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IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR WASATCH COUNTY, STATE OF UTAH

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UTAH STREAM ACCESS COALITION, a Utah  
non-profit corporation,

plaintiff,

vs.

ATC REALTY SIXTEEN, INC., a California  
corporation; UTAH DIVISION OF WILDLIFE  
RESOURCES, an agency of the State of Utah;  
UTAH DIVISION OF PARKS AND  
RECREATION, an agency of the State of Utah;  
SHERIFF TODD BONNER, Wasatch County  
Sheriff; and DOES 1-10,

Defendants.

**FIRST AMENDED COMPLAINT**

Civil No. 100500558

Hon. Derek Pullan

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The Utah Stream Access Coalition, by and through its counsel of record and for causes of  
action against defendants, alleges as follows:

## PARTIES

1. The Utah Stream Access Coalition (“the Coalition”) is a Utah nonprofit corporation in good standing with its base of operations in Salt Lake County, State of Utah.

2. Defendant ATC Realty Sixteen, Inc. (“ATC”) is a California corporation which, upon information and belief, owns and operates a real estate development on real property abutting the Provo River in Wasatch County, State of Utah. Said real property is more specifically described as, *inter alia*, Parcel Nos. 0189-3, 0189-4, 73374, 73390, 73408, 73424, 204877, 73416, 172549, 204882, 204883, 204884, 204885, and 204886 in the records of the Wasatch County (“the Victory Ranch property”).

3. Defendant Division of Wildlife Resources (“DWR”) is a division of the Department of Natural Resources, State of Utah, is authorized to issue and has issued criminal trespass citations as discussed herein, and is charged with enforcing that portion of Utah Code Ann. 23-20-14 pertaining to revocation of hunting and fishing privileges upon conviction of criminal trespass while engaged in wildlife-related activities.

4. Defendant Division of Parks and Recreation (“DPR”) is a division of the Department of Natural Resources, State of Utah, and is authorized to issue and has issued criminal trespass citations as discussed herein

5. Defendant Todd Bonner is the duly-elected Sheriff of Wasatch County, State of Utah. He and his office (collectively “the Sheriff”) are authorized to issue criminal trespass citations as discussed herein. Sheriff Bonner is named herein in his official capacity.

6. Does 1-10 are persons who own real property abutting the Provo River in Wasatch County, State of Utah.

## JURISDICTION – VENUE

7. This action seeks an adjudication and declaration regarding certain constitutional and other legal rights and duties of the Coalition, its members, and defendants as to Utah’s public waters, their beds and related public resources, including specifically but not limited to the waters, bed and resources of the Provo River in Wasatch County where it abuts the Victory Ranch and other private properties (collectively “the Landowner Properties”).

8. This court has jurisdiction over the parties and subject matter pursuant to Art. VIII Sect. 5 of the Constitution of Utah, Utah Code Ann. 78A-5-102, *et seq.* and Utah Code Ann. 78B-6-401, *et seq.*

9. Venue is proper in Wasatch County pursuant to Utah Code Ann. 78B-3-301, *et seq.*, and Utah Code Ann. 78B-6-401, *et seq.*

## APPLICABLE LAW

10. In July 2008, the Utah Supreme Court issued its opinion in *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008). Specifically, *Conatser* court – relying on its own precedent wherein it recognized, *inter alia*, public ownership of all waters flowing in or impounded on Utah’s rivers, streams and other natural watercourses (hereinafter collectively “public waters” or “Utah’s public waters”) and that with said ownership came a public easement, right-of-way, and servitude to utilize those public waters and related public resources for recreational or other lawful purposes – held that said easement, right-of-way, and servitude included the right to reasonably touch and use the publicly- or privately-owned beds of such public waters when so using such waters (referenced cases collectively referred to as “*Conatser*”).

11. The following provisions of the Constitution of Utah support the results in the *Conatser* decisions and the related rights of Coalition members and the public at issue herein: Article I, Sec. 23; Article I, Sec. 25; Article XVII, Sec. 1; and Article XX, Sec. 1.

12. The following provisions of the Constitution of Utah limit the powers of the legislature to abrogate the public easement and related rights recognized in *Conatser*: Article V, Section 1; and Article VIII, Section 1.

13. Among the rights retained by the people under the Constitution of Utah is the right to have certain public resources held and administered by the State in trust for the people – a principle known as the Public Trust Doctrine. Here, the Public Trust Doctrine imposes upon the State a duty to preserve and administer, in trust for the benefit of the people, Utah’s public waters, related public resources, and the rights of Coalition members and the public to access and use said resources as herein described.

### **PUBLIC WATERS ACCESS ACT<sup>1</sup>**

14. In 2010, the Utah Legislature passed the Public Waters Access Act (“the Act”). The Act was signed by Governor Gary Herbert on March 31, 2010, became law on May 11, 2010, and has been codified at Utah Code Ann. 73-29-101 through -208.

15. In effect, the Act, *inter alia*:

- a. declares and purports to adjudicate that constitutional prohibitions against the taking of private property take precedence over constitutional public trust and other

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<sup>1</sup> Two sections of the Act, 73-29-203 and -204, do not become effective until May 11, 2011. The Coalition reserves the right to amend this Complaint to challenge those sections when they become effective.

- obligations imposed on the State regarding Utah's public waters and related public resources;
- b. purports to over-rule *Conatser* by declaring that public ownership of Utah's public waters does not create a public easement, right-of-way or servitude to access and use those waters and related public resources for recreational purposes;
  - c. excludes public waters contained in man-made impoundments situated on a river, stream or other natural channel from the definition herein provided for 'public waters';
  - d. recognizes but restricts the right of the public to access and float Utah's public waters;
  - e. defines a 'navigable' water as, *inter alia*, a natural watercourse which "is useful for commerce and has a useful capacity as a public highway of transportation" and excludes such navigable public waters from the Act's provisions (*emphasis added*);
  - f. prohibits access to or use of Utah's public waters and related public resources except as expressly authorized by the Act or where the water is 'navigable' as defined by the Act; and
  - g. subjects individuals who violate the Act to prosecution for criminal trespass, civil liability, penalties, remedies, loss of hunting or fishing privileges under, *inter alia*, Utah Code Ann. 23-20-14, 76-6-206 and/or 76-6-206.3.

## **GENERAL ALLEGATIONS**

### **The Provo River**

16. The Provo River has its headwaters in the Uintah Mountains in Summit County, Utah, and flows, in turn, through Summit, Wasatch and Utah Counties, ultimately discharging into Utah Lake.

17. Pursuant to the above-referenced applicable law, all waters flowing in or impounded on Utah's rivers, streams and other natural watercourses, including specifically but not limited to the waters of the Provo River, are and have always been public property held in trust for the benefit of the people by the State of Utah and, before it, the Territory of Utah and State of Deseret.

18. Similarly, the fish, wildlife and other resources which live in, utilize or are a component of Utah's public waters (collectively "related public resources") are and have always been public property held in trust for the benefit of the people by the State of Utah and, before it, the Territory of Utah and State of Deseret.

19. With said public ownership the public has an easement, right-of-way and servitude, held in trust by the State for the benefit of the people, to lawfully access and use Utah's public waters and related public resources for recreational or other lawful purposes and to reasonably touch and use the privately- or publicly-owned beds of such waters up to and including the ordinary high water mark ("bed" or "beds") when doing so.

20. Since before Utah's statehood, the public has exercised these rights and has made extensive use of the entire reach of the Provo River and its bed for various commercial, recreational and other lawful purposes. For example, virtually the entire reach of the Provo

River, from the Uintah Mountains to Utah Valley, was used extensively from roughly 1870 into the 1900s to float timbers used for, *inter alia*, buildings, mining timbers, or railroad ties. More recently and until the enactment of Act, virtually the entire reach the Provo River has been used for subsistence or recreational boating and fishing. According to the *River Runner's Guide to Utah*, the stretch of river that includes Victory Ranch is part of a 23 mile section known as "Soapstone Road to Jordanelle Reservoir," and is usually runnable in late May through early July through an area that is "quite beautiful and wooded." This stretch of the Provo River contains numerous easy Class 2 and 3 rapids, which means that it is suitable for people with intermediate skills in canoes, kayaks and rafts. Similarly, the *Guide* describes the six mile "Deer Creek Reservoir to Upper Diversion Dam" stretch of river below Deer Creek as being "beautiful", offering "excellent fishing", and being suitable to canoeists, kayakers and rafters having beginner to intermediate skills.

21. ATC and Does 1-10 (collectively "the Landowners"), their predecessors-in-interest, or their agents have, adverse to said public ownership and rights, unlawfully claimed, asserted and usurped title to and possession and control of the public waters and related public resources of the Provo River where it abuts the Landowner Properties and, directly or through their agents, wrongly prevented, prohibited, precluded, impeded, restricted, limited, impaired and interfered with the lawful access to and use and enjoyment of such waters and resources by Coalition members and the public. Such conduct includes or has included, *inter alia* (collectively "Landowner Conduct"):

- a. posting 'No Trespassing' signs or similar signage or postings at public access points to the public waters of the Provo River so as to prevent or discourage access to the same;
- b. placing fences or other obstructions at said public access points and/or across the Provo River so as to preclude or impair public access to or use of the River and/or render such access or use unsafe;
- c. telling Coalition members and the public to leave the public waters of the Provo River on the grounds that said public waters and its bed are "private property"; and/or
- d. harassing Coalition members or the public who have lawfully accessed and are using the public waters and resources of the Provo River so as to interfere with said persons' use and enjoyment of the same.

22. DWR, DPR and the Sheriff have, based on the Act, cited or warned individuals, including one or more of Coalition members, for criminal trespass for lawfully accessing and using Utah's public waters and related public resources for recreational or other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and for reasonably touching and using the privately- or publicly-owned beds of such waters when doing so (collectively "Law Enforcement Activities").

#### Utah Stream Access Coalition

23. The mission of the Utah Stream Access Coalition includes, *inter alia*, restoring and preserving the right of its members to lawfully access and use Utah's public waters and related public resources for recreational or other lawful purposes, including specifically but not limited



to the waters and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the beds of such waters when doing so.

24. Richard Dombek is a Utah resident and Coalition member. On or about July 5, 2010, from a bridge on S.R. 32 where it crosses the Provo River, he entered the public waters of the Provo River where it abuts the Victory Ranch property and, walking up the bed of the River, approached an individual believed to be Matt Eastman, an employee or agent of Victory Ranch, intending to ask him if he knew if this was private or public access. The individual approached and confronted Dombek, told him that he was trespassing and could not fish there. The individual then placed a call on his cell phone and, as Dombek returned to S.R. 32 by the same route and at the same location where he had entered the River, he was confronted by a DPR officer and cited for criminal trespass. Dombek has not been back to the Victory Ranch section of the Provo River since.

25. Ryan Houk is a Utah resident and Coalition member. On multiple occasions beginning in approximately 1990 and continuing into 2010, he accessed the Provo River where it abuts the Victory Ranch property from a public right-of-way and, walking up the bed of the River below the high-water mark, fly-fished the River, including approximately 30 times following *Conatser*. On several of these post-*Conatser* occasions, Matt Eastman, whom Houk understood to be an agent of Victory Ranch, harassed Houk while fishing, stating that Houk would no longer be able to fish there after May 10, 2010, with May 11, 2010, being the effective date of the Act. Though desiring to do so, Houk has not returned to fish the Provo River where it abuts the Victory Ranch property since May 10, 2010.

26. Nicholas Francis is a Utah resident and Coalition member. On multiple occasions beginning in approximately 1999 through May 10, 2010, he accessed the Provo River where it abuts the Victory Ranch property from a public right-of-way and, walking up the bed of the River below the high-water mark, fly-fished the River. He returned to fish the Provo River where it abuts the Victory Ranch property after May 10, 2010, but was turned away by 'No Trespassing' signs and similar postings posted by ATC or its predecessor.

27. Kris Olson is a Utah resident and Coalition member. On multiple occasions prior to and including May 10, 2010, he accessed the Provo River where it abuts the Victory Ranch and Campground properties from a public right-of-way and, walking up the bed of the River below the high-water mark, fly-fished the River. He returned to fish the Provo River where it abuts the Victory Ranch property after May 10, but was turned away by 'No Trespassing' signs and similar postings posted by ATC or its predecessor.

28. Gary Nichols is a Utah resident and Coalition member. He is the author of *River Runners' Guide to Utah*, a comprehensive guidebook to the rivers and streams of Utah, which has been in print since 1982. Nichols has boated the public waters of the Provo River where it abuts the Landowner properties, utilizing its bed as hereinafter described, and intends to do so again in the future.

29. Jeff Harwin is a Utah resident, a Coalition member, and a licensed commercial fishing guide. On multiple occasions prior to and including May 10, 2010, he accessed the Provo River from public property below Deer Creek Reservoir and, by floating and/or wading below the high water mark, fly-fished the River through and below those properties with both friends and customers. He returned with two friends to fish this same section of the Provo River

in August 2010, again entering the River from public property above those properties. While fishing the River near where it abuts these properties, he was approached by a male individual. The individual displayed a badge and told Harwin and his companions that they were fishing “private water” and to leave the property or “he would call the Sheriff.” The group left and Harwin has not returned since out of concern for being cited for trespass. Because this incident occurred immediately below one of the few public access points on the Provo River below Deer Creek Reservoir, Harwin’s apparent inability to guide fisherman on this section of the Provo River impairs his ability to earn a living as a fishing guide.

#### Act’s Impact on Coalition members

30. Coalition members have significant recreational, business, educational, scientific, health and/or aesthetic interests in Utah’s public waters and related public resources, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties.

31. When recreating on Utah’s public waters such as the Provo River, Coalition members are accustomed to using the water’s bed for activities such as stopping, wade-fishing, scouting, resting, eating, wildlife watching, contemplating, and taking photographs. The Act’s apparent prohibitions and limitations regarding access to and use of Utah’s public waters that abut private property and the touching and use of the beds of such waters when doing so eliminates or significantly reduces the opportunities of Coalition members and the public to experience and enjoy Utah’s public waters and related public resources, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and the quality of such experiences.

32. Since the Act became effective and due to the above-described Landowner Conduct and Law Enforcement Activities, Coalition members are uncertain about their rights regarding access to and use of Utah's public waters and related public resources for recreational and other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, about what measures they may and may not take to ensure their safety and the safety minors in their care when using Utah's public waters, and whether they can reasonably touch and use the privately- and publicly-owned beds of such waters when making such use.

33. But for the Act and the uncertainties it has created, the above-listed individuals and other Coalition members would have, from and after May 11, 2010, through the present, continued to lawfully access and use Utah's public waters and related public resources for recreational and other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the beds of such waters when doing so.

34. The above-listed individuals and other Coalition members and their interests have been harmed, are being harmed, and will be harmed:

- a. by enforcement of the Act, through criminal trespass citations, by DWR, DPR or Sheriff with regard to Utah's public waters and related public resources, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties;
- b. by the Landowner Conduct or that of their predecessors- or successors-in-interest, or their agents;

- c. by the vagueness and resulting chilling effect of the Act's apparent restriction on or prohibition of lawful public access to and use of Utah's public waters and related public resources, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties.

35. The Coalition has a compelling interest to ensure that its members may lawfully access and use Utah's public waters and related public resources for recreational and other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts Landowner Properties, and to reasonably touch and use the publicly- or privately-owned beds of such waters when doing so.

#### **CLAIM FOR RELIEF**

(Declaratory and Injunctive Relief)

36. The Coalition realleges ¶s 1-35 as if more fully set forth herein.

37. The Act violates applicable law to the extent that it purports to abrogate or relinquish, to the enrichment of private landowners, the right of Coalition members and the public to lawfully access and use Utah's public waters and related public resources for recreational and other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the bed of such waters when doing so.

38. The Act violates applicable law and the separation of powers doctrine to the extent that it purports to: (a) adjudicate the constitutional rights of Coalition members, the public, and defendants; (b) declare that the *Conatser* decision constitutes a taking of private property; and (c) abrogate or relinquish, to the enrichment of private landowners, the rights of Coalition members

and the public to lawfully access and use Utah's public waters and related public resources for recreational and other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the bed of such waters when doing so.

39. Pursuant to applicable law and Utah Code Ann. 78B-6-401, 408 and Rule 57, Utah Rules of Civil Procedure, the Coalition is entitled to judgment declaring that:

- a. Utah's public waters and related public resources, including but not limited to the waters and resources of the Provo River where it abuts, *inter alia*, the Landowner Properties, are and always have been owned by the public and held in trust by the State or its predecessors for the benefit of the people;
- b. incident to said public ownership, the public has an easement, right-of-way and servitude, held in trust by the State for the benefit of the people, to lawfully access and use Utah's public waters and related public resources for recreational or other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the beds of such waters when doing so;
- c. The Landowners, their successors-in-interest, and their agents have no right to in any way prevent, prohibit, preclude, impede, restrict, limit, impair or interfere with the right of Coalition members or the public to lawfully access, use and enjoy the waters and resources of the Provo River for recreational or other lawful purposes and to reasonably touch and use the bed of the River when doing so;

- d. Coalition members and members of the public who lawfully access and use Utah's public waters for recreational or other lawful purposes and who reasonably touch and use the bed of such waters when doing so, including but not limited to the waters, resources and bed of the Provo River where it abuts the Landowner Properties, are not criminally or civilly liable for trespass, nor may their hunting or fishing privileges be terminated or suspended;
- e. the Act violates applicable law to the extent that it purports to:
- 1) adjudicate the constitutional rights of Coalition members and the public versus those of Landowners or other persons whose land abuts Utah's public waters;
  - 2) abrogate or relinquish, to the enrichment of private riparian landowners, the right of Coalition members or the public under applicable law to lawfully access and use Utah's public waters and related public resources, including specifically but not limited to the water and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the beds of such waters when doing so;
  - 3) prohibit Coalition members or the public from lawfully accessing and using Utah's public waters and related public resources for recreational or other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the publicly- or privately-owned beds of such waters when doing so;
  - 4) authorize the Landowners, their successors-in-interest, or their agents to in any way prevent, prohibit, preclude, impede, restrict, limit, impair or interfere with

the right of Coalition members or the public to lawfully access and use Utah's public waters and related public resources for recreational or other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, and to reasonably touch and use the beds of such waters when doing so;

- 5) authorize DWR, DPR or the Sheriff to cite Coalition members or the public for criminal trespass for lawfully accessing and using Utah's public waters and related public resources for recreational or other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, or for reasonably touching and using the beds of such waters when doing so; or
- 6) make Coalition members or the public liable in civil trespass to the Landowners or other persons owning land abutting Utah's public waters for lawfully accessing and using public waters and related public resources for recreational or other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, or for reasonably touching and using the bed of the River when doing so.

40. Based on the foregoing, the Coalition is further entitled to judgment:
  - a. permanently enjoining the Landowners, their successors-in-interest, and their agents from engaging in any conduct or undertaking any action which in any way prevents, prohibits, precludes, impedes, restricts, limits, impairs or interferes with the right of Coalition members or the public to lawfully access and use the waters and resources



of the Provo River where it abuts the Landowner Properties for recreational or other lawful purposes and to reasonably touch and use the bed of the River when doing so; and

- b. permanently enjoining DWR, DPR and the Sheriff from, based on a supposed violation of the Act, citing Coalition members or the public for criminal trespass or seeking a termination or suspension of hunting or fishing privileges for lawfully accessing and using Utah's public waters and related public resources for recreational or other lawful purposes, including but not limited to the waters and resources of the Provo River where it abuts the Landowner Properties, or for reasonably touching and using the beds of such waters when doing so.

41. The Coalition is further entitled to judgment awarding attorneys fees and costs under the private attorney general doctrine on the grounds that, *inter alia*, this action, if successful, will benefit a large number of people, requires private enforcement, and is of societal importance. The Coalition is further entitled to an award of costs, and such other and further relief as the Court deems just and appropriate in the circumstances.

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**REQUEST FOR RELIEF**


WHEREFORE, the Coalition requests judgment as follows:

1. Declaratory judgment as set forth in ¶39 above;
2. Permanent injunctive relief as set forth in ¶40 above; and
3. Judgment for attorneys fees, costs and such other and further relief as the Court

deems just and appropriate in the circumstances.

DATED this 15 day of April, 2011.

RICHARDS BRANDT MILLER NELSON



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