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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN WATERSHEDS PROJECT; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; and NATURAL RESOURCES DEFENSE COUNCIL,	)	
Plaintiffs,	)	
v.	)	Civil No. 15-cv-169-S
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,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As this Court is aware, several advocacy and membership organizations (the Interest Groups) allege that subsection (c) of both Wyoming Statute § 6-3-414 (2016) and Wyoming Statute § 40-27-101 (2016) (hereinafter, the 2016 crossing provisions) violate their rights under the First Amendment. As an initial matter, the Interest Groups lack standing to bring this challenge. The State has never enforced the criminal statute, and no party has ever relied upon the civil statute. As a result, the Interest Groups rely upon an alleged "chill" from the 2016 crossing provisions in this pre-enforcement challenge. Specifically, the Interest Groups allege that they have refrained from collecting "resource data" in Wyoming due to their fear of mistakenly crossing private property without permission in order to access adjacent public property where they would collect the "resource data." But the Interest Groups' supposed "chill" is conjectural, as any civil or criminal exposure from the 2016 crossing provisions must arise from a mistake by the Interest Groups. It is impossible for the Interest Groups or anyone else to predict when this mistake will be made, if ever. This fear of mistake, particularly given the sophistication of the Interest Groups, is not sufficiently imminent to support Article III standing.

Moreover, the Interest Groups' alleged "chill" is self-inflicted. In each instance where they allege "chill," they could have taken further steps to determine the ownership of the property. That they chose not to do so was a conscious decision that has consequences. Namely, if the Interest Groups could not conclusively determine, based on the due diligence that they chose to conduct, that they have the right to access private property, then they must refrain from accessing that property. That is not the laws "chilling" the Interest Groups from accessing the property. It is their decision to stop researching. It is self-inflicted. That cannot support standing.

If this Court were to hear the merits of the Interest Groups' case, the laws in question survive constitutional scrutiny. Specifically, the 2016 crossing provisions are content-neutral laws. They equally restrict anyone who trespasses on private property in order to access adjacent land to collect "resource data," whether they be government officials, advocacy organizations, recreationists, industry representatives, or others. And the contents of the "resource data" collected are irrelevant. The 2016 crossing provisions are not concerned with the content of the "resource data" but rather with the trespass related to the data collection.

Because the 2016 crossing provisions are content-neutral, in order to pass constitutional muster, the laws must (1) advance an important governmental interest unrelated to the suppression of free speech and (2) not burden substantially more speech than necessary to further that interest. This Court already found that the 2016 crossing provisions meet the first criterion. And the plain language of the laws shows that they meet the second criterion. Accordingly, Attorney General Peter K. Michael and Department of Environmental Quality Director Todd Parfitt (the State Defendants) request that this Court grant their motion for summary judgment.

BACKGROUND

I. The 2015 Trespass Statutes

Prior to the 2015 session of the Wyoming Legislature, landowners in the state explained to their elected representatives that various individuals, corporations, and government agencies were engaged in persistent trespass on private lands. (*See, e.g.*, Ex. A). These individuals were motivated to trespass on private land in order to collect so-called "resource data." (*Id.*) Examples where trespass to collect "resource data" occurred prior to 2015 included advocacy groups collecting soil or water samples, a government agency collecting data on game animals, and industry collecting information related to the extraction of fossil fuels. (Ex. B at 35-37, 52, 63-70; Ex. C. at 11-13,

43-45; Ex. D at 126-131; Ex. E at 9-11). These individuals were not deterred by Wyoming's existing criminal trespass statute, which is notice-based and fairly easy for a motivated individual to either ignore or purposefully evade. (*See* Dkt. No. 64 at 24-25).

In response to these complaints, the Legislature enacted two new statutes to discourage, and if necessary penalize, unauthorized trespass by individuals attempting to collect "resource data." Wyo. Stat. Ann. §§ 6-3-414 and 40-27-101 (2015) (hereinafter, the 2015 trespass statutes). The Legislature designed the two trespass statutes to supplement, without superseding or conflicting with, Wyoming's pre-existing criminal trespass statute as well as the long-standing civil prohibition of trespass in Anglo-American common law. *See* Wyo. Stat. Ann. § 6-3-303; *Salisbury Livestock Co. v. Colo. Cent. Credit Union*, 793 P.2d 470, 473 (Wyo. 1990) (recognizing common law trespass within Wyoming).

II. The Lawsuit and the Motion to Dismiss

On September 29, 2015, the Interest Groups filed a lawsuit alleging that the 2015 trespass statutes violated the following: the Petition Clause; the Freedom of Speech Clause; the Supremacy Clause; and the Equal Protection Clause of the United States Constitution. (Dkt. No. 1). The next month, the State Defendants and Wyoming Governor Matthew Mead, who was at that time a Defendant, moved to dismiss the lawsuit for failure to state a claim upon which relief could be granted. (Dkt. No. 28).

This Court granted the motion in part and denied it in part. (Dkt. No. 40). The Court dismissed the Supremacy Clause claim and dismissed Governor Mead as an improper party but voiced concerns about the validity of the 2015 trespass statutes under the Free Speech Clause and the Equal Protection Clause and allowed those claims to proceed. (*Id.*). In particular, the Court was concerned by the fact that the 2015 trespass statutes included, as an element of the wrongful

conduct, submission of information to a governmental agency. (*Id*.). This language was included within the statutory definition of "collect" in the 2015 trespass statutes. Wyo. Stat. Ann. § 6-3-414(d)(i) (2015). The Court stated that "[t]his final element is most crucial to the constitutional analyses [in the Court's decision]." (*Id*. at 4). The Court also expressed concern with the scope of the 2015 trespass statutes, noting that the laws' applicability on "open lands" was "somewhat unclear." (*Id*.).

III. The 2016 Trespass Statutes

In early 2016, the Legislature amended the 2015 trespass statutes, and the Governor signed the amendments into law, superseding the 2015 trespass statutes and creating two new statutes in their place. Wyo. Stat. Ann. §§ 6-3-414 and 40-27-101 (2016) (hereinafter, the 2016 trespass statutes). The most significant change to the laws was an amendment to the definition of "collect." While the 2015 definition of "collect" required either (1) the intent to submit "resource data" to the government or (2) the actual submission of "resource data" to the government, the Legislature removed this concept entirely from the definition of "collect" in the 2016 trespass statutes. Wyo. Stat. Ann. §§ 6-3-414 (e)(i) and 40-27-101 (h)(i) (2016). Under the 2016 statutes, it is irrelevant whether the individual submits information to the government. *Id*. This change broadened the scope and applicability of these trespass statutes. *Id*. The Legislature also removed the concept of "open lands" and restructured the trespass laws in an attempt to better distinguish between categories of violations. Wyo. Stat. Ann. §§ 6-3-414 and 40-27-101 (2016).

The 2016 criminal trespass statute provides for three categories of violations. First, a person commits criminal trespass if he or she (1) enters onto private land, (2) for the purpose of collecting "resource data," (3) without permission to enter the private land to collect "resource data." Wyo. Stat. Ann. § 6-3-414 (a) (2016). Second, a person commits criminal trespass if he or she (1) enters

onto private land, (2) and collects "resource data" from private land, (3) without permission to enter the private land to collect "resource data." *Id*. § 6-3-414 (b) (2016). Third, a person commits criminal trespass if he or she (1) crosses private land, (2) to access adjacent or proximate land where he or she collects "resource data," (3) without permission to enter the private land that was crossed. *Id*. § 6-3-414 (c) (2016). In sum, to commit criminal trespass under the 2016 criminal statute, an individual must enter onto private land without permission. Wyo. Stat. Ann. § 6-3-414 (2016). If a person does not enter onto private land without permission, that person cannot commit criminal trespass under the 2016 statute. *Id*.

The Legislature made identical changes to the 2016 civil trespass statute. Wyo. Stat. Ann. § 40-27-101 (2016). As a result, the 2016 civil trespass statute works in the same way as the 2016 criminal statute, with the only difference being that a violation of the civil statute results in potential civil liability for damages. *Id*.

In response to the Legislature's enactment of the new trespass statutes, the Interest Groups amended their complaint to challenge the 2016 trespass statutes.[1] (Dkt. No. 54). Notably, the Interest Groups abandoned their Petition Clause claim and narrowed the lawsuit's focus to their Freedom of Speech and Equal Protection claims. (*Id*.).

IV. The District Court's Dismissal

On May 3, 2016, the State Defendants moved to dismiss the Interest Groups' amended complaint for failure to state a claim upon which relief can be granted. (Dkt. No. 58). On July 6,

[1] The Interest Groups' challenge to the 2015 trespass statutes is moot because those laws have been superseded by legislative action. *See* 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.6 (3d ed.), Westlaw (database updated Apr. 2016). And the voluntary cessation exception does not apply. *See Rio Grande Silvery Minnow v. BLM*, 601 F.3d 1096, 1117 (10th Cir. 2010).

2016, this Court granted the motion and dismissed the case. (Dkt. No. 64). The Court divided its analysis into two sections: the First Amendment and Equal Protection.[2]

A. First Amendment

At the outset of its First Amendment analysis, the Court recognized that "[t]he threshold question … is to ask whether the challenged governmental action regulates protected activity; if not, the Court 'need go no further.'" (Dkt. No. 64 at 12). The Interest Groups argued that the 2016 trespass statutes violate the First Amendment because they impermissibly restrict the Interest Groups' ability to "create" speech by collecting "resource data" via trespass. (*Id*.) The Court disagreed, finding that "there is no First Amendment right to trespass upon private property for the purpose of collecting resource data." (*Id*. at 15). This resolved the Interest Groups' First Amendment claims against subsections (a) and (b) of the 2016 trespass statutes. (*Id*.). Because subsection (c) of the 2016 trespass statutes applies to individuals who cross private property without permission to access adjacent land in order to collect "resource data," and because the adjacent land could be public land, the Court looked at the Interest Groups' arguments against the 2016 crossing provisions more closely. (*Id*.).[3]

The Court provided a merits-based justification for dismissing the Interest Groups' challenge to the 2016 crossing provisions. The Court recognized that "[t]he Supreme Court 'has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.'" (Dkt. No. 64

[2] While the only portion of this Court's opinion that is relevant here is the analysis of the Interest Groups' First Amendment claim against the 2016 crossing provisions, the State Defendants offer a full summary for the Court's convenience.

[3] If an individual crosses private property without permission in order to collect resource data on an adjacent parcel of private land, subsection (c) applies. Wyo. Stat. Ann. §§ 6-3-414 (c) and 40-27-101 (c) (2016).

at 16) (citation omitted). The Court also recognized that the Supreme Court "has never held that a trespasser has the right to cross private property to engage in such activities" and noted that "[t]his 'restriction' is already in place by virtue of principles of real property ownership and existing concepts of trespass." (*Id*.). With this in mind, the Court determined that it "need not engage in further scrutiny of subsection (c), as it does not 'restrict' or 'regulate' a protected First Amendment activity[.]" (*Id*.). The Court went on to reject the Interest Groups' arguments that the 2016 trespass statutes are unconstitutionally overbroad and that the expungement provisions of the 2016 trespass statutes are unconstitutional. (*Id.* at 16-20).

B. Equal Protection

The Court also found that the Interest Groups' arguments under the Equal Protection Clause failed to state a claim upon which relief could be granted. (*Id*. at 21-26). First, the Court determined that, because the 2016 trespass statutes do not implicate a First Amendment right, "the revised statutes are not subject to strict scrutiny." (*Id*. at 22). Second, the Court found that the 2016 trespass statutes were not promulgated out of animus toward the Interest Groups. (*Id*.). Specifically, the Court determined that isolated comments of frustration by a few individual legislators are not evidence of animus by the Legislature as a whole. (*Id*. at 22-23). And, in any event, the 2016 amendments to the trespass statutes cured any animus that might have been present in the 2015 trespass statutes. (*Id*. at 23). And finally, the Court found that, because the 2016 trespass statutes "rationally relate to the interest of protecting private property rights," "[t]he statutes pass the rational basis test and therefore do not violate the Equal Protection Clause of the Fourteenth Amendment." (*Id*. at 26).

V. The Appeal

On August 2, 2016, the Interest Groups appealed.[4] (Dkt. No. 68). The groups chose to limit the scope of their appeal to the Court's determination that their First Amendment claim against the 2016 crossing provisions failed to state a claim upon which relief could be granted. (Ex. F) (Aplt. Br. at 20) ("Plaintiffs have limited their constitutional claims on appeal to their contention that § 6-3-414(c) and § 40-27-101(c) violate the First Amendment."). This means that the Interest Groups waived the right to appeal this Court's ruling on anything other than whether the Court erred in dismissing their claim that the 2016 crossing provisions violate the First Amendment. (*Id.*). Accordingly, the Interest Groups have waived any further challenge to subsections (a) and (b) of the 2016 trespass laws. (*Id.*). The Interest Groups also have waived **all** of their arguments under the Equal Protection Clause of the Fourteenth Amendment. (*Id.*).

Ultimately, the Tenth Circuit determined that the collection of "resource data" on **public** land is equivalent to the creation of speech. *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017). Accordingly, the court determined that the 2016 crossing provisions are entitled to "First Amendment protection," and remanded this case back to this Court for further analysis. *Id.* at 1198.

VI. Proceedings on Remand

Following the Tenth Circuit's ruling, the parties to this case engaged in discovery related to the Interest Groups' First Amendment challenge to the 2016 crossing provisions. All parties believe this Court can resolve this case via summary judgment.

[4] Plaintiffs People for the Ethical Treatment of Animals, Center for Food Safety, and Animal Legal Defense Fund opted not to join in this appeal. (*See* Dkt. No. 68). Accordingly, they are no longer parties to this suit, as reflected in numerous filings with this Court since the Tenth Circuit's ruling.

ARGUMENT

The State Defendants respectfully request that this Court grant their motion for summary judgment for several reasons. First, the Interest Groups lack standing to challenge the laws in question. Second, the Interest Groups' challenge is premature, and this Court should refrain from deciding the constitutionality of a law that was duly promulgated by the elected representatives of the citizens of Wyoming on an insufficient record. And third, the 2016 crossing provisions survive constitutional scrutiny.

I. The Interest Groups lack standing.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citations omitted). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (citations and quotations omitted). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* (citations omitted).

The Interest Groups bear the burden of establishing their standing to challenge the 2016 crossing provisions. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). "Standing to invoke the power of the federal courts is not a mere technical hoop through which every plaintiff must pass, but rather is 'a part of the basic charter promulgated by the Framers of the Constitution.'" *Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998) (citation omitted). "[T]he irreducible constitutional minimum of standing contains three elements:" injury-in-fact, a causal connection, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury-in-fact must be "actual or imminent" not "conjectural or hypothetical." *Id.*

In a pre-enforcement challenge such as this one, in order to show injury-in-fact, the Interest Groups can establish injury by showing that the 2016 crossing provisions have a "chilling effect" on their behavior. *Laird v. Tatum*, 408 U.S. 1, 11 (1972). But that does not remove the requirement that the injury be actual or imminent rather than conjectural or hypothetical. *See Lujan*, 504 U.S. at 560 ("irreducible minimum"). "Even in the First Amendment setting, [] broadly asserting a nebulous 'chill' does not always cut the constitutional mustard," and "[n]ot every chilling effect on protected expression caused by a general possibility of enforcement creates a justiciable controversy." *Kegler v. U.S. Dep't of Justice*, 436 F. Supp. 2d 1204, 1211 (D. Wyo. 2006) (citations omitted). The Interest Groups have not sufficiently alleged "imminent" harm to justify standing.

A. The Interest Groups' alleged "chill" is conjectural and unreasonable.

The Interest Groups do not allege a fear of being prosecuted after they intentionally trespass. (Dkt. No. 54). Rather, they allege a fear of being prosecuted after they mistakenly trespass. (*Id.*). The Interest Groups have not alleged an actual threat of prosecution from a county prosecutor. Instead, the Interest Groups assume that they **will** mistakenly trespass in the future and be prosecuted, despite the fact that their professions require them to be much more proficient than the average citizen in knowing precise locations. (*See, e.g., id.* at ¶ 15). This is insufficient. The Interest Groups' prediction that they will mistakenly trespass at some point in the indeterminate future, a necessary predicate to a potential prosecution and any associated "chill," is "conjectural or hypothetical" and cannot support standing. *See Lujan*, 504 U.S. at 560.

Moreover, to the extent that the Interest Groups are concerned with mistakenly violating the 2016 crossing provisions, they can take various steps to alleviate their fear. First, they can contact the landowner to obtain permission to be on the property in question. Remarkably, the Interest Groups do not routinely take this simple step. (*See, e.g.*, Ex. G at 67-68 (asking permission

twice in a four year span) and Ex. H at 27 (not asking permission at all)). The Interest Groups can rely upon Global Positioning System (GPS) devices and Global Information System (GIS) maps. They can rely on paper maps. They can use interactive maps online. The Interest Groups can contact various federal agencies. They can visit the county records office. And so on. There are a wealth of tools that the Interest Groups can rely upon to inform their knowledge about property ownership. The fact that the Interest Groups do not always avail themselves of these opportunities does not justify their claim of a "chill." Quite the contrary. It shows that their alleged "chill" is self-inflicted. In short, the Interest Groups' alleged "chill" is unreasonable, and they lack standing to maintain this lawsuit. *See Babbitt v. UFW Nat'l Union*, 442 U.S. U.S. 289, 298 (1979).

B. The Interest Groups' expert report is not dispositive.

Earlier in this litigation, this Court expressed disbelief that the sophisticated Interest Groups could reasonably fear violating the 2016 trespass statutes, including the 2016 crossing provisions. (Dkt. No. 64 at 14) ("To say Plaintiffs are incapable of utilizing the same GPS tools, methods, and research to determine their own location during, and en route to, such data collection activities is borderline disingenuous.").[5] In an attempt to counter that, the Interest Groups produced an expert report on GPS and mapping. (Dkt. No. 89-1). While the State Defendants disagree with some of the assertions and underlying assumptions in the expert report, the State Defendants can agree that (1) GPS is not 100% accurate, 100% of the time, and (2) electronic and paper maps depicting Wyoming are not 100% accurate, 100% of the time. But the Interest Groups' expert report misses the point.

[5] The State Defendants agree that it is ironic that these organizations go to great lengths to point out the limitations of the technologies upon which they so heavily rely.

At any point in history, humanity has been limited by the technology available to it. Today is no different. GPS location technology and GIS mapping technology are modern marvels. Many Wyoming citizens rely upon GPS every day, whether that be to find directions to a destination, to avoid trespass while hunting or fishing, or as a life-saving beacon in a backcountry emergency. But technology is not 100% perfect; that is true enough. The Interest Groups appear to assert that this lack of perfection proves that their fear of mistakenly trespassing is reasonable. It is not. As the Executive Director of Plaintiff Western Watersheds Project testified, if one is aware of the limitations of technology, one can exercise an appropriate level of caution based on those limitations. (*See* Ex. I at 64-65). Mr. Molvar, a long-time citizen of Wyoming who has traveled extensively throughout the state, testified that he has allowed for a buffer to avoid trespass. (*Id*. at 5, 64-65). Unsure of a property ownership boundary line, he didn't go "right up to the line." (*Id*. at 64-65). And that makes sense. If the Interest Groups are unsure of property ownership, and they know the limitations of available technology, they should exercise an appropriate level of caution based on that knowledge. And if they do that, they should not fear mistakenly trespassing.

C. The Interest Groups have not sufficiently alleged a "chill."

During discovery, the State Defendants asked the Interest Groups to identify any planned collection of "resource data" that the Interest Groups had foregone due to the existence of the 2016 crossing provisions. Each of the three Interest Groups provided specific instances where they alleged to have been "chilled." None are sufficient to establish standing.

1. Natural Resources Defense Council (NRDC)

NRDC alleges that it removed a request from its webpage that its members collect "resource data" in Wyoming due to the organization's concern that its members (not the organization) might be subject to liability under the data trespass laws. (Ex. J at 32). The 2016

crossing provisions, of course, do not prohibit organizations from exhorting members to collect "resource data." Wyo. Stat. Ann. §§ 6-3-414 (c) and 40-27-101 (c) (2016). So any chill that the organization felt for itself could not reasonably come from the 2016 crossing provisions. And any concern that NRDC felt for its members does not constitute "chill" on the members' part. Moreover, NRDC took the website down in 2015. (Ex. J at 32). Accordingly, any associated chill would have arisen from the now-superseded 2015 trespass laws not the 2016 crossing provisions. This cannot support standing.

NRDC alleges that an employee scientist cancelled a May 2015 trip to the Wind River Indian Reservation because of a lack of clarity regarding permission from the two Tribes. (*Id*. at 33). It is not possible that the 2016 crossing provisions chilled the NRDC employee because the 2016 crossing provisions did not exist in May 2015. Any alleged chill from the superseded 2015 trespass laws cannot support standing to challenge the 2016 crossing provisions.

NRDC alleges that it wished to undertake air quality monitoring in Wyoming in the fall of 2015, but it refrained from doing so due to Wyoming's data trespass laws. (*Id*. at 34-35). This alleged chill could not have come from the 2016 crossing provisions and cannot support standing.

Lastly, presumably in an attempt to provide at least one allegation of chill from the 2016 crossing provisions, NRDC states that it would "likely be useful" to visit the Chokecherry Sierra Madre wind energy project to collect "resource data" but that the 2016 crossing provisions "would deter this site investigation." (*Id*. at 35-36). This is the type of "conjectural or hypothetical" assertion that the Supreme Court rejected in *Lujan*, 504 U.S. at 560. It cannot support standing. *Id*.

2. National Press Photographers Associations (NPPA)

NPPA identified two instances where one of its members would have liked to have collected "resource data" but allegedly refrained from doing so due to the 2016 crossing

provisions. (Ex. H at 27). In the first instance, NPPA's member alleges that it was "impractical" for the member to determine property ownership "when responding to developing news events." (*Id*.). In the second, NPPA alleges that its member "was unable to immediately ascertain" property ownership "in the course of a developing story." (*Id*.). In other words, NPPA argues that its member was "chilled" by the 2016 crossing provisions because he did not have sufficient time to take the steps necessary to identify property ownership. (*Id*.).

As an initial matter, this is a perfect example of why the Legislature enacted the 2016 crossing provisions. NPPA's statements make plain that, if the 2016 crossing provisions did not exist, the NPPA member would have crossed private property without knowing whether he had the permission necessary to do so. It was only the 2016 crossing provisions that stopped him. And they only stopped him because he had not taken the time to conduct the due diligence necessary to determine property ownership. (*Id.*).

Simply because an individual is in a hurry does not give that individual the right to trespass. That individual must take the steps necessary to adequately determine that he has the right to go where he wants to go, which NPPA expressly recognizes could include a review of county records. (*Id.*). Other steps might include contacting the landowner(s) by telephone or in person or contacting a government agency. Without taking these steps, *any of them*, a fear of prosecution is self-inflicted and does not constitute reasonable "chill." The fact that the individual in this instance is a reporter chasing a story is of no import. The First Amendment does not guarantee the immediate right to speak (or to collect "resource data"). If a group wants to hold a protest march down Main Street, it is not entitled to do so immediately. It must get the proper permits. Even if its members are in a rush to have that protest. The same is true here. Moreover, NPPA provides no

evidence that any prosecution was "imminent." This alleged chill cannot support standing. *Lujan*, 504 U.S. at 560; *Babbitt*, 442 U.S. at 298.

3. Western Watersheds Project (WWP)

In response to the State Defendants' interrogatory, WWP initially identified five discrete locations that WWP wanted to visit but did not visit due to the alleged "chill" of the 2016 crossing provisions. (Ex. K at 24). In each instance, WWP's sole Wyoming employee, Jonathan Ratner, wanted to visit a parcel of public land. (Ex. G at 75-76). In each instance, Mr. Ratner identified that the road to that public land crossed private property. (*Id.*). In each instance, Mr. Ratner believed that a federal agency possessed an easement to cross the private property on the road, and he wanted to avail himself of that easement. (*Id.*). In each instance, WWP was unable to verify the existence of the easement. (*Id.*). WWP's reliance on its desire to visit these locations cannot support its alleged "chill" for several reasons.

WWP alleges that its fear or "chill" comes from the possibility that it will mistakenly trespass in the future and then be prosecuted. (Ex. K at 24). Neither WWP nor the other plaintiffs allege that they fear prosecution from knowingly trespassing. (Dkt. No. 54). With respect to each of these five locations, WWP conducted only limited research as to property ownership. (Ex. G at 74-81, 92-93). The results of WWP's research showed that WWP did not have a right to access the private property in question. (*Id.*). WWP is always free to conduct more research in an attempt to locate these supposed easements. If it chooses not to do so, WWP is accepting the results of the research that it did conduct. If the result of their research is that WWP does not have the right to access the private property, it could knowingly trespass on that private property, but it cannot credibly allege a fear of mistakenly trespassing. It stopped its research with the result that it had no right to access the private property. It must act accordingly by respecting those private property

rights. And, indeed, WWP claims that it has done just that. (*See* Ex. K at 23-24). With no risk of mistaken trespass, there is no "chill," which means no standing.

Moreover, given the results of WWP's research, Jonathan Ratner testified that the pre-existing trespass statute would **also** deter him from accessing the private property in question. (Ex. G at 46-47, 84). If the pre-existing trespass statute, which WWP is not challenging, deters Mr. Ratner from visiting the locations in question, WWP cannot assert that the 2016 crossing provisions are "chilling" WWP from visiting these locations. Mr. Ratner has effectively testified that, if this Court strikes down 2016 crossing provisions, he still will not try to visit these locations given what he knows about their ownership status. (*Id.*). In short, there is no redressability tied to striking down the 2016 crossing provisions; and therefore no standing. *Lujan*, 504 U.S. at 560.

In no instance did Mr. Ratner contact the landowners of the properties in question to (1) obtain permission or (2) to see if they were aware of the supposed easement. (*See* Ex. G at 67-68). That lack of diligence is unreasonable and cannot support WWP's alleged chill.

Also, Mr. Ratner does not claim that he cannot access the locations in question via a mode of non-automotive transportation. (*See id*. at 97-98). Mr. Ratner's frustration clearly comes from the fact that he cannot drive down a road, through private property, to get to his destination. (*Id.*). But the First Amendment doesn't guarantee the right of automobile usage. If WWP could not locate the easements that it believed to exist, other options were available. Mr. Ratner testified that WWP cannot afford to charter a helicopter to get to some of these locations. (*Id.* at 98). Setting aside that the First Amendment does not guarantee a price point, Mr. Ratner does not allege that he could not access these sites on foot, via mountain bike, or on horseback. (*See id*. at 97-98). WWP's frustration with the 2016 crossing provisions appears very much about convenience and expediency rather than access. (*Id*.).

Following the State Defendants' deposition of Mr. Ratner, WWP supplemented its original response to the State Defendants' interrogatory with three additional locations that WWP alleges the 2016 crossing provisions "chilled" it from visiting. (Ex. L at 4-5). With regard to the First Creek and Long Creek sites, Mr. Ratner testified that he feared mistakenly trespassing while attempting to visit these sites, given that the maps he had were inconsistent with one another. (Ex. M at 20, 27-28, 32). Mr. Ratner does not recall visiting the county courthouse in an attempt to determine ownership of the property in question. (*See id*. at 14-15). Mr. Ratner did not contact the private landowners in an attempt to resolve the alleged confusion. (*See* Ex. G at 67-68). It is not reasonable to fear mistaken trespass when one does not take these basic steps to identify property ownership. Any "chill" that Mr. Ratner felt related to First Creek and Long Creek was self-inflicted. If he chooses to limit his research thusly, the prudent course is for him to refrain from trying to access the property in question. One cannot manufacture "chill" by sticking one's head in the sand.

With regard to the third site, Coal Creek, Mr. Ratner testified that there are two roads that allow access to the site, but neither route has documented easements. (Ex. M at 37-39). This is just another way of saying that Mr. Ratner does not have the right to travel on the entirety of those roads. Accordingly, Mr. Ratner should avoid traveling on the relevant portions of those roads. If he does that, he need have no fear of mistakenly trespassing. And, of course, Mr. Ratner always has the option of accessing the Coal Creek site via non-automotive means. (*Id*. at 38). In short, WWP's supplemental responses do not establish standing.

II. The Interest Groups' challenge is premature and should be dismissed.

Despite the fact that the 2016 crossing provisions have been in place for two years, the State has never enforced the criminal statute, and a private party has never relied upon the civil

statute. This puts the Court in a conundrum, because, in a First Amendment challenge, precisely **where** the data collection takes place is critical to the required analysis. The Interest Groups' challenge is premature as a result.

In order to violate the 2016 crossing provisions, an individual must cross private property without permission to access adjacent or proximate land and then collect "resource data" on that adjacent or proximate land. Wyo. Stat. Ann. §§ 6-3-414 (c) and 40-27-101 (c) (2016). In a First Amendment challenge such as we have here, the Court must examine the nature of the adjacent or proximate property in order to, first, determine if the property is private or public, and second, if the land is public, conduct a forum analysis. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."); (Dkt. No. 40 at 28). If the land is public, the forum analysis then informs what level of scrutiny the Court must apply. *See Perry*, 460 U.S. at 45-46.

As this Court already held, if the data collection takes place on private property, then there is no First Amendment analysis to conduct. (Dkt. No. 64 at 15). The Interest Groups conceded this when they declined to appeal this Court's ruling on that very point. (Ex. F). On the other hand, if the data collection takes place on public property, this Court must determine what type of public forum that land is. If the property in question is Cheyenne's Francis E. Warren Air Force Base, for example, which, as home to the 90th Missile Wing, is a nonpublic forum, the status of the property is "most analogous to that of a private owner." *Paulsen v. Cty. of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991); *United States v. Albertini*, 472 U.S. 675, 686 (1986) ("[m]ilitary bases are generally not public fora"). Speech restrictions on a nonpublic forum are subject to a lesser standard of review. *Paulsen*, 925 F.2d at 69; *Perry*, 460 U.S. at 49 ("implicit in the concept of the nonpublic forum is

the right to make distinctions in access on the basis of subject matter and speaker identity"). If, on the other hand, the adjacent land is a public forum, the Court must determine whether it is a traditional public forum or a designated public forum before proceeding. *Perry*, 460 U.S. at 45-46.

Here, the Interest Groups bring a pre-enforcement challenge to the 2016 crossing provisions. (Dkt. No. 54). Without the facts provided by a real-world application of the laws, the Interest Groups' challenge leaves this Court with an insufficient record to determine their constitutionality. Courts can postpone adjudication until "a better factual record might be available" even in cases "where a challenged statute is sure to work the injury alleged." *See Babbitt*, 442 U.S. at 300 (citation omitted). This is particularly true in cases where the law at issue has never been applied. *See id*. "In that way, the Court might acquire information regarding how the challenged procedures actually operate[.]" *Id*. That is precisely the situation here, where the two laws at issue have never been enforced or utilized. And that is particularly important in this case, because this Court needs to know the nature of the forum in order to determine the level of scrutiny to apply. As such, this inquiry should be made on a case-by-case basis after the law is applied, rather than in a challenge like the one that the Interest Groups are pursuing. *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'") (citation omitted). The Interest Groups' First Amendment challenge to the 2016 crossing provisions is premature. This Court should dismiss the Interest Groups' case as a result.

III. The Crossing Provisions survive Constitutional scrutiny.

Should this Court find that the Interest Groups' challenge is ripe for review and that the Interest Groups have standing, this Court should grant the State Defendants' motion because the 2016 crossing provisions survive constitutional scrutiny.

A. The Interest Groups' facial challenge cannot be sustained.

In their First Amended Complaint, the Interest Groups assert both "facial" and "as-applied" challenges to the 2016 crossing provisions. (Dkt. No. 54). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Sabri v. United States*, 541 U.S. 600, 609 (2004). Moreover, facial challenges are generally discouraged, and the burden on the plaintiff is extremely heavy. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (facial challenges disfavored) and *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (heavy burden of persuasion). Here, the Interest Groups' facial challenge lacks merit because the laws at issue can be applied constitutionally in, at a minimum, some circumstances. *Salerno*, 481 U.S. at 745.

The 2016 crossing provisions prohibit the crossing of private property without permission in order to access adjacent property for the purpose of collecting "resource data." Wyo. Stat. Ann. §§ 6-3-414 (c) and 40-27-101 (c) (2016). The adjacent property may be public or private. *Id*. If an individual crosses private property without permission in order to access adjacent private land to collect "resource data," that person has violated the 2016 crossing provisions. *Id*. This Court already resolved that the Interest Groups have no constitutional right to access private property without permission to collect "resource data." (Dkt. No. 64 at 15). Accordingly, the 2016 crossing provisions are, at a minimum, constitutional in the "crossing private to access adjacent private" scenario. The Interest Groups' facial challenge fails as a result.

B. The Interest Groups' "as applied" challenge lacks merit.

That leaves the Interest Groups' "as applied" challenge. The State Defendants already stated why this Court should refrain from deciding this case – the laws have not been "applied" to

anyone, and the record is insufficient as a result. In any event, the 2016 crossing provisions survive the applicable level of scrutiny.

The Tenth Circuit determined that the collection of "resource data" on public land constitutes the exercise of free speech. *W. Watersheds*, 869 F.3d at 1195-96. Thus, the Court "must decide at the outset the level of scrutiny applicable to the [challenged] provisions." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994). The first step is to determine whether the laws in question are content-based or content-neutral. *See id.* at 642. In general, if the laws are content-based, they are subject to strict scrutiny, whereas if the laws are content-neutral, they are subject to intermediate scrutiny.[6] *See id.*

1. The Crossing Provisions are content-neutral.

"Deciding whether a particular [law] is content based or content neutral is not always a simple task." *Id.* The "principal inquiry" "is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "The purpose, or justification, of a [law] will often be evident on its face." *Id.* (citation omitted). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based." *Id.* at 643. "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most cases content-neutral." *Id.* (citation omitted).

The 2016 crossing provisions are not aimed at the content of the "resource data" collected. *See* Wyo. Stat. Ann. § 6-3-414 (c) (2016) and § 40-27-101 (c) (2016). To the contrary, they equally

[6] This analysis is more nuanced when the forum analysis is applied, but the Court does not have the facts necessary to conduct that analysis. *See supra* at 17-19.

restrict anyone who trespasses on private property in order to access adjacent land to collect "resource data," whether they be government officials, advocacy organizations, recreationists, industry representatives, or others. *Id.* And whatever "resource data" they collect, the contents are irrelevant. If, for example, an individual collects a water sample, it does not matter whether that water sample shows compliance with the law or a potential violation. The 2016 crossing provisions are not concerned with the content of the "resource data" but rather with the trespass related to the data collection. *Id.*

The Supreme Court's ruling in *Turner Broadcasting* is instructive here. In that case, plaintiffs challenged the constitutionality of a statute that required cable television operators to carry a certain number of local broadcast stations. *Turner Broad.*, 512 U.S. at 630. The reasoning behind the law was the concern that cable operators could harm businesses in the broadcast market. *Id.* at 632-35. The Supreme Court found the so-called "must carry" law to be content-neutral. *Id.* at 643-44. While the Court recognized that the law "interfere[s] with cable operators' editorial discretion by compelling them to offer carriage" to local broadcast stations, "the extent of the interference does not depend on the content of the cable operators' programming." *Id.* The law applies to all cable operators,[7] and "nothing in the law requires the cable operator to select a broadcast station with particular views." *Id.* at 644. The Court so held, even though the requirements of the law "burden cable programmers by reducing the number of channels for which they can compete." *Id.* at 645. The Supreme Court found this interference and burden acceptable because it did not relate to content. *Id.* The Court expressly recognized that the law "distinguish[ed] between speakers in the television programming market." *Id.* Nevertheless, the Supreme Court found that the law was content-neutral because the law did so "based only upon the manner in

[7] Other than those cable providers with fewer than 300 subscribers, which are exempt. *Id.* at 644.

which the speakers transmit their messages to viewers, and not upon the messages they carry[.]" *Id*.

The 2016 crossing provisions are content-neutral for essentially the same reasons. The laws are not concerned with content. Wyo. Stat. Ann. §§ 6-3-414 (c) and 40-27-101 (c) (2016). Rather, they make a distinction between those who collect "resource data" by trespass from those who do so without trespassing. *Id*. The content of the "resource data" collected is irrelevant. Just as in *Turner Broadcasting*, where the key determinant was the manner in which the speech was conveyed, here, the only thing that is relevant is the manner in which the "resource data" was collected. *See* 512 U.S. at 645. And the fact that the 2016 crossing provisions may "interfere" or "burden" the Interest Groups, something with which they clearly take issue, (Dkt. No. 54), does not make the laws content-based. *Id*. at 643-45.

2. The Crossing Provisions survive intermediate scrutiny.

Courts review content-neutral laws under the intermediate scrutiny test "because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad.*, 512 U.S. at 642; *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010). Under this test, a statute "will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Golan*, 609 F.3d at 1083 (citation and quotation omitted). The 2016 crossing provisions meet the requirements of this test.

It is the law of this case that the statutes in question advance important governmental interests. (Dkt. No. 64 at 25) ("protecting private property rights is a legitimate government interest"). It is also the law of this case that the Legislature did not enact these statutes out of animus to the Interest Groups. (*Id*. at 22). In other words, the Legislature did not enact these laws

to suppress the Interest Groups' speech. (*See id.*). Therefore, the sole unanswered question is whether the 2016 crossing provisions "burden substantially more speech than necessary to further those interests." *Golan*, 609 F.3d at 1083. They do not.

The Legislature enacted the 2016 crossing provisions to address complaints about individuals trespassing on private property in order to access adjacent property to collect "resource data." The plain language of the 2016 crossing provisions shows that the Legislature did so in a targeted and focused manner. Wyo. Stat. Ann. §§ 6-3-414 (c) and 40-27-101 (c) (2016). The 2016 crossing provisions do not prevent the Interest Groups or anyone else from collecting "resource data" in Wyoming. They simply require that data collectors conduct adequate due diligence about property ownership before they go into the field and then be mindful of property ownership while they are out in the field. This is the same standard that applies to hunters and anglers in Wyoming. Wyo. Stat. Ann. § 23-3-305(b); (Dkt. No. 64 at 24). It is true that, on some occasions, this will require data collectors to put in more effort to determine property ownership than was required before the laws were enacted. Indeed, that is a significant purpose of the 2016 crossing provisions, and landowners report that they are receiving more requests for permission to access their private property since the laws were passed. (*E.g.*, Ex. C. at 44; Ex. D at 132). On some occasions, the 2016 crossing provisions may require data collectors to take a longer route in order to avoid trespass. And in some circumstances, it may even require data collectors to access their target property via a mode of transportation less convenient than an automobile. (*See, e.g.*, Ex. G at 97-98). But data collectors can still create their speech – they must simply respect private property rights while doing so.

In short, the 2016 crossing provisions leave open the avenue for individuals to collect the data they desire from public lands. The burden may at times be inconvenient, but the burden is one

that is necessary to further the public interest in the enactment of a law targeted at preventing trespass by data collectors. *See Golan*, 609 F.3d at 1083. Accordingly, the 2016 crossing provisions survive intermediate scrutiny.

CONCLUSION

The Interest Groups lack standing to bring this case. This Court should not decide the constitutionality of a duly-promulgated law based on the Interest Groups' conjecture that they will mistakenly trespass in the future. It is unknowable whether this will ever happen. Moreover, the Interest Groups' alleged "chill" is self-inflicted. Their desire to conduct less due diligence than is necessary cannot be reframed as the fault of the 2016 crossing provisions. In short, to allow this case to proceed would frustrate the intent of the limitations placed on Article III jurisdiction.

In the unlikely event that a suit is brought against the Interest Groups in the future, they will then have the opportunity to challenge the constitutionality of the 2016 crossing provisions based on a specific factual record. That, in turn, will allow the Court to conduct a proper review of the laws with the facts necessary to do so. If, however, this Court considers the merits of the Interest Groups' argument, the State Defendants ask this Court to recognize that in 2016 the Legislature took reasonable steps to ensure that the 2016 crossing provisions do not burden substantially more speech than necessary to protect the property rights of Wyoming's citizens. For these reasons, the Court should grant the State Defendants' motion for summary judgment.

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CERTIFICATE OF SERVICE

I certify that on the 30th day of May 2018, I electronically filed the foregoing with the Clerk of the U.S. District Court of Wyoming using the CM/ECF system, which sent a notice of electronic filing to all counsel of record.

/s/ Erik Petersen
Erik E. Petersen