IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WESTERN WATERSHEDS PROJECT; NATIONAL PRESS PHOTOGRAPHERS ASSOCATION; NATURAL RESROUCES DEFENSE COUNCIL, INC., PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.; and CENTER FOR FOOD SAFETY,

Plaintiffs,

vs.

PETER K. MICHAEL, in his official capacity as Attorney General of Wyoming; TODD PARFITT, in his official capacity as Director of the Wyoming Department of Environmental Quality; PATRICK J. LEBRUN, in his official capacity as County Attorney of Fremont County, Wyoming; JOSHUA SMITH, in his official capacity as County Attorney of Lincoln County, Wyoming; CLAY KAINER, in his official capacity as County and Prosecuting Attorney of Sublette County, Wyoming; MATTHEW MEAD, in his official capacity as Governor of Wyoming,

Defendants.

Case No. 15-CV-0169-SWS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court upon a Motion to Dismiss, filed by Defendants Peter Michael, Todd Parfitt, and Matthew Mead (hereinafter State Defendants), in their official capacities. (ECF No. 28). Having considered the motion, response, oral

arguments, and all other relevant pleadings, the Court **GRANTS** in part and **DENIES** in part State Defendants' Motion to Dismiss.

BACKGROUND

Plaintiffs Western Watersheds Project (Western Watersheds), National Press Photographers Association (NPPA), National Resource Defense Council (NRDC), People for the Ethical Treatment of Animals (PETA), and, Center for Food Safety (CFS), are interest groups aimed at protecting and advocating for animals, wildlife, and the environment. (ECF No. 1, ¶¶ 17-35). Plaintiffs filed this action September 29, 2015, challenging the constitutionality of two statutes (hereinafter trespass statutes) passed by the Wyoming legislature earlier in 2015. Plaintiffs assert these trespass statutes unconstitutionally prevent them from collecting and submitting data relating to land and land use to governmental agencies, as they have done in the past in efforts to protect and advocate for animals and the environment.

One of the statutes is a criminal statute, Wyo. Stat. § 6-3-414, entitled "Trespassing to unlawfully collect resource data; unlawful collection of resource data." The other is a civil statute, Wyo. Stat. § 40-27-101, entitled "Trespass to unlawfully collect resource data; unlawful collection of resource data."[1] These trespass statutes are in large part identical, with one imposing criminal liability and the other imposing civil.

[1] The civil statute was originally codified at §40-26-101. The statute has now been recodified at § 40-27-101. The rest of this order will refer to the statute as recodified.

There are two proscriptive subsections of each statute, one pertaining to "open land," and the other "private open lands." Under the first, a person is subjected to either criminal or civil liability "if he:

> (i) Enters onto **open 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 land to collect resource data; or
>
> (B) Written or verbal permission of the owner, lessee or agent of the owner to enter or access the land to collect the specified resource data."

Wyo. Stat. §§ 6-3-414(a); 40-27-101(a) (emphasis added).

Under the second subsection, a person is subjected to either criminal or civil liability "if he enters onto **private open land** and collects resource data without:

> (i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or
> (ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the land to collect the specified resource data."

Wyo. Stat. §§ 6-3-414(b); 40-27-101(b) (emphasis added).

Various terms used within the statutes have unique definitions, distinct from their common meanings.[2] "Open land" is defined as land outside the exterior boundaries of

[2] Only the criminal statute, Wyo. Stat. § 6-3-414, provides definitions. However, the parties seem to agree the definitions were intended to apply to both statutes. The Court agrees. "In the absence of a state court case interpreting the relevant state law, federal courts must predict how the state court would interpret the statute in light of existing state court opinions, comparable statutes, and decisions from other jurisdictions." *United States v. Harmon*, 742 F.3d 451, 456 (10th Cir. 2014). "All statutes must be construed in *pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony." *Cheyenne Newspapers, Inc. v. Building Code Bd. of Appeals of City of Cheyenne*,2010 WY 2, ¶9, 222 P.3d 158, 162 (Wyo. 2010) (citation omitted). Here, both statutes relate to "trespass to unlawfully collect resource data," and contain identical language as to the proscribed conduct. Wyo. Stat. §§ 6-3-414(a)(i)-(ii), (b)(i)-(ii); 40-27-101(a)(i)-(ii), (b)(i)-(ii). Also, the civil statute cross-references the criminal statute. Wyo. Stat. § 40-27-101(d). For these reasons, the Court finds the Wyoming legislature likely intended the definitions included in the criminal statute to apply to the civil statute as well.

any incorporated city, town, approved subdivision or development. Wyo. Stat. § 6-3-414(d)(ii). "Resource data" is defined as "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." Wyo. Stat. § 6-3-414(d)(iv). "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 government entity to assess property values; or (C) Collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties." Wyo. Stat. § 6-3-414(d)(iv). "'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." Wyo. Stat. § 6-3-414(d)(i) (emphasis added).

Incorporating these definitions into the plain language of the trespass statutes, a person is criminally or civilly liable if he or she: (1) enters open land to collect resource data without an ownership interest, authorization, or permission; (2) somehow records or preserves data about the land or land use; and (3) intends to submit or actually submits such data to a governmental agency. This final element is most crucial to the constitutional analyses below. The trespass statutes do not punish one who simply enters land without permission or authorization for any other purpose, or one who intends to communicate collected resource data to anyone other than a governmental agency.

The scope of the trespass statutes remains somewhat unclear at this point, particularly with respect to the sections of the statutes relating to "open lands." Members

of the public have a right to be upon various "open lands" for various purposes. For example, citizens have the right to drive on I-25, or hike and picnic on state and BLM lands. At oral arguments, State Defendants opined if one has a right to be upon land, one has the necessary "legal authorization" to gather or preserve resource data and submit it to governmental agencies. Hr'g. Tr. Oral Argument at 8:21-9:13. However, a plain reading of the trespass statutes does not support State Defendants' interpretation.

The relevant statutory sections require "legal authorization to enter or access the land *to collect resource data*." Wyo. Stat. §§ 6-3-414(a)(ii)(A); 40-27-101(a)(ii)(A) (emphasis added). State Defendants' interpretation would render the emphasized portion meaningless. A statute should not be construed in a way that renders phrases meaningless, redundant, or superfluous. *Rake v. Wade*, 508 U.S. 464, 471-72 (1993). As written, and giving each phrase of these provisions meaning, the trespass statutes seem to require authorization not only to enter or access lands, but also to "collect resource data."

The general rights of the public to be upon various public lands do not include specific authorization to collect resource data,[3] and certainly not how that phrase is defined by the trespass statutes. Consistent with a plain reading of the trespass statutes, where that legal authorization to collect "specified resource data" does not exist, members of the public must obtain written or verbal permission from the owners of public lands, or their lessees or agents. Wyo. Stat. §§ 6-3-414(a)(ii)(B); 40-27-

[3] For example, the State of Wyoming extends to the public the privilege of using legally accessible state lands for casual recreational day uses, "such as horseback riding, photography, wildlife and bird observation, hiking, rock hunting, and other recreational day use." Office of Land and Land Invs., Bd. of Land Comm'rs R. and Regs., Ch. 13 §§ 2, 4. The BLM regulations permit "casual use" upon BLM lands, meaning any short term non-commercial activity which does not cause appreciable damage or disturbance to the public lands, their resources or improvements, and which is not prohibited by closure of the lands to such activities." 43 C.F.R. § 2920.0-5(k).

101(a)(ii)(B). If this Court were to accept the State Defendants' position, the permission provision of the statute would also be superfluous, as no permission would be required.

Under the criminal trespass statute, a first time offender faces imprisonment for not more than one (1) year and a fine of not more than one thousand dollars ($1,000), or both. Wyo. Stat. § 6-3-414(c)(i). A repeat offender faces imprisonment for not less than ten (10) days and not more than one (1) year, and a fine of not more than five thousand dollars ($5,000), or both. Wyo. Stat. § 6-3-414(c)(ii). Under the civil statute, a defendant is liable to the owner or lessee of land for "all consequential and economic damages proximately caused by the trespass," as well as litigation costs. Wyo. Stat. § 40-27-101(c).

In addition to potential imprisonment and monetary liability, the trespass statutes prohibit the use of resource data collected in violation of the statutes in any civil, criminal, or administrative proceeding, other than to prosecute a person under either statute. Wyo. Stat. §§ 6-3-414(e); 40-27-101(d); (e). Also, any data in possession of any Wyoming governmental entity which was collected in violation of the statutes must be expunged by the entity. Wyo. Stat. §§ 6-3-414(f); 40-27-101(f).

Plaintiffs assert the characterization of the statutes as "trespass statutes" is a misnomer. They believe the trespass statutes are meant to thwart their efforts to inform and influence governmental agency decisions. Plaintiffs bring four causes of action, arguing the trespass statutes: (1) violate the Petition Clause of the First Amendment; (2) violate the Free Speech Clause of the First Amendment; (3) are preempted by federal laws; and (4) violate the Equal Protection Clause of the Fourteenth Amendment.

State Defendants filed the present Motion to Dismiss (ECF No. 28), asserting: (1) Plaintiffs lack standing to challenge the civil trespass statute; (2) Plaintiffs fail to state a claim under F.R.C.P. Rule 12(b)(6) for each cause of action; and (3) the Governor is an improper defendant.

DISCUSSION

I. Governor Matthew Mead is an Improper Defendant

State Defendants assert the Governor is an improper defendant, as he has no enforcement authority under the trespass statutes. (ECF No. 28-1, pp. 23-24). Plaintiffs argue the Governor is a proper defendant because he would be involved in the expungement of data as required by the statutes because of his duties under Wyo. Stat. § 9-1-224. (ECF No. 34, p. 25). The Governor is not a proper party.

Any claim against a government official in his "official" capacity is, in actuality, a claim against the official's office, as the official is simply an agent of the government entity for which he works. *Brown v. Montoya*, 662 F.3d 1152, 1161 (10th Cir. 2011) (citing *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71(1989)). A state, and its agencies, have immunity from suit under the Eleventh Amendment, and thus cannot be sued in federal court by a private individual, unless: "(1) the state consents to suit; (2) Congress expressly abrogates the states' immunity; or (3) the citizen sues a state official pursuant to *Ex Parte Young*, 209 U.S. 123 (1908)." *Opala v. Watt*, 454 F.3d 1154, 1157 (10th Cir. 2006) *cert. denied*, 549 U.S. 1078 (2006).

Under *Ex Parte Young*, a plaintiff may sue a state official in his official capacity to enjoin alleged ongoing violations of federal law. *Crowe & Dunlevy, P.C. v. Stidham*, 640

F.3d 1140, 1154 (10th Cir. 2011). The official need not have a "special connection" to the allegedly unconstitutional statute. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010). Rather, the official must have "a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Id.* (internal citation and quotation marks omitted).

Here, the Governor's involvement in the enforcement of the trespass statutes is attenuated at best. The Wyoming legislature enacted Wyo. Stat. § 9-1-224 in 2012, providing "[t]he governor's office may supervise the collection of baseline scientific assessment data on public lands which may impact agricultural, mineral, geological, historical or environmental resources." Wyo. Stat. § 9-1-224(a). "The governor's office shall provide for a repository for all data collected. . . ." Wyo. Stat. § 9-1-224(a). At oral arguments, State Defendants explained the Governor's role in creating an information repository was essentially to disperse funds to the University of Wyoming, where the repository is housed and maintained. Hr'g. Tr. 55:16-56:16. The Governor's role since dispersing funds has been virtually nonexistent. Hr'g. Tr. 56:17-19. In any event, it is the "governor's office" charged with maintaining the repository, not necessarily the Governor himself. Hr'g. Tr. 55:11-15.

Even accepting, for argument's sake, the Governor is actively involved in monitoring or expunging data in the repository, his role would only be triggered *after* a court found a violation of one or both of the trespass statutes. Nothing gives the Governor authority to expunge data based upon a mere suspicion it was collected in violation of the trespass statutes. The Governor's duties are ministerial. He has no direct control over the

enforcement of the statutes and any expungement would only be in response to a court finding under the statutes.

In sum, Plaintiffs fail to identify a particular duty of the Governor to enforce the trespass statutes. Any purported connection is far too tenuous and arbitrary to justify naming Governor Mead as a defendant in this case.

II. Standing

State Defendants assert Plaintiffs lack standing to challenge the civil trespass statute, Wyo. Stat. § 40-27-101. (ECF No. 28-1, pp. 6-9). They argue any injury to Plaintiffs arising from this statute is attenuated and dependent upon the decisions of third parties. On the other side, Plaintiffs argue they do in fact have standing, as the civil statute chills their First Amendment activity by posing a real and credible threat of liability.

A. Standard of Review

On a motion to dismiss for lack of standing, the Court must accept as true all material allegations of the complaint, and construe the complaint in favor of the complaining party. *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The Court "should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

B. Discussion

To establish standing, a plaintiff must demonstrate an injury "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). The threatened injury must be certainly impending and not merely some speculative or attenuated future injury. *Id.* (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Here, State Defendants assert Plaintiffs' alleged injury arising out of the civil trespass statute is too speculative to convey standing. They claim any future injury to Plaintiffs is dependent upon the independent decision of a third party landowner to exercise his rights under the statute. Because no civil action is currently pending or threatened against the Plaintiffs, State Defendants argue Plaintiffs' injury is not certainly impending and is merely speculative.

The absence of a pending lawsuit brought by a third party does not automatically render Plaintiffs' injury speculative or attenuated. The Supreme Court has clearly held a plaintiff need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Similarly, the Tenth Circuit recognizes standing when a plaintiff reasonably refrains from engaging in First Amendment activity due to a credible threat of liability under a *civil* statute. *Initiative Referendum Inst.*, 450 F.3d at 1089.

The *Initiative Referendum Institute* court provided three criteria to evaluate the credibility and objectivity of the "chill" of First Amendment activity purportedly caused

by the threat of enforcement of a civil statute. *Id.* The court found if a plaintiff could satisfy these criteria, it would provide "roughly the same level of concreteness and particularity that our precedents have demanded in cases involving the threat of criminal prosecution." *Id.* Under this analysis, Plaintiffs must provide:

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced.

Id. (emphasis in original).

Here, Plaintiffs state they and/or their members have collected resource data from open lands in Wyoming and reported such data to governmental agencies in the past. (ECF No. 1, ¶¶64-65(a)-(j)). They assert this activity is protected speech or expression under the First Amendment.[4] Engaging in this activity now exposes Plaintiffs and their members to civil liability under the statute. Wyo. Stat. §40-27-101. Therefore, Plaintiffs satisfy the first criterion.

Plaintiffs' complaint includes general desires to engage in data collection in the future, as well as specific examples of recent scenarios wherein they wished to engage in certain data collection activities, but refrained. (ECF No. 1, ¶70(a)-(e)). Therefore, Plaintiffs satisfy the second criterion.

Under the third criterion, Plaintiffs must demonstrate they have refrained from engaging in constitutionally protected activity *because of* a credible threat that the statute

[4] State Defendants do not seem to contest Plaintiffs' assertion that submitting data to governmental agencies is protected expressive activity. As will be discussed below, State Defendants focus their argument on whether the challenged statutes are content neutral. They do not argue submitting resource data is unprotected speech. (ECF No. 28-1. pp. 13-16).

will be enforced, exposing Plaintiffs to real consequences. *Initiative and Referendum Inst.*, 450 F.3d at 1088. Plaintiffs cannot rely upon a subjective belief that the statute will be enforced against them, causing some speculative injury. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

State Defendants assert Plaintiffs face no credible threat of injury, but merely speculate that a third party landowner will elect to sue Plaintiffs under the civil statute. According to State Defendants, for a "chill" to be credible and objective, a statute must be "regulatory, proscriptive, or compulsory in nature," and "mandate" or "direct" rather than "authorize" government action. (ECF No. 28-1, pp. 7-9). State Defendants rely upon a string of governmental surveillance cases to support their arguments. *Tatum*, 408 U.S. 1; *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (1984); *Clapper*, 133 S. Ct. 1138.

State Defendants' arguments are unpersuasive for multiple reasons. First, the facts of this case are starkly different than those in the surveillance cases cited by State Defendants. The surveillance cases involved the Executive branch's authority to monitor communications and collect intelligence. The plaintiffs in those cases feared they would be targeted for surveillance, and argued such surveillance infringed upon their Fourth Amendment freedoms. In those cases, there were no "clear guiding principles" to determine who would be targeted for monitoring, i.e., no proscriptive or regulatory language. *Tatum*, 408 U.S. at 13-14; *United Presbyterian*, 738 F.2d at 1380 ("[N]o part of the challenged scheme imposes or even relates to any direct governmental constraint upon the plaintiffs. . . ."); *Clapper*, 133 S. Ct. at 1149 ("[R]espondents can only speculate

as to how the Attorney General and Director of the National Intelligence will exercise their discretion in determining which communications to target."). If persons were targeted for surveillance, the challenged authorizing laws or policies did not indicate whether those persons were to be punished, or how any information obtained from surveillance could be used. There was no clear identification under the scheme who might be monitored or when.

Here, although it may contain some ambiguities, the civil statute *does* contain "guiding principles" which "prohibit" certain conduct. "A person commits a civil trespass" if he enters "open land" or "private open land," without an ownership interest, legal authorization, or permission from the landowner or lessee, for the purposes of "collecting" "resource data." Wyo. Stat. § 40-27-101(a)-(b). The only "speculation" of injury here is whether a landowner will bring suit. Unlike the surveillance cases, the Plaintiffs' conduct triggers the application of the statute. State Defendants correctly point out the Supreme Court has "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150. However, State Defendants admit the statutes at issue here were "in response to complaints from aggrieved landowners throughout Wyoming." (ECF No. 28-1, p. 1). It is not "guesswork" to conclude that if Plaintiffs engage in complained-of activities, the complaining landowners will likely use the avenue of relief provided to them by the legislature.

Further, aside from fear of being targeted for surveillance, the plaintiffs in the surveillance cases failed to identify any separate injury or ensuing action. *Tatum*, 408

U.S. at 13-14; *United Presbyterian*, 738 F.2d at 1380 (finding plaintiffs had "not adequately averred that any **specific action** [wa]s threatened or even contemplated against them.") (emphasis added); *Clapper*, 133 S. Ct. at 1149-50 ("[E]ven if respondents could demonstrate that the targeting of their foreign contacts is imminent, respondents can only speculate as to whether the government will seek to use the [authorized] surveillance."). Whether or not some injury would result depended upon the desires and decisions of the government. The trigger of potential injury was not the conduct of the plaintiffs, but rather the decisions of the government to monitor them or take action. Here, the injury, an identifiable civil action, is triggered by the Plaintiffs' decisions to engage in the proscribed conduct. Wyo. Stat. § 40-27-101(c).

Moreover, the State is a potential plaintiff under the civil statute, as it owns "open lands" under Wyo. Stat. § 40-27-101(a). Plaintiffs have engaged in, and wish to continue engaging in, data collection on state lands. (E.g. ECF No. 1, ¶70.b. ("Western Watersheds has routinely monitored water quality of waterways on state and federal land.")). At oral arguments, State Defendants attempted to characterize the department within the Wyoming government charged with pursing civil actions on behalf of the state as a third party, separate and distinct from Wyoming legislature which enacted the law. Hr'g. Tr. 5:10-19. Even accepting that distinction, the Court finds Plaintiffs' fear that the State of Wyoming would seek civil penalties to be credible and not speculative.

The Wyoming legislature could not possibly have intended the civil statute to be invoked only by private citizens. Were that the case, only subsection (b) pertaining to "private open lands" would be necessary, rendering subsection (a) pertaining to "open

lands," pointless. Such a construction would violate "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (internal citation and quotation marks omitted). The inclusion of the "open land" provision, subsection (a), indicates the Wyoming legislature intended the State of Wyoming and other governmental landowners to pursue civil damages. Given the context, it is not speculative for Plaintiffs to believe the State would pursue this newly authorized relief.

Finally, and perhaps most important, the Supreme Court is clear one need not subject himself to criminal prosecution under a statute in order to challenge its constitutionality. *Steffel*, 415 U.S. at 459. The proscriptive portions of the criminal and civil trespass statutes contain identical language. Wyo. Stat. §§ 40-27-101(a)(i)-(ii), (b)(i)-(ii); 6-3-414(a)(i)-(ii), (b)(i)-(ii). The Court cannot imagine, and State Defendants have not provided, any scenario wherein an individual could violate the civil trespass statute without violating the criminal trespass statute. Hr'g. Tr. 5:25-6:16. To violate one is to violate the other. Thus, under State Defendants' argument, the Plaintiffs would need to violate the *criminal* statute, risk criminal prosecution, and then await a civil action and raise unconstitutionality as a defense. The law does not require Plaintiffs to take such risks. In fact,

> Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.

Mobil Oil Corp. v. Attorney General of the Commonwealth of Virginia, 940 F.2d 73, 75 (4th Cir. 1991) (holding plaintiff had standing to challenge a statute which authorized the attorney general to bring a civil action on behalf of the state); *see also Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (holding plaintiff had standing to challenge a civil statute that imposed civil fines where the attorney general failed to disavow enforcement); *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006-07 (9th Cir. 2003) (finding political action committee had standing to challenge state statute which imposed civil penalties for violations); *Ostergren v. McDonnell*, 2008 WL 3895593 at * 4-5 (E.D. Va. Aug. 22, 2008) (finding plaintiff had standing to bring First Amendment pre-enforcement challenge of a civil penalty statute).

For these reasons, the Court finds Plaintiffs satisfy the third *Initiative Referendum Institute* criterion by sufficiently demonstrated a credible threat, reasonably causing them to refrain from constitutionally protected activities. 450 F.3d at 1089. Having satisfied all three criteria, the Court finds Plaintiffs have established standing to challenge the civil trespass statute.

III. Failure to State a Claim under F.R.C.P. 12(b)(6)

State Defendants move to dismiss each of Plaintiffs' four causes of action, claiming Plaintiffs have failed to state a claim upon which relief may be granted under F.R.C.P. 12(b)(6). (ECF No. 28-1, pp. 10-23).

A. Standard of Review

Under F.R.C.P. 12(b)(6), the Court must accept as true all well-pleaded facts in the complaint, and draw all reasonable inferences therefrom in the light most favorable to the

plaintiffs. *Leverington v. City of Colorado Springs*, 643 F.3d 719, 723 (10th Cir. 2011) (citation omitted). The Court should disregard any conclusory statements or conclusions of law. *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). The "complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* The Tenth Circuit has stated plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Okla. Ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn*, 656 F.3d at 1215.

B. Preemption

Plaintiffs assert the trespass statutes are preempted by various federal environmental statutes and their implementing regulations.[5] (ECF No. 1, ¶¶113-135). Any claim of federal preemption should be resolved before considering substantive constitutional issues. *Philadelphia v. New Jersey*, 430 U.S. 141, 141-42 (1977).

[5] Plaintiffs argue the trespass statutes are preempted by: the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1388; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544; Federal Land Policy and Management Act (FLMPA), 43 U.S.C. §§ 1701-1787; and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1687.

The Supremacy Clause provides that "the Laws of the United States" (as well as treaties and the Constitution itself) "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Congress may preempt or invalidate a state law by enacting federal legislation.[6] *Oneok, Inc. v. Learjet, Inc.*, --U.S.--, 135 S. Ct. 1591, 1594 (2015). Federal law preempts state or local law in three situations:

> (1) express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law ...; (2) field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it; and (3) conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Southwestern Bell Wireless Inc. v. Johnson Cnty Bd. of Cnty. Com'rs, 199 F.3d 1185, 1190 (10th Cir. 1999) (internal citations and quotation marks omitted).

Plaintiffs present two conflict preemption arguments. First, Plaintiffs assert the trespass statutes are preempted because the Wyoming Department of Environmental Quality (WDEQ) cannot possibly comply with its obligations under the Clean Water Act (CWA) and the trespass statutes. (ECF No. 1, ¶118-124). Second, Plaintiffs argue the trespass statutes conflict with federal law by frustrating the purpose of public participation provisions found within various federal land use and environmental statutes and regulations. (ECF No. 1, ¶125-135).

[6] Federal regulations have preemptive effect equal to federal statutes. *Fidelity Federal Sav. And Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

There is a strong presumption against federal preemption of state law, particularly in cases where Congress is legislating "in a field in which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Courts should not assume the historic police powers of the states are superseded by federal law unless that was the clear and manifest purpose of Congress. *Arizona v. U.S.*, 132 S. Ct. 2492, 2501 (2012) (citations omitted). The presumption against preemption dictates a state law must do "major damage" to "clear and substantial federal interests before the Supremacy Clause will demand the state law surrender to a federal law." *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (internal citations and quotation marks omitted).

In this case, the state statutes at issue concern trespass and property rights. Regulation of issues such as trespass falls within the traditional role of the state. *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1238 (10th Cir. 2003). The federal statutes relied upon by Plaintiffs involve environmental and land use regulation. "Environmental regulation is a field that the states have traditionally occupied." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960)). Thus, in the context of the state and federal laws at issue, there is a strong presumption against federal preemption. Plaintiffs have not overcome it.

Plaintiffs first argue under the CWA, the WDEQ is obligated to assemble and consider all available data relating to water-quality, including data submitted by the public. (ECF No. 34, p. 23 (citing 40 C.F.R. § 130.7(b)(5))). Because the trespass statutes prohibit WDEQ from considering resource data collected in violation of the statutes,

Wyo. Stat. §§ 6-3-414(e); 40-27-101(d),(e), Plaintiffs assert WDEQ cannot comply with both state and federal law. (ECF No. 34, p. 23). Thus, Plaintiffs assert the state law must cede to federal law.

40 C.F.R. § 130.7(b)(5) requires the state to consider "readily available water-quality data and information." "Readily available" data includes data and information relating to "[w]aters for which water quality problems have been reported by local, state, or federal agencies; members of the public, or academic institutions." 40 C.F.R. § 130.7(b)(5)(iii). 40 C.F.R. § 130.7(b)(6) requires states to document their reasoning whether to list or not list waters under the regulation, providing "a rationale for any decision to not use any existing or readily available data and information . . . as described in § 130.7(b)(5)." Thus, Congress seemed to predict circumstances where a state would not consider "readily available data." It seems reasonable that a state could explain in its documentation why it elected to not consider data submitted in violation of a state trespassing law.

Furthermore, Plaintiffs do not indicate what would happen if the WDEQ failed to comply with this regulation. Under the CWA, states have the opportunity to implement their own water quality standard and implementation plans, granted such plans are approved by the Administrator of the Act. 33. U.S.C. § 1313. To the extent an initial plan, or any changes made to such plans, are disapproved by the Administrator and the state declines to amend its plan or changes, the Administrator of the Act will take over and publish regulations for water quality within that state. See 33 U.S.C. § 1313(b); (c)(4); (d)(2). Thus, a state's incentive to comply with data collection and water quality

standard implementation requirements under the CWA is to maintain primacy over its waters' regulation. The state may elect not to serve this role, thus ceding the authority to the federal government. If Wyoming believes its state interests are better served by implementing and enforcing a state law potentially revoking its primacy under the CWA, it is Wyoming's prerogative to make that choice.

The Court does not mean to say WDEQ's decision not to consider all submitted data would in fact warrant or result in revocation of Wyoming's primacy under the CWA. The Court simply notes under Plaintiffs' first preemption argument, WDEQ has the discretion to consider readily available data without violating federal law. Thus, the trespass statutes are not preempted by 40 C.F.R. § 130.7(b)(5).

In their second preemption argument, Plaintiffs assert the various provisions within the federal land and environmental statutes soliciting and permitting public participation are frustrated by the trespass statutes' prohibition of data submission. Conflict preemption requires that the state or local action stand "as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The state law must "thwart [ ] the federal policy in some material way." *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir. 1998) (citations omitted, alteration in original).

The Court does not find the trespass statutes stand as an obstacle to the full purposes of these various public participation provisions. The trespass statutes do not completely ban the submission of data to federal agencies. They may require a person to have an interest in the property, legal authorization, or permission to gather and submit

data. Nothing prevents members of the public from seeking such authorization or permission from the landowner, i.e., the state or federal government. If the federal government is soliciting such data and information from the public, surely it will give citizens permission to collect such data on federal lands. This permission requirement may add a step to the process of public participation, but does not do "major damage" to the federal laws.

Of course, it is possible the public may never obtain permission to collect resource data on some private, state, or local lands not open to the public, particularly if the data is critical of the land use. Even so, the trespass statutes do not conflict with the purposes of the federal statutes and regulations. Courts are not to assume the historic police powers of the states are superseded by federal law unless that was the clear and manifest purpose of Congress. *Arizona v. U.S.*, 132 S. Ct. at 2501 (citations omitted). The public participation provisions cited by the Plaintiffs do not indicate a "clear and manifest purpose of Congress" to supplant the State's ability to regulate and protect private property rights or access to state and local lands not already open to the public. The federal public participation provisions do not permit or encourage the public to participate and submit data by whatever means necessary, and certainly do not authorize trespass. In light of the strong presumption against preemption, the Court finds the trespass statutes do not conflict with the various public participation provisions under federal law as cited by Plaintiffs.

C. Free Speech Clause

Although Plaintiffs provide multiple arguments to support their Free Speech claim, State Defendants argue none state a claim for relief. First, Plaintiffs assert the statutes restrict core political speech. (ECF No. 1, ¶103). Second, Plaintiffs assert the statutes are unconstitutionally overbroad. (ECF No. 1, ¶106). Third, Plaintiffs assert the trespass statutes unconstitutionally discriminate based upon the content of speech. (ECF No. 1, ¶107). Finally, Plaintiffs assert the statutes unconstitutionally discriminate against speech based on viewpoint. (ECF No. 1, ¶108). The Court will first analyze the overbreadth argument, and then turn to the core political speech, content, and viewpoint discrimination arguments.

1. Overbreadth

Plaintiffs argue even if the statutes did not impermissibly restrict speech, the statutes are unconstitutionally overbroad. (ECF No. 34, pp. 18-20). To assert a facial overbreadth claim, a plaintiff must demonstrate that the challenged law (1) "could never be applied in a valid manner," or (2) that even though it may be validly applied to some, "it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (citations omitted). For purposes of this argument, Plaintiffs stipulate the statutes could be applied in a valid manner to some, but nevertheless are so broad as to inhibit other protected speech of third parties. "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *United States v. Williams*, 553 U.S. 285, 301 (2008) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800

(1984)). The court must find "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *N.Y. State Club Ass'n, Inc.*, 487 U.S. at 11 (citation omitted). The claimant bears the burden of demonstrating the law's application to protected speech is substantially overbroad, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications. *Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003) (citations omitted).

Here, Plaintiffs provide three examples to support their overbreadth argument: a child submitting a photo from her neighbor's property; a passerby who reports the coordinates of a fire, and; the hiker who reports illegal activities occurring on private property. (ECF No. 1, ¶¶82-83). First, Plaintiffs do not assert any real danger that the speech in the hypotheticals will be compromised. A reasonable person is not likely to resist reporting an emergency because of the potential application of the trespass statutes. Second, although these examples may demonstrate some impermissible applications of the statutes, they do not demonstrate substantial overbreadth when compared to the entire scope of potential instances of protected speech arising from entry of land. The Court finds Plaintiffs have fallen far short of demonstrating substantial overbreadth of the statutes.

2. Restriction of Speech

Plaintiffs assert the trespass statutes impermissibly restrict speech protected by the First Amendment by discriminating based up the content and viewpoint of the speech. They also assert the submission of data to governmental agencies is core political speech.

State Defendants argue the trespass statutes do not regulate speech based upon content or viewpoint, but rather regulate "secondary effects" of speech.

a. Free Speech Analysis Framework

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert, Ariz.*, --U.S.--, 135 S. Ct. 2218, 2226 (2015) (quoting U.S. Const. amdt. 1). The government may not restrict expression based upon its message, ideas, subject matter, or content. *Id.* The Court analyzes a First Amendment challenge in three stages. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985). First, the Court considers whether the conduct or speech is protected speech under the First Amendment. *Clark v. Cmty for Creative Non-Violence*, 468 U.S 288, 293 (1984). If the conduct or speech is protected, the Court then determines which First Amendment standard or standards apply, based upon the forum of the expression. *See Cornelius*, 473 U.S. at 797. Third, the Court considers whether the restriction of speech survives the applicable standard of scrutiny. *Id.*

The Supreme Court has identified three potential fora of protected speech: (1) the traditional public forum; (2) the public forum created by governmental designation; and (3) the nonpublic forum. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (citation omitted). In the case of a traditional public forum or designated public forum, the court considers whether the restriction is content-based or content-neutral. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

For a nonpublic forum, the court considers whether the restriction is viewpoint-based or viewpoint-neutral. *Cornelius*, 473 U.S. at 806.

"Deciding whether a particular regulation is content based or content neutral is not always a simple task. . . . As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994). A regulation is content-based on its face if it draws distinctions based upon the messages conveyed by the speech. *Reed*, 135 S. Ct. at 2227. A facially content-neutral regulation of speech is not content-based simply because of incidental effects on some speakers or messages. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). However, a facially content-neutral statute is content-based if it cannot be justified without reference to the content, or if it was adopted because the government disagreed with the message conveyed. *Reed*, 135 S. Ct. at 2227 (citing *Ward*, 491 U.S. at 791)).

In some instances, when considering whether a restriction is content-based, courts look to whether the restriction aims to regulate some conduct or effect distinct from the speech itself. *See e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (applying intermediate scrutiny to a zoning ordinance aimed at controlling the "secondary effects" of speech, rather than content of speech); *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) ("The statute does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations. Rather, the communications at issue are singled out by virtue of the fact that they were illegally intercepted—by virtue of the source, rather than the subject matter.").

Content-neutral restrictions of speech in a traditional public forum or designated forum are subject to intermediate scrutiny. *Clark*, 468 U.S. at 292. Restrictions aimed at conduct or effects are also subject to intermediate scrutiny. *See City of Renton*, 475 U.S. 41; *Bartnicki*, 532 U.S. 514. Under intermediate scrutiny, a restriction must be narrowly tailored to serve a significant governmental interest, leaving open ample alternative channels for communication of the information. *Id.* On the other hand, content-based restrictions are presumptively invalid and are subject to strict scrutiny, passing constitutional muster only if they are the least restrictive means to further a compelling interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

Restrictions of a nonpublic forum may discriminate based on subject matter and speaker identity, so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. *Perry Educ. Ass'n*, 460 U.S. at 49. "[A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed with the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created." *Cornelius*, 473 U.S. at 806 (citations omitted). The speaker may not be excluded, however, based solely upon the "point of view he espouses on an otherwise includible subject." *Id.* It is not enough that a restriction appear viewpoint-neutral: the facially viewpoint-neutral restriction may not simply be a façade for viewpoint discrimination. *Boy Scouts of America v. Wyman*, 335 F.3d 80, 93 (2d Cir. 2003) (citing *Cornelius*, 473 U.S. at 811-13). The exclusion cannot be motivated by a desire to suppress a particular point of view. *Cornelius*, 473 U.S. at 812. A facially viewpoint-neutral restriction is "viewpoint discriminatory only if its

purpose is to impose a differential adverse impact upon a particular viewpoint." *Boy Scouts of America*, 335 F.3d at 94 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

A viewpoint-based restriction, like a content-based restriction, is subject to strict scrutiny, passing constitutional muster only if it is the least restrictive means to further a compelling interest. *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014). A viewpoint-neutral restriction must be reasonable, although not necessarily the most reasonable or the only reasonable limitation. *Cornelius*, 473 U.S. at 808. The restriction does not have to be narrowly tailored to a compelling governmental interest, as the First Amendment does not demand unrestricted access to a nonpublic forum simply because that forum may be the most efficient means of delivering the speaker's message. *Id.* at 809.

The Supreme Court has carved out a heightened protection for what it considers to be "core political speech." Core political speech involves interactive communication concerning political change. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (citing *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

b. Analysis

Here, the parties seem to agree the challenged trespass statutes restrict protected speech under the First Amendment. The parties do not clearly identify which forum is at issue, and dispute whether exacting, strict, or intermediate scrutiny applies. The Court

does not need to determine at this stage in the proceedings which forum or level of scrutiny applies, as Plaintiffs state a plausible claim under even the most lenient scrutiny.

Accepting State Defendants position that the trespass statutes are content-neutral restrictions, aimed at secondary effects of the speech, the statutes must still withstand intermediate scrutiny. *City of Renton*, 475 U.S. 41. Intermediate scrutiny requires the statutes to be narrowly tailored to serve a significant governmental interest, leaving open ample alternative channels for communication of the information. *Clark*, 468 U.S. at 292. To be narrowly tailored, a law must not burden substantially more speech than is necessary to further the government's legitimate interests. *Ward*, 491 U.S. at 799. Under intermediate scrutiny, the law need not be the least restrictive alternative. *United States v. Albertini*, 472 U.S. 675, 689 (1985). A statute is narrowly tailored if it promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *Id.*

State Defendants assert the trespass statutes are a response to the complaints from constituents about persistent trespassers entering their land for purposes of collecting resource data to submit to state and federal land-use agencies. (ECF No. 28-1, p. 22). They assert the statutes seek to prevent illegal trespass. (ECF No. 28-1, p. 14). "[R]educing crime is a substantial government interest." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002). Protecting individual privacy is also a legitimate governmental interest justifying time, place, and manner regulations. *Carey v. Brown*, 447 U.S. 455, 470 (1980). Therefore, State Defendants have identified a legitimate government interest. The question then becomes whether the statutes are narrowly

tailored, or burden substantially more speech than is necessary to further the government's interests. *Ward*, 491 U.S. at 799.

First, as to the subsections of the trespass statutes pertaining to public open lands, Wyo. Stat. §§ 6-3-414(a); 40-27-101(a), State Defendants provide no explanation as to how prohibiting data collection upon, or access to, public open lands prevents illegal trespass. The public has a right to enter and use various public lands, including state lands. For example, the State of Wyoming extends to the public the privilege of using legally accessible state lands for casual recreational day uses, "such as horseback riding, photography, wildlife and bird observation, hiking, rock hunting, and other recreational day use." Office of Land and Land Invs., Bd. of Land Comm'rs R. and Regs., Ch. 13 §§ 2, 4. The BLM regulations permit "casual use" upon BLM lands, meaning any short term non-commercial activity which does not cause appreciable damage or disturbance to the public lands, their resources or improvements, and which is not prohibited by closure of the lands to such activities." 43 C.F.R. § 2920.0-5(k). Deterring people from collecting resource data on public lands does nothing to deter people from trespassing. The Court, however, does not reach through this motion to dismiss, the ultimate question of whether the state interests to prevent illegal trespass justify the restrictions on speech.

Second, although the subsections of the trespass statutes pertaining to private open lands may facially serve the legitimate governmental interests of preventing crime and protecting citizen's privacy, at this stage of the proceedings, Plaintiffs have sufficiently called the viewpoint neutrality of the statutes into doubt. As stated above, regardless of the forum, a facially neutral law motivated by a desire to suppress certain content or a

particular point of view is impermissible. *Reed*, 135 S. Ct. at 2227 (citing *Ward*, 491 U.S. at 791)). [T]he government's purpose is the controlling consideration. . . ." *Ward*, 491 U.S. at 791.

Although courts should be careful not to second guess the wisdom of legislative action, the legislature cannot restrict speech simply because it disagrees with the content or viewpoint. *Reed*, 135 S. Ct. at 2227. When a law purports to protect an interest already protected by existing law, courts have reason to be suspicious of the legislature's actual intent. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-37 (1973).

Here, the purported interest is the prevention of illegal trespass. The fact existing laws already seek to address conduct proscribed by a challenged law "casts considerable doubt upon the proposition" that the challenged law was intended to prevent that very sort of conduct. *Id.* A landowner already has avenues of redress against trespassers. Wyo. Stat. § 6-3-303; *Edgecomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 859 (Wyo. 1996) (adopting the definition of trespass under Restatement (Second) Of Torts ch. 7 at 275 (1965)). The Court is aware the new trespass statutes are not identical to the existing trespass laws of Wyoming. For example, the new trespass statutes apply only to certain types of trespassers. Also, the new criminal trespass statute increases punishment,[7] requires a lesser mens rea,[8] and prohibits the admission of,[9] and requires the

[7] Compare Wyo. Stat. §§ 6-3-303(b) ("Criminal trespass is a misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars ($750.00), or both.") with 6-3-414(c) (imposing imprisonment for not more than one (1) year, a fine not more than one thousand dollars ($1,000.00), or both" for first time offenders and "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" for repeat offenders).

[8] Compare Wyo. Stat. §§ 6-3-303(a) (requiring person to enter or remain on land of another, "knowing" he is not authorized) with 6-3-414(a)-(b) (including no specified mens rea as to the entry of land).

expungement of,[10] data collected in violation of the statute. Wyo. Stat. § 6-3-414. The civil trespass statute contains similar prohibitions of admission and expungement provisions, not part of a common law trespass action. Wyo. Stat. § 40-27-101(d), (e), (f). Even though the new statutes do not address trespass in the exact manner as existing trespass laws, the Court finds Plaintiffs have cast doubt that the trespass statutes were passed to merely prevent trespass.

Furthermore, the damages provision under the civil trespass statute appears to identify a desire to suppress particular content or viewpoint of speech. "A person who trespasses to unlawfully collect resource data or a person who unlawfully collects resource data 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." Wyo. Stat. § 40-27-101(c). If a person were to collect and report data evidencing improper land use, or violations of environmental laws or regulations, he would be liable for the consequential damages resulting from reporting the data to a governmental agency. On the other hand, if a person collects and submits data favorable to a landowner or lessee, there is no identifiable consequential injury to the landowner, and therefore no liability under the statute. Thus, the civil statute, although perhaps facially neutral, appears to simply be a façade for content or viewpoint discrimination. *Boy Scouts of America*, 335 F.3d at 93 (citing *Cornelius*, 473 U.S. at 811-13).

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[9] Wyo. Stat. § 6-3-414(e) ("No resource data collected 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.").

[10] Wyo. Stat. § 6-3-414(f) ("Resource data collected 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.").

c. Conclusion

Based upon the foregoing, the Court concludes that Plaintiffs complaint sets forth a plausible claim for relief under the Free Speech Clause.

D. Petition Clause

Plaintiffs assert the statutes impermissibly punish individuals for exercising their right to petition the government. (ECF No. 1, ¶¶71-75, 89-99). State Defendants argue Plaintiffs' Petition Clause and Free Speech Clause claims should be analyzed together. (ECF No. 28-1, p. 12). "Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 611, n. 11 (1985) (citation omitted). When a plaintiff fails to demonstrate how government action burdens his right to petition and right to free speech differently, the court views such claims as essentially the same. *See id.* Plaintiffs assert their Petition Clause claim should be analyzed separately from their Free Speech Clause claim. (ECF No. 34, pp. 9-10). If the Court were to accept State Defendants' argument, it would still find Plaintiffs have stated a claim for relief, having determined Plaintiffs state a claim for relief under the Free Speech Clause. Therefore, the Court finds, without deciding at this point whether a separate analysis is required, Plaintiffs sufficiently state a claim for their first cause of action under the Petition Clause.

E. Equal Protection

Plaintiffs argue the trespass statutes violate the Equal Protection Clause of the Fourteenth Amendment by only targeting those entering open land seeking to collect resource data rather than entering land for other purposes. (ECF No. 1, ¶¶ 137-138).

Plaintiffs also argue the trespass statutes discriminate against only those seeking to communicate with the government rather than communicate in another forum. (ECF No. 1, ¶¶ 137-138). Plaintiffs assert the trespass statutes violate the Equal Protection Clause because they are based upon animus toward particular groups and viewpoints. (ECF No. 34, p. 21).

"The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). Under traditional equal protection analysis, a legislative classification "will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* at 632. The law must be "narrow enough in scope and grounded in a sufficient factual context" for the court "to ascertain some relation between the classification and the purpose served." *Id.* at 632-33.

Judicial review in an equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "A classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). A classification is not impermissible simply because it "is not made with mathematical nicety or because in practice it results in some inequality." *Id.* (citations omitted). The law will fail rational basis only when it "rests on

grounds wholly irrelevant to the achievement of the State's objective." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978) (citation omitted). The Court is not bound by the parties' arguments as to what legitimate state interests the classification seeks to further; rather the Court is obligated to seek out other conceivable reasons for validating a state policy. *Teigen v. Renfrow*, 511 F.3d 1072, 1084 (10th Cir. 2007) (citations omitted).

Laws which burden a fundamental right or target a suspect class are subject to strict scrutiny. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 n. 3 (1976). Free speech is a recognized fundamental right. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336, n. 1 (1995). Strict scrutiny requires laws to be suitably tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

> A provision subject to strict scrutiny "cannot rest upon a generalized assertion as to the classification's relevance to its goals." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quotation omitted). Only "the most exact connection between justification and classification" survives. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quotation omitted).

Kitchen v. Herbert, 755 F.3d 1193, 1218-19 (10th Cir. 2014).

In this case, Plaintiffs' complaint contains sufficient factual allegations demonstrating the trespass statutes burden the Free Speech rights of those seeking to submit resource data to governmental agencies. As such, the trespass statutes must withstand strict scrutiny. State Defendants do not argue the trespass survive this level of scrutiny. They make no effort to identify an "exact connection between" the justification of preventing trespass, and the differential treatment of those who seek to communicate

with governmental agencies. *Gratz*, 539 U.S. at 270. In any event, Plaintiffs have included sufficient factual allegations to assert a "possibility that the motive for the classification was illegitimate." *Grutter*, 539 U.S. at 333. Therefore, Plaintiffs sufficiently state a plausible claim the trespass statutes impermissibly burden a fundamental right, stating an Equal Protection claim.

To the extent Plaintiffs assert the trespass statutes burden non-fundamental rights, requiring only a rational basis analysis, the Court still finds Plaintiffs state a claim, at least for portions of the trespass statutes. A law fails rational basis only when it "rests on grounds wholly irrelevant to the achievement of the State's objective." *Holt Civic Club*, 439 U.S. at 71. The non-private "open land" provisions of the trespass statutes, Wyo. Stat. §§ 6-3-414(a); 40-27-101(a), are "wholly irrelevant" the State Defendants' purported governmental interest of preventing trespass. As discussed above in the Free Speech analysis, the public enjoys various privileges to use various state and federal lands. The public's privileges do not include the specific authority to go upon these lands to collect resource data and submit that data to governmental agencies, however. The trespass statutes require an ownership interest, permission, or "legal authorization to enter or access the land to collect resource data." Wyo. Stat. §§ 6-3-414(a)(ii)(A),(B); 40-27-101(a)(ii)(A),(B). Having the right to access the land is not enough to remove the threat of criminal and civil liability under the trespass statutes. The trespass statutes prevent activity on lands even where the public would not be trespassing. Therefore, the non-private open land provisions of the trespass statutes do not prevent trespass.

Even though the non-private open land provisions do not prevent trespass, the Court is obligated to seek out other conceivable reasons for validating a state policy. *Teigen*, 511 F.3d at 1084. At this stage, the Court finds it difficult to conceive a permissible rationale for preventing the collection of resource data on lands which the public has the right to be upon. Nothing indicates this activity is more disruptive, destructive, or problematic than other uses.

State Defendants assert the trespass statutes are a response to the complaints from constituents about persistent trespassers entering their land for purposes of collecting resource data to submit to State and federal land-use agencies. (ECF No. 28-1, p. 22). State Defendants seek to justify the differential treatment of trespassers who collect resource data by arguing a person is more likely to trespass if he or she seeks to "collect" "resource data" than if he or she trespasses for other purposes. However, as in *Moreno*, this activity is already prohibited by existing trespassing laws. *See supra*, p. 31-32. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

At this stage of the proceedings, the Court finds Plaintiffs' complaint provides sufficient factual allegations to state a plausible cause of action under the Equal Protection Clause.

CONCLUSION

As set for the above, Plaintiffs' complaint and response wholly fails to justify the inclusion of the Governor as a party to this proceeding and he will be dismissed.

Similarly, there is no viable preemption issue and Plaintiffs' assertion to the contrary lacks legal or factual support to state a plausible claim. However, the same cannot be said for Plaintiffs' claims under the Free Speech and Petition Clause under the First Amendment and the Equal Protection Clause under the Fourteenth Amendment. As set forth above, this Court has serious concerns and questions as to the Constitutionality of various provisions of these trespass statutes. Accordingly, Defendants' Motion to Dismiss these claims is denied.

THEREFORE, IT IS HEREBY ORDERED that State Defendants' Motion to Dismiss (ECF No. 28) is hereby GRANTED IN PART and DENIED IN PART.

Dated this 28th day of December, 2015.

Scott W. Skavdahl
United States District Judge