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5 Attorney for the Property Owner

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8 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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10 In the Matter of: )  
11 Draft Cease and Desist Order and )  
12 Administrative Civil Liability against ) Property Owner's and Trustee  
13 Stornetta Family Trust and ) Newton Dal Poggetto's Amended  
( Newton Dal Poggetto (Trustee) ) Prehearing Brief

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15 This matter is before the Board due to the claim against the Property Owner  
16 demanding payment of a fine of \$22,800, and the Board's Office of Enforcement's (BOE)  
17 unwillingness to compromise on that penalty. Attached as Exhibit A is the Property  
18 Owner's initial substantive response dated September 3, 2013, to the BOE's original  
19 complaint. In this correspondence the Property Owner agreed to register the pond as a  
20 stockpond, but objected to the claims and the fine. Despite numerous attempts by the  
21 Property Owner to compromise on the amount of the fine, and the BOE's willingness to  
22 accept the stockpond registration to satisfy its procedural demands, the BOE has refused  
23 to reduce its claim by any amount whatsoever. Consistent with its original position, the  
24 Property Owner has filed with the Board a Registration for Livestock Stockpond Use  
25 Appropriation. The fine remains contested.

26 Preliminarily, we note the Amended Administrative Complaint dated May 1, 2014,  
27 (Amended Complaint) states the action against the Property Owner commenced on  
28 August 18, 2011. In fact, the first notice provided to Mr. Dal Poggetto, was dated

1 March 26, 2012, and even this communication identified Mr. Dal Poggetto incorrectly.  
2 Mr. Dal Poggetto attempted to correct the misinformation, and he promptly responded to  
3 the BOE with the letter attached here as Exhibit B.

4 After significant delay, caused by the BOE's incorrect identification of the Property  
5 Owner, and its unwillingness to resolve the matter reasonably, the Amended Complaint  
6 was served on Mr. Dal Poggetto in May 2014.

7 The Amended Complaint claims violations of the Water Code. First, it claims  
8 unauthorized diversion or use of water in violation of Water Code section 1052(a).  
9 Second, it claims a violation of Water Code section 5101 that requires a water user to file  
10 a specific Statement of Diversion and Use with the Water Board. Both of these claims are  
11 unsupported.

12 1. Unauthorized Diversion and Use of Water; Water Code section 1052(a).

13 The BOE's claims are based on the reservoir built by the Soil Conservation District  
14 in or about 1964. The Declaration of Gary Kiser attached as Exhibit C demonstrates, and  
15 is the only permissible evidence, that the dam and resulting reservoir were constructed by  
16 the Soil Conservation District. Accordingly, no permit was required pursuant to Water  
17 Code section 1252.1, which states,

18 An appropriation of water of any stream or other source of water under this  
19 part does not confer authority upon the appropriator to prevent or interfere  
20 with soil conservation *practices* above the point of diversion in the  
21 watershed in which such stream or other source originates, *which practices*  
22 *do not themselves constitute an appropriation for which a permit is required*  
23 *by this part. (Emphasis added.)*

24 The point of diversion is the dam constructed by the Soil Conservation District.  
25 The property owner has not changed its practices or water use from the time the dam was  
26 constructed. No irrigation has taken place, and no change in use has occurred. The  
27 property owner's riparian rights to use the water from the stream continued, though the  
28 State, essentially, acted of its own accord to expand whatever existed in 1964 into the

1 pond that exists today.

2 Further, the Property Owner's water use did not amount to a diversion or  
3 appropriation, as water was not being moved from its location (Water Code section  
4 5100(c)). It remained in the channel created by the State and was only used as a stock  
5 watering pond. We do not know the precise extent of the riparian right or amount of water  
6 on the property prior to 1964, but the use of the water has not changed since then.

7 The BOE's efforts to demonstrate malfeasance or ill-gotten gains by the Property  
8 Owner are objectionable, hearsay, and completely speculative.

9 2. Failure to File Statement of Diversion and Use; Water Code section 5101  
10 California Water Code §5101 requires each person or organization that uses  
11 diverted surface water or pumped groundwater after December 31, 1965 to file with the  
12 State Water Board a Statement of Water Diversion and Use.

13 However, there are four exemptions to this requirement, one of which, as stated in  
14 Section 5101(b) includes:

15 Diversions covered by a registration for small domestic or *livestock stockpond*  
16 uses, a stockpond certificate, or a permit or license to appropriate water on file with  
17 the board, consistent with Water Code section 1226 et seq. referring to  
18 appropriation of water, and section 1228, et seq., referring to and regulating the  
19 appropriation of water for livestock stockpond use. (*Emphasis added.*)

20 This exemption is also confirmed in Section 5101(f), again referring to Water Code  
21 section 1226 and 1228.

22 Again, the property owner's water use did not change, and the pond was created  
23 by the State's own action. It is undisputed that the structure was constructed for soil  
24 conservation purposes only, and not for agricultural irrigation or any other use other than  
25 stockpond watering. The only use of water prior to 1964 was stockpond watering, and  
26 again, this use has not changed.

27 Despite the Property Owner taking no action to create the pond, and the use of the  
28 water being unchanged over 50 years, the BOE now seeks to penalize the Property

1 Owner at least \$22,800 for alleged malfeasance. While the stockpond will be registered  
2 consistent with the stated purposes of the law and to serve the public interest, the  
3 Property Owner vigorously contests the imposition of a fine.

4 Attached hereto as Exhibit D is the Written Testimony of Newton Dal Poggetto.

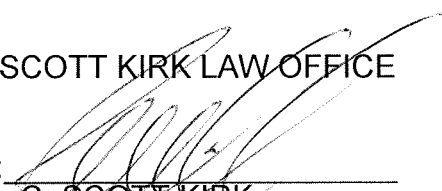
5 The Water Board's complaint, claiming the violations as stated and claiming a fine  
6 of \$22,800 are unsupported and unwarranted.

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8 DATED: August 20, 2014

C. SCOTT KIRK LAW OFFICE

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By:   
C. SCOTT KIRK  
Attorney for Property Owner

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