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5 Attorney for the Property Owner
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8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
9

10 In the Matter of:

11 Draft Cease and Desist Order and
12 Administrative Civil Liability against
13 Stornetta Family Trust and
Newton Dal Poggetto (Trustee)

}
} Property Owner's and Trustee
} Newton Dal Poggetto's Closing
} Brief

14
15 The evidence is clear and undisputed before the Board that the Soil Conservation
16 District (SCD) constructed a dam in the Property Owner's field to control erosion on, and
17 downstream from, the property. The dam was constructed about 50 years ago in 1964.
18 Since then the resulting pond has been used as a stockpond for grazing stock, and the
19 erosion has been minimized.

20 In 2013 the Board's Office of Enforcement (BOE) demanded that the Property
21 Owner comply with regulations and simultaneously pay a fine of \$22,800. On
22 September 3, 2013 the Property Owner responded and, "agree[d] to register the
23 stockpond", but he objected to the unsupported claims and the fine. Despite numerous
24 attempts by the Property Owner to compromise on the amount of the fine, and the BOE's
25 willingness to accept the stockpond registration to satisfy its procedural demands, the
26 BOE continues to press its enforcement action beyond reason and practical efficiency.

27 Consistent with its original position, the Property Owner has filed with the Board a
28 Registration for Livestock Stockpond Use Appropriation. Nevertheless, the BOE

1 continues to demand payment of a fine from the Property Owner and has invested a
2 significant amount of time and taxpayer money to shakedown an innocent landowner
3 without cause.

4 The agency's levying of a fine is arbitrary, capricious and not supported by the laws
5 of California. The damages claimed are not supported by the evidence, as the BOE is
6 unable to demonstrate how the Property Owners used water before and after the
7 construction of the dam by SCD. The Property Owner has shown the use of the property
8 has not changed as a result of the pond. Accordingly, though it is resolute in its attempts,
9 the BOE is unable to demonstrate any malfeasance on the part of the Property Owner or
10 ill-gotten gains resulting from the pond. The fine and its purported justifications are
11 unsupported and wholly speculative.

12 **A. The BOE's Notification Procedures were Incorrect and Misinformed.**

13 The BOE's Amended Administrative Complaint dated May 1, 2014, (Amended
14 Complaint) states the action against the Property Owner commenced on August 18, 2011.
15 In fact, the evidence shows the first actual notice provided to Mr. Dal Poggetto, was dated
16 March 26, 2012, and even then identified Mr. Dal Poggetto incorrectly. Upon receiving
17 this notice from the BOE, Mr. Dal Poggetto promptly attempted to correct the
18 misinformation and responded to the BOE with his letter dated April 2, 2012.

19 The BOE's argument to the contrary is self-serving and unsupported. The BOE did
20 not provide actual notice to the Property Owner until March of 2012. It is important to
21 reiterate, and again it is undisputed, even given the misinformation in the BOE's March
22 2012 communication, upon receiving proper service, the Property Owner responded
23 appropriately.

24 Still, after significant delay, caused by the BOE's incorrect identification of the
25 Property Owner, and its unwillingness to resolve the matter reasonably and efficiently, the
26 Amended Complaint was served on Mr. Dal Poggetto in May 2014, and the Board hearing
27 resulted.

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1 **B. Damage Claims are Unsupported**

2 The evidence at the hearing demonstrated that the BOE is consistent in demanding
3 payment for damages arising from its own prosecution of this case, or resulting from
4 action taken by the government itself, not the Property Owner.

- 5 1. It is undisputed the pond resulted from action taken by the SCD, not the
6 Property Owner's successor.
- 7 2. It is undisputed the Property Owner has not used the water on the property for
8 any agricultural purposes other than watering grazing cattle both before and
9 after 1964.
- 10 3. It is undisputed there has been no appropriation of water for vineyards or other
11 agricultural purposes on or off the property.
- 12 4. It is undisputed the dam constructed by the SCD helps to serve its purpose of
13 controlling erosion through this watershed.

14 Nevertheless, BOE is determined to demonstrate some wrongful action or unfair
15 benefit by the Property Owner which may serve to justify the extraordinary and
16 unsubstantiated fine that it seeks to impose.

17 The BOE, however, has not shown that the Property Owner gained any economic
18 benefit because of the pond. Groundwater was always available as a water resource, as
19 shown through a well on the property. The BOE's recitation of studies to support unfair
20 economic gain is not appurtenant, and does not address facts particular to the property.
21 The real benefit of the dam is the prevention of excessive soil erosion consistent with the
22 SCD's purpose. The resulting stockpond is an obvious but minor consequence of the
23 government's action.

24 Further, the BOE ignores the Declaration of Gary Kiser, who passed away shortly
25 after the hearing, to claim that the Property Owner was somehow involved in constructing
26 the dam. The BOE cannot say how, when, or why the Property Owner was involved, but
27 submits to the Board only hearsay testimony that is wholly speculative to support the
28 claimed complicity that in any event is innocuous and legally irrelevant.

1 This concerted effort by the BOE to disprove Mr. Kiser's Declaration shows that the
2 BOE serves only to support its own unjustified, wholly inefficient, and inequitable pursuits.
3 The BOE's argument is specious and its evidence is improper. It proves nothing other
4 than it is unknown what agreements or permissions were entered into in or before 1964
5 by the Property Owner and the Soil Conservation District.

6 **C. Property Owner is Compliant With Regulations**

7 The Property Owner has filed its Registration for Livestock StockPond Use
8 Appropriation. The BOE agreed prior to the Hearing that such Registration would satisfy
9 the Board's procedural requirements. Hence, the Water Board should have no further
10 issues, unless it objects to any of the provisions in the Registration form. If that is the
11 case, proper procedures will be followed to ensure compliance.

12 **D. The Fine/Penalty is Unwarranted**

13 The evidence presented at the Hearing also demonstrated that the BOE has spent
14 unnecessary time and money to achieve the Property Owner's compliance with its
15 regulatory scheme. Rather than acting appropriately to obtain the Property Owner's
16 compliance, the BOE's actions have been a self-perpetuating waste of agency funds and
17 public monies.

18 Despite the Property Owner taking no action to create the pond, and the use of the
19 water being unchanged for 60 years, the BOE seeks to fund its own unreasonable
20 inefficiencies by unfairly assessing costs and penalties to the Property Owner.

21 This action is self-defeating and must be seen only as the BOE's attempt to obtain
22 at least \$22,800 from the Property Owner to fund its own needs.

23 **E. Fair Notice was not Provided to the Property Owner**

24 Fair notice is an essential requirement of any statutory scheme. The law of this
25 state consistently holds that government agencies must provide citizens a reasonable
26 opportunity to know what is prohibited, so that he or she may act accordingly. Pacific Bell
27 Wireless, LLC, v. Public Utilities Commission (2006) 140 Cal. App. 4th 718, 44 Cal. Rptr.
28 3d 733; citing Grayned v. City of Rockford (1972) 408 U.S. 104, 108 [33 L. Ed. 2d 222,

1 92 S. Ct. 2294], fn. omitted.)

2 In this instance, fair notice was not provided to a Property Owner who had taken no
3 action to cause the basis of the BOE's complaint. Instead, government action decades
4 ago caused the problem, government errors were made that failed to properly notify the
5 Property Owner of vague and uncertain compliance issues, and the government's
6 unreasonable, obstinate, persecution of the Property Owner brings us to this point.

7 **F. Conclusion**

8 The Property Owner respectfully requests that the Water Board's complaint,
9 claiming the violations as stated and claiming a fine of \$22,800, be dismissed. The claims
10 and the penalties are unjust, unsupported and unwarranted. The Property Owner
11 requests instead a fair and timely response to his Stockpond Registration.

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13 DATED: October 23, 2014

C. SCOTT KIRK LAW OFFICE
By: 
CAMERON SCOTT KIRK
Attorney for Property Owner

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AFFIDAVIT AND PROOF OF SERVICE

I, Jody Quaster, declare that I am over 18 years of age. I am employed in Sonoma County at 290 B Street, Suite 200, Santa Rosa, CA 95401. My mailing address is 290 B Street, Suite 200, Santa Rosa, CA 95401. On this date, I served the within documents:

Property Owner's and Trustee Newton Dal Pogetto's Closing Brief

X **(BY ELECTRONIC MAIL) CCP § 1010.6(a)(6)** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses below. I did not receive within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

DIVISION OF WATER RIGHTS PROSECUTION TEAM
Yvonne West, Senior Staff Counsel
State Water Resources Control Board
Office of Enforcement
1001 I Street, 16th Floor
Sacramento, CA 95814
Yvonne.West@waterboards.ca.gov

DIVISION OF WATER RIGHTS
STATE WATER RESOURCES CONTROL BOARD
Attention: Michael Buckman
P.O. Box 2000, Sacramento, CA 95812-2000
wrhearintg@waterboards.ca.gov
Subject: "Stornetta-Dal Poggetto Draft CDO and ACL Hearing"

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on 10/23/14, at Santa Rosa, California.

Jody Quaster

