

# WYOMING’S DATA TRESPASS LAWS TRAMPLE FIRST AMENDMENT RIGHTS

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## INTRODUCTION

In 2015, Wyoming became the ninth state to pass legislation penalizing citizens for reporting harmful agricultural practices.<sup>1</sup> This legislation

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1. See, e.g., IDAHO CODE § 18-7042 (2014), *invalidated* by Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015); IOWA CODE ANN. § 717A.3A (2016) (passed in 2012); UTAH CODE ANN. § 76-6-112 (West 2012) (passed in 2012); MO. REV. STAT. § 578.013 (2016) (passed in 2012); S.C. CODE ANN. § 47-21-80 (2016) (passed in 2012); MONT. CODE ANN. § 81-30-105 (2015)

included two new statutes: the first created the crime of trespassing to collect resource data and became effective on March 5, 2015; this statute's civil counterpart became effective on July 1, 2015.<sup>2</sup> These over-broad statutes resemble existing or recently repealed "Ag Gag" laws.<sup>3</sup> Wyoming's laws, however, are distinguishable from existing Ag Gag laws. These involve accessing open land—both private and some public lands—rather than accessing a private agricultural facility. This Note compares and contrasts Wyoming's "Data Trespass" laws with a recently repealed Ag Gag law from Idaho, and the Idaho District Court decision declaring that law unconstitutional.<sup>4</sup>

Additionally, this Note uses ongoing litigation between Western Watersheds Project (WWP) and various NGOs against several Wyoming government officials to argue that Wyoming's new Data Trespass laws violate the First Amendment's Petition and Free Speech Clauses.<sup>5</sup> The Data Trespass laws violate the Petition Clause because the restrictions that they have placed on resource data collection severely interfere with a citizen's right to "petition the Government for a redress of grievances."<sup>6</sup> Citizens cannot petition the government without complete and accurate data. Furthermore, the new statutes require the government and courts to expunge from their systems and disregard as evidence any data that a citizen collected unlawfully.<sup>7</sup> The Data Trespass laws violate the Free Speech Clause because they prohibit a specific type of speech and a specific message, and the laws are not narrowly tailored to further a significant governmental interest.<sup>8</sup>

Lastly, the new trespass statutes undermine the public participation provisions in the Clean Water Act (CWA) and other environmental protection statutes. The statutes discourage citizen involvement in resource

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(passed in 1991); N.D. CENT. CODE § 12.1-21.1-02 (2016) (passed in 1990); KAN. STAT. ANN. § 47-1827 (2015) (passed in 1990).

2. WYO. STAT. ANN. §§ 6-3-414, 40-27-101 (2016).

3. Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1318–19 (2015) (describing the common forms of Ag Gag laws).

4. Trevor Hughes, *Wyoming Law Bans 'Data Trespassing'*, USA TODAY (May 14, 2015, 8:08 PM), <https://perma.cc/XS6T-8JRL>.

5. See Complaint for Declaratory and Injunctive Relief, *Western Watersheds Project v. Att'y Gen.*, No. 15-CV-169-S (D. Wyo. Sept. 29, 2015) (listing various First Amendment claims against Wyoming's new trespass laws); see 2016 Wyo. Sess. Laws 474 (amending the civil trespass statute); see also 2016 Wyo. Sess. Laws 481 (amending the criminal trespass statute); see Order Granting Motion to Dismiss at 26, *Western Watersheds Project v. Att'y Gen.*, 15-CV-00169-SWS (D. Wyo. July 6, 2016) (granting Defendants' motion to dismiss after Wyoming amended the trespass laws and reasoning that the First Amendment does not grant the right to trespass on private property).

6. U.S. CONST. amend. I.

7. WYO. STAT. ANN. §§ 6-3-414, 40-27-101 (2016).

8. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (describing the test that courts apply to potential First Amendment violations).

data collection and hinder environmental groups and citizens' ability to bring suits against polluters.<sup>9</sup> Citizen suits play a major role in resolving environmental issues. The uncertainty over what behaviors the statutes permit or prohibit discourages citizens from participating for fear of criminal charges or civil liability. This deterrence is problematic because agencies rely heavily on data that the public collects when issuing National Pollutant Discharge Elimination System (NPDES) permits,<sup>10</sup> nonpoint source regulations,<sup>11</sup> federal grazing permits,<sup>12</sup> and other decisions that affect the environment. The CWA, along with other environmental statutes, require that the government encourage and facilitate public participation before implementing a regulation or granting a permit that will affect the environment.<sup>13</sup> The public counts on the information that groups like WWP gather.

Concerned citizens created NGOs like WWP to protect the environment, and citizen involvement in resource data collection is crucial to enforcing the CWA due to scarce administrative resources.<sup>14</sup> Public participation provisions in environmental statutes exist both to ensure that the public has a say in the decision-making process and to encourage public participation in gathering data and forming policy.<sup>15</sup>

This Note uses information from the Bureau of Land Management (BLM), the Wyoming Department of Environmental Quality (WDEQ), the Environmental Protection Agency (EPA), the CWA, case law, and other

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9. See Clean Water Act, 33 U.S.C. § 1365(a) (2012) ("Any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation.").

10. See *id.* § 1342 (allowing State governments to issue NPDES permits so long as the public is notified and allowed a hearing on the issuance of any permit).

11. See *id.* § 1329(a)(1)(C) ("The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which . . . describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources.").

12. See Federal Land Policy and Management Act, 43 U.S.C. § 1712(f) (2012) ("The Secretary shall allow an opportunity for public involvement . . ."); *id.* § 1739(e) ("[T]he Secretary, by regulation, shall establish procedures, including public hearings . . . to give . . . the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in . . . the management of, the public lands.").

13. 33 U.S.C. § 1342 ("[T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants . . .").

14. See Daniel J. Fiorino, *Streams of Environmental Innovation: Four Decades of EPA Policy Reform*, 44 ENVTL. L. REV. 723, 725, 742–43 (2014) (implying that public participation in environmental decision-making is an effort to mitigate scarce government resources).

15. See 33 U.S.C. § 1251 (2012) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.").

secondary sources to explore the issues surrounding land ownership in the West that culminated with Wyoming's unconstitutional new trespass laws. Part I introduces the Data Trespass laws and compares them to Wyoming's existing criminal trespass statute. The section then provides an overview of the ongoing case between several Wyoming ranches and WWP that triggered the adoption of the new laws and the public perception of the laws. Part I also provides historic context for the conflicting views surrounding land ownership that allowed the legislation to pass. Part II introduces the trespass laws as a new kind of Ag Gag law, fully analyzes why the statutes violate the First Amendment's Petition and Free Speech Clauses, and briefly discusses the ongoing case in the United States District Court for the District of Wyoming between WWP, National Press Photographers Association, Natural Resources Defense Council (NRDC), People for the Ethical Treatment of Animals (PETA), and Center for Food Safety against the Attorney General of Wyoming, the Director of the WDEQ, and other state officials.<sup>16</sup> This Note concludes by describing the practical effect of the laws—stifling public participation.

## I. RELEVANT BACKGROUND

### A. Description of the New Trespass Laws

The Wyoming legislature passed two new laws in 2015. The first created a civil cause of action for trespassing to unlawfully collect resource data or unlawful collection of resource data.<sup>17</sup> The second, more controversial law, created the crime of trespassing to unlawfully collect resource data or unlawful collection of resource data.<sup>18</sup> Both the criminal law and the civil law mirror one another and only differ in the resultant penalties.<sup>19</sup> The laws both provide for two actionable offenses. The first is trespassing to unlawfully collect resource data, which provides that a person is guilty of trespassing to unlawfully collect resource data if he or she “enters onto open land for the purpose of collecting resource data” without permission or statutory authority with the intention of submitting that data to a state or federal government agency.<sup>20</sup> This means that someone who enters open land merely intending to collect resource data can be found guilty or liable. The provision also prohibits a person from

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16. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 3.

17. WYO. STAT. ANN. § 40-27-101 (2016).

18. *Id.* § 6-3-414.

19. *Id.* §§ 6-3-414, 40-27-101.

20. *Id.*

crossing open land to collect resource data on adjacent lands, and it does not specify that the open land must be private open land.

The civil and criminal statutes both define open land as “land outside the exterior boundaries of any incorporated city, town, subdivision . . . or development.”<sup>21</sup> “Collect” is defined as “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.”<sup>22</sup> An essential element is submittal or intent to submit data to the government. A person who enters open land and collects water samples or other resource data for their own personal use would not be liable or guilty under the statutes. “Resource data” is defined to mean

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

- (A) For surveying to determine property boundaries or the location of survey monuments;
- (B) Used by a state or local governmental entity to assess property values;
- (C) Collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties.<sup>23</sup>

The second component of both laws is unlawful collection of resource data, which creates a civil or criminal action for collecting resource data from *private* open land without proper authorization.<sup>24</sup> The only difference between the civil and criminal statutes is the penalties. The penalties for the crime of trespassing to unlawfully collect resource data and unlawful collection of resource data are imprisonment for up to one year, a fine of up to \$1,000, or both.<sup>25</sup> A repeat offender may be imprisoned for no less than ten days, nor more than one year, given a fine of no more than \$5,000, or both.<sup>26</sup> A person who trespasses to unlawfully collect resource data or unlawfully collects resource data is liable in a civil action for all

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21. *Id.* §§ 6-3-414(d)(ii), 40-27-101(d)(ii).  
22. *Id.* §§ 6-3-414(d)(i), 40-27-101(d)(i).  
23. *Id.* §§ 6-3-414(d)(iv), 40-27-101(d)(iv).  
24. *Id.* §§ 6-3-414, 40-27-101.  
25. *Id.* § 6-3-414.  
26. *Id.*

consequential and economic damages caused by the trespass, as well as litigation costs.<sup>27</sup> However, both the civil and criminal laws include a provision stating that any data collected during an unlawful trespass may not be used as evidence in any civil, criminal, or administrative proceeding.<sup>28</sup> Any governmental agency in possession of resource data collected unlawfully must expunge the data from its records.<sup>29</sup> For example, water samples collected from public lands that would normally be evidence in an action against a polluter must be thrown out if the data collector crossed over private lands to reach the stream.

The new trespass laws place restrictions on access to private and public lands that go beyond those imposed by Wyoming's preexisting trespass statute. Wyoming's general trespass statute provides that a person is guilty of trespass if he "enters or remains on or in the land or premises of another person *knowing he is not authorized to do so*."<sup>30</sup> Notice of private property is given by a personal communication from the landowner or by posting of signs "reasonably likely to come to the attention of intruders."<sup>31</sup> Under this standard trespass law, a person entering property to collect resource data could only be guilty of trespass if he or she knowingly entered property owned by another.<sup>32</sup> The new laws are problematic because they do not include any provisions on notice or intent, implying that a person who unknowingly or unintentionally trespasses, perhaps on unposted land, while attempting to collect resource data may be guilty or liable.

The patchwork of private and public ownership that characterizes Wyoming's open land increases the unfairness from lack of notice or intent requirements in the new statutes. The uncertainty over whether a citizen may or may not enter open land to collect resource data discourages him or her from doing so for fear of criminal prosecution or civil liability, even though that entry may be legal under the new laws. So, what led the Wyoming legislature to adopt these laws that carve out such a narrow exception to the standard state trespass law?

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27. *Id.* § 40-27-101.

28. *Id.* §§ 6-3-414, 40-27-101.

29. *Id.*

30. *Id.* § 6-3-303 (emphasis added).

31. *Id.*

32. *See Wyoming v. Livingston*, 443 F.3d 1211, 1216 (10th Cir. 2006) (alleging that Defendants violated Wyoming Statute § 6-3-303(a) when they knowingly entered the land of another without authorization).

*B. Litigation that Prompted the New Trespass Laws*

In June of 2014, a group of 15 Wyoming ranchers filed a trespass suit against WWP, Jonathan Ratner in his individual capacity and as director of WWP, and John Does 1 through 10.<sup>33</sup> The ranchers sought to enjoin WWP from crossing their private lands in the future.<sup>34</sup> They alleged that in June of 2005 and May of 2010, Ratner submitted water samples that prove that he trespassed in the course of collecting those samples.<sup>35</sup> Ratner submitted the samples to WDEQ to have the stream added to the CWA's 303(d) list of impaired waters because the stream's *E. coli* levels exceeded the federal limit by up to 200 times.<sup>36</sup> The ranchers argued that Ratner could not possibly have reached the federal lands from which he took the samples without using their private road.<sup>37</sup> Ratner, on the other hand, maintained that he accessed the stream through public access easements.<sup>38</sup>

Ratner filed a motion to dismiss on December 11, 2014, arguing that

1. The ranchers failed to state a claim on which relief can be granted;
2. Any claim of trespass before June 2010 is barred by the statute of limitations;
3. The use of a road crossing private property is presumptively permissive and does not constitute a trespass;
4. Ratner and WWP have acquired prescriptive easements;
5. Ratner used existing right of way easements to cross the ranchers' land;
6. The Doctrine of Public Necessity insulates Ratner against trespass claims;
7. Ratner can cross the ranchers' private land if it is the only way to access public waters;
8. Equitable estoppel requires dismissal of the ranchers' claims;

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33. Press Release, Budd-Falen Law Offices, L.L.C., Landowners File Trespass Lawsuit Against Western Watersheds Project (June 11, 2014), <https://perma.cc/P64S-HWGP>.

34. Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss at 2, *Frank Ranches v. Ratner*, No. 40007 (D. Wyo. Jan. 6, 2015).

35. Budd-Falen Law Offices, *supra* note 33.

36. *Id.*; Jeremy P. Jacobs, *High-Stakes Suit Pits Ranchers Against Water-Sampling Greens*, E&E PUB., LLC (Nov. 18, 2014), <https://perma.cc/4VKZ-3PX7>; Defendant's Memorandum of Points and Authority in Support of Motion to Dismiss at 2, *Frank Ranches v. Ratner*, No. 40007 (D. Wyo. Dec. 11, 2014) [hereinafter Defendant's Motion to Dismiss].

37. Jacobs, *supra* note 36.

38. *Id.*

9. The ranchers have unclean hands.<sup>39</sup>

The case is still ongoing in the District Court of Wyoming, but led in part to the Data Trespass laws.

Following enactment of the new trespass laws in early 2015, members of the public were quoted in the media expressing concern that the new laws could make it a crime to take photographs in national parks.<sup>40</sup> While proponents of the legislation contend that the laws cannot apply to federal lands because Wyoming has no jurisdiction over those lands, the over-broad language of the statutes encompasses federal lands and could impact public state lands.<sup>41</sup> Others argue that the laws stifle First Amendment rights and were designed to punish whistleblowers.<sup>42</sup> On the other hand, some support the laws because they strengthen private property rights. Ranchers are tired of biased public interest groups “trespassing” over their lands to take samples in an attempt to put the ranchers out of business.<sup>43</sup> Despite the mixed reactions to the new laws, there have not been any complaints or charges filed under the laws, so it is unclear how they will be implemented absent litigation interpreting the statutes. However, the laws will likely both strengthen private property rights and, because they also apply to some public open lands, silence environmental interest groups in violation of the First Amendment.

### C. Land Ownership in Wyoming

History and politics have complicated the pattern of land ownership in the West. To promote western expansion in the nineteenth century, the federal government encouraged the construction of rail lines through the West by granting every other 640-acre parcel along rail corridors to a railroad company.<sup>44</sup> The hope was that the lands remaining with the government would increase in value as the companies built rail lines, which the government would later sell at high prices. The plan was successful further east, but the government struggled to sell the lands in the arid

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39. Defendant’s Motion to Dismiss, *supra* note 36, at 3–24.

40. Justin Pidot, *Forbidden Data: Wyoming Just Criminalized Science*, SLATE (May 11, 2015, 10:04 AM), <https://perma.cc/SJD3-LWRM>.

41. Bob Beck, *Officials Say Data Collection Bill Does Not Impact Federal Lands*, WYO. PUB. MEDIA (May 13, 2015), <https://perma.cc/FB9E-VBNV>.

42. *Id.*

43. Budd-Falen Law Offices, *supra* note 33.

44. CTR. FOR W. PRIORITIES, *LANDLOCKED: MEASURING PUBLIC LAND ACCESS IN THE WEST* 5 (2013), <https://perma.cc/H93R-JKZJ>.

West.<sup>45</sup> The result of this failed venture is the checkerboard pattern of public and private land that now plagues much of the West.

Gaining legal access to the checkerboard lands is difficult because crossing from one corner of public land to the corner of another public land is not allowed.<sup>46</sup> Although there are no state or federal laws that address these “corner crossings,” BLM does not consider them legal entries.<sup>47</sup> Consequently, Montana, Wyoming, New Mexico, Colorado, Utah, and Idaho each have over 150,000 acres of public lands that the public cannot access.<sup>48</sup> Montana alone has nearly 2 million landlocked acres, followed by Wyoming with over 750,000 acres of landlocked public land that the public can only legally access through easements.<sup>49</sup> This maze of private open lands, public open lands, private roads, and public easements makes it very difficult to determine whether a person is permitted to access property, and the new statutes do not require knowledge that one is trespassing in order to be convicted.<sup>50</sup>

Politics are yet another factor that complicate land ownership in Wyoming. The history of public land ownership in the West is rife with conflicts, the most significant of which is the conflict between the state and the federal government for control of western lands. The federal government retained ownership and control over a large portion of western lands throughout much of the nineteenth century and granted Congress the authority to regulate the lands to promote development.<sup>51</sup> As western states joined the union, however, they sought control over the federal lands within their own boundaries, typically to exploit the natural resources within the state.<sup>52</sup>

Conflicts between the federal government and the states over management of the federal public lands resulted in four Sagebrush Rebellions.<sup>53</sup> These Rebellions sought to address issues such as water rights, forest management, grazing fees, and resource exploitation.<sup>54</sup> The

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45. *Id.*

46. BUREAU OF LAND MGMT., WYOMING PUBLIC LAND ACCESS GUIDE 1, 2 (2013), <https://perma.cc/T532-4XJE>.

47. *Id.* at 2.

48. *Id.* at 3.

49. *Id.*

50. WYO. STAT. ANN. §§ 6-3-414, 40-27-101.

51. See Sandra K. Davis, *Fighting Over Public Lands: Interest Groups, States, and the Federal Government*, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 11, 14 (Charles Davis ed., 2d ed. 2001) (explaining the authority vested in Congress to support schools, roads, and railroads in the West).

52. *Id.* at 15.

53. See *id.* at 14–18 (describing the causes and results of the four Sagebrush Rebellions from the 1880s until the late 1970s).

54. *Id.* at 15–17.

end result of these Rebellions was increased federal regulatory presence on western lands and the landowners' lingering desire to have federal lands within state boundaries pass into state ownership.<sup>55</sup> By the end of the four Sagebrush Rebellions, a new group surfaced claiming an interest in western lands—environmentalists seeking to prevent landowners from overexploiting resources.<sup>56</sup> These divergent viewpoints finally clashed in the form of the Data Trespass laws.

#### D. Livestock Grazing in Wyoming

The tensions between environmentalists, ranchers, federal land agencies, and proponents of state land ownership are very apparent in Wyoming today. The federal government owns over 30 million acres of land in Wyoming, just under half of the state's area; the state owns 3.6 million acres.<sup>57</sup> Wyoming lawmakers are currently studying the effects on the state of a potential transfer of federal lands into state ownership.<sup>58</sup> Local governments are split over the issues of grazing rights and conservation.<sup>59</sup> Livestock, especially cattle ranching, is a vital component of Wyoming's economy. In 2014, cattle production was valued at over \$937 million.<sup>60</sup> Wyoming had 11,400 farms and ranches in operation in 2014, and the cattle industry accounted for over half of all cash receipts in that year.<sup>61</sup> Private grazing fees in 2014 averaged \$21.00 per month, per head.<sup>62</sup> Grazing fees on Wyoming's trust lands were set at \$4.64 in 2010 and generated around \$5 million that year.<sup>63</sup> Federal grazing fees are on average much lower than private and state grazing fees; in 2013 and 2014, federal grazing fees were

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55. *Id.* at 16–17.

56. *Id.* at 18.

57. *Id.* at 1; CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 5 (2014), <https://perma.cc/E3S2-SD6Y>.

58. Gregory Nickerson, *Local Governments Take Sides in Transfer-of-Federal-Lands Debate*, WYOFILE (June 16, 2015), <https://perma.cc/SM58-63YX>.

59. *Id.*; see generally Memorandum of Agreement Between the State of Wyo. Dep't of Env'tl. Quality & the U.S. Env'tl. Prot. Agency Region VIII (June 30, 1975), <https://perma.cc/AB6T-LAEU> [hereinafter Memorandum of Agreement] (outlining Wyoming's agreement to issue and monitor NPDES permits).

60. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., WYOMING 2015 AGRICULTURAL STATISTICS 22 (2015), <https://perma.cc/FP5G-ELCR>.

61. *Id.* at 22.

62. *Id.* at 25.

63. U.S. DEP'T OF INTERIOR, ECONOMIC REPORT FISCAL YEAR 2012, CHAPTER 8: FORAGE AND LIVESTOCK GRAZING 63 (2012).

set at the legal minimum of \$1.35.<sup>64</sup> Undoubtedly, the livestock industry benefits Wyoming's economy, but it is not without costs.

Environmentalists are concerned about the devastating effects that livestock grazing has on Wyoming's lands and waters. Grazing has damaged 80 percent of the streams and riparian ecosystems in the western United States.<sup>65</sup> In 2000, Wyoming produced around 11 million tons of cattle waste, which is a significant source of pollutants like phosphorus, nitrogen, and bacteria.<sup>66</sup> Increased bacteria and protozoa in streams are dangerous to humans because exposure through swimming or other contact can cause disease.<sup>67</sup> Bacteria and protozoa enter streams directly from fecal matter and fecal runoff.<sup>68</sup> Also injurious to water quality are buried microorganisms churned up by cattle hooves.<sup>69</sup> Ranchers can solve these problems in large part by building fences to keep cattle away from streams.

In addition to directly threatening human health, poor grazing practices also adversely impact water species. Allowing cattle to graze on riparian lands destroys streamside vegetation and the shade it provides for the water, resulting in increased water temperature from greater sun exposure and threats to coldwater species.<sup>70</sup> Birds and mammals also suffer from lost riparian habitat and lost food sources.<sup>71</sup> Several states have enacted laws to protect the agricultural industry and stop citizens from investigating such environmental harms under the guise of protecting private property rights. Wyoming joined this group of states when it passed the new trespass laws seemingly to stifle environmentalists and to protect the profitable ranching industry.

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64. Christine Glaser et al., *Costs and Consequences: The Real Price of Livestock Grazing on America's Public Lands*, CTR. FOR BIOLOGICAL DIVERSITY (Jan. 2015), <https://perma.cc/4GS4-EGPP>.

65. Joy Belsky et al., *What the River Once Was: Livestock Destruction of Waters and Wetlands*, in WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST 179, 179 (George Wuerthner & Mollie Matteson eds., 2002).

66. John Carter, *Stink Water: Declining Water Quality Due to Livestock Production*, in WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST 189, 191 (George Wuerthner & Mollie Matteson eds., 2002); see WYOMING 2012 AGRICULTURAL STATISTICS, *supra* note 60, at 39 (suggesting that the number is likely lower today because the number of cattle in the state has declined).

67. Belsky et al., *supra* note 65, at 182.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

## II. FIRST AMENDMENT ANALYSES OF AG GAG LAWS

## A. Idaho's Invalidated Ag Gag Law

A First Amendment analysis of Idaho's recently invalidated Ag Gag law strengthens the argument that Wyoming's trespass law would also fail First Amendment scrutiny.<sup>72</sup> Idaho was the eighth state to pass a law with the underlying motive of punishing citizens for reporting harmful agricultural practices.<sup>73</sup> Idaho's law and seven other state laws address citizens knowingly trespassing, gaining access to agricultural facilities through misrepresentation, or damaging agricultural facilities.<sup>74</sup> While Wyoming's laws are different because they address trespass to open land rather than a facility, they fit under the Ag Gag umbrella because the legislative intent was to silence speech that the legislature finds unfavorable.<sup>75</sup> In particular, Idaho's statute on "interference with agricultural production" is interesting to compare to Wyoming's new statutes because the United States District Court for the District of Idaho recently deemed Idaho's statute unconstitutional in *Animal Legal Defense Fund v. Otter* on August 3, 2015.<sup>76</sup> The statute at issue stated:

- (1) A person commits the crime of interference with agricultural production if the person knowingly:
  - (a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, misrepresentation or trespass;
  - (b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;
  - (c) Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers;

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72. IDAHO CODE § 18-7042 (effective 2014).

73. See, e.g., IDAHO CODE § 18-7042 (2014); IOWA CODE ANN. § 717A.3A (2012); MO. REV. STAT. § 578.013 (2012); MONT. CODE ANN. § 81-30-105 (1991); N.D. CENT. CODE § 12.1-21.1-02 (1991); KAN. STAT. ANN. § 47-1827 (1990) (existing "Ag Gag" statutes).

74. *Id.*

75. See Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 4 (quoting Wyoming legislators who referred to the groups that inspired the new trespass laws as activists, extremists, nefarious, and evil); *Animal Legal Defense Fund v. Otter*, 118 F. Supp. 3d 1195, 1201 (D. Idaho 2015) (referring to a supporter of the bill who called the groups "terrorists and insinuated that their investigations were defamatory").

76. *Animal Legal Defense Fund*, 118 F. Supp. 3d at 1209-12.

(d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; or

(e) Intentionally causes physical damage or injury to the agricultural production facility's operations, livestock, crops, personnel, equipment, buildings or premises.<sup>77</sup>

In its opinion, the court employed a three-step First Amendment analysis. First, the plaintiff bears the burden of demonstrating that the First Amendment applies to the prohibited activity.<sup>78</sup> If the plaintiff meets this burden, the court then analyzes the context in which the expression took place to determine which First Amendment standards apply.<sup>79</sup> Under the final step, the court evaluates whether the state's reasons for restricting the expression satisfy the applicable First Amendment standards.<sup>80</sup>

The court found that the statute's misrepresentation clause triggers the First Amendment, stating that a deception under Idaho's statute would not cause a legally cognizable harm that the First Amendment does not protect, such as fraud or perjury.<sup>81</sup> The greatest harm that would result from a communication that the statute prohibits would arise from publishing a damaging story about a facility's abusive practices.<sup>82</sup> The First Amendment was designed to protect exactly this type of speech that exposes misconduct and promotes dialogue on public-interest issues.<sup>83</sup>

Under step two, the court found that the audiovisual recording provision discriminates both on content and on viewpoint, triggering the highest level of scrutiny.<sup>84</sup> Idaho argued that the audiovisual recording provision was not content-based because it did not regulate what was said, only where it was said.<sup>85</sup> This argument did not convince the court. The court reasoned that a person could not be prosecuted under the statute for merely standing in an agricultural facility but could, however, face up to a year in jail if the person then filmed animal abuse within the facility

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77. IDAHO CODE § 18-7042.

78. *Animal Legal Defense Fund*, 118 F. Supp. 3d at 1202.

79. *Id.*

80. *Id.*

81. *Id.* at 1203.

82. *Id.* at 1204.

83. *Id.*

84. *Id.* at 1203–04.

85. *Id.* at 1205.

without the owner's consent.<sup>86</sup> Furthermore, a law can be content-based if the underlying purpose of the law is to suppress specific ideas.<sup>87</sup> The legislative history of Idaho's law reveals that its purpose was to protect agricultural facility owners by suppressing speech that criticized agricultural work practices.<sup>88</sup> The court also found that the Idaho statute discriminated based on viewpoint because the effect of the consent provision was to "burden speech critical of the animal-agricultural industry."<sup>89</sup> Viewpoint-based restrictions also trigger the highest level of scrutiny.<sup>90</sup>

Under the third step, because it was a content-based restriction, the court would only uphold the law if it was narrowly tailored to fulfill a compelling state interest.<sup>91</sup> The court held that an interest in protecting personal privacy and private property was an important interest, but not a compelling interest under the context presented.<sup>92</sup> Idaho erred in upholding the private property interests of agricultural production facilities—a heavily regulated industry—over the public's interest in the safety of the food supply, the humane treatment of animals, and worker safety, which should be subject to public scrutiny.<sup>93</sup> Even if protecting private property was a compelling interest, the statute was not narrowly tailored to fulfill that interest; Idaho already has civil and criminal laws that protect private property rights without violating free speech.<sup>94</sup> Although Wyoming's laws differ from Idaho's, the similarities between the two strengthen the argument that Wyoming's laws should be invalidated on First Amendment grounds.

### B. Litigation over Wyoming's Data Trespass Laws

WWP and several interested groups sued the Governor of Wyoming, the Attorney General of Wyoming, and various Wyoming government officials on September 29, 2015.<sup>95</sup> WWP's complaint raised various claims, including violations of the Free Speech and Petition Clauses of the First Amendment, violation of the Equal Protection Clause, and a preemption

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86. *Id.* at 1205–06.

87. *Id.* at 1206.

88. *Id.*

89. *Id.* at 1207.

90. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014) (noting that an act that favors one viewpoint over another must withstand strict scrutiny).

91. *Animal Legal Defense Fund*, 118 F. Supp. 3d at 1207.

92. *Id.*

93. *Id.*

94. *Id.* at 1208.

95. Complaint for Declaratory and Injunctive Relief, *supra* note 5.

claim.<sup>96</sup> The Wyoming Defendants filed a motion to dismiss and the United States District Court for the District of Wyoming filed an order granting in part and denying in part defendants' motion to dismiss on December 28, 2015.<sup>97</sup> This order dismissed the Governor as an improper defendant, but upheld the majority of WWP's claims and began an analysis of the Free Speech and Petition Claims.<sup>98</sup>

## 1. Claim Under the Free Speech Clause

### a. Legal Framework

Although Wyoming's Data Trespass laws are distinguishable from Idaho's Ag Gag law, a similar First Amendment framework applies. The Idaho District Court opinion provides a helpful—although by no means controlling—analysis of an ag gag law and set of facts resembling the challenge against Wyoming's trespass statutes.<sup>99</sup> Additionally, the Wyoming District Court's order on defendants' motion to dismiss provides a thorough analysis of the Data Trespass statutes using First Amendment Supreme Court cases.<sup>100</sup>

Under step one of the First Amendment analysis, Wyoming's laws must prohibit protected speech to trigger the First Amendment.<sup>101</sup> Next, the Court uses the public or nonpublic nature of the forum to determine which First Amendment standard applies.<sup>102</sup> If the forum is public, the Court decides whether the speech restriction is content-based or content-neutral.<sup>103</sup> If the forum is nonpublic, the Court must decide whether the restriction is viewpoint-based or viewpoint-neutral.<sup>104</sup> Under the third and final step, the Court then decides if the restriction survives under the relevant standard of scrutiny.<sup>105</sup>

A content-neutral restriction is subject to intermediate scrutiny, meaning that the restriction must further a substantial government interest

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96. *Id.* at 51–67; *see* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss at 17, 21–23, 33, *Western Watersheds Project v. Att'y Gen.*, 15-CV-00169-SWS (D. Wyo. Dec. 28, 2015) (analyzing the substantive claims and dismissing the preemption claim because the trespass statutes do not conflict with the participation requirements under federal law).

97. *Id.* at 1.

98. *See id.* at 22 (dismissing Plaintiffs' preemption claim and assessing the merits of Plaintiffs' other substantive claims).

99. *Id.* at 28 (assessing the merits of Plaintiffs' claims).

100. *Id.*

101. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

102. *Id.*

103. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

104. *Cornelius*, 473 U.S. at 806.

105. *Id.* at 797.

and leave open alternative avenues of communication.<sup>106</sup> A content-based restriction is subject to strict scrutiny and will only survive if it is the least restrictive means to further a compelling government interest.<sup>107</sup> A viewpoint-neutral restriction must be reasonable, while a viewpoint-based restriction is subject to strict scrutiny.<sup>108</sup> In the order on defendants' motion to dismiss, the Wyoming District Court included a third level of scrutiny in the First Amendment analysis—an “exacting scrutiny” that applies to a restriction that burdens “core political speech.”<sup>109</sup>

#### b. Analysis of Content-Based Restrictions

Both parties acknowledge that the new trespass statutes restrict protected speech and therefore trigger the First Amendment analysis.<sup>110</sup> Courts have long held that photographs are protected speech under the First Amendment.<sup>111</sup> The definition of “collect” under Wyoming’s challenged laws includes photographing information from open land that is submitted or intended to be submitted to a government agency.<sup>112</sup> This provision suffices to trigger First Amendment protection.

Step two of the analysis identifies the level of scrutiny that the Wyoming laws must survive to remain valid based on the forum of the protected speech. WWP contends that the statutes are content-based restrictions because their prohibitions “apply only to a person who communicates or intends to communicate resource data on matters of public concern.”<sup>113</sup> Additionally, WWP claims that the statutes are viewpoint-based because their prohibitions apply only to a person who collects resource data from open land without authorization.<sup>114</sup> Authorization is given by the landowner, who consequently controls who may submit resource data to the government and is unlikely to authorize collecting unfavorable resource data.<sup>115</sup>

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106. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 41 (1986).

107. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

108. *McCullen*, 134 S. Ct. at 2530; *Cornelius*, 473 U.S. at 808.

109. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 96, at 28.

110. *Id.*

111. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (declaring that a statute prohibiting photographs, videos, or sound recordings that depict animal cruelty to be content-based restrictions under the First Amendment).

112. WYO. STAT. ANN. §§ 6-3-414, 40-27-101.

113. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 55.

114. *Id.*

115. *Id.*

The Wyoming District Court did not decide whether exacting, strict, or intermediate scrutiny applies, nor did it decide whether the forum was public or nonpublic because WWP's Free Speech claim is plausible "under even the most lenient scrutiny."<sup>116</sup> The court analyzed Wyoming's trespass statutes under the content-neutral (intermediate scrutiny) standard that applies to public forums and also briefly discussed whether the statutes were impermissibly motivated by the desire to suppress a certain viewpoint under the nonpublic forum standard.<sup>117</sup>

Wyoming argued that the statutes are content-neutral because they are "aimed at secondary effects of the speech" and were written in response to complaints from landowners about frequent trespassers entering their land for the purpose of collecting resource data to submit to regulatory agencies.<sup>118</sup> Wyoming claims that, for this reason, the statutes' primary aim is to prevent illegal trespass.<sup>119</sup> The Wyoming District Court agreed with Wyoming that preventing illegal trespass is a substantial government interest, so the laws must be narrowly tailored to further that interest to survive intermediate scrutiny.<sup>120</sup>

Wyoming's assertions about the purpose of the statutes raise two major issues about the illegality of the trespasses that they aim to prevent. First, Wyoming already has an existing statute to prevent trespass that requires a person *knowingly* enter private land to be guilty of trespass.<sup>121</sup> A person accidentally wandering onto unposted open land to collect resource data could not be found guilty under the existing trespass statute. For this reason, Wyoming cannot argue that the new trespass statutes were in response to complaints about illegal trespass if those entries onto unposted land by resource data collectors were not illegal under the existing trespass statute.

Second, the new statutes' provisions on public open lands do not further the interest of preventing illegal trespass. The public has the right to enter and use many public lands for recreational purposes. As the Wyoming District Court reasoned, "detering people from collecting resource data on public lands does nothing to deter people from trespassing."<sup>122</sup> If simply

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116. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 96, at 28–29.

117. *Id.* at 29–31.

118. *Id.* at 29.

119. *Id.*

120. *Id.*

121. See WYO. STAT. ANN. § 6-3-303 ("A person is guilty of criminal trespass if he enters . . . the land or premises of another person, knowing he is not authorized to do so.").

122. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 96, at 30.

wandering onto open land by itself is not a trespass, the additional action of collecting resource data on that land should not make it one.

The District Court found that the lesser *mens rea* and the requirement that agencies expunge any resource data collected illegally under the new trespass statutes casts enough doubt on Wyoming's assertion that the statutes were passed solely to prevent trespass.<sup>123</sup> The Court found that WWP stated a plausible claim even under the intermediate scrutiny standard but did not answer the ultimate question of whether the state interest of preventing illegal trespass justifies the restrictions on speech.<sup>124</sup>

The Idaho District Court in *Animal Legal Defense Fund* provides guidance for courts to consider when weighing the state interest against the restrictions on speech. The court reasoned that protecting the interests of a heavily regulated industry cannot contravene the public's interest in the "safety of the food supply, worker safety, and the humane treatment of animals."<sup>125</sup> A similar reasoning applies in analyzing the Data Trespass statutes. Preventing illegal trespass is an important state interest, but it is not more important than the public's interest in protecting the state's lands and waters—especially when a landowner's expectation of privacy is limited on unposted open land.

The Wyoming District Court did not answer the question of whether the Data Trespass laws are content-based or content-neutral, but instead, chose to analyze the statutes under the most lenient level of scrutiny for content-neutral restrictions.<sup>126</sup> However, WWP argues that the statutes are content-based because they apply only to a person communicating resource data and are, therefore, subject to strict scrutiny.<sup>127</sup>

The underlying purpose of the Data Trespass laws is to suppress the collection of resource data that, if submitted to the government, could harm Wyoming's livestock industry. The Wyoming legislature enacted the laws shortly after WDEQ added three streams to a list of impaired waters and *Frank Ranches v. Ratner* commenced.<sup>128</sup> Additionally, WWP's complaint states that during legislative debates for the Data Trespass statutes, various legislators referred to groups like WWP as activists, extremists, and

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123. *Id.* at 31–32.

124. *Id.* at 30.

125. *Animal Legal Defense Fund*, 118 F. Supp. 3d at 1207.

126. *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 96, at 29 ("Plaintiffs state a plausible claim under even the most lenient scrutiny.").

127. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 55.

128. *See id.* at 3 (arguing that the Wyoming legislature enacted the new statutes because WWP's data led the Wyoming DEQ to add three streams to the impaired waters list in 2012); *see* Budd-Falen Law Offices, *supra* note 33 (announcing *Frank Ranches v. Ratner* on June 11, 2014).

nefarious.<sup>129</sup> This suggests that the Wyoming legislature passed the laws in an attempt to suppress groups like WWP that the legislature believes harbor negative feelings about the livestock industry and ranchers' work practices.

The laws only apply to a person entering open land to collect resource data and give the landowner ultimate control over who is authorized to enter the land and what data that person can collect. Whether a landowner authorizes the data collection will likely depend on what the landowner thinks the collector will find. Additionally, the provision that requires agencies to expunge any data collected unlawfully under the statutes suggests that the laws are more about restricting the contents of the communication than they are about preventing trespass.<sup>130</sup> These facts support the argument that the laws are content-based because the underlying purpose of the regulation is to suppress a particular topic or idea.<sup>131</sup> For the same reasons that the statutes would likely not survive intermediate scrutiny, they would also fail under strict scrutiny.

### c. Analysis of Viewpoint-Based Restrictions

In addition to claiming that the Data Trespass statutes restrict protected speech based on content, WWP also classifies the statutes as viewpoint-based restrictions.<sup>132</sup> The Wyoming District Court in its order granting in part and denying in part defendants' motion to dismiss did not explicitly rule on whether the trespass statutes were viewpoint-based or view-point neutral but did find that WWP "sufficiently called the viewpoint neutrality of the statutes into doubt."<sup>133</sup> The court found that the damages provision under the civil statute "appears to identify a desire to suppress a particular content or viewpoint of speech."<sup>134</sup> Under that provision, a trespasser is liable for "all consequential and economic damages proximately caused by the trespass."<sup>135</sup> Basically, a trespasser would only be liable for consequential damages that resulted from reporting environmental violations but would not be liable for any damages if he reported resource data in compliance with environmental regulations because no harm would result. Furthermore, the court found that the existence of a statute already

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129. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 4.

130. WYO. STAT. ANN. §§ 6-3-414, 40-27-101.

131. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.")

132. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 4.

133. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 96, at 30.

134. *Id.*

135. WYO. STAT. ANN. § 40-27-101(c).

designed to prevent trespass casts doubt on the neutrality of the statutes' viewpoint.<sup>136</sup>

A regulation is a viewpoint-based restriction when it "makes it likely that prosecution will occur based on displeasure with the position taken by the speaker."<sup>137</sup> WWP's complaint cites one senator referring to the incident between WWP and several ranchers as an "attack on property rights" by "a group of people that don't necessarily see [things] the same way."<sup>138</sup> Furthermore, citizens cannot enter open land to collect resource data unless they have legal authorization or written or verbal permission to collect the "specified resource data."<sup>139</sup> The landowner can deny someone access to any resource data that the owner worries does not comply with environmental regulations. This all suggests that the statutes are an attempt to prevent citizen scientists from communicating unfavorable information about poor land conditions and water quality on open land to government agencies. If a court deems the Data Trespass statutes viewpoint-based restrictions, they would fail under strict scrutiny.

## 2. Claim Under the Petition Clause

WWP's second First Amendment claim is that the Data Trespass laws violate the Petition Clause, which prohibits laws that abridge the right of the people "to petition the Government for a redress of grievances."<sup>140</sup> In its order on defendants' motion to dismiss, the Wyoming District Court focused mainly on whether this claim should be analyzed together with, or separate from, the Free Speech Clause claim.<sup>141</sup> It did not reach a decision on this issue and instead simply ruled that WWP's Free Speech Clause claim was sufficient to state a claim for relief under the First Amendment.<sup>142</sup> If the two claims are analyzed separately, however, the Data Trespass statutes directly violate the Petition Clause.

The statutes specify that a person must submit or intend to submit resource data to an agency of the state or federal government to violate them.<sup>143</sup> The statutes also require that the government expunge from its records and disregard any data collected in violation of the statutes in

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136. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 96, at 31.

137. *Hill v. Colorado*, 530 U.S. 703, 709 (2000).

138. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 4.

139. WYO. STAT. ANN. §§ 6-3-414, 40-27-101.

140. U.S. CONST. amend. I.

141. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *supra* note 96, at 33.

142. *Id.*

143. WYO. STAT. ANN. §§ 6-3-414, 40-27-101.

enforcement proceedings.<sup>144</sup> Both of these provisions directly inhibit the public's right to communicate concerns over harmful agricultural practices to the government and impede government agencies' ability to correct harmful practices.

### III. WYOMING'S LAWS VIOLATE PUBLIC PARTICIPATION REQUIREMENTS

In addition to the Petition Clause protecting the right of citizens to communicate with their government, various statutory provisions require the government to encourage and facilitate public participation in environmental decision-making and enforcement. While the Data Trespass laws do not expressly forbid citizens from collecting environmental resource data, they do discourage public participation in that process.

Specifically, the laws make it more difficult for NGOs like WWP, that have no statutory authority to enter private lands or open lands, to collect resource data because they now need express permission from a landowner to enter unposted open land or risk civil or criminal liability.<sup>145</sup> Even if a group receives funding from a federal or state agency to collect data, such as academic researchers, these statutes require group members to get permission from the landowner to access the lands.<sup>146</sup> The University of Wyoming's Office of Research and Economic Development has dedicated a portion of its website to information about the new laws and provides permission forms for the University's researchers to fill out to ensure legal access to both private and state lands.<sup>147</sup> These forms request permission both to enter property and to collect specified resource data to ensure that the data is not thrown out.<sup>148</sup>

While it is legitimate to require researchers to obtain permission from a landowner to knowingly enter private posted land, it is much less reasonable to require permission to enter or traverse open land when the researcher has no notice that the land is private. Wyoming's checkerboard pattern of private, state, and federal land ownership exacerbates this issue

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144. *Id.* §§ 6-3-414, 40-27-101.

145. *See* 33 U.S.C. § 1318 (2012) (“[T]he Administrator or his authorized representative . . . shall have a right of entry to, upon, or through any premises in which an effluent source is located.”); *see also* WYO. STAT. ANN. § 6-3-414 (“A person is guilty of trespassing to unlawfully collect resource data from private land if he . . . does not have . . . statutory, contractual, or other legal authorization . . . or written or verbal permission of the owner . . .”).

146. *Trespassing to Unlawfully Collect Resource Data: Frequently Asked Questions*, U. OF WYO., <https://perma.cc/4M6Y-JSZE> (last updated May 14, 2015).

147. *See Obtaining Permission from a Landowner to Collect Resource Data*, U. OF WYO., <https://perma.cc/M5FX-VJ2D> (last visited Oct. 28, 2016) (providing links to information on the Data Trespass Laws and permission forms).

148. *Id.*

of notice—especially in large areas of open grazing land. The uncertainty over whether a researcher is on private or public land and whether she needs express permission to be on those lands, discourages the public from collecting resource data for fear of criminal prosecution. This effect is directly contrary to the CWA’s goal for states to encourage “public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program.”<sup>149</sup>

Public participation within the CWA includes, “providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official.”<sup>150</sup> In addition to private citizens, “the public” under this provision includes, among other groups, environmental organizations, scientific and health societies, and educational associations.<sup>151</sup> States are supposed to encourage public involvement in implementing environmental laws by using “all feasible means” to create opportunities for public participation.<sup>152</sup>

When members of the public discover that an entity is violating an effluent limitation or other statutory provision, they may be entitled to file suit against the violator.<sup>153</sup> Such suits are integral to improving water quality and other environmental standards because many state agencies responsible for enforcing environmental laws lack the resources to correct every violation. WDEQ, the agency responsible for implementing water quality standards throughout Wyoming, lists only eight staff members who are responsible for conducting site inspections for Wyoming Discharge Pollutant Elimination System (WYPDES) permit holders.<sup>154</sup> The State Nonpoint Source Program, which operates through voluntary and incentive methods, is overseen by a taskforce of 13 citizens who represent different interest groups throughout the state.<sup>155</sup>

The lack of professional-staff capacity to handle water quality issues has led citizens to pick up the slack on the issues that administrative

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149. 33 U.S.C. § 1251 (2012).

150. 40 C.F.R. § 25.3 (2015).

151. *Id.*

152. *Id.*

153. See 33 U.S.C. § 1365 (“[A]ny citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation . . .”).

154. See *WYPDES Contacts*, WYO. DEP’T ENVTL. QUALITY, <https://perma.cc/KXZ8-3DZD> (last updated Oct. 16, 2014) (listing contacts for WYPDES staff members); *WYPDES*, WYO. DEP’T ENVTL. QUALITY, <https://perma.cc/9TU7-Q7QB> (last visited Jan. 5, 2017).

155. *Task Force*, WYO. DEP’T ENVTL. QUALITY, <https://perma.cc/X5QS-TPYH> (last visited Jan. 5, 2017).

agencies fail to address.<sup>156</sup> For example, water quality samples that WWP has submitted to WDEQ has led WDEQ to list three streams under section 303(d) of the CWA, with five other creeks on a section 303(d) draft list for 2014.<sup>157</sup> Environmental victories in Wyoming resulting from citizen suits will likely be few and far between in the era of the Data Trespass laws because any resource data collected illegally must be expunged from any government database and disregarded in enforcement proceedings.<sup>158</sup> With no evidence, there is no case.

Additionally, the CWA requires administrative agencies to provide opportunities for public hearings when issuing or altering NPDES permits.<sup>159</sup> Although runoff and waste from rangelands are not regulated under the NPDES program because they are nonpoint sources, the over-broad trespass laws reach waterbodies that do fall within the NPDES program. EPA delegated implementation authority of the NPDES permit program to Wyoming, which has charged WDEQ with executing the WYPDES program.<sup>160</sup> If a state fails to fulfill its obligations enumerated in its implementation plan, citizens can petition to have EPA withdraw its approval of the state's NPDES program authority.<sup>161</sup>

A pending petition requesting EPA to withdraw Wyoming's NPDES program authority addresses Wyoming's failure to follow public participation requirements.<sup>162</sup> Specifically, the petition alleges that WDEQ issued permits to discharge pollutants without responding to substantive objections during the public comment period.<sup>163</sup> The Data Trespass laws would only worsen this problem because WDEQ could not consider any data that a citizen scientist collected illegally under the statutes. Moreover, there would be far fewer substantive comments for agencies to consider because environmental groups will hesitate to enter land to collect resource data for fear of criminal prosecution or civil liability.

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156. See David R. Hodas, *Enforcement of Environmental Law in the Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1609 (1995) (“[Citizen suit activity] accounts annually for almost five times the number of judicial actions as the federal government, and is almost equal to the total of all state judicial actions combined.”).

157. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 36.

158. WYO. STAT. ANN. §§ 6-3-414, 40-27-101.

159. 33 U.S.C. § 1342 (2012).

160. *Id.*; see generally Memorandum of Agreement, *supra* note 59 (outlining Wyoming's agreement to issue and monitor NPDES permits).

161. 33 U.S.C. § 1342.

162. Memorandum for Petition for Corrective Action or Withdrawal of the State of Wyoming's Auth. to Administer the Clean Water Act's Nat'l Pollution Discharge Elimination Sys. Program, Wyo. Outdoor Council & Powder River Basin Res. Council at 28-35, (Mar. 5, 2001) (on file with Environmental Protection Agency).

163. *Id.* at 32-33.

In addition to controlling point-source pollution, the CWA requires states to identify waters that will not maintain the applicable water quality standard without additional controls on nonpoint sources of pollution.<sup>164</sup> Plans to bring waters into compliance with standards should use information from local public and private agencies and organizations with expertise in nonpoint sources of pollution to develop best management practices and other controls.<sup>165</sup> Pollution from grazing lands is a nonpoint source and fits within this statutory provision. The Wyoming legislature likely passed the Data Trespass laws to shield this category of pollution; they apply only on open lands “outside the exterior boundaries of any incorporated city, town, subdivision, or development.”<sup>166</sup> In addition, the legislature passed the laws shortly after the lawsuit commenced between a group of Wyoming ranchers and WWP after WWP’s data caused Wyoming to add a stream to the 303(d) list of impaired waters.<sup>167</sup>

Public participation provisions appear throughout the CWA. These provisions ensure public involvement in decision-making and ensure that environmental agencies have complete and accurate data when making decisions on permits, state water quality standards, and enforcement proceedings. Wyoming’s Data Trespass laws violate these provisions because they discourage citizen involvement in data collection and prohibit government agencies from considering any resource data collected illegally under the laws.<sup>168</sup>

#### CONCLUSION

The Wyoming legislature claims that it passed the Data Trespass laws to protect private property rights. However, a closer look reveals that the motive behind the laws was to hinder groups like WWP from investigating and reporting harmful agricultural practices. The statutes’ broad language allows them to apply to public lands, putting them within the scope of the First Amendment. The laws violate the Free Speech Clause of the First Amendment because they single out a particular type of speech and are not narrowly tailored to fulfill a compelling governmental interest. The laws also violate the Petition Clause because an entry onto open land only becomes illegal when a citizen communicates or intends to communicate collected resource data to a government agency. Finally, Wyoming’s laws

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164. 33 U.S.C. § 1329(a)(1) (2012).

165. *Id.* § 1329(a)(1)(C), (b)(3).

166. WYO. STAT. ANN. §§ 6-3-414(d)(ii), 40-27-101(d)(ii).

167. Jacobs, *supra* note 36.

168. WYO. STAT. ANN. §§ 6-3-414, 40-27-101.

violate public participation provisions in the CWA because they severely discourage citizens from gathering resource data and from taking part in the decision-making process, which is essential to ensuring the safety of state waters.

Landowners, who post notice on their private property or explicitly inform trespassers that their entry is unauthorized, already have an avenue for redress under Wyoming's pre-existing trespass statute: redress that does not interfere with the public's ability to collect resource data. The Wyoming legislature missed the mark when it violated the First Amendment and prioritized private property interests over the safety of the state's waters.



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