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-00130-SPW-TJC
Honorable Susan P. Watters, District Judge

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

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APA	Administrative Procedure Act
ER	Excerpts of Record
FER	Further Excerpts of Record
NEPA	National Environmental Policy Act
OSM	U.S. Office of Surface Mining, Reclamation and Enforcement
Union	International Union of Operating Engineers, Local 400
Westmoreland	Westmoreland Rosebud Mining LLC

INTRODUCTION

Plaintiffs' Response effectively concedes the facts and law that demonstrate the lack of an Article III case or controversy sufficient for standing. Similarly, they assert no authority for the District Court's decision to bypass its statutory and constitutional obligation to conduct de novo review of the Magistrate Judge's recommendation. Because both standing and review of the Magistrate decision are separable from the substantive decisions under the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") and are plainly final, this Court retains appellate jurisdiction.

Finality. Despite the finality rule that puts the remanded NEPA and APA issues off limits in this appeal, the Court has jurisdiction to hear the standing and Federal Magistrates Act issues. Both matters are legally separable and unquestionably final. If reversed, a decision on either issue would put a halt to or substantially narrow wasteful remand proceedings before the Office of Surface Mining Reclamation and Enforcement ("OSM"). Absent this appeal, both issues would forever avoid appellate review.

Standing. Plaintiffs do not dispute that their standing declarants drove 360 miles one way to observe mining they find "disgust[ing]" and "sicken[ing]." Nor do Plaintiffs refute that their alleged injuries are self-inflicted. Rather, relying on *Federal Election Commission v. Cruz*, 142 S. Ct. 1638 (2022), Plaintiffs argue that

self-inflicted injury is enough. *FEC v. Cruz,* however, expressly distinguishes self-inflicted injury from voluntarily inviting enforcement of an unlawful statute that applies regardless of plaintiffs' actions. Other than targeted contact *after* Plaintiffs expressed formal opposition to Area F, the declarants rely on unspecified and vague assertions of decades-old drives through the West Fork or time spent in ill-defined, large swaths of land (*e.g.*, "southeastern Montana" and "the Colstrip area"). Plaintiffs cannot distinguish their interest from any other member of the public who might drive on the public road in the West Fork basin.

Review of the Magistrate Judge's Recommendation. Contrary to Plaintiffs' arguments, Westmoreland's and the Union's objections to the Magistrate's recommendations were specific and proper, and the District Court's failure to review them de novo, in violation of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), was not harmless error.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW SEPARABLE LEGAL ISSUES.

An appellate court has jurisdiction over "all final decisions of the district courts." 28 U.S.C. § 1291. Although remand orders may not be subject to appeal by a non-agency, the Court has appellate jurisdiction when "(1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted

proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Crow Indian Tribe v. U.S.*, 965 F.3d 662, 676 (9th Cir. 2020) (quoting *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004)).

"[T]he final judgment rule deals in practice, not theory," and a "remand should not defeat . . . jurisdiction to review the unquestionably final" portions of a district court order. *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1229 (9th Cir. 2014) (quotation omitted); *see also Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075 (9th Cir. 2010) ("*Alsea* did not announce a hard-and-fast rule prohibiting a non-agency litigant from appealing a remand order."). The critical question is whether the issues being appealed have been "conclusively determined," *Crow Indian Tribe*, 965 F.3d at 670, and are "unquestionably final," *HonoluluTraffic*, 742 F.3d at 1229.

A. Plaintiffs' Standing Is Appealable Now.

Each of the three elements for appealability is satisfied here. *First*, standing is a "separable legal issue" detached from the merits. *Crow Indian Tribe*, 965 F.3d at 676. Absent standing, the remainder of the District Court's order is a nullity. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998) (Standing is "a threshold question that must be resolved . . . before proceeding to the merits."). Here, the district court has "conclusively determined" Plaintiffs have standing.

Crow Indian Tribe, 965 F.3d at 670. Unlike the substantive NEPA and APA issues remanded to OSM, the agency cannot address whether Plaintiffs had standing to bring this action in the first place. Nor can Westmoreland and the Union challenge Plaintiffs' standing in *this* case through a *subsequent* challenge to the agency's decision on remand. Plaintiffs offer no contrary authority.

Second, because the remand order is a nullity absent standing, that order "may result in a wasted proceeding." *Alsea Valley*, 358 F.3d at 1184. If Westmoreland and the Union prevail on standing, the District Court's remand will be vacated and this case will be closed. *See Steel Co.*, 523 U.S. at 94 (when jurisdiction "ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause" (quotations and citation omitted)). OSM then may cease its review on remand.

Third, "review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Crow Indian Tribe*, 965 F.3d at 676 (citation and quotations omitted). Courts declining to accept an appeal have premised their ruling on the notion that, if dissatisfied with the future agency decision on remand, a litigant "would then be able to appeal." *Alsea Valley*, 358 F.3d at 1185. In other words, the rationale for the administrative remand rule reflects the understanding that an appeal is delayed, but not denied. While that may be true for the

substantive NEPA and APA issues (as it was for the merits issues remanded in *Alsea Valley* and the other cases Plaintiffs cite), it is not true for standing.

The remand will end with a new agency decision on Area F. If OSM affirms its approval of Area F, Plaintiffs will bring suit challenging that *new* decision, bringing *new* claims, and potentially recruiting *new* declarants to claim *new* injuries. Although Plaintiffs would have to demonstrate standing for the *new* challenge, whether they had standing to pursue *this* case will never again be reviewable. Accordingly, it is appealable now.

B. The District Court's Standard of Review is Appealable Now.

Like standing, the District Court's standard of review is not tied to the remanded merits issues. The agency will not address the application of the Federal Magistrates Act on remand, and the NEPA process on remand constitutes a wasted proceeding to the extent it was ordered based on the District Court's erroneous standard of review. Moreover, in any subsequent challenge to OSM's *new* decision, Westmoreland and the Union will not be able to challenge the District Court's standard of review in *this* case. Because an appeal delayed would be an appeal denied, the District Court's standard of review is appealable now.

C. Plaintiffs' Cited Cases Denying Appeal Do Not Apply.

Plaintiffs rely on *Pit River Tribe* and *Center for Biological Diversity v. Bureau of Land Management*, 69 F.4th 588 (9th Cir. 2023). Resp. at 33–36. But

in both, the Court lacked jurisdiction to hear the underlying merits issues. *Pit River Tribe* involved appeal of merits issues that were remanded to the agency for further analysis, not separable legal issues that were conclusively determined by the district court.[1] In *Center for Biological Diversity*, an appeal of the denial of intervention was moot because the court could afford no relief on the merits issues remanded to the agency. 69 F.4th at 592–93. Not so here where a favorable decision on standing or the Magistrate's Act would dispose of the case or, at least, could substantially narrow the scope of the administrative remand.

Plaintiffs' citations to *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1025–26 (9th Cir. 2010), and *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 842 (D.C. Cir. 2008), are inapplicable for a different reason. Resp. at 36–37. *Cassirer* and *La Reunion* each involved an appeal from denial of a motion to dismiss. Thus, the defendants still had the opportunity to challenge standing before the district court at summary judgment. Here, the District Court has already issued its summary judgment order.

This case is more like *Honolulu Traffic*, 742 F.3d 1222 (appeal of issues finally decided against appellants and not remanded to the agency), *Crow Indian Tribe*, 965 F.3d 662 (appeal of remand order demanding application of a specific

[1] Other cases cited in Plaintiffs' brief are inapposite for the same reason. *See* Resp. at 35 n.4.

methodology), and *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011) ("distinct" legal issues that would not be addressed by agency on remand were properly appealed).[2] In those cases, this Court denied motions to dismiss a non-agency's appeal of a remand order where, as here, the issues on appeal were separable and conclusively determined by the district court.

Finally, there is no merit to Plaintiffs' argument that this appeal is premature because the District Court deferred vacatur for 19 months. Exception from the finality rule does not turn on whether the court vacates the underlying decision, but on whether the question on review is legally separable and conclusively determined. In any event, deferred vacatur is still a form of vacatur. Moreover, had Westmoreland waited 19 months to appeal, the appeal would be time-barred under FRAP 4(a)(1)(B).

II. PLAINTIFFS LACK STANDING.

Nearly all relevant legal principles and facts regarding Plaintiffs' lack of standing are uncontested. On the law, Plaintiffs do not dispute that (i) they bear the burden of demonstrating standing; and (ii) at the summary judgment stage, they must set forth undisputed, specific facts, as opposed to "mere allegations," to

[2] For a further explanation of why these cases disfavor dismissal, *see* Response in Opposition to Motion to Dismiss, Dkt. 17, at 11–14.

demonstrate the requisite injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

On the facts, Plaintiffs concede that (i) their only standing declarants, Messrs. Johnson and Gilbert, live in Helena, Montana, approximately 360 highway miles from the Mine; (ii) Johnson and Gilbert have sporadically driven from Helena to the "Colstrip area" specifically to monitor Mine activities; (iii) these drive-bys on a public road are the only form of recreation Johnson and Gilbert have undertaken in the West Fork basin where Area F is located—neither has hunted, fished, or hiked in the West Fork; and (iv) all of the specific trips to view Area F that are referenced in Johnson's and Gilbert's declarations occurred *after* Plaintiffs formally expressed their opposition to Area F.

Reduced to their essence, Plaintiffs' standing arguments are that (i) Johnson's and Gilbert's self-inflicted injuries are sufficient; (ii) if recent targeted drives through the West Fork are not enough for standing, vague, unspecified, or decades-old drives through the West Fork save their case; and (iii) even if Johnson and Gilbert cannot show sufficient interest in Area F, their occasional visits to the "Colstrip area" and "southeastern Montana," combined with their fear of injury from alleged air and water pollution, are enough. Each of these arguments is baseless.

A. Voluntary Exposure to Aesthetic or Recreational Injury is Not a Sufficient Basis for Standing.

1. *Cruz* Did Not Alter the Rule that Self-Inflicted Aesthetic or Recreational Injury Does Not Confer Standing.

Plaintiffs distort the Supreme Court's decision in *Cruz* and ignore the uniform case law rejecting attempts to manufacture recreational or aesthetic injury. *See* Resp. at 42, 53–55. In *Cruz*, the Court held that plaintiffs had standing to bring a constitutional challenge to a statute because they were subject to the law regardless of whether they intentionally triggered enforcement. *Cruz*, 142 S. Ct. at 1647. Thus, *Cruz* "is best understood as referring only to those cases in which a plaintiff asserts 'an injury resulting from the application or threatened application of an assertedly unlawful enactment.'" *Feldman v. Star Tribune Media Co. LLC*, No. 22-cv-1731, 2023 U.S. Dist. LEXIS 37416, *16 n.3 (D. Minn. Mar. 7, 2023) (quoting *Cruz*, 142 S. Ct. at 1647).[3]

Here, as in *Feldman*, *Cruz* "has no bearing . . . because this case does not involve a challenge to a statute, regulation, or other enactment." *Id.* The two other

[3] The *Cruz* Court distinguished *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), cited by Appellants, Op. Br. at 25, where the plaintiffs "attempted to manufacture standing by voluntarily" incurring burdens. *Cruz*, 142 S. Ct. at 1647; *see also id.* (distinguishing *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), where harm to States was a result of their "own independent response"). Johnson's and Gilbert's actions similarly constitute an "attempt[] to manufacture standing" through their "voluntar[y]" and "independent response" of driving to Area F to see the mining that purportedly harms them.

cases Plaintiffs cite present the same scenario as *Cruz*. The plaintiffs in *Evers v. Dwyer*, 358 U.S. 202 (1958), were subject to the statute whether or not they intentionally triggered enforcement. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), involved a statute prohibiting discriminatory misrepresentations regarding housing availability. The plaintiffs to whom such misrepresentations were made "suffered injury in precisely the form the statute was intended to guard against." *Id.* at 373.

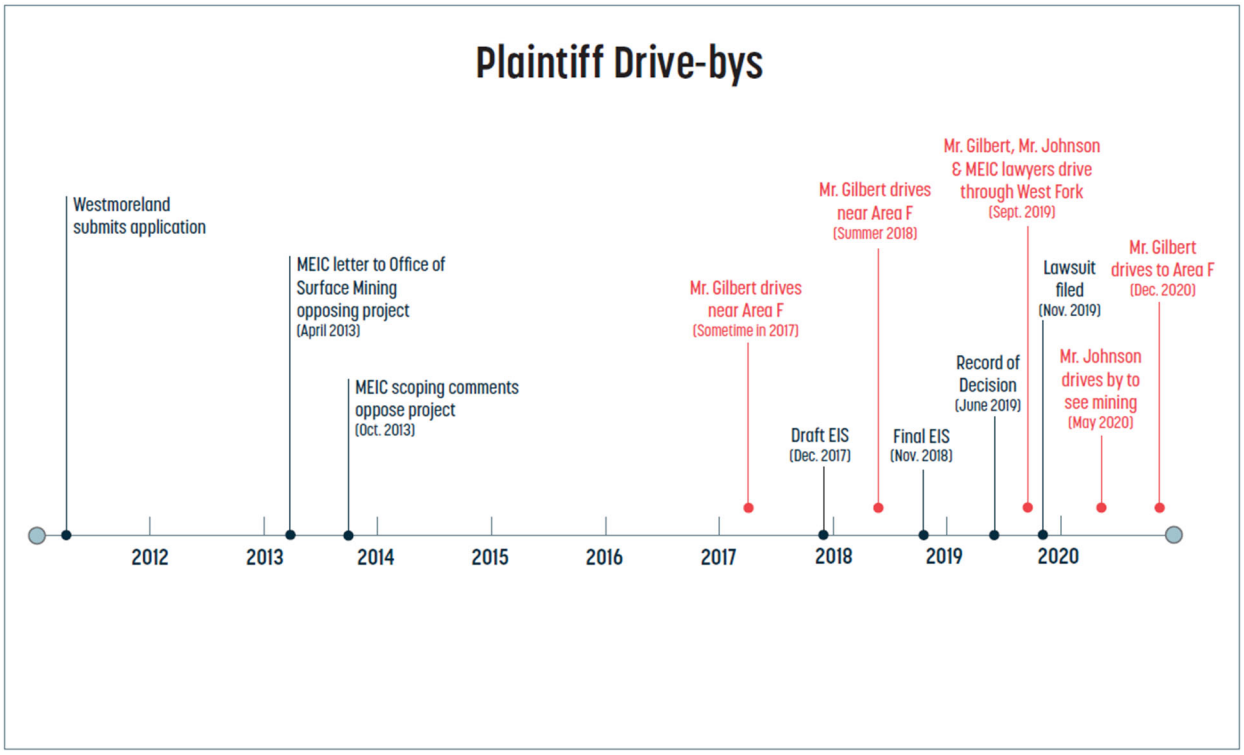
As in every prior comparable case of self-inflicted aesthetic or recreational injury, this Court should dismiss for lack of standing. *See Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 540–41 (5th Cir. 2019); *Mancuso v. Consol. Edison Co.*, 25 F. App'x 12, 13 (2d Cir. 2002); *New Eng. Anti-Vivisection Soc'y v. U.S. Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 172–75 (D.D.C. 2016); *Ohio Valley Envtl. Coal. v. Maple Coal Co*., 808 F. Supp. 2d 868, 879–80 (S.D. W. Va. 2011).[4]

2. Plaintiffs' Area F Drive-Bys Are Self-Inflicted Injury.

The timing of one's exposure to aesthetic injury, *i.e.*, *after* opposition to the project, by itself, is evidence of intent to manufacture standing. *Mancuso*, 25 F. App'x at 13 (visits to Echo Bay were "in order to prepare for this litigation"); *Ohio*

[4] Plaintiffs have failed to identify any case in which a plaintiff established standing through a self-inflicted *aesthetic or recreational* injury.

Valley, 808 F. Supp. at 880 (lack of "prior connection" key to finding of no injury from voluntary exposure to site). Johnson's and Gilbert's five drive-bys of Area F all occurred since 2017. *See* Figure 4 below. This alone is a basis to deny standing, absent a pre-existing interest. *See Mancuso*, 25 F. App'x at 13.



Op. Br. at 28, Figure 4.

Plaintiffs now attempt to cobble together something to show that Johnson and Gilbert had an interest in the West Fork pre-dating Plaintiffs' opposition to Area F. They cannot.

Johnson alleges zero interest or presence in the West Fork prior to his first drive-through in 2019.

Plaintiffs go to great lengths to paint Gilbert as a regular in the West Fork, claiming that he has passed through the West Fork on "numerous occasions" or "many times."[5] Resp. at 15, 16, 44, 45, 47, 65. But, in the filings for this case, the only averment Gilbert made about any pre-2017 interest is a vague assertion that during his time conducting biological research in the Tongue River Valley (far east of Colstrip) from 1977 to 1986—about 40 years ago—he "visited West Fork Armells Creek and its many tributaries on numerous occasions." 3-ER-0295. These unspecified, decades-old visits, apparently for work and not recreation, provide no basis for aesthetic injury today. *Lujan*, 504 U.S. at 564 (past visits to "areas of the projects before the projects commenced prove[] nothing" for standing).

Plaintiffs' suggestion that Gilbert maintained an ongoing relationship with the area of the expansion is unsupported. Their repeated reference to annual visits, Resp. at 15–16, 19, 23, 43, 60, are references to the Colstrip Area more generally, which is not a basis for standing. *See infra,* Section II.C. Reference to the "many

[5] In fact, Plaintiffs have "disclaimed" recreational use of the West Fork "where [Gilbert] has never hunted, hiked, or fished." Op. Br. at 33. Indeed, he also testified, "I know that I have not hunted there," 3-ER-0432, a point that Plaintiffs concede in their brief, Resp. at 64. Moreover, in Plaintiffs' response to discovery specifically asking to identify travels to the West Fork, Plaintiffs did not identify even one visit to the area. 3-ER-0411–13. Plaintiffs cannot avoid their having disclaimed Gilbert's recreational interest on relevance grounds, *see* Resp. at 45, since, of course, relevance is not the standard for discovery.

times" Gilbert visited the West Fork comes from his 2019 deposition testimony in a different Montana administrative proceeding.[6] There, Gilbert testified he estimated "driv[ing] through and around that country six to eight times" in the last 20 years. 3-ER-0446 (108:2–4). Three of those drives were post-opposition to the Area F expansion and at least one was specifically designed to establish standing in this case. *See supra* Figure 4; 3-ER-0441 (70:16–25). There is no indication that the other three or four drives predated Plaintiffs' opposition to Area F, which is documented as early as 2013. Regardless, these unspecified and undated drives do not support a concrete and particularized interest in the West Fork, *Lujan*, 504 U.S. at 560, and at best call for jurisdictional discovery.[7] *See infra*, Section II.F.

[6] The standards for demonstrating an interest sufficient to initiate an administrative challenge before the Montana Board of Environmental Review, Resp. at 21–22, are distinct from and not relevant to Article III standing.

[7] The only other snippet of testimony that Plaintiffs cite is a vague reference from Gilbert's 2014 deposition where he claims to have been "down *parts of* West Fork Armells Creek . . . *[s]ometime* within the last five years," "[p]robably driving around looking for places to hunt." Resp. at 45 (quoting 3-ER-0431, and failing to include "sometime" qualifier; emphasis added). Whether this unspecified drive through *parts of* the West Fork was in view of Area F or occurred at all is speculative given Gilbert's hazy *sometime* recollection that he "*probably* [has] been on most of the county roads between West Fork Armells Creek and Tongue River at one time or another." 3-ER-0431.

B. Driving on a Public Road is Not Distinct From a Generalized Grievance Suffered by Other Members of the Public.

Even if self-inflicted injury supported standing, Johnson's and Gilbert's occasional long-distance drives would be insufficient. In *Environmental Defense Fund v. Fed. Energy Regulatory Comm'n*, the D.C. Circuit found that a petitioner lacked standing to challenge a pipeline where her purported aesthetic injury "is that she must look at an 'eyesore' [half a mile from her home] several times per week while driving past." 2 F.4th 953, 970 (D.C. Cir. 2021). According to the court, these "alleged aesthetic injuries reflect nothing more than generalized grievances." *Id.*; *see also W. Radio Servs. Co. v. Espy*, No. 94-6323-HO, 1996 U.S. Dist. LEXIS 22901, *12 (D. Or. Feb. 3, 1996), *aff'd*, 79 F.3d 896 (9th Cir. 1996) (viewing telecommunications towers from public highway was not "particularized or distinct from a generalized grievance" (internal quotations omitted)).

In cases cited by Plaintiffs, Resp. at 46 n.9, plaintiffs engaged in a range of activities beyond merely driving past. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–83 (2000) (standing where nearby residents fished, camped, swam, picnicked, and canoed on the affected river); *Sierra Club v. Jewell*, 764 F.3d 1, 5–6 (D.C. Cir. 2014) (standing based on multiple declarants' aesthetic enjoyment from numerous, well-documented visits to historic battlefield, educational studying, and remembrance of family members at battlefield); *United States v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir.

1989) (standing where members "use these waters for recreational purposes"); *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985) (standing where affiant's family swims, fishes, and picnics along affected river); *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 657 (7th Cir. 2011) (standing based on birdwatching and other wildlife viewing). In addition, *Metropolitan St. Louis* and *Consolidated Rail Corp.* were decided before the *Lujan* Court defined Article III requirements (1992), and *Sierra Club* was decided before the D.C. Circuit rejected drive-by standing in *Environmental Defense Fund* (2021).

Like the plaintiffs in *Environmental Defense Fund* and *Western Radio Services*, Johnson and Gilbert purport to suffer an aesthetic injury from seeing Area F when they drive past.[8] Unlike the plaintiffs in *Environmental Defense*

[8] Although not relevant, Plaintiffs' Response includes vintage photos that predate reclamation. Resp. at 8–9. In fact, much of the Mine is in active reclamation (complete reclamation requires 10 years of observed revegetation success) and Westmoreland has been the recipient of numerous reclamation awards. 1-FER-0006–8, 0011–26. The below photograph shows reclaimed mine land in Area E that OSM has deemed compliant. 1-FER-0009.

Fund who lived nearby and drove past "several times per week," 2 F.4th at 970, Johnson and Gilbert live at least 360 miles away, have driven past Area F just a handful of times over the course of several years, and their drive-bys were targeted for the purpose of standing. *See supra,* Figure 4. Lowering the bar for standing to such a *de minimis* threshold would nullify the particularity requirement for injury, authorizing suit by a "roving environmental ombudsman seeking to right environmental wrongs wherever he might find them." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000).

C. Plaintiffs' Vague Assertions of Interests in "Southeastern Montana" or the "Colstrip Area" Cannot Support Standing.

Unable to establish a sufficient interest in the Area F viewshed, Plaintiffs attempt to conflate the Area F viewshed with the "Colstrip area," "Colstrip region," or "southeastern Montana," arguing annual trips to the region support standing. Resp. at 14–20 (citing 3-ER-0296, 0307, 0310).

These are strawman arguments; there is no dispute that Johnson and Gilbert have ties to southeastern Montana and the general Colstrip area. But a connection to an entire region such as "southeastern Montana" or the general "Colstrip area" is insufficient to establish a pre-existing aesthetic or recreational interest affected by the specific mining in Area F. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (it is insufficient to show use of "unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur"); *Friends of Animals v. U.S. Fish and Wildlife Serv.*, 789 F. App'x 599, 600 (9th Cir. 2020).

This is especially true because Plaintiffs' alleged harm is rooted in visual aesthetics—*i.e.*, the displeasure of seeing mining in Area F, 3-ER-0308 (Johnson: "shocked and disgusted to see" mine expansion); 3-ER-0309; 3-ER-0296 (Gilbert: "[F]or me, viewing [West Fork] is a pleasure—like a Sunday drive"), which is only visible from the West Fork basin. 4-ER-0656–57; Op. Br. at 7–8. Johnson and

Gilbert cannot establish harm from the Area F expansion by pointing to an interest in vast areas from which Area F is not visible.

D. Plaintiffs' Asserted Awareness of Water and Air Pollution Outside of Area F is Not a Cognizable Injury.

Plaintiffs also now argue that Area F impacts to air and water quality extending to areas outside of the West Fork may be the source of their injury. Resp. at 48–52. But while Johnson and Gilbert have registered their "concern" for these environmental effects, they do not have a specific injury from them.[9] *See* 3-ER-0309, 0312 (Johnson averring that he "know[s]" of power plant pollution and alleged health effects to people in Rosebud County and is "dismay[ed]" by alleged harm to prairie streams); 3-ER-0298–300 (Gilbert alleging he "know[s]" of, is "concerned by," and is "aware" of water impacts and air emissions).

Mere "awareness" of alleged pollution, detached from any personal harm, is not a "concrete and particularized" injury for standing. *Lujan*, 504 U.S. at 560; *see also Laidlaw*, 528 U.S. at 181 ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.");

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[9] Plaintiffs cite to a number of cases, including *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141 (2000), for the proposition that a plaintiff can establish standing based on harm from cumulative and indirect impacts that extend beyond the source. Resp. at 40–41, 48. That is true—so long as the plaintiff shows that such impacts cause them injury, which Plaintiffs have not. Merely showing harm to the environment is insufficient. *Laidlaw*, 528 U.S. at 173; *Ecological Rights Found.*, 230 F.3d at 1151.

Hollingsworth v. Perry, 570 U.S. 693, 704 (2013) (to have standing, a party "must seek a remedy for a personal and tangible harm"); *Mainstreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 745 (7th Cir. 2007) (standing cannot be based on "some abstract psychic harm or a one-day-I'll-be-hurt allegation"); *Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120 (3d Cir. 1997) (no standing where members claimed they are "injured by the knowledge that [defendant] pollutes nearby waters"); *Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 777–78 (1983) ("anxiety and stress" over environmental impacts are insufficient injury for NEPA action). Thus, while someone may hypothetically be able to establish concrete and particularized harm through downstream water impacts—for instance, because they recreate on an affected stream, as in *Laidlaw*, 528 U.S. at 181–83—these Helena-based declarants have not.

Moreover, the declarants' allegations of "harm" from breathing polluted air during sporadic trips to Colstrip, 3-ER-0309, is no greater or more particularized than any other member of the public who may drive through the area once or twice per year. *See supra*, Section II.B. Nor can Plaintiffs prove causation and redressability. The Colstrip power plant, which is a separate facility under separate ownership from the Mine, has been operating since 1975. 4-ER-0599. The Area F expansion is not a cause—not even a partial one—of the plant's operations.

Likewise, the plant will continue combusting coal at the same rate regardless of the Area F expansion. 1-FER-0027; 4-ER-0650. In short, cessation of Area F mining would not reduce the plant's air emissions.[10]

E. Plaintiffs Have Not Established a Sufficient Continuing Interest.

Johnson's and Gilbert's purported plans to continue driving through the West Fork suffer from the same fatal defects as their prior visits—they are self-inflicted and in the nature of generalized, public grievances. Given that Johnson and Gilbert began their recent drives to Area F only once litigation was imminent, their professed desire to return for recreational and aesthetic purposes is not credible. Rather, subsequent drives are simply a continuation of their coordinated effort to incur aesthetic injury. Indeed, Johnson admits that he plans to return to "view the current status of the Area F expansion"—despite purporting to be "shocked and disgusted" by the mere sight of it. 3-ER-0308, 0310.

[10] Plaintiffs erroneously rely on *WildEarth Guardians v. United States Dep't of Agric.*, 795 F.3d 1148 (9th Cir. 2015), Resp. at 41, 50, which stands for the proposition that causation and redressability can be satisfied when an injury is partially caused by the challenged activity and a favorable ruling could partially redress the averred injury. 795 F.3d at 1157–59. This holding is irrelevant to Plaintiffs' claim where no portion of the injury was caused by or would be redressed by stopping mining in Area F.

F. Contradictory Testimony Regarding Alleged Interest in the West Fork Raises Issues of Material Fact Warranting Jurisdictional Discovery.

Even if the Court determines that the declarations on their face aver facts sufficient for standing, prior testimony in other cases raises issues of material fact that foreclose summary judgment, *see Wallis v. Princess Cruises, Inc*., 306 F.3d 827, 832 (9th Cir. 2002), and call for discovery. *See* Op. Br. at 37–39.

Though Plaintiffs accuse Westmoreland of "cherry-picking" from the record, Plaintiffs' prior testimony has, at best, been inconsistent.[11] For instance:

- Though Gilbert claims that his purpose in visiting the West Fork in recent years was to appreciate "its aesthetic values," 3-ER-0296, he admitted at deposition that one of these trips was to contrive standing, 3-ER-0441 (70:16–25), and that in another trip he was accompanied by counsel, 3-ER-0442 (77:2–9).
- In 2018, Gilbert testified that he intended to return to the Colstrip area to "chase turkeys and probably in the fall to hunt upland birds," 3-ER-0435 (111:8–16), but later admitted he never took the trip, 3-ER-0447 (112:25–113:6), and this testimony conflicts with other testimony that

[11] A detailed list of inconsistences was included in the motion for discovery below. 3-ER-0395–96 (and attached exhibits).

after 2007, he has not been hunting on public lands near Colstrip, 3-ER-0421 (25:9–18).

Westmoreland and the Union seek discovery to resolve any factual disputes—to the extent they are material to summary adjudication. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992). If material facts remain undetermined, an evidentiary hearing should be held. *Lujan*, 504 U.S. at 561 ("[A]t the final stage [of litigation], those facts [regarding standing] (if controverted) must be supported adequately by the evidence adduced at trial" (internal quotations omitted)).

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

Plaintiffs agree that the Magistrates Act obligates an Article III district court judge to review "specified proposed findings or recommendations to which objection is made" under a de novo review standard.[12] Resp. at 68. Nonetheless, Plaintiffs attempt to stretch the rules and the case law to a breaking point, arguing

[12] Contrary to Plaintiffs' argument, Resp. at 33, this Court reviews the District Court's application of the Magistrates Act de novo, not for abuse of discretion. Op. Br. at 20; *see also United States v. Foster*, 57 F.3d 727, 730-31 (9th Cir. 1995) (the issue of whether a magistrate judge "acted in contravention of the Magistrates Act and Article III of the Constitution . . . raises a question of law subject to *de novo* review"), *rev'd on other grounds*, 133 F.3d 704, 704 (9th Cir. 1998).

that the district court may disregard the clear statutory language *requiring de novo review* and apply a clear error standard, if the judge deems certain objections "improper." Resp. at 67–72. Such a reading of the Magistrates Act cannot stand, particularly where the only reason the Magistrates Act is constitutional is *because* it guarantees de novo review by an Article III judge. Op. Br. at 42. Here, where Westmoreland and the Union were deprived of a clear constitutional right, remand for consideration of their objections under the required de novo standard is necessary.

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

Plaintiffs make no attempt to defend the District Court's misreading of *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309 (9th Cir. 1981), *Thomas v. Arn*, 474 U.S. 140, 152 (1985), and other Montana District Court decisions for the proposition that the Magistrates Act allows the District Court to apply a "proper v. improper" test as an excuse to apply a lesser clear error standard for reviewing objections. *See* Resp. 67–76. The District Court's cited cases hold no such thing, and the District Court's reliance on them for that proposition was error. *See* Op Br. at 47–50.

Instead, Plaintiffs cite to two out-of-circuit decisions to argue that general objections and mere references to previously filed papers or arguments (neither of which apply to Westmoreland's filings here) do not constitute proper objections.

Resp. at 68 (citing *Tyler v. Wates*, 84 F. App'x 289, 290 (4th Cir. 2003) ("general objection to the entirety of the magistrate judge's report is tantamount to a failure to object"); *Mario v. P&C Food Mkts*., 313 F.3d 758, 766 (2d Cir. 2002) (one sentence objection not enough). Even if the cited decisions were on all fours, they are contrary to Ninth Circuit precedent. *See*, *e.g., Dawson v. Marshall*, 555 F.3d 798, 799 (9th Cir. 2009) ("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."); *see also Maas v. City of Billings*, 2023 U.S. App. LEXIS 3289, at *3 (9th Cir. Feb. 10, 2023) (Wallace, J., concurring) (same).

Worse yet, Plaintiffs cite to *United States v. Reyna-Tapia*, 328 F.3d 1114, 1118 (9th Cir. 2003), for their position that "*there is no question* that objections which are not 'specific' are not 'proper' and are not entitled to de novo review." Resp. at 71–72. But *Reyna-Tapia* merely held that de novo review is required "*if objection is made*, but not otherwise." 328 F.3d at 1121. The court reasoned that "[n]either the Constitution nor the statute requires a district judge to review, de novo, findings and recommendations *that the parties themselves accept as correct*." *Id.* (emphasis added). Nothing in *Reyna-Tapia* supports a lesser clear error standard of review when objections are supposedly "improper." *See id.*

Westmoreland's full-throated objections hardly "accept[ed] as correct" the Magistrate's findings and recommendations. *See* 2-ER-0078–114. Contrary to

Plaintiffs' assertions, the objections were not "general," they did not fail to "'itemize' each finding and recommendation to which they" objected, and they did not merely repeat arguments made to the Magistrate. *See* Resp. at 71–72.[13] Rather, Westmoreland and the Union filed a 30-page objection pointing to approximately one dozen specific findings and recommendations and supporting each objection with a citation to a case or the record. *See* 2-ER-78–114.[14] These objections met even the District Court's erroneous standard for submitting "proper" objections for de novo review. *See* Op. Br. at 44; 1-ER-0004.

Finally, on the record below, Plaintiffs cannot claim they were not on notice regarding the specificity of the objections made to the Magistrate Judge given their response to each objection made by Westmoreland and the Union. In any event, it cannot be said that Westmoreland's and the Union's objections were tantamount to no objection at all or acceptance of the Magistrate's findings and recommendations

[13] That some arguments may have reasserted points previously made to the Magistrate Judge was entirely proper. *See* Op. Br. at 44–46; *Maas*, 2023 U.S. App. LEXIS 3289, at *3 (Wallace, J., concurring).

[14] Contrary to Plaintiffs' assertion, Westmoreland and the Union did not waive their position that they submitted "proper" objections. Resp. at 70. Westmoreland and the Union explained how their objections were proper, provided examples to the Court, and included the objections in the Excerpts of Record. *See* Op. Br. at 43, 50 n.16; 2-ER-0078–114.

"as correct," such that de novo review is excused under *Reyna-Tapia.* 328 F.3d at 1121.

B. The District Court's Application of an Unlawful Standard of Review Requires Reversal.

Plaintiffs argue that, even if the District Court applied an incorrect clear error standard of review, reversal and remand is unnecessary because it was "harmless error." Resp. at 72–76. Plaintiffs are wrong. Westmoreland and the Union are not required to prove prejudice. Instead, where, as here, the District Court violated their constitutional right to review by an Article III judge, *see* Op. Br. at 50–54, reversal is required "without inquiry into harmlessness." *CPC Patent Techs. PTY Ltd. v. Apple, Inc.*, 34 F.4th 801, 810 (9th Cir. 2022).

In *CPC*, the court reversed and remanded a district court's application of a clear error standard of review, instead of a de novo standard, without considering prejudice. *Id.* at 805, 807, 810. The *CPC* court's conclusion that it could remand "without inquiry into harmlessness" was supported by citation to other Ninth Circuit decisions dealing with violations of the Magistrates Act. *Id.* (citing *Mitchell v. Valenzuela*, 791 F.3d 1166, 1173-74 (9th Cir. 2015) (explaining vacatur and remand is necessary because the court "cannot countenance" a magistrate judge's failure to comply with 28 U.S.C. § 636), and *Flam v. Flam*, 788 F.3d 1043, 1046 (9th Cir. 2015) (reversing and remanding for magistrate judge to comply with the Magistrates Act)). More recently, this Court explained that it has "vacated and

remanded the district court's order where it clearly applied the wrong standard of review," without indicating that a harmlessness inquiry is required. *United States v. Ramos*, 65 F.4th 427, 434 (9th Cir. 2023) (citing *CPC*, 34 F.4th at 810) (declining relief because the "district court asserted that it conducted de novo review not only in its order adopting the magistrate judge's report and recommendation, but also in its order denying the motion for reconsideration").

Indeed, the cases discussed in the Opening Brief, at 52–54, detailing why violations of the Magistrates Act must be reversed and remanded make no mention of prejudicial or harmless error, *see* Resp. at 73 n.23, because reversal is required to "satisfy the constraints of the Magistrates Act and avoid possible constitutional infirmities." *Coolidge v. The Schooner Cal.*, 637 F.2d 1321, 1327 (9th Cir. 1981). The Court may apply the harmless error standard of 28 U.S.C. § 2111 only to "errors or defects which do not affect the substantial rights of the parties." When a party is deprived of de novo review by an Article III judge, as guaranteed by the Magistrates Act, the party's substantial rights—constitutional rights—are violated. Op. Br. at 50–51; *see also Sanchez v. Sessions*, 904 F.3d 643, 652 (9th Cir. 2017) (where "compliance with the regulation is mandated by the Constitution, prejudice may be presumed").

Plaintiffs' reliance on *United States v. Pantohan*, 602 F.2d 855, 858 (9th Cir. 1979), for application of a harmless error standard is misplaced. *See* Resp. at 73

n.23. At issue in *Pantohan* was the district court's review of a pre-trial ruling under 28 U.S.C. § 636(b)(1)(A), 602 F.2d at 858, not a dispositive ruling under § 636(b)(1)(C), which implicates the constitutional right to de novo review of dispositive rulings by an Article III judge. In any event, this Court has reversed and remanded where the improper standard of review was applied to non-dispositive rulings without any inquiry into harmlessness. *See Albiso v. Block*, 1995 U.S. App. LEXIS 10079, *15 (9th Cir. May 1, 1995). And in *Maas*, Judge Wallace would have applied harmless error in the concurrence because, without explanation, "the result would have been the same regardless."[15] *See* 2023 U.S. App. LEXIS 3289, *5. The same is not true here where the District Court's application of clear error review prejudiced the findings on the merits.

The Court should reject Plaintiffs' invitation to assume that, regardless of the District Court's express application of the clear error standard, it "nevertheless closely reviewed Westmoreland's arguments." Resp. at 74. First, a close review is not what the Magistrates Act requires. Second, this Court has previously rejected such an invitation. *See CPC*, 34 F.4th at 805 n.4 ("To the extent Apple invites us to do so, we decline to speculate that the district judge really reviewed the

[15] The *Maas* "prejudice" language quoted in Plaintiffs' brief, Resp. at 73, relates to the majority's application of an abuse of discretion standard to the denial of discovery, not to the Magistrates Act standard of review, which is not even mentioned by the majority. 2023 U.S. App. LEXIS 3289, *2.

magistrate judge's order de novo: the district judge expressly concluded that the clear error standard applied [and] mentioned the standard throughout the order.").

Further, Westmoreland's and the Union's decision not to attempt an appeal of the substantive NEPA issues remanded by the District Court is in no way a concession that the District Court decided them correctly. *See* Resp. at 75. Rather, it is a recognition of the legal constraints of the finality rule. *See, e.g., MEIC v. Haaland*, 2021 U.S. App. LEXIS 34331 (9th Cir. Nov. 18, 2021). As Westmoreland and the Union argued in their opposition to Plaintiffs' motion to dismiss this appeal, had the District Court applied the correct standard of review, the outcome on those issues may have been different. Dkt. 17 at 15–16. In any event, *all the rulings* made after clear error review are unconstitutional, warranting remand and reversal. *See* Op. Br. at 50–51.

Lastly, to the extent the Court applies a harmless error test (it should not), Westmoreland and the Union have demonstrated prejudicial error. The District Court's application of the proper de novo standard of review to the threshold jurisdictional question could have disposed of the entire case, negating costly and timely remand proceedings. Likewise, the District Court's application of the de novo standard to the merits issues could have reduced the scope of remand. Having to comply with impermissibly broad remand orders is prejudicial error.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over the unquestionably final, separable legal issues in this appeal. The Court should reverse the District Court's decision that Plaintiffs have standing, and remand to the District Court with instruction to dismiss the case with prejudice. In the alternative, if the Court finds Plaintiffs may have standing, but that disputed issues of fact preclude summary judgment, it should remand to the District Court with instructions for jurisdictional discovery. To the extent the Court determines Plaintiffs have standing, it should remand to the District Court for reconsideration of the parties' objections to the findings and recommendations of the Magistrate Judge under the statutory de novo standard of review.

DATED August 21, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 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

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