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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN WATERSHEDS PROJECT; et al.,	)
	)
Plaintiffs	)
	) Civil No. 15-cv-169-S
v.	)
	)
PETER K. MICHAEL, in his official capacity as Attorney General of Wyoming; et al.,	)
	)
Defendants.	)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS ON BEHALF OF DEFENDANTS PETER K. MICHAEL AND TODD PARFITT

INTRODUCTION

The State of Wyoming has enacted two laws (the "Data Censorship Laws") to stop whistleblowers and citizen scientists from collecting and disseminating certain information about public and private lands within the State, including information about agriculture and the environment. *See* Wyo. Stat. §§ 6-3-414(e)(iv); 40-27-101(h)(iii). Although the State recently enacted amendments in an effort to avoid constitutional scrutiny,[1] the Laws' purpose and effect

[1] The 2016 amendments, copies of which are included as an addendum, have not yet been codified. This memorandum refers to them by their future code sections. It distinguishes between the original and amended Laws by noting "(2015)" after any citation to the original Laws.

remains to suppress disfavored speech. The Laws subject individuals to liability only if they collect or intend to collect "resource data." *Id.* §§ 6-3-414(a)-(c); 40-27-101(a)-(c). And once information collected in violation of the Laws is communicated to the government, the Laws require government agencies to ignore it. *Id.* §§ 6-3-414(f); 40-27-101(f). Because collecting data is protected by the First Amendment as part of the speech process, and the Data Censorship Laws are designed to punish individuals who speak about particular subjects from particular viewpoints, the Laws are subject to strict constitutional scrutiny. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). They do not survive.

The State has been tenacious in its effort to suppress Plaintiffs' speech. The original versions of the Data Censorship Laws expressly linked liability to communicating with government agencies. *See* First Am. Compl. for Declaratory and Injunctive Relief ¶ 1, Docket No. 54, Apr. 11, 2016 (hereinafter "Compl."); *see, e.g.*, Wyo. Stat. § 6-3-414(d)(i) (2015). After this Court expressed "serious concerns and questions as to the Constitutionality of various provisions" of the Laws as originally enacted, Order Granting in Part and Denying in Part Defs.' Mot. to Dismiss, Docket No. 40 at 38 (Dec. 28, 2015) (hereinafter "First Mot. to Dismiss Order"), the State amended the Laws to tie liability to collecting resource data. Compl. ¶ 2.

The State cannot evade the protections afforded by the First Amendment by "proceed[ing] upstream and dam[ming] the source" from which flows disfavored speech. *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). Speech is a process, and the First Amendment protects all aspects of that process. *Citizens United v. FEC*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the

speech process."). That includes both "the creation and dissemination of information." *Sorrell*, 564 U.S. at 570.

Virtually all speech would be subject to regulation if the government could simply prohibit actions integral to that speech. Rather than banning publication of photographs, the government could prohibit taking pictures of controversial subjects; rather than prohibiting the sale of books, the government could bar those with subversive ideas from purchasing laptops. The First Amendment does not permit suppression of speech by such artifice. The State cannot punish individuals for communicating resource data to the government, as it initially attempted to do, and it cannot punish individuals for collecting information that forms the basis of such communication, as it now attempts to do. *See Animal Legal Defense Fund v. Otter*, 44 F. Supp. 3d 1009, 1023-25 (D. Idaho 2014) (hereinafter "*ALDF I*") (denying motion to dismiss challenge to state law prohibiting recording within agricultural facilities as violating the First Amendment); *see also Animal Legal Defense Fund v. Otter*, 118 F. Supp. 3d 1195, 1204-07 (D. Idaho 2015) (hereinafter "*ALDF II*") (ruling that state law prohibiting recording within agricultural facilities violated the First Amendment).

The State attempts to deflect constitutional scrutiny by describing the Laws as trespass laws. *See, e.g.*, Mem. in Supp. of Mot. to Dismiss on Behalf of Defs. Peter K. Michael and Todd Parfitt 4, 17-20, Docket No. 58-1, May 3, 2016 (hereinafter "Defs.' Mem."). The State's traditional trespass laws punish those who enter private property without permission. *See, e.g.*, Wyo. Stat. § 6-3-303 (defining criminal trespass); *Bellis v. Kersey*, 241 P.3d 818, 824 (Wyo. 2010) (explaining civil trespass). The Data Censorship Laws, on the other hand, impose criminal and civil liability on people who collect data without permission, even if they have landowners' permission to enter private property. *See, e.g.*, Wyo. Stat. § 6-3-414(a)(ii)(B); First Mot. to

Dismiss Order at 5 (interpreting virtually identical language in original laws as requiring both permission to enter land and to collect data).

Even if the Laws were limited to trespassers, the "[u]nderinclusiveness" of targeting only trespassers collecting resource data would strongly suggest that the State had acted to "disfavor[] a particular speaker or viewpoint." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 802 (2011); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("The government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."). The State could not create special laws to punish trespassers who criticize the president, or register as Republicans, or belong to particular religions, without violating the First Amendment. The First Amendment similarly limits the State's ability to create special laws that tie criminal or civil liability to collecting factual information, particularly factual information about matters of public concern. The State may not engage in such targeting of speech without surviving strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015). The State also may not create laws substantially motivated by animus toward a particular group of people, such as environmentalists, without violating the Equal Protection Clause of the Fourteenth Amendment. *See* Compl. ¶ 117 (alleging that the Laws were motivated by animus against environmental groups); *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

Because the Complaint adequately states a claim under both the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, the Court should deny the State's motion to dismiss. [2]

[2] The amended complaint names two state officials as defendants—the attorney general and the director of Wyoming Department of Environmental Quality. *See* Compl. ¶¶ 54-55. Collectively, they are referred to as the "State." The three local government officials named as defendants, *see* Compl. ¶¶ 56-58, have not filed a motion to dismiss.

STATUTORY BACKGROUND

In 2015, the Wyoming Legislature enacted the Data Censorship Laws to penalize individuals (with certain exceptions) who collect "resource data" from "open lands" within the State and communicate that data to a government agency. Wyo. Stat. §§ 6-3-414 (2015); 40-27-101 (2015); *see* Compl. ¶ 1. A year later, after this Court questioned the Laws' constitutionality, First Mot. to Dismiss Order at 38, the Wyoming Legislature amended the Laws, *see* Compl. ¶ 3.

As amended, the Data Censorship Laws impose criminal and civil liability on persons who "collect" "resource data" in three situations: First, if a person "[e]nters onto private land for the purpose of collecting resource data," Wyo. Stat. §§ 6-3-414(a)(i); 40-27-101(a)(i); second, if a person "enters onto private land and collects resource data from private land," *id.* §§ 6-3-414(b); 40-27-101(b); and third, if a person "[c]rosses private land to access adjacent or proximate land where he collects resource data," *id.* §§ 6-3-414(b)(i); 40-27-101(b)(i).[3] That third situation includes people who collect resource data on public land.

The Laws define "collect" to include "to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location of the collection." *Id.* §§ 6-3-414(e)(i); 40-27-101(h)(i). The Laws define "resource data" to include "data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural

[3] Subsections (a) of the Data Censorship Laws apply to individuals who enter private land with the intent to collect data, while subsections (b) apply to individuals who collect data from private land, even if they did not enter private land with the intent to do so.

artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species," with three narrow exceptions. *Id.* §§ 6-3-414(e)(iv); 40-27-101(h)(iii).[4]

Subsections (a) and (b) exempt individuals from liability under those subsections if individuals have "[w]ritten or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data." *Id.* §§ 6-3-414(a)(ii)(B), (b)(ii); 40-27-101(a)(ii)(B), (b)(ii). Subsections (a) also exempt individuals from liability under those subsections if individuals have "[a]n ownership interest in the real property, or statutory, contractual or other legal authorization to enter the private land to collect the specified resource data." *Id.* §§ 6-3-414(a)(ii)(A); 40-27-101(a)(ii)(A). Subsections (c) exempt individuals with "[a]n ownership interest in the real property, or statutory, contractual or other legal authorization to cross the private land," or with "[w]ritten or verbal permission of the owner, lessee or agent of the owner to cross the private land." *Id.* §§ 6-3-414(c)(ii)(A)-(B); 40-27-101(c)(ii)(A)-(B).

The criminal Data Censorship Law subjects violators to imprisonment and fines. *Id.* § 6-3-414(d). The civil Data Censorship Law requires payment of "all consequential and economic damages proximately caused" and all "litigation costs," including "attorney fees." *Id.* § 40-27-101(d).

The Data Censorship Laws also regulate data that is communicated to the government by individuals that violate their provisions. The criminal Data Censorship Law provides that "[n]o resource data collected on private land in violation of this section is admissible in evidence in any civil, criminal or administrative proceeding" other than a criminal or civil action brought

[4] The Laws exempt data for surveying property boundaries or assessing property values or collected by "peace officers" from the definition of "resource data." Wyo. Stat. §§ 6-3-414(e)(iv)(A)-(C); 40-27-101(h)(iii)(A)-(C).

against the individual collecting the data. *Id.* § 6-3-414(f). The civil Data Censorship Law includes a provision to the same effect with slightly different phrasing. *Id.* § 40-27-101(f). Both Laws also prohibit any consideration of that information "in determining any agency action." *Id.* §§ 6-3-414(g); 40-27-101(g). And any "governmental entity," including "the state, University of Wyoming or any local government," must "expunge[]" any information collected in violation of the statutes from "all files and data bases." *Id.* §§ 1-39-103(a)(i); 6-3-414(g); 40-27-101(g).

STANDARD OF REVIEW

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court "must accept as true all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1178 (10th Cir. 2012) (quotation marks omitted).

ARGUMENT

I. The Complaint States a Claim that the Data Censorship Laws Violate the First Amendment's Guarantee of Freedom of Speech

The Court should deny the State's motion to dismiss Plaintiffs' claim under the Free Speech Clause because the Complaint adequately alleges that the Data Censorship Laws constitute content-based restrictions on expressive activity protected by the First Amendment, Compl. ¶¶ 108-110, and are unconstitutionally overbroad, Compl. ¶ 107. The State makes no effort to show the Laws would survive strict scrutiny, and the State fails to demonstrate that any legitimate applications of the Laws outweigh their substantial unconstitutional reach. Therefore, the State has not shown that the Complaint fails to state a valid claim that the Data Censorship Laws unconstitutionally suppress the freedom of speech.

A. Collecting Information Is Protected by the Free Speech Clause

The Free Speech Clause protects not just the utterance of words, but the entire "speech process." *See Citizens United*, 558 U.S. at 336. As a result, the Court should reject the State's argument that collecting information—even truthful information about issues of public concern such as that collected by the Plaintiffs, Compl. ¶¶ 80, 82—is mere conduct unprotected by the First Amendment. Defs.' Mem. at 7-10.

For purposes of the Free Speech Clause, "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference." *Brown*, 564 U.S. at 792 n.1; *see also Buehrle*, 813 F.3d at 977; *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). That is because "laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United*, 558 U.S. at 336. Thus, the First Amendment protects "the act of *making* audio or audiovisual recording . . . as a corollary of the right to disseminate the resulting recording." *ACLU*, 679 F.3d at 597 (emphasis in original). It protects not only against censorship of particular written material, but against "law[s] prohibiting trade magazines from purchasing or using ink." *Sorrell*, 564 U.S. at 571. As the Ninth Circuit explained in holding that the Free Speech Clause protects the creation of tattoos, "[a]lthough writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation." *Anderson*, 621 F.3d at 1061-62l; *see ALDF II*, 118 F. Supp. 3d at 1205 ("Prohibiting undercover investigators or whistleblowers from recording an agricultural facility's operations inevitably suppresses a key type of speech because it limits the information that might later be published or broadcast.").

The Data Censorship Laws' history underscores the vital importance of First Amendment protections for the speech process. The State initially enacted the Laws expressly to punish

people for communicating information to the government. *See, e.g.*, Wyo. Stat. § 6-3-414(d)(i) (2015). After this Court called the constitutionality of the Laws into doubt, First Mot. to Dismiss Order at 38, the State amended them to achieve the same suppression of speech—a little less explicitly, but just as effectively—by shifting the locus of regulation "upstream." *Buehrle*, 813 F.3d at 977. Now the State punishes individuals for collecting resource data, rather than communicating it. *See* Wyo. Stat. §§ 6-3-414(e)(i) (defining the word "collect"); 40-27-101(h)(i) (same). Such sleight of hand does not save the Laws from the First Amendment. The State will equally deter advocates from communicating resource data to government agencies and the public by punishing the collection of such information as by punishing communication directly; that is why the First Amendment applies to both modes of suppression.

The Supreme Court has specifically identified the "creation . . . of information" as protected by the First Amendment. *Sorrell*, 564 U.S. at 570. "Facts . . . are the beginning point of much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Id.* Allowing the government to control the creation and flow of information would "tilt public debate in [the state's] preferred direction." *Id.* at 578-79. Like the Vermont law struck down in *Sorrell*, the Data Censorship Laws serve to impermissibly manipulate public discourse by preventing individuals from collecting information they wish to disseminate. [5] The Laws

[5] In *Sorrell*, the Supreme Court struck down a Vermont law that, among other things, prohibited pharmacies from selling information about prescription practices to data mining firms, which collected that data to produce reports that they, in turn, leased to pharmaceutical manufacturers. 564 U.S. at 558-60. The Court resolved two consolidated cases, the first brought by pharmacies seeking to sell prescription information to data mining companies, and the second brought by data mining companies seeking to collect that information. *See* 564 U.S. at 561. Both the pharmacies and the data mining companies asserted that their First Amendment rights—to disseminate information on the one hand, and collect information on the other hand—had been violated. *Id.* at 561-62. The Court agreed that both the "creation and dissemination of information are speech within the meaning of the First Amendment." *Id.* at 570.

attempt such manipulation by subjecting those individuals who enter or cross private land to liability because, and *only because*, they wish to or do collect information about "land and land use," including information about animal abuse, hazardous pollution, misuse of publicly owned natural resources, and environmental health that Plaintiffs want to collect, disseminate, and report. *See* Wyo. Stat. §§ 6-3-414(e)(iv); 40-27-101(h)(iii); Compl. ¶¶ 80, 82.

Contrary to the State's suggestion that *Sorrell* only protects the flow of information between willing private parties, Defs.' Mem. at 9, the Supreme Court broadly held that "information is speech." 564 U.S. at 570. The fact that the Vermont law regulated information traded between types of private companies was relevant only because, in limited circumstances, the government may constitutionally regulate access to information already in its hands. *See* 564 U.S. at 568-70 (distinguishing *L.A. Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999)). But that exception is irrelevant here because the State does not possess the "resource data" the collection of which is a central element for liability under the Data Censorship Laws.

The State also insists, based on a misreading of *Zemel v. Rusk*, 381 U.S. 1 (1965), that the Supreme Court has "rejected . . . outright" First Amendment protection for the collection of information. Defs.' Mem at 7-8. *Zemel*, however, stands for the unremarkable proposition that "[t]he right to speak and publish does not carry with it the *unrestrained* right to gather information." 381 U.S. at 17 (emphasis added). Plaintiffs do not contend that either *Sorrell* or any other case recognizes an absolute and "unrestrained" right to collect information. It is well established that those seeking to collect information, like those seeking to engage in other activities protected by the First Amendment, are often subject to regulations of general application. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Just as the First Amendment does not exempt people from traditional trespass laws because they want to speak

while standing on private property, it does not exempt them from such laws because they want to collect information. The plaintiffs in *Zemel* disagreed with this basic principle, seeking an exemption from generally-applicable law: They argued that a ban on travel to Cuba violated the First Amendment because they wanted to collect information while traveling. 382 U.S. at 17. The plaintiffs advanced no allegation that the travel ban in general, or as applied to their situation, targeted the collection of information specifically. Rather, travel to Cuba was generally prohibited but had the incidental effect of preventing the plaintiffs from collecting the information they sought. *Zemel*, then, has no bearing on this case because Plaintiffs here do not seek an exemption from generally-applicable laws. Instead, they challenge laws that specifically and exclusively punish people who collect or intend to collect information after having entered or crossed private land.

The importance of First Amendment protection for the entire speech process is exemplified here. The Wyoming legislature enacted the Data Censorship Laws for the specific purpose of suppressing speech. That intent is clear from the face of the statute, which not only punishes individuals for collecting information, *see* Wyo. Stat. §§ 6-3-414(a)-(c); 40-27-101(a)-(c), but also directly requires government agencies to ignore such information, and expunge it from their records, once it is communicated to them. *Id.* §§ 6-3-414(f)-(g); 40-27-101(f)-(g). The damages provision of the civil Data Censorship Law also regulates communication by requiring payment of "all consequential and economic damages proximately caused" by violations of the Law. Wyo. Stat. § 40-27-101(d). Only the communication of resource data, and not its collection, is likely to result in such damages. The Laws thus regulate the speech process both upstream of the moment of communication—by outlawing data collection—and downstream of the moment of communication—by regulating the use of such data after it has been

communicated to the government and requiring payment of damages resulting from data publication. *See* Wyo. Stat. §§ 6-3-414(f)-(g); 40-27-101(d), (f)-(g). Moreover, the Laws regulate both of those aspects of the speech process even with regard to matters of substantial public concern, such as where resource data would reveal illegal animal abuse or dangerous environmental pollution. The structure of the Laws thus recognizes the inextricable connection between collecting and communicating information. The Laws seek to prevent communication disfavored by the government by squeezing it from both sides.

The Laws' legislative history confirms that their purpose is to suppress communication of resource data. In introducing the original versions of the Laws, which created the provisions prohibiting consideration of data by government agencies and requiring expungement of such data from government records,[6] Senator Larry Hicks explained that their "purpose" was to address "information" collected and communicated to the government that "goes into some depository of some agency that then subjects [property owners] to additional scrutiny." Audio Recording of Senate 2015 Session, Jan. 19, 2015 at 2:03:50-2:05:01 (statement of Senator Hicks); *see id.* at 2:18:15-2:19:26 (explaining that the Laws are intended to prevent the federal government from considering information about sage grouse population and habitat).[7] The legislative record therefore manifests the Laws' intent to suppress communication between citizens and their government.

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[6] The 2016 amendments to the Laws only added the phrase "on private land" to the expungement and non-consideration provisions. *Compare* Wyo. Stat. §§ 6-3-414(f)-(g) (2015); 40-27-101(f)-(g) (2015); *with* Wyo. Stat. §§ 6-3-414(f)-(g); 40-27-101(f)-(g). The 2015 legislative history of the original Laws is, therefore, the only relevant history of those provisions.

[7] The audio file of the House proceeding is available on the Wyoming Legislature's website at http://legisweb.state.wy.us/2015/audio/senate/s0119pm1.mp3.

In reality, only those that communicate resource data are likely to face liability, because it is publication that would alert landowners to the prior act of collection. The District of Idaho recently considered a similar circumstance when it invalidated a law banning audiovisual recording within agricultural facilities without the owner's consent. *ALDF I*, 44 F. Supp. 3d at 1023; *ALDF II*, 118 F. Supp. 3d at 1204-07. The court ruled that the act of recording was itself protected by the First Amendment, *ALDF II*, 118 F. Supp. 3d. at 1205, but that even if it were not, the law effectively regulated the communication of audiovisual recordings because individuals "will likely never be punished" unless recordings were eventually published. *ALDF I*, 44 F. Supp. 3d at 1023. Because "[a] law that expressly punished activists for publishing videos of agricultural operations would be considered a regulation of speech," so too would the law before the court because enforcement of its provisions "will likely have the same effect." *Id.* The Data Censorship Laws act in precisely the same fashion: even if they were otherwise permissible conduct regulations of general application—which they plainly are not—their effect will likely be to punish only those individuals who communicate about, or report on, resource data.

B. The Data Censorship Laws Do Not Escape Constitutional Scrutiny Because They Relate to Private Property

The State argues that the Data Censorship Laws cannot violate the First Amendment because they restrict speech on private property. *See* Defs.' Mem. at 10-12.[8] In making this argument, the State relies on cases that apply "forum analysis," Defs.' Mem. at 10, which analyze restrictions of speech on public property. Those cases do not apply to the Data Censorship Laws.

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[8] The State's Brief includes two sections related to this argument, *see* Defs.' Mem at 10-11 ("There is no right to exercise free speech on the private property of another."), 12 ("With no 'forum' involved, there is no 'scrutiny' for this Court to apply."), but both argue that because private property is not subject to forum analysis, Plaintiffs can bring no First Amendment claim.

Forum analysis, in limited circumstances, provides the government with greater flexibility to regulate speech on public property than on private property. It is fundamental to First Amendment law, however, that "[f]orum analysis applies only to government-owned property . . . . If the government wishes to control speech in privately owned schools or in privately owned homes, the analysis of the problem does not relate to whether the government may restrict speech in any particular forum." John E. Nowak & Ronald D. Rotunda, Constitutional Law § 16.1(f) (Hornbook Series 8th ed. 2010); *see also* Erwin Chemerinsky, Constitutional Law: Principles and Policies (4th ed. 2011) (explaining that the Supreme Court has dealt with "claims of a right to use government property for speech purposes . . . by identifying different types of government property . . . and by articulating different rules as to when the government can regulate each"). Thus, forum analysis creates special rules for regulation of speech within government property that is a public forum, a designated public forum, or a nonpublic forum. *See Ark. Educ. Television Comm'n v. Forbes*, 532 U.S. 666, 677-78 (1998) (identifying categories of government property for purposes of forum analysis). But when government action is not limited to those spaces, strict scrutiny applies to any content-based regulation.[9]

[9] The briefing on the State's previous motion to dismiss did not address forum analysis, leading the Court to state that "[t]he parties do not clearly identify which forum is at issue." First Mot. to Dismiss Order at 28. As explained here, the doctrines surrounding forum analysis only apply when the government seeks to control speech within a specific governmental property. When the government regulates broadly, the fact that regulation also applies to public property does not trigger forum analysis. For example, in *Reed* the Court struck down a sign ordinance that applied to both private and public property. 135 S. Ct. at 2224-25. Although the church that challenged the ordinance "frequently" placed signs "in the public right-of-way abutting the street," *id.* at 2225, the Court conducted no forum analysis in striking down the ordinance because the ordinance was not specifically directed at those public right-of-ways.

The State's contention that it must have free reign to regulate speech on private property because private property does not fall within a recognized "forum" has no basis in law. The logic of that argument would enable the government to criminalize any conversation around the kitchen table about subjects or viewpoints to which the politically powerful object. Big Brother may exercise such power in George Orwell's fictional Airstrip One, *see* George Orwell, 1984 (1949), but such censorship is anathema to the First Amendment. The Supreme Court has also consistently applied the First Amendment to regulations affecting private property. For example, the Court has "invalidated restrictions on door-to-door canvassing and pamphleteering," which, of course, occur on private property. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 160 (2002); *see also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980). Similarly, the Court has applied strict scrutiny to content-based ordinances that restrict signs on private property. *See Reed*, 135 S. Ct. at 2224.

Unsurprisingly, the cases the State cites for the reckless proposition that the First Amendment does not apply to private property have nothing to do with that issue, but instead address whether the First Amendment protects against the actions of private parties. "It is, of course, commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). *Lloyd Corporation, LTD. v. Tanner* held that the First Amendment did not require a private corporation to allow distribution of handbills on property owned by the corporation. 407 U.S. 551, 567-68 (1972). *Hudgens v. NLRB* held that the First Amendment did not prevent a private employer from excluding picketing workers from property the employer owned. 424 U.S. at 509. Plaintiffs do not, however, challenge private action, but the constitutionality of duly enacted laws, which are enforced and implemented by the State and to which the First Amendment applies with full

force. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941 (1982) (noting that while petitioner could not bring constitutional challenge to "misuse"" of state law by private individuals, "the procedural scheme created by the statute obviously is the product of state action"); *McGuire v. Reilly*, 386 F.3d 45, 60 (1st Cir. 2004) (explaining that state action exists "if what the plaintiff is really aiming at is the constitutionality of the statute itself").

C. The State Does Not Argue that the Data Censorship Laws Are Content Neutral

The State does not deny that the Data Censorship Laws are content-based, and they plainly are: they differentiate between speech related to "resource data" and other subject matters. Wyo. Stat. §§ 6-3-414(a)(i), (b), (c)(i) (tying criminal liability to collecting "resource data"); 40-27-101(a)(i), (b), (c)(i) (tying civil liability to collecting "resource data"); *see Mosley*, 408 U.S. at 95 ("[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). The Laws are also content based because they were enacted for the purpose of suppressing speech on particular subjects. *See Reed*, 135 S. Ct. at 2227; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994). And the Laws discriminate on the bases of viewpoint, which is a particularly "egregious form of content discrimination." *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Indeed, this Court already ruled that "Plaintiffs have sufficiently called the viewpoint neutrality of the statutes into doubt." First Mot. to Dismiss Order at 30; *see also id.* at 32 (explaining that the consequential damage provision indicates that civil Data Censorship Law "appears to simply be a façade for content or viewpoint discrimination"). The analysis of whether the Laws are content based, assuming they target speech, has not changed because all versions of the Data Censorship Laws still apply only to "resource data." *Compare, e.g.*, Wyo. Stat. 6-3-414(a); *with* Wyo. Stat. 6-3-414(a) (2015).

D. The State Does Not Argue that the Data Censorship Laws Survive Strict Scrutiny

The Complaint adequately alleges that the Data Censorship Laws are content-based regulations and that strict scrutiny applies. *See* Compl. ¶¶ 105-09; *Reed*, 135 S. Ct. at 2231. The State makes no argument in favor of dismissal that the Laws can survive strict scrutiny.

E. The Complaint Adequately Alleges that the Data Censorship Laws Are Unconstitutionally Overbroad

The State's argument against overbreadth, Defs.' Mem. at 13, rests on a flawed reading of the Data Censorship Laws and a massive underappreciation of the threat to expressive activity that the Laws pose. The allegations in the Complaint adequately call into question whether "a substantial number of [the Laws'] applications are unconstitutional, judged in relation the statute[s'] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); *see* Compl. ¶ 107. Specifically, the Complaint illustratively identifies as subject to liability under the Data Censorship Laws, "every person who uses a cell phone to take a picture [1] while inadvertently standing on private land; [2] while on private land with landowner consent to be present, but without specific permission to take photos; and [3] while on any land, including public land, after having inadvertently crossed private land en route." Compl. ¶ 107.

The State's argument ignores all but the first category of individuals identified in the Complaint, Defs.' Mem. at 13, presumably based on its mistaken claim that "[i]f a person does not enter onto private land without permission, that person cannot commit criminal trespass under the 2016 statute." Defs.' Mem. at 4; *see also* Compl. ¶ 14. That is not correct: As this Court has already opined of the nearly identical statutory language in the original Data Censorship Laws, "[t]he relevant statutory sections require 'legal authorization to enter or access the land *to collect resource data*,'" and "giving each phrase of these provisions meaning, the

trespass statutes seem to require authorization not only to enter or access land, but also to collect resource data." First Mot. to Dismiss Order at 5; *see* Wyo. Stat. §§ 6-3-414(a)(ii)(B), (b)(ii); 40-27-101(a)(ii)(B), (b)(ii).

In any event, the Complaint alleges that "members of the public routinely use" roads built and maintained by the government that cross private property at unmarked locations. Compl. ¶¶ 13-14, 25. The Complaint further alleges that "[m]uch of Wyoming is comprised of undeveloped lands that include no visible demarcations that separate public and private lands," and that "it is often difficult to determine whether a road that appears open to the public, and which the public routinely makes use of, crosses private land, and if it does so, whether a public right of way exists over that road." Comp. ¶ 81; *see also* Compl. ¶ 13 ("[A]reas in Wyoming that are 'a jumble of federal, private, and state land,' where there are 'no fences, cattle, notice of private property, or other postings.'" (quoting *Wyoming v. Livingston*, 443 F.3d 1211, 1215 (10th Cir. 2015)). Because the Laws contain no *mens rea* requirement, they apply to everyone while inadvertently on private land without permission, or while on public land or on private land with permission—while hiking, fishing, hunting, or camping—if they drove along one of the many roads built and maintained by the government that happen to cross private land on the way. Compl. ¶¶ 13, 25, 107.

The definitions included in the Laws also ensure that individuals who do not even envision themselves as collecting data at all will be vulnerable to liability. Every cellphone picture or video of the lands of Wyoming will capture resource data within the Laws' meaning because recording such images constitutes data collection, any information about land or land use constitutes resource data, and cellphones embed geographic location information in the images or videos they capture as a matter of course. *See* Compl. ¶ 92; Wyo. Stat. §§ 6-3-

414(e)(i), (e)(iv); 40-27-101(h)(i), (h)(iii). Everyone who takes photos or makes recordings using a cellphone or other device that records geographical information, for any reason—be it journalistic, artistic, educational, scientific, or otherwise—either while inadvertently on private land or having unknowingly stepped onto private land to access public land, would be subject to civil and liability under the Data Censorship Laws. The Laws thus will punish the expressive activity of a vast number of people unsure as to precisely where public property ends and private property begins.

Moreover, people who enter private land with permission, but then take cellphone photos without obtaining specific permission to do so, violate the Data Censorship Laws: every school child visiting a local farm, every fisherman who has received permission to walk the streams crossing private property, or every tourist on a horseback ride across a private ranch. Innumerable visitors to the vast expanses of Wyoming will violate the Data Censorship Laws. The Laws thus substantially threaten to "deter or 'chill' constitutionally protected speech," especially because the criminal Data Censorship Law "imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). The Complaint, therefore, states a claim that the Laws are unconstitutionally overbroad.

II. The Complaint Adequately States a Claim that the Data Censorship Laws Violate the Fourteenth Amendment's Equal Protection Clause

The Complaint adequately alleges that the Data Censorship Laws violate the Equal Protection Clause both because they burden the fundamental right to freedom of speech, Compl. ¶ 115, and because they are infected with unconstitutional animus, Compl. ¶ 117-18. The Court, therefore, should not dismiss Plaintiffs' claim under the Equal Protection Clause.

A. The Complaint Adequately Alleges that the Data Censorship Laws Burden the Fundamental Right of Freedom of Speech

As discussed above, the Complaint adequately alleges that the Data Censorship Laws burden the right of freedom of speech. Free speech is a fundamental right that is protected by the Equal Protection Clause, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995), and laws that burden fundamental rights must withstand strict scrutiny, *see Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 932 (10th Cir. 1989); *see also* First Mot. to Dismiss Order at 35 (ruling that "the trespass statutes must withstand strict scrutiny" under the Equal Protection Clause because Plaintiffs' adequately alleged that the Laws "burden . . . Free Speech Rights"). Because the State makes no argument that the Laws can survive strict scrutiny, the Court should not dismiss Plaintiffs' claim under the Equal Protection Clause.

B. The Complaint Adequately Alleges that the Data Censorship Laws Are Infected by Unconstitutional Animus

The Complaint adequately alleges that adoption of the Data Censorship Laws "was motivated in substantial part by animus toward environmental groups," Compl. ¶ 117, *see also* Compl. ¶ 118, and even facially neutral laws are subject to heightened review, or deemed outright unconstitutional, if motivated by animus toward a particular group of people, *see, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The State makes three arguments in support of its contention that the Complaint does not adequately allege that the Data Censorship Laws are infected by animus. First, the State appears to argue, relying on a concurrence by Judge Jerome Holmes, that a plaintiff can prove animus based only on the structural features of a law, and not legislative history. Defs.' Mem. at 22-23

(relying on *Bishop v. Smith*, 760 F.3d 1070, 1096-1109 (10th Cir. 2014) (Holmes, concurring)). Judge Holmes' individual view, however, is in direct tension with the Supreme Court's finding of unconstitutional animus based on legislative history. *See Windsor*, 133 S. Ct. at 2693 (relying on "[t]he history of [a federal statute]'s enactment" as evidence of animus); *see also ALDF II*, 118 F. Supp. 3d at 1211 (finding law violated the Equal Protection Clause because it "was animated by an improper animus toward animal welfare groups and other undercover investigators in the agricultural industry"); *cf. Reed*, 135 S. Ct. at 2228-29 (recognizing that a legislative motive to suppress speech can subject a facially-neutral regulation to strict scrutiny).

Second, the State argues that even if the Complaint adequately alleges that the 2015 Data Censorship Laws were motivated by animus, the next year the same legislators were motivated by only the purest of intentions when they amended the Laws. Defs.' Mem. at 21. A legislature does not automatically cleanse the taint of improper motive by amending a law. Legislative motive may "be inferred from the totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Even when a legislature entirely reenacts a law originally motivated by improper purposes, the original legislative motive may still bear on the constitutionality of the reenacted provision. *See Hayden v. Paterson*, 594 F.3d 150, 167 (2d. Cir. 2010) ("We do not take lightly the possibility that a legislative body might seek to insulate from challenge a law known to have been originally enacted with a discriminatory purpose by (quietly) reenacting it without significant change."); *Chen v. City of Houston*, 206 F.3d 502, 518 (5th Cir. 2000) (explaining that "the district court erred in categorically and totally dismissing evidence of intent garnered from prior [voting] plans" but finding that council that reenacted plan did so without discriminatory purpose).

It is difficult to imagine a circumstance in which the animus motivating the original Laws would be more relevant to analyzing the revised Laws. Here, the 63rd Wyoming legislature enacted the original Data Censorship Laws and then amended those laws only a year later.[10] Senator Larry Hicks was a sponsor of both the original laws and the amendments.[11] Moreover, the objective of the amendments was to attempt to preserve the Laws from being struck down by this Court. *See* Audio Recording of Senate 2016 Budge Session, Feb. 16, 2016 Afternoon Session at 0:19:12-0:19:54 (statement by Senator Hicks) (explaining that the "intent" of the amendment is "str[iking] that language" on which the Court focused during the "hearing that was held on the bill with the legal challenge" in hopes that the revised law would avoid scrutiny).[12] Nor is there any legislative history indicating that the Legislature had suddenly developed a new rationale for the amendments that it did not have when it enacted the 2015 Laws. *See* Audio Recording of House 2016 Budget Session, Feb. 25, 2016 at 2:12:24-2:12:40 (statement of unnamed co-sponsor of amendment to criminal law) (explaining amendment and saying "I think everyone's pretty much aware of the reasons why. I'm not going to go into that").[13] The

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[10] The Laws were initially enacted in March 2015, *see* Wyoming Legislature, 2015 Bill Information, http://legisweb.state.wy.us/2015/billreference/BillReference.aspx?type=ALL (hereinafter "2015 Bill Information"), and the amendments were enacted in March 2016, *see* Wyoming Legislature, 2016 Bill Information, http://legisweb.state.wy.us/2016/billreference /BillReference.aspx?type=ALL (hereinafter "2016 Bill Information").

[11] *See* 2016 Bill Information; 2015 Bill Information. Senator Hicks is listed as sponsor of the 2015 civil Law and 2016 amendments to the civil and criminal Laws. The Judiciary Committee, of which the Senator is a member, is listed as sponsor of the 2015 criminal Law.

[12] An audio recording of the Senate proceedings is available is available on the Wyoming Legislature's website at http://legisweb.state.wy.us/2016/audio/senate/s021616pm1.mp3.

[13] An audio recording of the House proceeding is available on the Wyoming Legislature's website at http://legisweb.state.wy.us/2016/audio/house/h022516pm1.mp3. The member of the

Legislature amended the Data Censorship Laws in 2016 to preserve the effect of the 2015 Laws to target disfavored groups based on animus. At the very least, this is a question of fact that the Court should not resolve at this stage.

Third, the State argues that the Complaint does not adequately allege animus because the legislative history cited demonstrates mere "frustration on the part of a few of the legislators . . . [and not] animus on the part of the Legislature as a whole." Defs.' Mem. at 20-21 (emphasis omitted). As the State admits, however, Plaintiffs' allegations need only "state a claim to relief that is plausible on its face." Defs.' Mem. at 6 (quoting *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012)). The allegations in the Complaint easily surpass that requirement. The Complaint includes a general allegation that "Wyoming's adoption of the Laws was motivated in substantial part by animus toward environmental groups and their activities." Compl. ¶ 117. The Complaint connects this general allegation to allegations of specific statements by legislators making clear that they intended to target environmental groups, and the Complaint further alleges that legislators referred to those at whom the statutes were aimed as "activist[s]," "extremists," "nefarious," and "evil." Compl. ¶¶ 117-18. Such allegations are on par with the legislative history that the Supreme Court has relied on to strike down laws for evincing animus, *see Windsor*, 133 S. Ct. 2675, 2693 (finding animus based on a congressional committee's report explaining that law was intended to express a "moral disapproval of homosexuality"); *Moreno*, 413 U.S. at 534 (finding animus because the "little legislative history" that existed indicated that the law was intended to prevent "hippies" from receiving food stamps), and in any case are sufficient at this preliminary stage of litigation.

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standing committee explaining the amendment is not referred to by name but as a "representative from the land of sugar and barley").

C. Plaintiffs' Equal Protection Claim Should Not Be Dismissed Because the Data Censorship Laws Are "Targeted" Trespass Laws

The State argues that Plaintiffs' equal protection claim should be dismissed because the Equal Protection Clause does not prohibit creation of "a targeted criminal trespass statute." Defs.' Mem. at 18. This argument misses the point. The Equal Protection Clause requires heightened scrutiny when the government burdens fundamental rights or enacts laws based on "a bare . . . desire to harm a politically unpopular group." *Moreno*, 413 U.S. at 534.

Relatedly, the State argues that because it has enacted a law to target people trespassing to "hunt, fish, or trap," Defs.' Mem. at 19 (citing Wyo. Stat. Ann. § 23-3-305(b) (2016)), it can enact the Data Censorship Laws to target people trespassing to collect data. This argument fails on its own terms because, unlike Wyoming Statute § 23-3-305(b), the Data Censorship Laws impose criminal and civil liability even on people who enter property with permission, and thus are not trespassers in any traditional sense. *See* Wyo. Stat. §§ 6-3-414(a)(ii)(B), (b)(ii); 40-27-101(a)(ii)(B), (b)(ii); *see also* First Mot. to Dismiss Order at 5. The Data Censorship Laws are not, therefore, truly trespass laws at all, because trespass laws protect a property owner's right to exclude others from their land.

The State's argument also fails because a government's ability to enact one targeted law—like the State's law that singles out trespassing hunters, fisherman, and trappers—does not mean the government has a free hand to target anyone, for any reason. Presumably, the State would not argue it can constitutionally create special trespass laws for racial or religious minorities, members of the gay and lesbian community, or those who vote in presidential elections. Similarly, the State cannot create special laws motivated by animus against a group of people or that target individuals for engaging in activities protected by the First Amendment.

CONCLUSION

For the reasons stated, the Plaintiffs respectfully request that the Court deny the State's motion to dismiss the Plaintiff's First Amended Complaint.

Respectfully submitted this 24th Day of May, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the May 24, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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DATED this 24th Day of May, 2016.

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ORIGINAL SENATE ENGROSSED
FILE NO. SF0075

ENROLLED ACT NO. 55, SENATE

SIXTY-THIRD LEGISLATURE OF THE STATE OF WYOMING
2016 BUDGET SESSION

AN ACT relating to crimes and offenses; amending provisions related to the crimes of trespassing to unlawfully collect resource data and unlawful collection of resource data; creating the crime of trespassing to access adjacent or proximate land; repealing the definition of "open land"; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 6-3-414(a)(intro), (i), (ii)(A), (B), (b)(intro), (ii), by creating a new subsection (c) and by amending and renumbering (c) through (f) as (d) through (g) is amended to read:

6-3-414. Trespassing to unlawfully collect resource data; unlawful collection of resource data.

(a) A person is guilty of trespassing to unlawfully collect resource data from private land if he:

(i) Enters onto ~~open~~ private land for the purpose of collecting resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter ~~or access~~ the private land to collect the specified resource data; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to enter ~~or access~~ the private land to collect the specified resource data.

(b) A person is guilty of unlawfully collecting resource data if he enters onto private ~~open~~ land and collects resource data from private land without:

ENROLLED ACT NO. 55, SENATE

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2016 BUDGET SESSION

(ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(c) A person is guilty of trespassing to access adjacent or proximate land if he:

(i) Crosses private land to access adjacent or proximate land where he collects resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

~~(c)~~(d) ~~Trespassing to unlawfully collect resource data and unlawfully collecting resource data~~ Crimes committed under subsection (a), (b) or (c) of this section are punishable as follows:

(i) By imprisonment for not more than one (1) year, a fine of not more than one thousand dollars ($1,000.00), or both;

(ii) By imprisonment for not less than ten (10) days nor more than one (1) year, a fine of not more than five thousand dollars ($5,000.00), or both, if the person has previously been convicted of trespassing to unlawfully collect resource data or unlawfully collecting resource data.

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~~(d)~~ (e) As used in this section:

(i) "Collect" means to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form ~~from open land which is submitted or intended to be submitted to any agency of the state or federal government~~ and the recording of a legal description or geographical coordinates of the location of the collection;

(iii) "Peace officer" means as defined by W.S. 7-2-101;

(iv) "Resource data" means data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species. "Resource data" does not include data:

(A) For surveying to determine property boundaries or the location of survey monuments;

(B) Used by a state or local governmental entity to assess property values;

(C) Collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties.

~~(c)~~ (f) No resource data collected on private land in violation of this section is admissible in evidence in any civil, criminal or administrative proceeding, other than a prosecution for violation of this section or a civil action against the violator.

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~~(f)~~(g) Resource data collected on private land in violation of this section in the possession of any governmental entity as defined by W.S. 1-39-103(a)(i) shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.

Section 2. W.S. 6-3-414(e)(ii) is repealed.

Section 3. This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

(END)

Speaker of the House

President of the Senate

Governor

TIME APPROVED: _____

DATE APPROVED: _____

I hereby certify that this act originated in the Senate.

Chief Clerk

ORIGINAL SENATE ENGROSSED
FILE NO. SF0076

ENROLLED ACT NO. 52, SENATE

SIXTY-THIRD LEGISLATURE OF THE STATE OF WYOMING
2016 BUDGET SESSION

AN ACT relating to trade and commerce; amending provisions related to the civil causes of action for trespass to unlawfully collect resource data and unlawful collection of resource data; creating the civil trespass to access adjacent or proximate land; providing definitions; repealing a duplicative provision; and providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 40-27-101(a)(intro), (i), (ii)(A), (B), (b)(intro), (ii), by creating a new subsection (c), by amending and renumbering (c) as (d), by amending and renumbering (d) and (f) as (f) and (g) and by creating a new subsection (h) is amended to read:

40-27-101. Trespass to unlawfully collect resource data; unlawful collection of resource data.

(a) A person commits a civil trespass to unlawfully collect resource data from private land if he:

(i) Enters onto ~~open~~ private land for the purpose of collecting resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or statutory, contractual or other legal authorization to enter ~~or access~~ the private land to collect the specified resource data; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to enter ~~or access~~ the private land to collect the specified resource data.

ORIGINAL SENATE ENGROSSED
FILE NO. SF0076

ENROLLED ACT NO. 52, SENATE

SIXTY-THIRD LEGISLATURE OF THE STATE OF WYOMING
2016 BUDGET SESSION

(b) A person commits a civil trespass of unlawfully collecting resource data if he enters onto private ~~open~~ land and collects resource data from private land without:

(ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(c) A person commits a civil trespass to access adjacent or proximate land if he:

(i) Crosses private land to access adjacent or proximate land where he collects resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

~~(c)~~ (d) A person who trespasses to unlawfully collect resource data, ~~or~~ a person who unlawfully collects resource data or a person who trespasses to access adjacent or proximate land under this section shall be liable in a civil action by the owner or lessee of the land for all consequential and economic damages proximately caused by the trespass. In a civil action brought under this section, in addition to damages, a successful claimant shall be awarded litigation costs. For purposes of this subsection, "litigation costs" shall include, but is not limited to, court costs, expert witness fees, other witness fees, costs associated with depositions and discovery, reasonable attorney fees and the reasonably necessary costs of identifying the trespasser, of obtaining effective

service of process on the trespasser and of successfully effecting the collection of any judgment against the trespasser.

~~(d)~~ (f) Resource data unlawfully collected on private land under this section is not admissible in evidence in any civil, criminal or administrative proceeding, other than a civil action for trespassing under this section or a criminal prosecution for trespassing under W.S. 6-3-414.

~~(f)~~ (g) Resource data unlawfully collected on private land under this section in the possession of any governmental entity as defined by W.S. 1-39-103(a)(i) shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.

(h) As used in this section:

(i) "Collect" means to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location of the collection;

(ii) "Peace officer" means as defined by W.S. 7-2-101;

(iii) "Resource data" means data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species. "Resource data" does not include data:

(A) For surveying to determine property boundaries or the location of survey monuments;

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FILE NO. SF0076

ENROLLED ACT NO. 52, SENATE

SIXTY-THIRD LEGISLATURE OF THE STATE OF WYOMING
2016 BUDGET SESSION

(B) Used by a state or local governmental entity to assess property values;

(C) Collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties.

Section 2. W.S. 40-27-101(e) is repealed.

Section 3. This act is effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

(END)

Speaker of the House

President of the Senate

Governor

TIME APPROVED: _____

DATE APPROVED: _____

I hereby certify that this act originated in the Senate.

Chief Clerk