.

Though Mr. Gilbert claims he intends to continue to visit the West Fork drainage, he does not detail any particular plans to do so. *See* 3-ER-0300–01. Thus, Mr. Gilbert's alleged interest in Area F amounts to a handful of perfunctory drives initiated when litigation was imminent.

II. Procedural History

Plaintiffs, in addition to three other original plaintiffs, initiated this action in November 2019, alleging that the Office of Surface Mining's Record of Decision and underlying EIS violated the requirements of NEPA and the APA. 4-ER-0502–33. Though the District Court referred preliminary motions to the Magistrate Judge, *see* 3-ER-0498–500, the parties did not consent to referral of the merits decision to the Magistrate Judge. *See* 3-ER-0460.

Westmoreland first challenged Plaintiffs' standing in a Rule 12 motion to dismiss. 3-ER-0494–97. Separately, Westmoreland moved for targeted discovery regarding the alleged interests of Mr. Gilbert and the declarant for WildEarth Guardians. 3-ER-0448–51. On referral from the District Court Judge, the Magistrate Judge denied the motion for discovery and recommended that the action be dismissed for lack of standing with respect to three of the five plaintiffs, who had not alleged sufficient injury in fact. 3-ER-0380–81. Plaintiffs did not object to the dismissal of three of the five plaintiffs. The District Court adopted the

Magistrate Judge's findings and recommendations in full.[5] 3-ER-0355. Plaintiffs subsequently amended their complaint, adding back the three parties that had been dismissed. 3-ER-0314–53.

In June 2021, the parties filed cross-motions for summary judgment. In their motion, Westmoreland and the Union argued, *inter alia*, that all five plaintiffs had failed to establish the requisite standing. 2-ER-0238–43. In particular, Westmoreland and the Union explained that Plaintiffs had attempted to manufacture standing. Rather than show a pre-existing interest in Area F, the declarants went out of their way to create an aesthetic or recreational injury in the vicinity *after* learning of the proposed Mine expansion, by traveling great distances to the Mine, in some cases accompanied by their litigation team, to view Area F. Notwithstanding declarants' self-inflicted injury, the Magistrate Judge found that three declarants (Mr. Johnson, Mr. Gilbert, and Mr. Jeremy Nichols) adequately showed standing.[6] 1-ER-0045–52. On the merits, the Magistrate Judge found that

[5] In order to survive Westmoreland's facial motion to dismiss, the environmental opponents simply needed to allege facts sufficient to support standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). The Court found that three plaintiffs had failed to adequately allege injury in fact to meet even this minimal threshold.

[6] Plaintiffs did not attempt to argue that two of their standing declarants had sufficient interests to maintain standing where neither had ever been in the vicinity of Area F. *See* 1-ER-0046 n.3.

the Office of Surface Mining's analysis of Area F's environmental impacts failed to meet NEPA's requirements. 1-ER-0052–74.

The parties filed timely objections to the Magistrate Judge's findings and recommendations. Westmoreland and the Union included nine pages objecting to the Magistrate Judge's recommendation on standing, emphasizing that the declarants had attempted to manufacture "drive-by" standing and citing case law disapproving such a practice. 2-ER-0088–96.[7]

In the order on appeal ("Order"), 1-ER-0002–38, the District Court applied a piecemeal standard of review, considering some of the Magistrate Judge's findings and recommendations de novo and others for clear error. Specifically, the District Court applied a de novo standard of review only to those findings and recommendations to which, as the court described, the parties "properly objected." 1-ER-0008–09, 0019, 0022, 0028, 0036. For objections deemed "improper," it applied a clear error standard. 1-ER-0008, 0017–18, 0022, 0027.

Regarding Westmoreland's and the Union's objections on standing, the District Court determined on clear error review that one of the three distant declarants, Mr. Jeremy Nichols, an employee of WildEarth Guardians who lives over 500 miles away in Colorado, had impermissibly manufactured standing by

[7] Plaintiffs did not object to the Magistrate Judge's finding that two of the plaintiffs lacked standing. *See* 1-ER-0008 n.1.

"us[ing] the area in pursuit of environmental activism without a pre-existing personal connection." 1-ER-0014. Specifically, (i) Mr. Nichols' historic visits to the area were to "southeast Montana," a "vast" area too imprecise to support standing, (ii) his travel to the "area where the Rosebud mine and Area F are located" did not specify the bounds of the "area," and (iii) his "most recent" trip coincided with the organization's dispute over the Mine, suggesting that the declarant went "looking for pollution." 1-ER-0013–14.

By contrast, the District Court determined that Mr. Johnson and Mr. Gilbert had established standing for MEIC and the Sierra Club. 1-ER-0009–12. Though the District Court did not disagree that Mr. Johnson and Mr. Gilbert had gone to Area F looking for pollution, the court determined that their pre-existing interest in the area was enough to establish an injury. *Id*. The Court made the finding despite Mr. Johnson's admission that his regular trips to the "Colstrip region" were "part of [his] duties of . . . employment," and not for aesthetic or recreational purposes, 3-ER-0307, and despite Mr. Gilbert's admission that his aesthetic interests were in areas other than the West Fork, 3-ER-0295–96. The District Court ultimately found no clear error in the Magistrate Judge's findings and recommendations as to Mr. Johnson and Mr. Gilbert. 1-ER-0011–12.

On the merits, the District Court adopted most of the Magistrate Judge's findings that the Office of Surface Mining's analysis ran afoul of NEPA and the

APA, applying clear error review to some issues and de novo review to others. 1-ER-0014–36. The District Court remanded to the Office of Surface Mining, deferring vacatur for 19 months to allow correction of the identified errors. 1-ER-0037–38.

Westmoreland and the Union timely appealed the Order to this Court. 4-ER-0699–702. The remaining Plaintiffs filed a motion to dismiss for lack of jurisdiction. App. Dkt. 9. The motions panel denied Plaintiffs' motion without prejudice to renewing their jurisdictional arguments in the answering brief. App. Dkt. 20.

SUMMARY OF THE ARGUMENT

Westmoreland and the Union appeal two issues from the District Court's order—whether Plaintiffs have standing to sue and whether the District Court could apply the clear error standard of review to the Magistrate Judge's findings and recommendations. The District Court erred on both counts.

First, Plaintiffs failed to meet their burden to prove standing for at least four reasons.

- The two declarants have endeavored to manufacture standing through deliberate and targeted trips to the West Fork with no purpose other than to observe the Area F expansion. Plaintiffs cannot claim injury from self-inflicted harms—"someone who goes looking for pollution

cannot claim an aesthetic injury in fact from seeing it." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 540 (5th Cir. 2019).

- Plaintiffs' argument that its injuries were not self-inflicted—that its declarants (an MEIC board member and lawyer) have an abiding aesthetic interest that pre-dates Plaintiffs' opposition to Area F—is simply not credible where one declarant never visited Area F before the Final Record of Decision and the other admitted that (i) he joined Sierra Club to ensure standing for the organization, (ii) he diverted from the direct route to a destination to drive through Area F, and (iii) his specific purpose in visiting the West Fork was to establish standing.
- Plaintiffs' alleged recreational and aesthetic interest in the vast reaches of "Southeastern Montana" and the "Colstrip region" are too vague to support standing.
- The declarants failed to allege firm plans to return to Area F or the West Fork, other than for the purpose of monitoring the progress of mining.

Plaintiffs have no pre-litigation interest in the relevant area. Instead, they have engineered drive-bys solely to establish standing. The Court should reverse and remand with direction to the District Court to dismiss the case with prejudice.

Second, contrary to 28 U.S.C. § 636(b)(1), the District Court applied an unlawful clear error standard of review to Westmoreland's and the Union's objections to the Magistrate Judge's findings and recommendations. The Federal Magistrates Act demands application of a de novo standard of review, lest the District Court unconstitutionally abdicate its Article III role and responsibilities. Here, by applying clear error review to the standing issue, as well as to substantive questions going to the merits, the District Court erred, and its decision should be reversed and remanded for review under the prescribed de novo standard of review.

STANDARDS OF REVIEW

The Court reviews a district court's ruling on summary judgment de novo. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020). Questions of standing are also reviewed de novo. *Loyd v. Paine Webber, Inc.*, 208 F.3d 755, 758 (9th Cir. 2000). Finally, the propriety of the District Court's application of clear error review to the Magistrate Judge's findings and recommendations under 28 U.S.C. § 636 is a question of law reviewed de novo. *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000) ("Purely legal questions are reviewed de novo.").

ARGUMENT

I. MEIC AND THE SIERRA CLUB DID NOT CARRY THEIR BURDEN TO PROVE STANDING TO CHALLENGE AREA F.

A. The Constitutional Minimum of Article III Standing.

The "irreducible constitutional minimum of standing" requires the party invoking federal jurisdiction to establish three elements. *Lujan*, 504 U.S. at 560. First, the litigant has the burden to demonstrate "injury in fact," or an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations and quotations omitted). Second, the injury in fact must be "fairly traceable to the challenged action," and not the result of the independent actions of a third party. *Id*. (citations and quotations omitted). Third, and finally, a favorable decision must be likely to redress the injury. *Id*. at 561. Plaintiffs bear the burden to support each element of standing "in the same way as any other matter on which the plaintiff[s] bear[] the burden of proof" "at the successive stages of the litigation." *Id*. At summary judgment, "the plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true." *Id*. (citation omitted).

When an organization seeks to challenge an agency action on behalf of its members, it must demonstrate that (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests at stake are germane to the

organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc*., 528 U.S. 167, 181 (2000). Thus, for purposes of this case, Plaintiffs were required to present members who could establish injury in fact, causation, and redressability.

In environmental cases, courts must carefully distinguish between injury to the plaintiff and injury to the environment. *See Laidlaw*, 528 U.S. at 181. Generalized advocacy regarding a particular environmental issue or concern—i.e., activism against coal mining or opposition to activities generating greenhouse gas emissions—does not establish a sufficient particularized interest or geographic nexus for standing. *See Wash. Env't. Council v. Bellon*, 732 F.3d 1131, 1143–44 (9th Cir. 2013) (no standing where effect of refinery emissions on climate was "scientifically indiscernible"); *Mont. Env't. Info. Ctr. v. BLM*, 2013 U.S. Dist. LEXIS 86560, at *18–23 (D. Mont. June 14, 2013) (MEIC lacked standing to challenge oil and gas leases on climate alone), *overruled on other grounds*, 615 F. App'x 431 (9th Cir. 2015); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 307 (D.C. Cir. 2013) (Plaintiffs "cannot establish standing based on the effects of global climate change.").

Rather, Plaintiffs must establish a cognizable interest with a geographic nexus to the area at issue—"a connection to the area of concern sufficient to make

credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded." *Ecological Rights Found. v. Pac. Lumber Co*., 230 F.3d 1141, 1149 (9th Cir. 2000) (citation omitted). Vague allegations regarding recreational use or an aesthetic interest within a large or undefined area are not enough. *Summers*, 555 U.S. at 499 ("plaintiffs must show that they use the area affected by the challenged activity and not an area roughly in the vicinity of a project site." (citation and quotation omitted)). Without a geographic nexus, Plaintiffs cannot establish injury in fact. *Id*. (court must "assure itself that" members "plan to make use of the specific sites" where the environmental effects will be felt); *Lujan*, 504 U.S. at 567 n.3 ("geographic remoteness" forecloses injury where "the impact . . . in those distance places" will not extend to plaintiffs' location).

B. Self-Inflicted Harms Do Not Establish an Injury Sufficient to Support Standing.

Absent a concrete and particularized injury to an *existing* interest, Plaintiffs cannot manufacture standing by placing themselves in harm's way. Where alleged injuries are built on aesthetic or recreational interests, Plaintiffs cannot decide to target a particular action *first*, and then establish a geographic nexus to the place by dispatching members to the area *later*. The Fifth Circuit Court of Appeals said as much in *Center for Biological Diversity*, 937 F.3d 533. There the plaintiffs wanted

to challenge oil and gas operations in the Gulf of Mexico, so they deliberately sought out oil platforms and potential spills to establish standing. The court held that "someone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it." *Id*. at 540. In other words, "[a] person cannot manufacture standing by voluntarily setting aside potential aesthetic interests (like viewing a pristine expanse of ocean) to pursue an incompatible interest (like viewing oil spills)." *Id*. at 541.

As the Second Circuit similarly explained in *Mancuso v. Consolidated Edison Co.*:

> the record here demonstrates nothing more than that the Mancusos visited Echo Bay in order to prepare for this litigation. Their aesthetic sensibilities may have been injured in the course of these visits, but *the Mancusos do not currently reside, own property, or recreate in, on, or near Echo Bay*; they do not "use" Echo Bay for any purpose other than to obtain evidence to support this lawsuit.

25 F. App'x. 12, 13 (2d Cir. 2002) (emphasis added). The Second Circuit went on to say that "[a]ny aesthetic injury experienced as a result of these visits is therefore simply *a byproduct of this lawsuit* and cannot satisfy even the minimal showing of injury-in-fact needed to meet the standing requirement. *Id*. (emphasis added).

In *Ohio Valley Environmental Coalition v. Maple Coal Co*., 808 F. Supp. 2d 868, 879–80 (S.D. W. Va. 2011), the court dismissed Clean Water Act claims for lack of standing where the plaintiffs lacked a "prior connection" to the specific

creek where injury was alleged. If the court were to find otherwise, "any individual with an interest in [the state] and a general concern for the environmental health of the state could create standing" simply by visiting the site of the action; "[t]his pushes the standing analysis too far." *Id*. at 880. Only declarants with pre-existing recreational and aesthetic interests in the targeted streams could establish standing.

This result is consistent with cases in this and other circuits rejecting standing based on self-inflicted injuries. *See Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 959 F.3d 341, 350–51 (9th Cir. 2020) ("Purely 'self-inflicted injuries' are insufficient" to establish standing. (citation omitted)); *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 415–18 (2013) (parties cannot manufacture standing by voluntarily incurring costs based upon fears of hypothetical future surveillance); *Grocery Mfrs. Ass'n v. EPA,* 693 F.3d 169, 177 (D.C. Cir. 2012) (voluntary use of a new type of fuel is "self-inflicted harm" not fairly traceable to government conduct); *New Eng. Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 175 (D.D.C. 2016) (aesthetic injury is self-inflicted when the person's "presence at the place that he says will injure him aesthetically is not compelled (e.g., someone who does not live or work in the vicinity, nor has any history of traveling there, and is not otherwise required to be there)" or the person sets aside potential aesthetic interests to pursue an

incompatible interest). In sum, absent a pre-existing aesthetic or recreational interest in an area, an environmental advocacy group cannot create standing by sending members to the area, after the challenged action is proposed, to investigate or monitor pollution.

C. Plaintiffs Fail to Demonstrate a Concrete and Particularized Injury from Area F Mining.

Plaintiffs cannot point to a single member who lives and works in Colstrip, Montana, or even in Rosebud County. Instead, they rely on the alleged aesthetic interests of a staff attorney and a board member, both of whom live over 360 highway-miles from Area F and who were dispatched to drive through the West Fork after MEIC began active opposition to Area F. This long distance, "drive-by" injury, coupled with vague or non-existent prior interests in the West Fork, does not show the requisite standing.

1. Plaintiffs Deliberately Orchestrated Drive-By Visits to Area F to Manufacture Standing.

Mr. Johnson and Mr. Gilbert both acknowledge that their handful of drives through the West Fork drainage and past Area F were motivated by the anticipated Area F litigation. Indeed, it is implausible that they would have had any Area F-related interest ***not*** based on the need to prove standing. The Area F surface and the vast majority of the surrounding lands in the West Fork are privately owned: entering into or near Area F would amount to trespass. *See supra* at Statement of

the Case § I.A. The only public lands available for recreation in the West Fork are small, isolated sections, many of which are only accessible through private lands, leaving limited opportunity to hike, bike, horseback ride, or hunt on lands in view of Area F. *See* 4-ER-0647; 3-ER-0282. The only way to observe Area F is to undertake a lengthy drive away from any plausible areas for recreation, and, more importantly, MEIC's standing witnesses only took this trip to establish standing in preparation for litigation. Neither Mr. Johnson nor Mr. Gilbert alleges any other use or interest potentially affected by Area F.

By 2017, as the timeline in Figure 4 below shows, MEIC and the Sierra Club had already registered their opposition to Area F and were gearing up for potential litigation when Mr. Gilbert first drove by Area F. *See* 4-ER-0662–93 (2013 MEIC and Sierra Club scoping comments opposing Area F); 4-ER-0694–97 (2013 MEIC and Sierra Club Letter to the Office of Surface Mining opposing Area F). As Area F progressed and approval was imminent, Plaintiffs stepped up their efforts, making targeted drives through the West Fork and demonstrating a deliberate intent to manufacture standing.

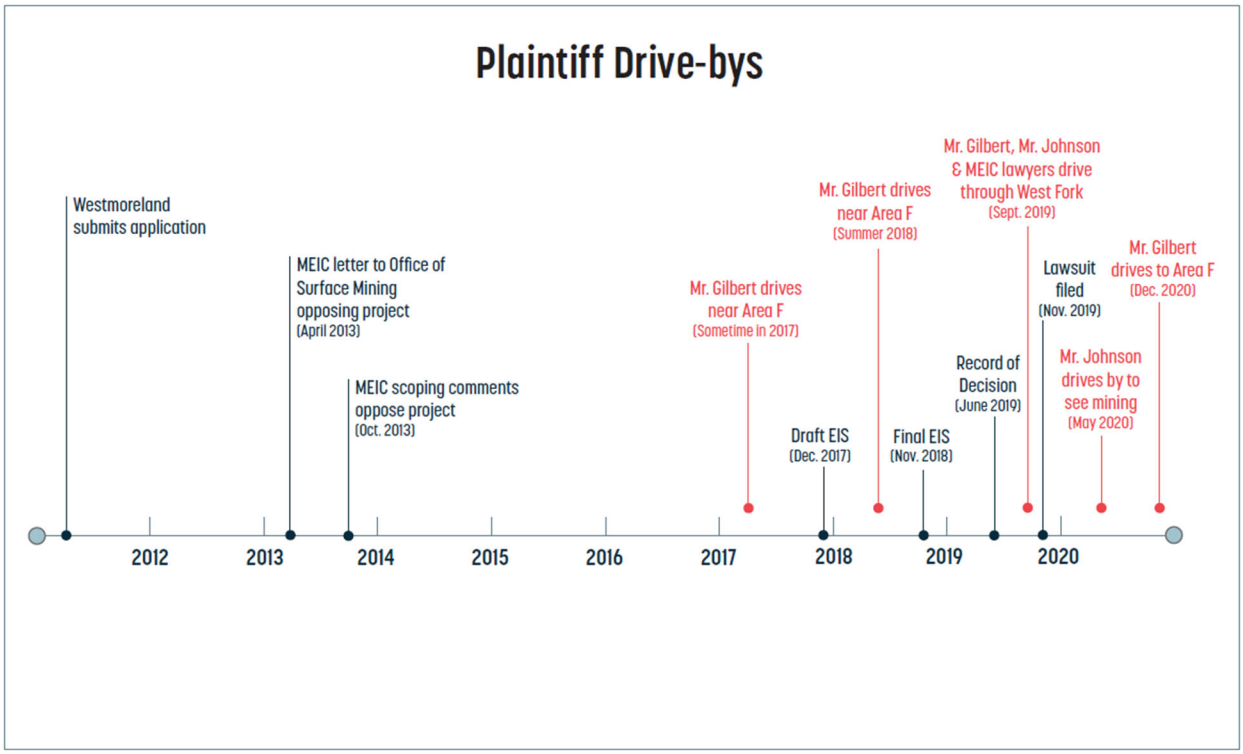

Figure 4. Sources: 3-ER-0307–08 (Johnson actions); 3-ER-0296 (Gilbert actions); 4-ER-0579 (FEIS); 4-ER-0659 (DEIS); 4-ER-0535 (ROD); 4-ER-0502 (complaint); 4-ER-0662 (scoping comments); 4-ER-0694 (letter).

Mr. Johnson. MEIC's counsel, Mr. Johnson, claims to have been in the vicinity of Area F only twice. Both of those visits post-date the Office of Surface Mining's final approval of Area F in June 2019, and were admittedly for the purposes of his employment and apparent pursuit of this litigation:

- In 2019, after the Office of Surface Mining approved Area F, he detoured through the West Fork with the MEIC legal team and Mr. Gilbert just months before this case was filed, in anticipation of the litigation, and presumably to establish standing. 3-ER-0307.

- In May 2020, he drove through again, admittedly to check on the status of Area F mining, apparently for the purposes of this litigation. 3-ER-0308.

Mr. Gilbert. Mr. Gilbert's interest in Area F is limited to four drive-bys dating from 2017 (during the time MEIC was actively engaged in opposition to the Area F expansion and preparing for litigation).[8] A number of facts demonstrate that Mr. Gilbert's connection to Area F was specifically designed to bring this case.

- Mr. Gilbert testified that his purpose in rejoining the Sierra Club was to establish standing. 3-ER-0436 (Hr'g Tr. 113:6-116:8).
- In sworn testimony, Mr. Gilbert disclaimed any prior recreational interest in the West Fork drainage when specifically asked. 3-ER-0390–93; 3-ER-0404–06.
- In 2017, just before the draft EIS was released for public comment, Mr. Gilbert made his first documented trip driving along a county road to view Area F. 3-ER-0296.

[8] Though Mr. Gilbert alleges unspecified early drives through the West Fork, any such visits from decades ago are not sufficient for standing. *See infra* at Argument § I.C.2.

- In 2018, after the draft EIS was released and just before the Final EIS, he drove through again, admitting in parallel state litigation that he deviated from the quickest route to his destination in southeastern Montana that day to drive through the West Fork for the express purpose of establishing standing to challenge Area F. 3-ER-0441 (Dep. Tr. 70:3-25).
- In 2019, the MEIC legal team, including Mr. Johnson, took Mr. Gilbert along with the goal to specifically see Area F, after the challenged Record of Decision authorized the expansion and just a few months before this case was filed. 3-ER-0442 (Dep. Tr. 77:2-6).
- Finally, in 2020, after the lawsuit was filed, Mr. Gilbert drove back into the West Fork to see the Area F mining operations. 3-ER-0296.

Mr. Johnson's and Mr. Gilbert's visits to the West Fork and Area F are self-inflicted injury: (i) they were not compelled, and (ii) the declarants set aside their aesthetic interests to travel out of their way to pursue the incompatible interest of looking for pollution. Having taken lengthy expeditions for the sole purpose of seeing Area F, as the Area F approval was imminent and then after this case was filed, MEIC's witnesses were indisputably "looking for" any aesthetic injuries they suffered. *Ctr. for Biological Diversity*, 937 F.3d at 540–41 ("A person cannot manufacture standing by voluntarily setting aside potential aesthetic interests (like

viewing a pristine expanse of ocean) to pursue an incompatible interest (like viewing oil spills).”). To the extent either was “shock[ed],” “disgust[ed],” or “sicken[ed],” to see the mining they set out to see, those effects epitomize self-inflicted injury.

The District Court dismissed the third plaintiff below on this basis, finding the “temporal parallel” between the WildEarth Guardians declarant Mr. Jeremy Nichols’ interest in Area F and his employer’s opposition to the Mine to be too convenient. 1-ER-0014. As the District Court held, “use of the area in pursuit of environmental activism without a pre-existing personal connection” could not support standing.[9] *Id*. The same is true of Mr. Johnson and Mr. Gilbert, who only began the drives past Area F when litigation was imminent. Thus, “[a]ny aesthetic injury experienced as a result of these visits is . . . simply a byproduct of this lawsuit.” *Mancuso*, 25 F. App’x at 13.[10] To find otherwise would nullify the

[9] The District Court did not disagree that Mr. Johnson’s and Mr. Gilbert’s recent trips to Area F were designed to prove standing. But the court apparently excused the self-inflicted nature of the injuries caused by these targeted trips based on the declarants’ alleged pre-existing interest in the area, 1-ER-0010–12. The record, however, does not support the existence of any such previous interests. *See infra* at Argument § I.C.2.

[10] To the extent Mr. Johnson or Mr. Gilbert claim injury from seeing other aspects of the coal mining operation or the operations at the Colstrip Power Plant within the town of Colstrip, these “aesthetic” injuries are not fairly traceable to mining in Area F and would not be redressed by halting mining in Area F where other areas

Article III case and controversy requirement that the person seeking review "be himself among the injured." *Lujan*, 504 U.S. at 563 (quotation and citation omitted). Instead, "any individual with an interest in [opposing coal mining] and a general concern for [climate change] could create standing" simply by driving by the site of the action. *Ohio Valley*, 808 F. Supp. 2d at 880. Standing does not stretch so far.

2. Without Their Manufactured Interests, Plaintiffs Lack a Geographic Nexus to Area F; Interests in "Southeastern Montana" or the "Colstrip Region" Are Too Vague to Support Standing.

The courts have rejected standing grounded on generalities or use within a "vast area" that is not limited to the site at issue. *Summers*, 555 U.S. at 499; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (claims of use of "unspecified portions of an immense tract of territory" cannot support standing). Here, the standing witnesses allege only vague locational interests.

Mr. Johnson. Mr. Johnson does not allege any interest in, or visits to, the West Fork or Area F prior to the summer of 2019 (shortly before this litigation was filed) when he, Mr. Gilbert, and other MEIC lawyers drove through the area. *See* 3-ER-0307. Prior to 2019, Mr. Johnson alleges only general travel to the "Colstrip

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of the Rosebud Mine, or other mines, are separately permitted and will continue to support power plant operations. 4-ER-0642, 0650.

region" and "Colstrip and the surrounding area," "[*a*]*s part of the duties of my employment*."[11] *Id.* (emphasis added). In other words, Mr. Johnson alleges no pre-litigation interest in the West Fork.

Mr. Gilbert. Mr. Gilbert comes somewhat closer than Mr. Johnson to a pre-existing interest, but still falls short. Much of his alleged connection to the West Fork is decades old as part of his job as a biologist from 1977-1986 (he is since retired), or based on vague assertions of unspecified drives "through and around Colstrip" in the past 15 years. 3-ER-0295–96. Moreover, the facts show that Mr. Gilbert's pre-litigation interest was in southeastern Montana and areas where he hunted and fished near Colstrip—not near Area F.[12] Prior to his opposition to Area F, Mr. Gilbert specifically disclaimed any use of lands in the vicinity of Area F in the West Fork where he has never hunted, hiked, or fished. 3-ER-0390–93, 3-ER-0404–06. He now only vaguely claims to have occasionally driven through the

[11] The District Court pointed to Mr. Johnson's numerous trips to Colstrip as evidence of his prior interest in the area. 1-ER-0009–10. Colstrip is not Area F, however, and Area F cannot be viewed from Colstrip, which is 12 miles away. Regardless, Mr. Johnson does not allege his interest in visiting Colstrip for purposes of his employment will be in any way affected by mining in Area F.

[12] When asked in a prior deposition to indicate precisely where he had previously hunted in the vicinity of the Mine, Mr. Gilbert circled two areas on a map. 3-ER-0424–29 (Dep. Tr. 28:16–33:13). One is southeast of Colstrip, and the other is a small section of State land north of Colstrip and east of Highway 39, both approximately 15 miles from Area F and not within view. *See id.*

West Fork basin before his first litigation-focused trip in 2017. 3-ER-0295–96. As noted above, there is no other plausible reason for Mr. Gilbert to have traveled the route to or near Area F. *See supra* at Argument § I.C.1.

Even if Mr. Gilbert did occasionally drive through the West Fork or alongside Area F on the county road over the years, such vague and unspecified interests are not enough for standing. As this Court noted in *Friends of Animals v. U.S. Fish and Wildlife Serv.*, 789 Fed. App'x. 599, 600 (9th Cir. 2020), "travels across [an area] . . . taking [the declarant] through [the area]" are not sufficient to establish a particularized interest in the place.

Plaintiffs below relied heavily on *Laidlaw*, 528 U.S. 167, but that case cannot help their claims. There, *several* standing witnesses lived very near the site and *regularly* recreated on the very river where the pollution was occurring. The Supreme Court recounted that (i) one organization member lived "a half-mile from Laidlaw's facility" and had fished, camped, and picnicked on the river at issue; (ii) another "lived two miles from the facility" and had "picnicked, walked, birdwatched, and waded" along the river; (iii) another member lived 20 miles away and said that she would recreate on the river were it not for her concerns about illegal discharges; (iv) another member testified that her home near the Laidlaw facility had a lower value due to pollutant discharges; and (v) finally another member said that he had canoed on the very river at issue in the litigation. *Id*. at

181–83. Nothing in the record below even approximates the *Laidlaw* standing declarants' level of connection to the Area F expansion.

Even the District Court below rejected standing for the third plaintiff (WildEarth Guardians) where its declarant, Mr. Jeremy Nichols, averred a pre-litigation interest "generally to southeast Montana," because "the region of southeast Montana is vast."[13] 1-ER-0013–14. Mr. Johnson's and Mr. Gilbert's alleged interests in the "Colstrip region" are equally insufficient. Any pre-existing recreational and aesthetic interests in the vastness of Southeastern Montana or areas near Colstrip, particularly where they are miles away and not visible from Area F or the West Fork, are not enough to establish injury.

3. Plaintiffs' Alleged Intentions for Future Visits to Area F Are Insufficient.

Plaintiffs' standing witnesses do not provide a credible basis to show concrete plans to make future visits to the West Fork.

Mr. Johnson. At the time of Mr. Johnson's declaration in mid-2021, he claimed to have plans to visit "the Colstrip region" and "Southeastern Montana" to

[13] The Magistrate Judge recommended dismissal of two of the original five plaintiffs at summary judgment on similar grounds, where one had "not claim[ed] a particularized injury in relation to Area F," and the other only alleged he visited Colstrip on a single occasion and did not assert any plan to return. 1-ER-0046 n.3. Plaintiffs did not object to dismissal of those other plaintiffs from the case. *See* 1-ER-0008 n.1.

hunt on a friend's ranch. 3-ER-0310. Mr. Johnson does not specify where his friend's ranch is located. *See id.* Further, there is no evidence that he followed through on these plans during the last two years. In any case, unplanned future visits to unspecified areas within broad areas like the Colstrip region and southeastern Montana, do not provide a sufficient geographic nexus to establish an injury in fact. *See supra* at Argument § I.C.2. Moreover, any future targeted trips to Area F, which Mr. Johnson has not specifically planned, would, as Mr. Johnson described, be for the specific purpose "to view the current status of the Area F expansion," not to recreate in the area. 3-ER-0310.

Mr. Gilbert. Mr. Gilbert's general interest in returning to southeastern Montana is insufficient for the same reasons. There is no record evidence of any visit from Mr. Gilbert anywhere in the vicinity of the Mine (much less near Area F) in the last three years. *See* 3-ER-0292–303.[14] Certainly, Mr. Gilbert does not profess to have plans to actually set foot on the privately held land in Area F. If he does return, it will be limited to a "drive by" expressly to view the Area F mining.

[14] Mr. Gilbert's testimony in other proceedings calls into question whether he will follow through on his intent for future visits. In a prior deposition, Mr. Gilbert claimed having "concrete" plans to hunt turkeys near Colstrip in the spring of 2018, but later admitted in sworn testimony that the hunting did not occur. 3-ER-0397 n.8; 3-ER-0447 (Dep. Tr. 111:14–113:6).

Absent a concrete plan to return to the West Fork, Plaintiffs cannot demonstrate a cognizable injury. "Such 'someday' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury" required to show standing. *Summers*, 555 U.S. at 496 (quoting *Lujan*, 504 U.S. at 564) (emphasis in original).

D. Westmoreland and the Union Should be Allowed to Take Discovery and the District Court Should Hear Testimony.

Plaintiffs have the burden to establish standing. *See, e.g.*, *Lujan*, 504 U.S. at 561; *Leite*, 749 F.3d at 1121. At summary judgment, "the plaintiff can no longer rest on . . . 'mere allegations,' but must set forth by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (citation omitted). Where the facts for standing are "controverted," they must be "supported adequately by the evidence adduced at trial." *Id.* (citation and quotation omitted).

Here, as discussed above, even taking the Plaintiffs' declarations as true, Plaintiffs failed to demonstrate a sufficient injury in fact for standing. However, even if the Court finds that the declarations on their face allege injury in fact, Westmoreland and the Union presented sworn testimony and declarations from other proceedings that raise questions of material fact and controvert Plaintiffs' alleged pre-existing interest in Area F. For instance,

- Though Mr. Gilbert claims generally that he has occasionally driven through the West Fork drainage over the past 15 years, in several sworn statements and depositions over the past 10 years, he failed to claim any particularized interest in the West Fork, even when specifically asked. 3-ER-0404–06.
- At deposition, Mr. Gilbert could not provide clear, specific testimony that he ever hunted or otherwise recreated in the West Fork, 3-ER-0418, 0431–32 (Dep. Tr. 20:13-17, 37:16-25, 38:1-18), despite Plaintiffs' answers to interrogatories suggesting he "regularly hunts" in the West Fork and other drainages near the Mine, 3-ER-0413.
- Mr. Gilbert's description of the nature and purpose of his drive through the West Fork in 2018 evolved over time with inconsistent declarations and deposition statements. While his 2020 standing declaration in this case alleged that he occasionally stopped to walk during his drive to enjoy the beautiful area, he did not mention taking any walks in his 2019 deposition. After Westmoreland and the Union pointed out the inconsistency, Mr. Gilbert backtracked in his standing declaration for summary judgment, returning to his original story that he only drove through the area. *See* 3-ER-0455; 3-ER-0439–40 (Dep. Tr. 46:20–50:24); 3-ER-0296.

These issues of material fact foreclose a finding of summary judgment in Plaintiffs' favor. Rather, Plaintiffs' standing witnesses should be made available

for deposition and to testify, subject to cross-examination, in court. Indeed, standing-based discovery is routinely conducted in suits brought by organizations whose standing derives from individual members. *See Laidlaw*, 528 U.S. at 177 (noting that the district court had examined affidavits and deposition testimony from members of the plaintiff organizations when analyzing standing). Here, given Mr. Gilbert's conflicting testimony regarding his alleged interest and activities in Area F, discovery and a hearing were appropriate and should be ordered on remand. *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 713 (9th Cir. 1992) (If "jurisdictional facts are disputed on remand, the parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed.").

II. THE DISTRICT COURT ERRED BY APPLYING A CLEAR ERROR STANDARD TO REVIEW THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS.

Rather than the statutory de novo review standard required under the Federal Magistrates Act, the District Court applied a clear error standard in reviewing certain of the Magistrate Judge's findings and recommendations to which Westmoreland and the Union had objected. Of particular concern, the District Court reviewed objections regarding Plaintiffs' standing for clear error. Other critical questions going to the merits of Plaintiffs' NEPA claims also were reviewed for clear error, potentially affecting the outcome of the case.

The District Court's use of a lesser clear error standard—on the basis that certain objections were "improper"—is reversible error. As a member of this Court recently explained: "There is no such rule [allowing for a clear error review of objections] in our circuit, and such a rule is atextual, illogical, and likely anathema to Article III." *Maas v. City of Billings*, 2023 U.S. App. LEXIS 3289, at *3 (9th Cir. Feb. 10, 2023) (Wallace, J., concurring).

A. The Federal Magistrates Act Requires De Novo Review When a Party Objects to the Findings and Recommendations.

"The Federal Magistrates Act, 28 U.S.C. §§ 631–39, governs the jurisdiction and authority of federal magistrates." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1118 (9th Cir. 2003) (en banc). Magistrate judges "are creatures of statute, and so is their jurisdiction." *NLRB v. A-Plus Roofing, Inc*., 39 F.3d 1410, 1415 (9th Cir. 1994). Unlike district judges, they are not Article III judicial officers, and "[t]he authority of federal magistrate judges is limited to those matters authorized by Congress." *United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996).

As applicable here, where the parties did not consent to proceeding before the magistrate judge, *see* 28 U.S.C. § 636(c)(1), the district court may designate a magistrate judge to consider various matters. *See id.* § 636(b). These matters are generally categorized as "dispositive" or "non-dispositive," and a magistrate judge's authority with respect to each category is different. *Flam v. Flam*, 788 F.3d 1043, 1045–46 (9th Cir. 2015). Magistrate judges may issue orders as to

non-dispositive pretrial matters, and district courts review such orders under a "clearly erroneous or contrary to law" standard of review. 28 U.S.C. § 636(b)(1)(A). While magistrate judges may hear dispositive motions, they may only make proposed findings of fact and recommendations for a district court judge to consider. *Id*. § 636(b)(1)(B), (C).

Parties are afforded the opportunity to "serve and file written objections" to a magistrate judge's proposed findings of fact and recommendations. *Id.* § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(2); D. Mont. L.R. 72.3. If a party objects:

> A judge of the court ***shall*** make a ***de novo*** determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court ***may*** accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b)(1)(C) (emphasis added). "By utilizing the words 'shall' and 'may' in consecutive sentences, Congress clearly indicated that district courts are *required* to make a de novo determination of the portions of the magistrate judge's report to which a party objects." *Dawson v. Marshall*, 555 F.3d 798, 799 (9th Cir. 2009) (quoting *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000)); *see also Maas*, 2023 U.S. App. LEXIS 3289, at *3 (Wallace, J., concurring) ("Use of the word 'shall' indicates that Congress 'clearly indicated that district courts are

required to make a *de novo* determination of the portions of the magistrate judge's report to which a party objects[.]'" (quoting *Howell*) (emphasis in original)).

Indeed, "the Magistrates Act comports with Article III *because* it subjects magistrates' rulings to de novo determination by a federal district judge." *United States v. Saunders*, 641 F.2d 659, 663 (9th Cir. 1980) (emphasis added) (citing *United States v. Raddatz*, 447 U.S. 667, 681–84 (1980)); *see also Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1415 (9th Cir. 1991) (acknowledging that the "Supreme Court [in *Raddatz*] upheld the constitutionality of this provision on the ground that de novo review provided sufficient oversight").

B. The District Court's Use of a Clear Error Standard Violates the Federal Magistrates Act.

The District Court here applied an unlawful, ad hoc standard under which it reviewed some of the Magistrate Judge's findings de novo and reviewed other findings for clear error. *See supra* at Statement of the Case § II; 1-ER-0008. Specifically, when considering Westmoreland's and the Union's objections, the District Court applied the required de novo standard of review only to those findings and recommendations to which, as the court described, the parties "properly objected," citing Federal Rule of Civil Procedure 72(b)(3). 1-ER-0008, 0019, 0022, 0028, 0036. For any objection deemed "improper," it applied a clear error standard. 1-ER-0008, 0017–18, 0022, 0027.

The District Court's rationale for using the clear error standard is flawed. First, Westmoreland and the Union properly objected to the Magistrate Judge's findings of fact and recommendations. 28 U.S.C. § 636(b)(1). Second, even if that were not so, none of the District Court's cited authorities support application of a clear error standard.

1. Westmoreland and the Union Properly Objected to the Magistrate Judge's Findings and Recommendations.

Westmoreland and the Union timely filed specific objections to the Magistrate Judge's findings of fact and recommendations. *See supra* at Statement of the Case § II. However, applying a "proper" vs. "improper" metric untethered from the Federal Magistrates Act and court rules, the District Court deemed portions of Westmoreland's and the Union's objections "improper."

The Federal Magistrates Act provides broadly that "any party may serve and file written objections," without defining a required form for objections. 28 U.S.C. § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b)(2) ("a party may serve and file specific written objections"). The District Court's local rule provides more guidance:

> (a) An objection filed pursuant to 28 U.S.C. § 636(b)(1) must:
>
> (1) itemize each factual finding of the magistrate judge to which objection is made, identifying the evidence in the record the party relies on to contradict that finding; [and]

> (2) itemize each recommendation of the magistrate judge to which objection is made, setting forth the authority the party relies on to contradict that recommendation[.]

D. Mont. L.R. 72.3(a)(1)-(2). In short, the local rule required Westmoreland and the Union to "itemize" each finding or recommendation to which it objected and support those objections with "evidence in the record" or "authority," respectively. *Id.* Consistent with the local rule, the District Court defined "proper" objections as those that "identify the parts of the magistrate's disposition that the party finds objectionable and present legal argument and supporting authority, such that the district court is able to identify the issues and the reasons supporting a contrary result." 1-ER-0004 (quoting *Mont. Shooting Sports Ass'n v. Holder*, 2010 WL 4102940, at *2 (D. Mont. Oct. 18, 2010)).

From there, the District Court meaningfully parted ways with the clear language of the local rule, engrafting additional, illogical, and onerous requirements. The District Court proclaimed that "restating" an argument made at summary judgment is not enough. *See* 1-ER-0004, 0009, 0027, 0036. Instead, it required (i) citation to "new caselaw," 1-ER-0028, (ii) reference to evidence that was previously "overlooked," 1-ER-0009, or (iii) development of new argument(s), 1-ER-0009, 0017–18, 0022, to warrant de novo review.

These requirements make no sense in this context and are inexplicably drawn from requirements found in separate Federal Rules of Civil Procedure not

applicable here. For example, the District Court's bar against repeating arguments made at the summary judgment stage contradicts Ninth Circuit precedent waiving arguments presented in objections *that were* ***not*** *previously raised* during summary judgment. *See Greenhow v. Sec'y of HHS*, 863 F.2d 633, 638–39 (9th Cir. 1988) (affirming district court's refusal to consider argument raised for the first time in an objection to the magistrate judge's recommendation), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992); *see also Farquhar v. Jones*, 141 F. App'x 539, 540 (9th Cir. 2005) (same).

In a concurring opinion, written specifically to "call attention to the standard of review used by the district court [of Montana] to review the magistrate judge's report and recommendations," Circuit Judge Wallace rejected the district court's choice to apply a clear error standard "because the plaintiff's objections merely advanced the same arguments as those presented to the magistrate judge." *Maas*, 2023 U.S. App. LEXIS 3289, at *3 (Wallace, J., concurring). As Judge Wallace explained: "permitting district courts to employ clear error review of a party's objections merely because the objections repeat arguments made before the magistrate judge turns the nature of review on its head." *Id.* at *4. To hold that "a party is not entitled to de novo review of arguments that were previously raised before the magistrate judge would be illogical." *Id.* (citing *Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339, 346 (6th Cir. 2018) ("The heads-I-win-tails-you-

lose restrictions that the district court has imposed on objections are illogical and without legal support."). According to Judge Wallace: "Such a rule cannot stand." *Id.*

In addition, while courts require motions for reconsideration or amendment under Federal Rules 59(e) and 60(b) to contain, among other things, new evidence or a change in the law,[15] neither 28 U.S.C. § 636(b)(1) nor Rule 72(b)(2) have such requirements. The District Court gave no basis for engrafting these other rules' requirements on objections filed under 28 U.S.C. § 636(b)(1). Indeed, logic precludes any such basis: Rules 59(e) and 60(b) govern a second review by the *same* decisionmaker. Unsurprisingly, a party seeking a different answer from the same decisionmaker should present new information. By contrast, 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) address bringing the same questions before a new decisionmaker—the first (and only) Article III decisionmaker to evaluate those questions in the District Court.

Regardless, Westmoreland's and the Union's objections were sufficient under 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b)(2), and D. Mont. L.R. 72.3(a)(1)–(2), as well as the recent Ninth Circuit guidance on this issue, which

[15] When requesting relief under Rules 59(e) and 60(b), a party must identify "newly discovered evidence." *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Under Rule 59(e), another basis for a party seeking to amend a judgment is to identify "an intervening change in controlling law." *Id.*

provides that even where "objections may have been meritless and imprecisely stated," they still trigger a district judge's obligation to "make a de novo determination." *Maas*, 2023 U.S. App. LEXIS 3289, at *4 (Wallace, J., concurring).

2. The District Court's Cited Authorities Do Not Support a Clear Error Standard.

The District Court relies primarily on *McDonnell Douglas Corporation v. Commodore Business Machines, Inc*., 656 F.2d 1309 (9th Cir. 1981), and *Thomas v. Arn*, 474 U.S. 140 (1985), to support application of a clear error standard when "proper" objections are not raised. 1-ER-0003. But neither case can be stretched to suggest that a clear error standard of review applies to objections brought against the findings and recommendations of a magistrate judge on a dispositive motion pursuant to 28 U.S.C. § 636(b)(1).

The Ninth Circuit in *McDonnell* found just the opposite. When the losing party argued that the district court should have applied a clear error standard to the magistrate's original findings of fact, the court rejected the argument. 656 F.2d at 1313. The court explained that 28 U.S.C. § 636(b) provides for clear error review only for certain pretrial non-dispositive motions. *Id.* "[I]n all other cases, the statute grants the broadest possible discretion to the reviewing district court." *Id.* Importantly, the Ninth Circuit emphasized that "[w]hen either party objects to any

portion of the magistrate's report, the district court is charged to make a de novo determination of that portion." *Id.*

In *Thomas*, the defendant "failed to file objections at any time." 474 U.S. at 144. She argued that rather than foreclosing her late objection under the de novo standard, the court should have nonetheless reviewed the magistrate judge's recommendation "under some lesser standard." *Id.* at 149. The Court disagreed, finding that no lesser standard of review was available under 28 U.S.C. § 636(b). *Id.* The Court explained:

> § 636(b)(1)(C) simply does not provide for such review. This omission does not seem to be inadvertent, because Congress provided for a "clearly erroneous or contrary to law" standard of review of a magistrate's disposition of certain pretrial matters in § 636(b)(1)(A).

Id. at 149. Thus, neither decision makes any mention of an "improper" objection being subject to a clear error standard of review.

The Montana district court opinions relied upon by the District Court likewise lend no support for applying a "proper vs. improper" test to select the appropriate standard of review. *See* 1-ER-0003–04. Indeed, *Hagberg v. Astrue* actually confirms that 28 U.S.C. § 636(b)(1) "require[s] this Court to make a *de novo* determination of those portions of the Findings and Recommendations to which objection is made." 2009 U.S. Dist. LEXIS 95795, at *1–2 (D. Mont. Oct. 14, 2009). The *Hagberg* court criticized the filed objections as "merely

repeat[ing] the arguments already rejected" by the magistrate judge. *Id.* at *2. "This conclusion, however, does not relieve the Court of its duty to review de novo [the magistrate judge's] conclusions of law." *Id.* Indeed, the district court adopted the magistrate judge's recommendations as "well-grounded in law and fact" only "[a]fter a de novo review." *Id.* at *3.

In *Montana Shooting Sports Association v. Holder*, the court explained, consistent with the local rule, that "[a] party makes a proper objection by identifying the parts of the magistrate's disposition that the party finds objectionable and presenting legal argument and supporting authority, such that the district court is able to identify the issues and the reasons supporting a contrary result." 2010 U.S. Dist. LEXIS 110891, at *6–7 (D. Mont. Oct. 18, 2010). But in *Montana Shooting Sports,* the objections "consist[ed] of a list of 12 bullet points summarily describing aspects [of the magistrate judge's] analysis with which they disagree." *Id.* at *6. In other words, "[t]he objections [we]re not supported by any analysis or citation to legal authority, save for a generalized reference to the arguments presented before [the magistrate.]" *Id.* Because the objecting party "made no effort to support their summary objections with argument or authority explaining why they disagree with" the magistrate judge's recommendations, the court criticized their objections as insufficient and applied a clear error standard, citing *McDonnell Douglas Corporation v. Commodore Business Machines, Inc.*,

656 F.2d 1309 (9th Cir. 1981), as support. *Id.* at *7. As discussed above, however, *McDonnell Douglas Corporation* does not support application of a lesser clear error standard; therefore, the *Montana Shooting Sports* court legally erred, like the District Court here, in applying the lesser standard.

In addition, the objections described in *Montana Shooting Sports* are categorically different than the objections filed by Westmoreland and the Union, which (i) specifically identified the findings and recommendations to which they objected, and (ii) supported each objection with reference to record evidence and applicable legal authorities consistent with D. Mont. L.R. 72.3(a)(1)–(2).[16]

C. The District Court's "Clear Error" Standard Violates Westmoreland's and the Union's Constitutional Rights.

Article III, § 1 of the Constitution serves both "to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,'" and "to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (internal citations omitted).

[16] Indeed, Westmoreland and the Union cited to additional authorities holding that plaintiffs lack standing when they rely on self-inflicted injuries. 2-ER-0091–93. Even under the District Court's own test for "proper" objections, this should have been enough. Nonetheless, the District Court reviewed Plaintiffs' standing under a clear error standard. 1-ER-0009.

In the context of the Federal Magistrates Act, compliance with "the strictures of the Constitution" require that "an Article III judge reviewed the case and rendered judgment." *Dawson*, 555 F.3d at 799. Indeed, "the Magistrates Act comports with Article III *because it subjects magistrates' rulings to de novo determination by a federal district judge*." *Saunders*, 641 F.2d at 663 (emphasis added); *see also United States v. Remsing*, 874 F.2d 614, 618 (9th Cir. 1989) ("[T]he statutory and constitutional obligation of the district court is to arrive at its own independent conclusion about those portions of the magistrate's report to which objections are made.").

Here, because the District Court did not review the Magistrate Judge's findings and recommendations under the required de novo standard, Westmoreland and the Union were denied their Constitutional right to have their case decided by an independent, Article III judge. *See Maas*, 2023 U.S. App. LEXIS 3289, at *4 (Wallace, J., concurring) (recognizing that, "importantly," the district court's application of a clear error standard of review "run[s] afoul of Article III.").

D. Incorrect Application of a Statutory Review Standard is Reversible Error.

The District Court's use of a clear error standard to review several of Westmoreland's and the Union's objections violated the Federal Magistrates Act and should be reversed.

The Ninth Circuit made clear several decades ago that where a "district court fail[s] to follow the procedural requirements of the Magistrates Act, 28 U.S.C. § 636 . . . [the Court must] reverse and remand for further proceedings." *Coolidge v. The Schooner Cal*., 637 F.2d 1321, 1323 (9th Cir. 1981); *see also id.* at 1327 ("because the district court did not follow the statutory requirements the judgment must be reversed and the case remanded"). Other circuit courts are in accord. *See, e.g., First Union Mortg. Corp. v. Smith*, 229 F.3d 992, 997 (10th Cir. 2000) (reversing and remanding because "the district court did not make an independent determination of the basis for the [magistrate judge's] order in light of [the party's] challenges"); *Flournoy v. Marshall*, 842 F.2d 875, 876 (6th Cir. 1988) ("vacat[ing] and remand[ing] the cases for a 'de novo' review of the magistrates' reports and recommendations to insure that they are legally and factually correct").

Courts reverse and remand violations of the Federal Magistrates Act for two independent reasons, both of which are applicable here. First, "as the statutory design and legislative history of the Federal Magistrates Act makes evident, Congress intended the standards for review of a magistrate's findings to be taken

seriously and applied in accord with the express language set forth in that statute." *Id.* at 878. In other words, "[f]or review of the magistrate's findings . . . , Congress insured that the district judge would be the final arbiter by providing a 'de novo' standard for review[.]" *Id.*; *see also Maas,* 2023 U.S. App. LEXIS 3289, at *5 (Wallace, J., concurring) ("The Federal Magistrates Act was only upheld because it promises litigants a de novo determination by an Article III judge.").

The Ninth Circuit explained that, when a district court fails to undertake the required de novo review, it improperly abdicates its statutory duties. *Coolidge*, 637 F.2d at 1327. Reversing and remanding for "[t]he exercise of this de novo review will serve to satisfy the constraints of the Magistrates Act and avoid possible constitutional infirmities." *Id.*; *see also Flournoy,* 842 F.2d at 879 ("Due to the great importance of adherence to the express provisions of section 636(b), we VACATE the decision of the district court . . . and REMAND to the district court for a 'de novo' review[.]").

Second, applying the correct standard of review is critical and can be outcome determinative. "As we are well aware, . . . the difference between a *de novo* review of a record and a review under the clearly erroneous standard is significant." *Ocelot Oil Corp. v. Sparrow Indus*., 847 F.2d 1458, 1464 (10th Cir. 1988) (finding the district court applied incorrect clear error standard to review magistrate judge's recommendation and reversing and remanding).

Here, the District Court amplified its erroneous standing analysis, *see* Argument § I, by reviewing the Magistrate Judge's standing findings under the improper clear-error standard. 1-ER-0009. Other issues decided on clear error included Westmoreland's and the Union's objections to some but not all of the Magistrate Judge's findings and recommendations regarding the cumulative surface water impacts analysis, 1-ER-0015, two of the three bases for objection regarding the greenhouse gas emissions analysis, 1-ER-0022, the objection regarding whether the scope of indirect effects analysis should extend to Yellowstone River withdrawals, 1-ER-0027, and objections to the recommended remedy, 1-ER-0036. Each of these issues must, therefore, be remanded for reconsideration under the correct standard.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's decision that Plaintiffs MEIC and Sierra Club have standing, and remand to the District Court with instruction to dismiss the case with prejudice. In the alternative, if the Court finds that one or more Plaintiffs may have standing, it should remand to the District Court with instructions to allow for discovery on disputed issues of fact regarding standing and for reconsideration of the parties' objections to the findings and recommendations of the Magistrate Judge under the required de novo standard of review.

DATED April 5, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

s/ Hadassah M. Reimer
Hadassah M. Reimer

FORM 8: CERTIFICATE OF COMPLIANCE

9th Cir. Case Number: 22-36002

I am the attorney or self-represented party.

This brief contains 12,116 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

s/ Hadassah M. Reimer
Hadassah M. Reimer

FORM 17: STATEMENT OF RELATED CASES

9th Cir. Case Number: 22-36002

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

s/ Hadassah M. Reimer
Hadassah M. Reimer

ADDENDUM

28 USCS § 636

(a) Each United States magistrate [magistrate judge] serving under this chapter [*28 USCS § 631* et seq.] shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under *section 3401, title 18, United States Code*, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [post-trial] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions.

(2) A judge may designate a magistrate [magistrate judge] to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate [magistrate judge] to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of *rule 53(b) of the Federal Rules of Civil Procedure* for the United States district courts.

(3) A magistrate [magistrate judge] may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates [magistrate judge's] shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate [magistrate judge] or a part-time United States magistrate [magistrate judge] who serves as a fulltime judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate [magistrate judge] may exercise such jurisdiction, if such magistrate [magistrate judge] meets the bar membership requirements set forth in section 631(b)(1) [*28 USCS § 631(b)(1)*] and the chief judge of the district court certifies that a full-time magistrate [magistrate judge] is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate [magistrate judge] is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate [magistrate judge] to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate [magistrate judge] may again advise the parties of the availability of the magistrate [magistrate judge], but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates [magistrate judges] shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate [magistrate judge] in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate [magistrate judge] designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate [magistrate judge] under this subsection.

(5) The magistrate [magistrate judge] shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter [*28 USCS §§ 631* et seq.] shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title [*28 USCS § 2072*].

(e) Contempt authority.

(1) In general. United States magistrate judge serving under this chapter [*28 USCS §§ 631* et seq.] shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority. A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties. The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court. Upon the commission of any such act—

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii)the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders. The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate [magistrate judge] may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate [magistrate judge] shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate [magistrate judge] so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [*28 USCS § 635*].

(g) A United States magistrate [magistrate judge] may perform the verification function required by *section 4107 of title 18, United States Code*. A magistrate [magistrate judge] may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by *section 4109 of title 18, United States Code*, and may perform such functions beyond the territorial limits of the United States. A magistrate [magistrate judge] assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate [magistrate judge] who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate [magistrate judge] in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate [magistrate judge] may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth

in section 377 of this title [*28 USCS § 377*] or in subchapter III of chapter 83, and chapter 84, of title 5 [*5 USCS §§ 8331* et seq., *8401* et seq.] which are applicable to such magistrate [magistrate judge]. The requirements set forth in subsections (a), (b)(3), and (d) of section 631 [*28 USCS § 631*], and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate [magistrate judge], shall not apply to the recall of a retired magistrate [magistrate judge] under this subsection or section 375 of this title [*28 USCS § 375*]. Any other requirement set forth in section 631(b) [*28 USCS § 631(b)*] shall apply to the recall of a retired magistrate [magistrate judge] under this subsection or section 375 of this title [*28 USCS § 375*] unless such retired magistrate [magistrate judge] met such requirement upon appointment or reappointment as a magistrate under section 631 [*28 USCS § 631*].

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