

STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
PUBLIC HEARING

In the Matter of:

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

Unnamed Stream Tributary to
Napa River, Napa County
-----/

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
COASTAL HEARING ROOM
1001 I STREET, SECOND FLOOR
SACRAMENTO, CALIFORNIA

TUESDAY, SEPTEMBER 2, 2014

8:58 A.M.

Reported by:
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9 Ms. Jean McCue, Staff Engineer

10 Mr. Michael Buckman, Senior Environmental Scientist

11
12 PROSECUTION TEAM:

13 Yvonne M. West, Esq. Senior Staff Counsel

14 Mr. Aaron Miller, Senior Water Resource Control Engineer

15 Mr. Kevin Porzio, Water Resource Control Engineer

16
17 STORNETTA FAMILY TRUST AND
18 NEWTON DAL POGGETTO (TRUSTEE)

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Mr. Newton Dal Poggetto

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DIVISION OF WATER RIGHTS PROSECUTION TEAM

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STORNETTA FAMILY TRUST AND
NEWTON DAL POGGETTO (TRUSTEE)

	DIRECT	CROSS
Mr. Newton Dal Poggetto	75	86

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(Further detailed listing of exhibits can be found at
[www.waterboards.ca.gov/waterrights/water_issues/programs/
hearings/dalpoggetto/exhibits/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/dalpoggetto/exhibits/))

DIVISION OF WATER RIGHTS

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1 STORNETTA FAMILY TRUST AND
2 NEWTON DAL POGGETTO (TRUSTEE)

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P R O C E E D I N G S

1
2 September 2, 2014

8:58 a.m.

3 CO-HEARING OFFICER MOORE: Welcome again.

4 This is the time and place for the hearing
5 regarding Administrative Civil Liability Complaint and
6 Draft Cease and Desist Order against the Stornetta
7 Family Trust and Newton Dal Poggetto in his capacity as
8 trustee of the Stornetta Family Trust, hereinafter we'll
9 refer collectively to Dal Poggetto.

10 Are you having a hard time hearing, sir?
11 Could we get better audio for you?

12 MR. POGGETTO: I have seeing/hearing on a good
13 day; so if I cup my ears, I can hear you very well.

14 CO-HEARING OFFICER MOORE: Okay. We also can
15 try to make it more comfortable.

16 (Inaudible comments.)

17 CO-HEARING OFFICER MOORE: Are we okay?

18 MR. KIRK: Sure.

19 CO-HEARING OFFICER MOORE: I'll make sure to
20 speak right into the microphone so you can hear.

21 So my name is Steven Moore. I'm a member of
22 the State Water Resources Control Board. And with me is
23 my fellow Board member and Co-Hearing Officer, Vice
24 Chair Frances Spivy-Weber.

25 We will be assisted by Staff Counsel Carlos

1 Mejia, Staff Environmental Scientist Jane Farwell on the
2 far left, and Staff Engineer Jean McCue in the center,
3 and Senior Environmental Scientist Michael Buckman, who
4 is sitting over there at the side table.

5 The original Administrative Civil Liability
6 Complaint and Draft Cease and Desist Order were issued
7 by the Assistant Deputy Director for Water Rights on
8 March 16, 2012, and amended on May 1st, 2014.

9 Before we get started, a few words about our
10 safety procedures. Please look around and identify the
11 exits closest to you. In the event of a fire alarm,
12 we're required to evacuate this room immediately.
13 Please take your valuables with you, go downstairs, and
14 we'll try to help you to the nearest exit; but you
15 should also know that you can find an exit door by
16 following the ceiling-mounted exit signs.

17 Our evacuation location is catty-corner across
18 the street at the Cesar Chavez Plaza.

19 Okay. Now, back to the hearing. The hearing
20 is being held in accordance with the Notice of Public
21 Hearing that was dated May 22nd, 2014.

22 Now, the purpose of this hearing is to afford
23 the parties to this proceeding an opportunity to present
24 relevant oral testimony and other evidence which address
25 the following key issues:

1 First, whether the State Water Board should
2 impose administrative civil liability upon Dal Poggetto
3 for trespass; and, if so, what amount and on what basis?

4 Number two, whether the State Water Board
5 should impose administrative civil liability upon Dal
6 Poggetto for failure to file a required Statement of
7 Diversion and Use; and, if so, what amount and on what
8 basis?

9 And three, whether the State Board should
10 adopt with or without revision the amended Draft CDO
11 against Dal Poggetto issued on May 1st, 2014.

12 Just a reminder of some things. We're
13 broadcasting this hearing on the Internet and recording
14 both audio and video. In addition, a court reporter is
15 present to prepare a transcript of this proceeding.

16 Anyone who would like an expedited copy of the
17 transcript must make separate arrangements with the
18 court reporter. I'm sure she'll give you her card
19 during the break.

20 To assist the court reporter, please provide
21 her with your business card. When you speak, please be
22 sure to use the microphone and speak right into it, like
23 I'm trying to do, so everyone can hear you, including
24 the folks on the Web that may be listening in.

25 Now, before we begin the evidentiary portion

1 of the hearing and hear from the Prosecution Team and
2 Dal Poggetto, we will hear from any speakers who did not
3 submit a Notice of Intent to Appear but wish to make a
4 non-evidentiary policy statement. Is there anyone here
5 who wishes to make a non-evidentiary policy statement?

6 Seeing no hands, it appears that -- we will
7 note at this point for the record that no one has
8 indicated they wish to make a non-evidentiary policy
9 statement, and we will move on to the evidentiary
10 portion of the hearing for presentation of evidence and
11 related cross-examination by the parties who have
12 submitted notices of intent to appear.

13 Now, the parties will present their cases in
14 chief and/or conduct cross-examination in the following
15 order: First, the Division of Water Rights Prosecution
16 Team; second, the Stornetta Family Trust and Newton Dal
17 Poggetto, Trustee.

18 At the beginning of each case in chief, the
19 party may make an opening statement briefly summarizing
20 the party's position and what the party's evidence is
21 intended to establish.

22 After any opening statement, we will hear
23 testimony from the parties' witnesses. Before
24 testifying, witnesses should identify their written
25 testimony as their own and affirm that it is true and

1 correct. Witnesses should summarize the key points in
2 the written testimony and should not read their written
3 testimony into the record.

4 Direct testimony will be followed by
5 cross-examination by the other party, Board staff,
6 Co-Hearing Officer Spivy-Weber, and myself. Redirect
7 testimony and recross-examination, limited to the scope
8 of the redirect testimony, may be permitted.

9 After both cases in chief are completed, the
10 parties may present rebuttal evidence.

11 Now, I will say the parties are encouraged to
12 be efficient in presenting their cases and the
13 cross-examination. Except where Co-Hearing Officer
14 Spivy-Weber or I approve a variation, we will follow
15 procedures set forth in the Board's regulations and the
16 hearing notice.

17 The parties' presentations are subject to the
18 following time limits: Opening statements are limited
19 to 20 minutes. For oral presentations of direct
20 testimony, each party will be allowed up to one hour
21 total to present all its direct testimony. Any
22 cross-examination will be limited to no more than one
23 hour per witness or panel of witnesses. Additional time
24 may be allowed upon showing good cause.

25 Oral closing arguments will not be permitted.

1 An opportunity will be provided for submission of
2 written closing briefs. We will set the briefing
3 schedule at the close of the hearing.

4 So before we begin, are there any procedural
5 issues that need to be addressed?

6 MS. WEST: Board Member Moore, I have a few.
7 First, just procedurally, I have a corrected page 4 of
8 testimony by Mr. Porzio. We have a correction to the --
9 inadvertent correction. One of the dates was listed as
10 November 6, 2012, and it is November 6, 2013; so I just
11 wanted to get that into the record. I have a copy for
12 opposing counsel.

13 CO-HEARING OFFICER MOORE: It appears this is
14 related to the field inspection report, North Coast
15 Watershed Reservoir Investigation.

16 MR. KIRK: That's fine, Mr. Moore. We knew
17 that was a mistake.

18 CO-HEARING OFFICER MOORE: Okay. Thank you
19 for catching that.

20 MS. WEST: Sure. And I wanted to ask for
21 Mr. Buckman just -- as far as time limit, our two
22 witnesses will be doing their presentations jointly; so
23 I would ask for an hour be put on the clock instead of
24 the 20 minutes that you would get for one -- or 40
25 minutes is fine. Either one.

1 CO-HEARING OFFICER MOORE: That sounds
2 consistent with the one hour we allow for direct
3 testimony.

4 MS. WEST: Right.

5 CO-HEARING OFFICER MOORE: That's acceptable.

6 MS. WEST: And then, finally, I do have an
7 objection. I do want to object to the late submission
8 of a pre-hearing brief and additional exhibits from
9 Mr. Dal Poggetto and his attorney, Mr. Kirk, as well as
10 I would like to object to the failure to file witness
11 testimony.

12 What Mr. Kirk has provided for Mr. Dal
13 Poggetto is a summary of testimony, not written
14 testimony and Mr. Kiser's declaration is also
15 insufficient in that it does not provide facts to
16 demonstrate why Mr. Kiser is qualified to speak to the
17 issue.

18 CO-HEARING OFFICER MOORE: And that was
19 Mr. Gary Kiser?

20 MS. WEST: I'm sorry. Mr. Gary Kiser.

21 CO-HEARING OFFICER MOORE: Okay. So you
22 object to the late submittal of the summary comments
23 from Mr. Dal Poggetto and to the written declaration of
24 Mr. Gary Kiser?

25 MS. WEST: I do. Mr. Kirk actually submitted

1 two late submittals, including a pre-hearing brief and
2 additional exhibits.

3 CO-HEARING OFFICER MOORE: Okay. I'm going to
4 note the objection, but I think I'm going to go ahead
5 and allow the discussion of these items. At this point
6 we haven't decided whether to enter them into evidence.

7 MS. WEST: I understand. I just ask for a
8 little leniency and patience with me when it comes to
9 cross-exam and rebuttal in light of the fact that this
10 is the first time I'll be hearing the testimony.

11 CO-HEARING OFFICER MOORE: Any comments from
12 the staff?

13 Okay.

14 MR. KIRK: If I could just comment.

15 CO-HEARING OFFICER MOORE: Yes.

16 MR. KIRK: All of the facts that will be
17 stated here today by Mr. Dal Poggetto, and the facts
18 that have been stated in Mr. Kiser's declaration, are
19 well known to the State. The State has been aware of
20 these facts. There is nothing new, nothing surprising.
21 There is no cause for prejudice to the State in any way
22 because they've been aware of these same facts for at
23 least a year.

24 CO-HEARING OFFICER MOORE: Okay. It's noted.
25 As a hearing officer, I'm aware of the submitted

1 information. I think we can proceed.

2 MR. KIRK: Thank you.

3 CO-HEARING OFFICER MOORE: Okay. Now I will
4 invite appearances by the parties who are participating
5 in the evidentiary portion of the hearing. Will those
6 making appearances please state your name, address, whom
7 you represent, so the court reporter can enter this
8 information into the record.

9 First, the Division of Water Rights
10 Prosecution Team.

11 MS. WEST: Good morning Vice Chair
12 Spivy-Weber, Board Member Moore, and members of the
13 hearing team. My name is Yvonne West. I am the Senior
14 Staff Counsel with the Office of Enforcement, here today
15 representing the Division of Water Rights Enforcement
16 staff.

17 MR. MILLER: Good morning. My name is Aaron
18 Miller. I am a Registered Engineer in the State of
19 California. I'm a Senior Water Resource Control
20 Engineer for State Water Board Division of Water Rights.

21 MR. PORZIO: Good morning. My name is Kevin
22 Porzio. I am a Water Resource Control Engineer with the
23 Division of Water Rights, State Water Resources Control
24 Board.

25 CO-HEARING OFFICER MOORE: Thank you.

1 And next, the Stornetta Family Trust and
2 Newton Dal Poggetto, Trustee.

3 MR. KIRK: My name is Cameron Scott Kirk. I'm
4 an attorney representing Newton Dal Poggetto, Trustee
5 for the Stornetta Family Trust.

6 MR. POGGETTO: Newton Dal Poggetto, Trustee of
7 the Stornetta Family Trust.

8 CO-HEARING OFFICER MOORE: Thank you. And is
9 that all the parties that are planning to testify?

10 MR. KIRK: Yes. In these hearings before I've
11 referred to you as "your Honor," which I will try not to
12 do today. But yes, thank you.

13 Mr. Kiser was supposed to be here, but we will
14 present testimony from Mr. Dal Poggetto that he spoke to
15 Mr. Kiser's wife, and Mr. Kiser is unable to get out of
16 bed.

17 CO-HEARING OFFICER MOORE: Okay. And nothing
18 provided in writing, or at least oral testimony?

19 MR. KIRK: From Mr. Dal Poggetto. We do have
20 the exhibits, of course, as well as the Declaration of
21 Mr. Kiser.

22 CO-HEARING OFFICER MOORE: Okay. Thank you.
23 I will now administer the oath. Will those persons who
24 may testify during this proceeding please stand and
25 raise your right hand. Or you can do it sitting. It's

1 okay. Please raise your right hand.

2 (Whereupon all prospective witnesses were
3 sworn.)

4 CO-HEARING OFFICER MOORE: Thank you.

5 We will begin. We will now hear the
6 Prosecution Team's opening statement and direct
7 testimony, followed by any cross-examination from
8 Cameron Scott Kirk.

9 MR. KIRK: Thank you.

10 CO-HEARING OFFICER MOORE: Please proceed.

11 (Thereupon an overhead presentation was
12 presented as follows:)

13 MS. WEST: Just give me a few moments. We're
14 just getting the presentation to come up on the screen
15 for you.

16 Again, my name is Yvonne West. I'm the Senior
17 Staff Counsel with the Office of Enforcement
18 representing the Division of Enforcement staff here
19 today in this matter.

20 The matter before you is an Administrative
21 Civil Liability Complaint and proposed Cease and Desist
22 Order. They were initially issued to Newton Dal
23 Poggetto, successor trust, and Mr. Newton Dal Poggetto,
24 as Trustee and as an individual, on March 16, 2012.
25 Those original documents are included as our exhibit in

1 WR-11.

2 This original ACL was received by Mr. Dal
3 Poggetto on March 26, 2012, as demonstrated in Water
4 Rights -- in our Exhibit WR-13 and Dal Poggetto's own
5 Exhibit B.

6 The Enforcement staff was informed of the
7 mistake in naming the parties through the letter
8 requesting that the hearing on this matter from Mr. Kirk
9 dated April 4, 2012, and included as Exhibit WR-13.

10 Subsequently, Enforcement staff engaged in
11 good faith confidential settlement discussions with
12 Mr. Kirk and Mr. Dal Poggetto, with the understanding
13 that any mistake in how parties were named could and
14 would be resolved prior to any final order in this
15 matter. This intent was memorialized in my
16 September 26, 2013, letter to Mr. Kirk and submitted in
17 these proceedings by Dal Poggetto as Exhibit 3 of
18 Mr. Dal Poggetto's initial submittal.

19 After it became clear the settlement
20 discussions were no longer productive, an Amended ACL
21 Complaint and proposed Cease and Desist Order were
22 issued on May 1st, 2014, that corrected the names of the
23 parties to the Stornetta Family Trust and named Mr. Dal
24 Poggetto only in his capacity as the trustee of that
25 trust. These parties are referred collectively

1 hereafter in my presentation as "Dal Poggetto." And the
2 Amended ACL and Amended CDO are included as WR-15 to our
3 exhibits.

4 Outside of maybe changing the parties' names,
5 the substance of the Amended ACL and Cease and Desist
6 Order are identical to the initial ACL Complaint and
7 Cease and Desist Order issued on March 16, 2014.

8 --oOo--

9 I believe Mr. Moore has already been provided
10 with the key issues in this matter, but they're before
11 you on slide number two. The key issues of the State
12 Board requested the parties to address at this hearing
13 and notices -- and provided in the hearing notice on
14 this matter are before you.

15 I would like to note that the proposed Cease
16 and Desist Order that the Enforcement staff is
17 recommending be adopted in the Amended Cease and Desist
18 Order dated May 1st, 2014, not the March 16, 2012,
19 version of that order. So just a correction to what is
20 stated in the hearing notice.

21 I would like -- the Division of Enforcement
22 and staff at this time has submitted for your
23 consideration a legal brief, written testimony, and
24 evidence in support of issuance of the Administrative
25 Civil Liability Order in the amount proposed, as well as

1 property is not allowed under a riparian right. This
2 was established in "People v. Shirokow." Well, it was
3 reasserted in "People v. Shirokow." It was established
4 much earlier in "Lux v. Haggin."

5 Since 1913, the only means of obtaining such
6 an appropriative right is through a permit or license
7 issued by the State Water Board.

8 Mr. Miller's and Mr. Porzio's testimony, along
9 with the other evidence submitted here today by the
10 Division Enforcement staff, will demonstrate that Dal
11 Poggetto is diverting water outside of a riparian right
12 and without the required State Water Board authorization
13 in violation of Water Code section 1052.

14 Specifically, testimony and evidence will
15 demonstrate that the reservoir on the Stornetta Family
16 Trust property is created by a single-axis span across a
17 jurisdictional surface stream. The stream feeding the
18 reservoir is seasonal, meaning it dries up every year,
19 and that every year there is a period of time for which
20 there is no natural flow available to the property under
21 riparian right.

22 Reservoirs which divert and store water for
23 use in a season where water would not be naturally
24 available to the property require an appropriative
25 right. Diverted and stored water is available and is

1 used on the property for stockwatering purposes.

2 And, finally, Dal Poggetto's application for a
3 stockpond registration was not filed until after the
4 deadline for submission of evidence in these
5 proceedings.

6 --oOo--

7 The second violation of the ACL Complaint
8 alleges the failure to file the initial Statement for
9 Water Diversion and Use. Water Code section 5101
10 requires that each person, after December 31st, 1965,
11 diverting water, shall file with the Board prior to July
12 1st of the succeeding year a statement of his or her
13 diversion use.

14 Failure to file for a diversion that occurs
15 after January 1st, 2009, is subject to the imposition of
16 administrative civil liability of up to \$1,000, plus
17 \$500 for each additional day on which the failure to
18 file continues past 30 days after the State Water Board
19 has called a violation to the attention of that person.

20 Today's testimony and evidence submitted prior
21 to this hearing demonstrates that the reservoir on the
22 Stornetta Family Trust property diverts and stores water
23 seasonally each year; that the Stornetta Family Trust
24 does not have a water right for that diversion and
25 storage; and that it does not qualify for any of the

1 limited exceptions to Water Code section 5101 statement
2 filing requirements.

3 Accordingly, an initial statement reporting
4 diversions made during 2009 was required to be filed by
5 Dal Poggetto prior to July 1st, 2010, and supplemental
6 statements are required in accordance with Water Code
7 section 5104.

8 The Napa Reservoir investigation letter,
9 included as Exhibit WR-5, mailed to Dal Poggetto on
10 August 18, 2011, provided notice and information
11 concerning the need to file a Statement of Diversion and
12 Use for the reservoir.

13 Dal Poggetto was again informed of the need to
14 file a statement in the initial ACL Complaint and
15 proposed CDO received by him on March 16, 2014, and
16 included as Water Rights -- Exhibit DWR-11; and that Dal
17 Poggetto has not filed an initial Statement of Diversion
18 and Use for the reservoir.

19 All these facts will be demonstrated by our
20 evidence and testimony here today. Accordingly, the
21 State Water Board can impose its liability on Dal
22 Poggetto for failure to file a statement.

23 Here, the ACL Complaint seeks penalties for
24 the initial failure to file a statement violation of
25 \$1,000, and \$1,000 as a recommended liability amount is

1 associated with this failure to file a statement.

2 --oOo--

3 The ACL Complaint proposes a total liability
4 of \$22,800. Water Code section 1055.3 requires that
5 when determining the amount of liability the State Water
6 Board shall consider all relevant circumstances,
7 including but not limited to: The extent of harm caused
8 by the violation; the nature and persistence of the
9 violation; the length of time in which the violation
10 occurred, and the corrective action, if any, taken by
11 the violator.

12 --oOo--

13 In addition, the Policy for Maintaining
14 Instream Flows in Northern California Coastal Streams
15 provides further guidance on how these factors are to be
16 evaluated when considering the liability. Factors in
17 the policy -- highlighted in the policy include:
18 Avoiding costs and economic benefit amount; deterrent
19 amount, including consideration of culpability and the
20 extent of harm; staff costs; ability to pay, and any
21 other appropriate factors when setting the limit.

22 In addition to the liability factor, the
23 policy establishes a minimum liability that shall be
24 assessed at a level that recovers staff costs and
25 economic benefit associated with the acts which

1 proposed Cease and Desist Order being recommended for
2 adoption here today is the revised Cease and Desist
3 Order issued on May 1st, 2014, with the corrected party
4 name.

5 --oOo--

6 The proposed Cease and Desist Order requires a
7 Statement of Diversion and Use for past diversion and
8 provides three options by which Dal Poggetto can come
9 into compliance:

10 One, by filing and diligently pursuing the
11 livestock stockpond registration. Or if this is not
12 accepted by the Division, then filing for and diligently
13 pursuing an Appropriative Water Rights application,
14 while operating the reservoir in compliance with the
15 North Coast Instream Flow Policy. Four, ceasing the
16 diversion and storing the water subject to State Water
17 Board's permitting authority.

18 --oOo--

19 Mr. Kirk, through the submission of a
20 pre-hearing brief, raised a number of legal arguments.
21 Most, if not all, of those arguments raised are
22 addressed in my September 26, 2013, letter to Mr. Kirk
23 included as Dal Poggetto's Exhibit 3. I will also
24 address those arguments and any additional arguments
25 raised during this proceeding in our rebuttal.

1 Continuing with our present focus on the
2 Division Enforcement staff's case in chief, Mr. Miller
3 will testify that the ACL Complaint and Draft CDO issued
4 to Dal Poggetto are part of a broader North Coast
5 unauthorized reservoir investigation that included
6 outreach, education, and enforcement efforts undertaken
7 by the Division to bring into compliance a significant
8 number of unauthorized reservoirs in Napa, Marin,
9 Sonoma, Mendocino, and Humboldt counties.

10 The actions issued against Dal Poggetto are
11 consistent with a number of other enforcement actions
12 issued by the Division at that time. Mr. Porzio will
13 then testify to his investigation of the Dal Poggetto
14 property and the findings reached by the Division as a
15 result of that investigation.

16 Mr. Miller will then provide additional
17 testimony concerning the issuance of the ACL Complaint,
18 the proposed civil liability amount, the proposed Cease
19 and Desist Order terms, and staff recommendation.

20 At this time I would like to turn to
21 Mr. Miller and Mr. Porzio. I would like that Mr. Miller
22 will please introduce himself and provide his
23 qualification as an expert.

24 MR. MILLER: Good morning. My name is Aaron
25 Miller. I am a Registered Engineer with the State of

1 California. I am a Senior Water Resource Control
2 Engineer at State Water Board Division of Water Rights.
3 I have 13 years of water rights experience working both
4 the enforcement and permitting sections of the Division.
5 I am currently the Senior Supervisor, Division
6 Enforcement, in No. 4.

7 MS. WEST: Mr. Miller, were you involved in
8 the preparation and submittal of your written testimony
9 and the Division of Enforcement staff evidence
10 submission for today's hearing?

11 MR. MILLER: Yes.

12 MS. WEST: Is your written testimony submitted
13 prior to this hearing and that you are about to provide
14 your own, and is it a true, correct, and accurate
15 account of your participation in this matter to the best
16 of your knowledge?

17 MR. MILLER: Yes.

18 MS. WEST: Thank you.

19 Mr. Porzio, if you could take a moment and
20 please introduce yourself and provide your
21 qualifications.

22 MR. PORZIO: Good morning, Board Member Moore
23 and Vice Chair Spivy-Weber.

24 My name is Kevin Porzio. I'm a Water Resource
25 Control Engineer with the Division of Water Rights

1 Enforcement Unit 4. I have four years of experience
2 with the Enforcement section, which includes inspecting
3 permitted and licensed water rights projects for
4 compliance with terms and conditions, investigation of
5 water diversion without a known water right or claimed
6 basis of right, and investigation of water rights
7 complaints.

8 MS. WEST: Mr. Porzio, were you involved in
9 the preparation and submittal of your written testimony
10 and the Division of Enforcement staff evidence
11 submission for today's hearing?

12 MR. PORZIO: Yes.

13 MS. WEST: Is your written testimony submitted
14 prior to this hearing and that you are about to provide
15 your own, and is it a true, correct and accurate account
16 of your participation in this matter to the best of your
17 knowledge?

18 MR. PORZIO: Yes, it is.

19 MS. WEST: Thank you. And with that, I
20 believe we're going to go ahead and start with
21 Mr. Miller.

22 CO-HEARING OFFICER MOORE: At this time I want
23 to make sure our clock is reset. And I might check on
24 Mr. Dal Poggetto. Are you hearing everything okay over
25 there?

1 MR. DAL POGGETTO: I can hear the man, but I
2 can't really hear the lady. She is about half
3 intelligible.

4 CO-HEARING OFFICER MOORE: Okay.

5 MR. DAL POGGETTO: I understand what she's
6 getting at and the gist of what she's doing. I don't
7 know whether she's reading it or not, but it's...

8 CO-HEARING OFFICER MOORE: Okay. And also --

9 MR. DAL POGGETTO: So far it's just rote.
10 I'm reading that. That's very good. I like that.

11 CO-HEARING OFFICER MOORE: Yeah. It's pretty
12 close to what she read into the record. I just want to
13 make sure you're comfortable and feeling like you're
14 hearing everything.

15 MR. DAL POGGETTO: I'm pretty comfortable.

16 CO-HEARING OFFICER MOORE: All right. Thank
17 you. Hold on a second.

18 MR. KIRK: I think we're all right. Thank
19 you.

20 CO-HEARING OFFICER MOORE: Okay. With that,
21 we have direct testimony by the prosecution testimony.
22 And we're scheduling 40 minutes.

23 TESTIMONY AND EXAMINATION BY PROSECUTION TEAM

24 (Thereupon an overhead presentation was
25 presented as follows:)

1 MR. MILLER: Good morning, Board Member Moore,
2 Vice Chair Spivy-Weber. Again, my name is Aaron Miller.
3 I'm a Senior Engineer with the State Water Board. This
4 morning Kevin Porzio and myself will go through our
5 presentation of our testimony and evidence, quick
6 overview of the presentation.

7 I will begin with a general overview of the
8 North Coast unauthorized reservoir investigation.
9 Mr. Porzio will go through the initial investigation and
10 site specific investigation. I will then continue the
11 presentation, going through the Administrative Civil
12 Liability, proposed penalty amount, the Draft Cease and
13 Desist Order, and our staff recommendations.

14 --oOo--

15 If water is flowing and the surface stream is
16 diverted to storage in a facility at a time when flow is
17 high for use in times when flow is low or does not
18 exist, then the diverter is appropriating water to
19 storage that is subject to the State Water Board's
20 permitting authority. Any water right must be obtained.

21 The reservoir may be constructed for a variety
22 of reasons. The most common reasons are for some sort
23 of beneficial use to the landowner. These uses include
24 irrigation of crops or pasture, stockwatering, domestic
25 use at a residence, fire protection, and recreational

1 uses such as fishing, swimming or boating.

2 Water districts may build reservoirs for
3 municipal and industrial use.

4 In 2011, the Division of Water Rights began
5 investigating the basis of right for existing reservoirs
6 in Marin, Mendocino, Napa, Sonoma, and portions of
7 Humboldt County.

8 In December 2007, the State Water Board
9 produced a draft Substitute Environmental document,
10 hereon referred to as "SED," as part of its development
11 of the North Coast Instream Flow Policy.

12 Appendix E of that SED contains the report of
13 Potential Indirect Environmental Impacts of Modification
14 or Removal of Existing Unauthorized Dams produced by
15 Stetson Engineers in December 2007. This is Water
16 Rights Exhibit WR-25.

17 In order to complete this report, Stetson
18 Engineers produced a Geographic Information System, or
19 GIS layer, which identify the locations of existing
20 potential unauthorized dams.

21 In June and July of 2011, a review of this GIS
22 layer, aerial photographs, and the United States
23 geological survey topographic maps of the Napa County
24 was undertaken by Division staff.

25 --oOo--

1 The Policy identified 1,771 potential illegal
2 reservoirs. Enforcement staff undertook investigation
3 beginning in 2011 and have closed approximately 1200
4 cases. Over 1200 of these alleged illegal reservoir
5 cases were closed due to the fact that the reservoirs
6 are covered by existing water rights or not subject to
7 the State Water Board's permitting authority.

8 Of the remaining alleged illegal reservoirs,
9 Division staff contacted many landowners either by phone
10 or by sending notice letters. Approximately 350 letters
11 were sent throughout the policy area.

12 The letters provided information about the
13 need for a water right, the State Water Board's
14 authority to impose a civil liability for an
15 unauthorized diversion, the Statement of Diversion Use
16 filing requirements, and gave property owners an
17 opportunity to provide information concerning the basis
18 of right for the reservoir or to submit a corrective
19 action plan.

20 Dal Poggetto was sent a copy of this letter on
21 August 18, 2011, identified as Water Right Exhibit WR-5.

22 Also, Exhibit WR-6 identifies the address this
23 notice letter was sent to. I would like to point out
24 that this address is the same address that the ACL and
25 CDO were sent to and where the Certified Mail was signed

1 helps eliminate impact to the environment and other
2 illegal users of water by keeping water instream that
3 would otherwise have been diverted for use.

4 --oOo--

5 The following table is a summary of the
6 Enforcement actions issued in 2012 that resulted from
7 this reservoir investigation. Summarized here are 11
8 Administrative Civil Liability Complaints and proposed
9 Cease and Desist Orders to owners of property where an
10 unauthorized reservoir had been identified. Nine of
11 these Enforcement cases were issued to property owners
12 where no response to the Division's notice letter was
13 received. Dal Poggetto is one of these cases. The
14 other two Enforcement cases were issued due to the lack
15 of an adequate response to findings and letters issued
16 by the Division.

17 I'd like to point out that you could see
18 through these 11 different actions a wide range of
19 reservoirs that were investigated and Enforcement action
20 brought against, as reflected in the fourth column, all
21 the different proposed civil liability amounts.
22 Additionally, the last column also shows which cases
23 have since settled.

24 With that, I'd like to turn it over to Kevin
25 Porzio to go through the initial investigation letter.

1 MR. PORZIO: Good morning, again. My name is
2 Kevin Porzio. My testimony here today and my written
3 testimony submitted prior to this hearing is my own, and
4 it is a true, correct and accurate account of my
5 participation in this investigation to the best of my
6 knowledge.

7 I will now be discussing the initial
8 investigation and followed by the site specific
9 investigation.

10 (Thereupon an overhead presentation was
11 presented as follows:)

12 MR. PORZIO: Slide No. 9: Dal Poggetto's
13 reservoir is located just to the east of the Napa-Sonoma
14 County line between the cities of Napa and Sonoma along
15 Highway 121 and is within the Napa River watershed in
16 Napa County. Dal Poggetto's reservoir, along with many
17 other potentially unauthorized reservoirs within the
18 policy area, were investigated in 2011, at which point
19 we opened this investigation.

20 My initial investigation started by reviewing
21 the Division's record and verifying reservoirs in
22 question that did not have water rights associated with
23 them.

24 The Division did not have a water right on
25 record for Dal Poggetto's reservoir. My initial

1 sufficiently to cause runoff that runoff would flow
2 towards the unnamed stream and down towards the
3 reservoir.

4 The area of the watershed above the dam is
5 approximately 170 acres. The parcel boundary was
6 obtained from the Division Office of Information
7 Management and Analysis server. Using GIS software, I
8 added the Napa County Assessor parcel boundary layer,
9 which is shown in this image.

10 MS. WEST: Real quickly, Mr. Porzio, I just
11 want to clarify for everyone this imagery that was
12 created, it was created by a government entity, the
13 National -- would you repeat the name? And then was it
14 provided for purposes -- or for what purposes were these
15 aerial images documented by that state entity?

16 MR. PORZIO: These images were obtained as a
17 shape file from the State Department of Agriculture.
18 They were used to identify the reservoirs, and they were
19 used because it came from a State agency.

20 MS. WEST: And did the Department of
21 Agriculture use these for crop surveys?

22 MR. PORZIO: I believe that is correct.

23 MS. WEST: And are the features that we're
24 seeing this on this aerial, just to clarify, you placed
25 the red line and the black line on this image?

1 MR. PORZIO: Yes, that's correct.

2 MS. WEST: You digitized everything. And does
3 this image represent a fair representation as far as the
4 location of the stream of the reservoir, the
5 outbuildings, the other geographical features you
6 witnessed when you were on site?

7 MR. PORZIO: Yes. The final site inspection,
8 everything in this image, was correct in position, and
9 it was helpful before arriving knowing where and what to
10 look for.

11 MS. WEST: Okay. Thank you.

12 --oOo--

13 MR. PORZIO: Slide No. 10. This is the USGS
14 topo map of the reservoir shown in Exhibit WR-8. I know
15 it is hard to see on the slide, but there is a blue line
16 following the low area of the contour line above the
17 reservoir and another blue line on the downstream side
18 of the reservoir.

19 The blue lines represent intermittent drainage
20 features commonly associated with rivers, streams and
21 creeks. The topo map indicates the dam was constructed
22 on a stream channel, hereon out referred to as "Unnamed
23 Stream." The original date of this topo map is 1951,
24 with photo revisions applied to the map in 1980.

25 The pink markings indicate new features that

1 were constructed between the date of the original topo
2 map and the photo-revised map. This topo map indicates
3 the reservoir was filled between 1951 and 1980, and the
4 dam was constructed across a blue line stream from water
5 from the Unnamed Stream Tributary to Huichica Creek.

6 --oOo--

7 Slide No. 11. This slide and the next two
8 slides are supplemental photos from the initial
9 Reservoir and Investigation Report, Exhibit WR-8. This
10 is figure 3. Shown here is a screen shot from Bing Maps
11 as viewed online on February 10, 2012. The image
12 clearly shows water being stored behind a single-axis
13 dam. The heavily wooded area running from the upper
14 portion of the reservoir to the upper left corner of the
15 photo coincides with the blue line stream as shown on
16 the topo map on the previous slide. A channel appears
17 to be entering the tree line at a 90-degree angle.

18 So if we view the back end of the reservoir on
19 the north side of the slide, it goes up to the upper
20 left portion, this heavily wooded area, which is where
21 the stream was indicated on the topo map. And then here
22 there is also a channel visible from this aerial image,
23 which coincides with the contours of the topo map.

24 MS. WEST: And, again, Mr. Porzio, is this a
25 fair representation of what you witnessed when you were

1 on site when you visited, as far as the location of the
2 instream channel, the reservoir, and general topography
3 surrounding it?

4 MR. PORZIO: Yes, there is a very accurate
5 representation, other than the green grass.

6 MS. WEST: Thank you.

7 --oOo--

8 MR. PORZIO: Slide No. 12 is a supplemental
9 photo. Figure No. 2 is a screen shot from Bing Maps as
10 viewed online February 10, 2012. The image shows the
11 watershed above the reservoir as seen looking south.
12 When we look at the photo on the lower right-hand
13 corner, you can identify a channel that starts here and
14 hooks through the canyon and then starts working its way
15 to the reservoir in the upper left-hand corner of the
16 photo. This section coincides with the blue line stream
17 as shown on the topo map.

18 --oOo--

19 MR. PORZIO: Slide No. 13, figure 4, is a
20 screen shot from Google maps as viewed on February 10,
21 2012. The image shows the area downstream of the
22 reservoir. A channel is visible. In the middle of the
23 photo is kind of this dirt spotted area, and that
24 channel runs to the lower right portion of the photo,
25 then making a hook and running alongside the road. The

1 discussing the site-specific investigation of Dal
2 Poggetto's Napa County property that fully surrounds the
3 reservoir in question.

4 On October 16, 2013, my supervisor, Mr. Aaron
5 Miller, and I were granted access to the reservoir to
6 conduct a site inspection with Mr. Newton Dal Poggetto.

7 At the inspection, Mr. Newton Dal Poggetto
8 informed us that the land is leased by a third party for
9 their dry milk cows and calves.

10 I took photographs and GPS measurements of the
11 reservoir, the channel above and below the reservoir,
12 and other points of interest. Mr. Miller and I took
13 measurements of the dam, spillway, and reservoir's water
14 level.

15 This image is from Exhibit WR-14, figure 30.
16 It was taken from the southwest side of the dam looking
17 north across the reservoir. As shown here, the
18 reservoir is covered by a rust-colored plant. This
19 plant material was observed in the spillway channel and
20 also downstream in the unnamed stream channel.

21 MS. WEST: Mr. Porzio, these photos on this
22 slide 14, and the subsequent photos that you have
23 labeled as site photos throughout the remainder of your
24 presentation, were those all photos taken by you on
25 site?

1 MR. PORZIO: Yes, that is correct.

2 MS. WEST: And they are a fair representation
3 of what you viewed that day on site?

4 MR. PORZIO: Yes, they are.

5 MS. WEST: Thank you.

6 --oOo--

7 MR. PORZIO: Slide No. 15. This image is from
8 Exhibit WR-14, inspection photos, page 1. This image
9 was created using the USGS topographical map and
10 overlaying the 2009 NAIP aerial imagery. The NAIP layer
11 transparency was then reduced to approximately 50
12 percent so that the contoured lines of the topo map can
13 be viewed in relation to the physical features as seen
14 from an overhead view. The layers showing the topo map
15 blue line streams was then placed on top of the two
16 lower layers described.

17 Lastly, I added the parcel boundary in black
18 and the GPS segments that I measured as collected on
19 site in red, and a description tag to identify the
20 unnamed stream's proximity to Huichica Creek and my GPS
21 measurements of the defined channel.

22 In this image you can see the GPS measurements
23 in red coincide with the topo map blue line stream both
24 above and below the reservoir.

25 The next eight slides are pictures I

1 personally took during the site inspection.

2 MS. WEST: Just momentarily, Mr. Porzio, the
3 red dots that you are showing on the map are
4 measurements that you took in the field with a handheld
5 GPS; is that correct?

6 MR. PORZIO: Yes, that is correct.

7 MS. WEST: And do those measurements identify
8 and confirm and line up accurately with the tip of the
9 topo map and NAIP aerial imagery?

10 MR. PORZIO: Yes, they do.

11 MS. WEST: Thank you.

12 --oOo--

13 MR. PORZIO: So, real quick, the next eight
14 slides. When we arrived on site, we drove across the
15 dam to the northern portion of the reservoir, and from
16 there I started walking north and began my measurements
17 on this channel that's 90 degrees to the Unnamed Stream.

18 So the photos are going to go in order of the
19 direction I walked, which was north into the channel and
20 then downstream to the reservoir. And then Aaron and
21 myself walked down to the property line in the lower
22 right-hand corner and then began GPSing the Unnamed
23 Stream as we walked north towards the reservoir.

24 --oOo--

25 MR. PORZIO: Slide No. 16. The photo in this

1 figure 16, were taken in the channel of the Unnamed
2 Stream looking south as I walked towards the reservoir.

3 --oOo--

4 MR. PORZIO: Slide 19. Figure 24, followed by
5 figure 16, were taken in the channel of the Unnamed
6 Stream looking south as I walked towards the reservoir.

7 --oOo--

8 MR. PORZIO: Slide No. 20. Figure 32 shows
9 the reservoir from the north bank looking south towards
10 the point of diversion, an onstream single-axis earthen
11 dam. In figure 32 you can see the dam running from left
12 to right across the top portion of the photo.

13 Figure 34 shows the western side of the
14 reservoir as I walked south towards the dam. Cow dung
15 was observed along the reservoir edge, as shown in
16 figure 34.

17 --oOo--

18 MR. PORZIO: Slide No. 21. Figure 64 and
19 figure 67 were taken at the southernmost part of the
20 Unnamed Stream.

21 The next series of photos are looking north
22 as I walked the Unnamed Stream channel below the
23 reservoir up towards the toe of the dam.

24 --oOo--

25 MR. PORZIO: Slide 22. Figure 74, followed by

1 figure 76, were taken in the channel of the Unnamed
2 Stream looking north as I walked north towards the
3 onstream earthen dam.

4 Figure 76 shows the confluence of the spillway
5 channel in the shadows on the right. The main channel
6 of the Unnamed Stream curves to the left in figure 76
7 towards the dam.

8 The spillway channel was created to bypass the
9 center part of the dam, so this channel to the left
10 doesn't really receive any water per se, although the
11 overflow from the reservoir would be coming down the
12 spillway, the spill channel on the right.

13 --oOo--

14 MR. PORZIO: Slide No. 23. Figure 79 was
15 taken in the channel of the Unnamed Stream looking north
16 as it slightly curves to the right of the photo towards
17 the toe of the earthen dam.

18 Figure 86 shows the Unnamed Stream ending as
19 it is obstructed by the earthen dam. Since the dam was
20 built, it appears some channelization is formed on the
21 back side of the earthen dam.

22 --oOo--

23 MR. PORZIO: Slide No. 24. As documented
24 during the field inspection, the initial investigation
25 findings accurately describe the onstream storage

1 Dal Poggetto is making unauthorized diversions
2 of water at said reservoir, which constitutes a trespass
3 against the State as defined by Water Code section 1052,
4 subdivision (a).

5 The Draft CDO is based on past violations of
6 the prohibition in Water Code section 1052 against the
7 diversion or use of water subject to the State Water
8 Board's jurisdiction and the threat of future
9 unauthorized diversion and use of water.

10 The ACL Complaint was issued based on the past
11 unauthorized diversion of water from an unnamed stream
12 tributary to Huichica Creek in the Napa Creek watershed,
13 and a failure to file a Statement of Water Diversion and
14 Use and reporting water diversion into the reservoir.

15 Enforcement staff referred to the North Coast
16 Policy appendix H when considering whether or not
17 Enforcement action was warranted and in developing the
18 Enforcement documents.

19 --oOo--

20 MR. MILLER: The maximum ACL amount authorized
21 by statute for an unauthorized diversion is \$500 for
22 each day in which a trespass occurred.

23 Enforcement staff have reason to believe the
24 trespass has been occurring since prior to 1980.
25 Considering only the last three years of unauthorized

1 Poggetto's unauthorized reservoir has provided an
2 economic advantage conservatively estimated at \$3,915 in
3 the last three years. This economic benefit estimate
4 does not include other economic benefits such as
5 increased property values associated with having the
6 reservoir.

7 --oOo--

8 MR. MILLER: After determining the avoided
9 costs, we then looked at the extent of harm, nature and
10 persistence of violations, length of time each violation
11 occurs, and any corrective action.

12 The factors considered for this case were the
13 Napa River watershed contains a threatened central
14 California Coastal steelhead trout fishery, and
15 unauthorized diversions of water have been shown to
16 contribute to the cumulative impact of reducing water
17 supplies and habitat from the fishery.

18 The reservoir has existed for many years and
19 water has been diverted to storage in each of those
20 years without a basis of right.

21 The Division provided prior notice that
22 Division records indicated an appropriative water right
23 authorizing storage and reservoir did not exist and
24 warned of the potential for an unauthorized diversion of
25 water to be occurring.

1 Dal Poggetto had over six months prior to the
2 issuance of the Enforcement action to respond to the
3 Division and provided none.

4 To quantify the other relevant circumstances
5 in this matter, the disincentive factor was applied to
6 the estimated avoided costs for this case. Considering
7 the above factors and the Division's goal in deterrence,
8 a factor of five times the estimated economic benefit
9 was deemed appropriate.

10 After using a disincentive factor, the
11 justified liability was calculated at approximately
12 \$19,006 before considering additional violations and
13 associated staff costs.

14 --oOo--

15 MR. MILLER: The other violation being
16 considered is the failure to file a statement.
17 California Water Code section 5107 provides that the
18 State Water Board may administratively impose civil
19 liability pursuant to section 1055 in an amount not to
20 exceed \$1,000, plus \$500 per day for each additional day
21 on which the violation continues if the person fails to
22 file a statement within 30 days after the State Water
23 Board has called the violation to the attention of the
24 person.

25 --oOo--

1 MR. MILLER: The reservoir is subject to the
2 permitting authority of the State Water Board and
3 collects water storage on an annual basis. The Draft
4 CDO was issued to bring Dal Poggetto into compliance and
5 to eliminate the continued unauthorized diversion.

6 The Draft CDO outlines the various steps that
7 need to be taken to obtain an appropriative right for
8 the diversion of water and comply with the North Coast
9 Instream Flow Policy or to have the reservoir removed
10 and cease the unauthorized diversion.

11 --oOo--

12 MR. MILLER: Staff recommendations for this
13 case are to: Issue the ACL order as proposed with the
14 additional staff costs incurred to pursue compliance,
15 issue the proposed CDO requiring Dal Poggetto to take
16 immediate action to bring this matter into compliance
17 and to ensure diligent pursuit of the application, or
18 other corrective measures by Dal Poggetto or future
19 trustees.

20 --oOo--

21 MS. WEST: I had a quick question for
22 Mr. Miller before you conclude your presentation.

23 In the issuance of the CDO in this case, we
24 provided three options. Is there a reason why the first
25 option, the registration of the reservoir, may not be

1 sufficient?

2 MR. MILLER: It's possible that it may not --
3 livestock stockpond registration may not be the course
4 of action that can be pursued due to the size of the
5 reservoir. Typically, stockpond registrations are
6 limited to diversions of water of 10 acre-feet annually,
7 and this reservoir's capacity is estimated over 20-acre
8 feet.

9 MS. WEST: Are there conditions of permitting
10 you could place on it potentially and authorize it once
11 they find out more about this particular reservoir?

12 MR. MILLER: Yes. Permitting staff reviewed
13 the application and then considered whether to issue a
14 registration. They could put standard conditions on the
15 reservoir to require measuring requirements in order to
16 demonstrate no more than 10-acre feet a year is
17 withdrawn and collected into storage.

18 MS. WEST: Thank you.

19 CO-HEARING OFFICER MOORE: Does that conclude
20 your presentation?

21 MR. MILLER: That concludes our presentation.

22 CO-HEARING OFFICER MOORE: Very good.

23 Doing a time check, it's about ten after
24 10:00. I want to check on our court reporter.

25 Very good.

1 So at this time I would like to request that
2 the Prosecution Team offer exhibits into evidence, or
3 just clarify for the record.

4 MS. WEST: Sure. At this point the
5 Prosecution Team would move the Water Rights Exhibits
6 WR-1 through WR-26 be moved into evidence.

7 CO-HEARING OFFICER MOORE: Okay. It looks
8 like the Hearing Officer will accept those into
9 evidence.

10 Before we take a break, I'd like to offer Dal
11 Poggetto's team to --

12 MS. WEST: Can I just clarify? We also have a
13 Water Rights 27 and Water Rights 28, which are exhibits
14 by reference. We'd like to move them all into evidence.
15 WR-1 through WR-28.

16 CO-HEARING OFFICER MOORE: Okay. I just
17 wanted to verify those were part of the record. Okay.
18 Yes. We'll accept that.

19 (Thereupon the above exhibits as described
20 were entered into evidence.)

21 HEARING OFFICER MOORE: Okay. At this time
22 we'd like to offer the opportunity to cross-examine the
23 Prosecution Team.

24 MR. KIRK: Thank you, Mr. Moore,
25 Ms. Spivy-Weber. Thanks for everyone's time here today.

1 ///

2

3

CROSS-EXAMINATION

4 BY MR. KIRK:

5 Q. For Mr. Porzio, first of all. Several
6 references were made to the August 18th, 2011 letter.

7 Who was that addressed to?

8 A. (Mr. Porzio) One second, please. The
9 August 18 letter was addressed to Newton Dal Poggetto.

10 Q. Was it simply to Newton Dal Poggetto?

11 A. Yes. At 555 Crest Way, Sonoma County, 95476.

12 Q. Wasn't it addressed to the Dal Poggetto Trust?

13 A. No. Exhibit WR-6 is the mailing list that all
14 the initial reservoirs were sent to, and his name is
15 listed there as Newton Dal Poggetto. And it also
16 indicated the parcel No. 047-070-018.

17 Q. Does it indicate that he's an owner?

18 A. It's just addressed to him.

19 Q. Are you aware that when the original ACL was
20 served on Mr. Dal Poggetto there was significant
21 confusion as far as who Mr. Dal Poggetto was, what his
22 role as potential owner was, and what his role may have
23 been as far as any trust is concerned?

24 A. Yes.

25 Q. Okay. And that's the only reason, really,

1 that you had to amend the ACL, right, was because of
2 that confusion?

3 A. The ACL was amended after correspondence
4 between Yvonne and yourself.

5 Q. Wherein we identified Mr. Dal Poggetto as the
6 proper entity, Trustee of the Stornetta Family Trust;
7 right?

8 A. That is correct.

9 Q. Okay. Do you know for certain that Mr. Dal
10 Poggetto received the letter of August 18, 2011?

11 A. No. I pulled this information from
12 ParcelQuest, who listed this is the address for that
13 property, the owner of that property, and that's who the
14 August 18, 2000, letter was sent to, and additionally
15 the ACL and CDO.

16 Q. Is the dam itself illegal?

17 A. I would like to back up one second and just
18 state that the letter -- the August 18th letter sent to
19 this address previously stated was not returned to the
20 State Water Board.

21 Q. Okay.

22 A. Your next question, is the dam unauthorized?

23 Q. Yes.

24 A. Yes.

25 Q. Okay. Just because nothing has been filed

1 with the State Water Board?

2 A. Yes. The dam is onstream.

3 Q. Okay. And you're aware that the Soil
4 Conservation District constructed the dam; right?

5 A. It's alleged. Yes.

6 Q. Okay. Do you have any reason to think that it
7 wasn't the Soil Conservation District that constructed
8 the dam?

9 A. No.

10 Q. Okay. Do you have any information to indicate
11 that erosion control was not the purpose for
12 construction of the dam in 1964?

13 A. No.

14 Q. Would you agree that that was the purpose in
15 1964 that the Soil Conservation District constructed the
16 dam?

17 A. That's unknown.

18 Q. Okay. Have you seen Mr. Kiser's declaration?

19 A. Yes.

20 Q. Do you disagree with Mr. Kiser's declaration?

21 MS. WEST: At this point I'd like to object
22 and again point out that Mr. Kiser's declaration does
23 not provide sufficient information to demonstrate why
24 he can speak to the issue, and I do not have the
25 opportunity to cross-examine Mr. Kiser.

1 CO-HEARING OFFICER MOORE: I'm inclined to
2 accept the objection, but I would like to -- you can
3 restate your question.

4 BY MR. KIRK:

5 Q. Mr. Kiser declares in his declaration that he
6 was employed by the Soil Conservation District in Sonoma
7 County in 1964. Do you have any reason to disagree with
8 that?

9 A. (Mr. Porzio) No.

10 Q. Mr. Kiser says that as part of his employment
11 with the Soil Conservation District he was personally
12 involved in the construction of reservoir No. 596, which
13 is the reservoir we're talking about here; right?

14 A. That's correct.

15 Q. Do you have any reason to disagree with the
16 fact that Mr. Kiser was employed by the Soil
17 Conservation District and was personally involved in the
18 construction of the dam?

19 A. No, I do not.

20 Q. Mr. Kiser says in his declaration that the
21 construction of the reservoir was the result of action
22 taken by the Soil Conservation District without
23 personal involvement of the property owner.

24 Do you have any reason to disagree with that?

25 A. No.

1 Q. Okay. When the Soil Conservation District
2 constructed the dam in 1964, was there anything illegal
3 about it?

4 A. Yes.

5 Q. What?

6 A. The fact that it was constructed on an unnamed
7 stream with defined bed and banks, and it does not have
8 a water right. It was built post-1914 and, therefore,
9 would need water rights to appropriate diversion and use
10 at the reservoir.

11 Q. Have you talked to the Soil Conservation
12 District about their liability in this case?

13 A. Yes.

14 MS. WEST: Again, it's a legal question,
15 supposing there is some liability on the part of the
16 Soil Conservation District.

17 MR. KIRK: It's not a legal question. It's
18 really just has he contacted the Soil Conservation
19 District?

20 CO-HEARING OFFICER MOORE: At this point I
21 want to remind everyone that this is cross-examination
22 of the Prosecution Team's testimony, and so you're
23 introducing questions that relate to exhibits but are
24 probably more of a logical outgrowth of discussion,
25 perhaps, in your direct testimony.

1 Does legal counsel have any advice on that?

2 STAFF COUNSEL MEJIA: Would you indulge me in
3 asking a question?

4 CO-HEARING OFFICER MOORE: Yes.

5 STAFF COUNSEL MEJIA: Thank you.

6 For the record, my name is Carlos Mejia. I'm
7 Staff Counsel for the Board, and I'm advising in the
8 hearing of this matter.

9 Mr. Kirk, are you seeking to elicit from
10 Mr. Porzio's testimony the truth of the matter asserted
11 in Mr. Kiser's declaration?

12 MR. KIRK: Actually, I'm trying to see whether
13 or not Mr. Porzio disagrees with any of the statements
14 made in Mr. Kiser's declaration.

15 STAFF COUNSEL MEJIA: So you're not seeking to
16 use Mr. Porzio's testimony to establish the truth of the
17 matter asserted in Mr. Kiser's declaration?

18 MR. KIRK: No. I am trying to seek
19 Mr. Porzio's belief that these matters are true.

20 MS. WEST: Again, Mr. Porzio has no expertise
21 in these matters, nor has he testified to them or claims
22 that they are true or not true.

23 MR. KIRK: Go ahead. If you want to confer,
24 go ahead.

25 (Discussion off the record.)

1 CO-HEARING OFFICER MOORE: Now, I respect that
2 you're using the exhibit as substantive information, but
3 I would prefer that you not use the direct testimony,
4 you know, of the Prosecution Team for this line of
5 questioning and evidence. There will be opportunity to
6 question at a later time on this matter.

7 MR. KIRK: And I appreciate that, Mr. Moore.
8 Thank you very much.

9 I believe that the papers that have been
10 filed, the briefs, and the relatively succinct briefs,
11 indicate the real dispute that we're dealing with here.
12 And so the fact that the Soil Conservation District
13 built this dam without the involvement of the property
14 owner is key. And then after 1964, the water use did
15 not change, there was no --

16 MS. WEST: This sounds like his case in chief.

17 CO-HEARING OFFICER MOORE: Objection upheld.
18 We will get to that matter under the procedure of the
19 hearing.

20 Is there any more cross-examination of the
21 Prosecution Team's presentation?

22 MR. KIRK: Yes.

23 CO-HEARING OFFICER MOORE: Go ahead.

24 MR. KIRK: Thank you.

25 Let's switch to Miller if we can, please.

1 BY MR. KIRK:

2 Q. Mr. Miller, has there been any use of the
3 water other than stockwatering?

4 A. (Mr. Miller) To our knowledge, no.

5 Q. There are no other diversions; correct?

6 A. The diversion we're aware of is the diversion
7 of water storage for stockwatering purposes.

8 Q. Okay. Do you know whether or not the
9 diversion was made for the purpose of stockwatering?
10 Or, rather, wasn't it done for the purpose of erosion
11 control?

12 A. The purpose of use that we've confirmed
13 through our site inspection is stockwatering. The
14 cattle are currently using the water.

15 Q. Do you have any knowledge regarding how and
16 when the Soil Conservation District constructed the dam?

17 A. Only through the documents we've seen.

18 Q. Anything other than Mr. Kiser's declaration?

19 A. No.

20 Q. Am I correct that no statement of diversion
21 and use is required if it's registered as a stockpond?

22 A. That is correct. But it has to be registered
23 first.

24 Q. I understand.

25 MR. KIRK: Those are all the questions I have.

1 Thank you.

2 CO-HEARING OFFICER MOORE: Thank you,
3 Mr. Kirk.

4 I'd like to offer the opportunity for staff or
5 counsel or, of course, my Co-Hearing Officer
6 Spivy-Weber. Any questions of the Prosecution Team at
7 this time?

8 MS. FARWELL: I have questions.

9 CO-HEARING OFFICER MOORE: Ms. Farwell.

10 MS. FARWELL: Thank you. Thank you,
11 Mr. Moore. Jane Farwell, Environmental Scientist. I
12 have a question for Mr. Miller.

13 Mr. Miller, your written testimony, starting
14 at the bottom of page 5 under the heading of "The Extent
15 of Harm, Nature and Persistence of Violation Length of
16 Time over which the Violation Occurs and Corrective
17 Action Being Taken," you state there is a cumulative
18 impact to reducing water supplies in habitat fishery.

19 Can you elaborate on the types of harm and
20 significance of harm you think has been caused by this
21 alleged violation?

22 MR. MILLER: This factor that we considered is
23 due to, you know, the knowledge that not just this
24 reservoir but many unauthorized reservoirs can
25 cumulatively reduce water supplies in a watershed.

1 With less water in a stream, there's less
2 water available for legal users to divert. There's also
3 less water available for the environment and the habitat
4 to use it.

5 MR. KIRK: I'll object, your Honor. To the
6 extent that Mr. Miller responds for this reservoir,
7 that's one thing; but he's responding for any number of
8 reservoirs.

9 CO-HEARING OFFICER MOORE: I'm not going to
10 uphold the objection because the question was about
11 cumulative setting, you know, for a context. So I think
12 the discussion has been clear that it's incremental or
13 contributes to a cumulative concern; so I'm going to
14 allow this discussion.

15 MS. FARWELL: Thank you. That's it.

16 CO-HEARING OFFICER MOORE: Any other
17 questions?

18 Counsel?

19 STAFF COUNSEL MEJIA: Thank you, Mr. Hearing
20 Officer.

21 First, for Mr. Miller: Following up on that
22 same line of inquiry, on what do you base your assertion
23 for the potential of cumulative impacts to occur in the
24 watershed?

25 MR. MILLER: Primarily, work experience.

1 Also, many of the factors identified in the North Coast
2 Instream Flow Policy.

3 STAFF COUNSEL MEJIA: I also note in your
4 testimony, which has been offered into evidence as Water
5 Rights Exhibit 1, at pages 5 through 6 you also state
6 that the Napa River watershed contains the threatened
7 Central California Coastal steelhead trout fishery.

8 On what do you base that assertion?

9 MR. MILLER: I believe it's -- you know, it's
10 something that, I believe, has been published by NOA and
11 the Natural Marine Fishery Service. It's knowledge
12 that's readily available.

13 STAFF COUNSEL MEJIA: Something that's
14 generally known; is that right?

15 MR. MILLER: Generally known, yes.

16 STAFF COUNSEL MEJIA: I'd also like to turn
17 your attention to Exhibit 26, which you also referred to
18 when you testified.

19 How long have you been in your current
20 position, Mr. Miller?

21 MR. MILLER: I've been in my current position
22 as a Senior Water Resource Control Engineer for four
23 years.

24 STAFF COUNSEL MEJIA: And your
25 responsibilities during that time have predominantly

1 been Enforcement?

2 MR. MILLER: Yes. Supervision of Enforcement
3 Unit.

4 STAFF COUNSEL MEJIA: Have you previously
5 calculated the potential economic benefit of an
6 unauthorized diversion?

7 MR. MILLER: Yes.

8 STAFF COUNSEL MEJIA: And how many times would
9 you say you've calculated?

10 MR. MILLER: I believe every case on the
11 slide I -- the summary came up in my presentation. All
12 of those cases are -- were cases from my unit, and I
13 have calculated liability for those.

14 STAFF COUNSEL MEJIA: When you previously
15 calculated the economic benefit of an allegedly
16 unauthorized diversion, did you rely upon the types of
17 studies contained in Exhibit 26?

18 MR. MILLER: Yes.

19 STAFF COUNSEL MEJIA: To the best of your
20 knowledge, is that the type of information that another
21 similarly experienced person attempting to calculate the
22 economic benefit of an allegedly unauthorized diversion
23 could rely on?

24 MR. MILLER: I believe so. The purpose of the
25 document isn't for calculating economic benefit per se

1 from an unauthorized reservoir, but it contains
2 information that allowed us to have an idea of what it
3 would cost to pump groundwater, which would be a
4 replacement for the unauthorized water collected in
5 storage.

6 STAFF COUNSEL MEJIA: Thank you, Mr. Miller.

7 For Mr. Porzio, can I direct your attention to
8 Exhibit WR-9.

9 MR. PORZIO: Yes.

10 STAFF COUNSEL MEJIA: What is this document?

11 MR. PORZIO: This was a contact report with
12 Mary Gebing from the Napa County Assessor's Parcel
13 Office. This was after sending the August 18th letter,
14 at which point we hadn't heard anything from Mr. Newton
15 Dal Poggetto. We had tried to find information
16 available online such as phone numbers and e-mail
17 addresses, none of which was available; so I called the
18 County Assessor's Office to confirm that the address was
19 correct and that we were sending the notice to the right
20 liable party.

21 STAFF COUNSEL MEJIA: And I'd like to direct
22 your attention now to Exhibit 10.

23 MR. PORZIO: Yes.

24 STAFF COUNSEL MEJIA: What is this document?

25 MR. PORZIO: This was a follow-up call to

1 ensure the name was correct and to try to determine who
2 was liable for anything that occurs on that parcel.

3 STAFF COUNSEL MEJIA: Did you author this
4 document?

5 MR. PORZIO: Yes.

6 STAFF COUNSEL MEJIA: So you're saying it
7 memorializes the conversation you had?

8 MR. PORZIO: Yes. It is a contact report.

9 STAFF COUNSEL MEJIA: I'd also like to direct
10 your attention to Exhibit WR-18. What is Exhibit 18?

11 MR. PORZIO: This was an attempt to try to
12 find documentation from the Soil Conservation Service
13 that -- just anything we could find as to how -- what
14 type of policies they had implemented during the time
15 this reservoir was constructed to see if we could get
16 some of their policy documents to find out what
17 guidelines they were following when they were contacting
18 property owners to help economically or financially or
19 with actual physical work.

20 So it was just a follow-up. And some
21 information was made available, such as engineering
22 services not provided by NRCS. And this is similar to
23 the contact report. It's just to memorialize a
24 conversation and how we were trying to come up with some
25 of the information that was later submitted as exhibits.

1 STAFF COUNSEL MEJIA: Thank you, Mr. Porzio.
2 I have a question for Ms. West as to Exhibit
3 23.

4 MS. WEST: Certainly.

5 STAFF COUNSEL MEJIA: Can I ask for what
6 purpose you're seeking to admit this item?

7 MS. WEST: This is an historic document,
8 published historic document generally outlining some of
9 the history of the Soil Conservation District and type
10 of actions that they took in the communities.

11 It is obtained from the National Resources
12 Conservation's website. They have a collection of
13 historical published documents outlining the history of
14 the agency and the underlying Soil Conservation
15 Districts and why they came about and what type of
16 actions they were tasked with or authorized to do.

17 STAFF COUNSEL MEJIA: You say you retrieved
18 this document from what website?

19 MS. WEST: It's from the Federal National --
20 National Conservation Services website, USDA. It is a
21 published work. The entire compilation is a published
22 document of historical works. As you can tell, it was
23 previously presented at some conferences.

24 STAFF COUNSEL MEJIA: Thank you.

25 CO-HEARING OFFICER MOORE: Any more questions?

1 MR. BUCKMAN: I have some more.

2 CO-HEARING OFFICER MOORE: Yes, Mr. Buckman.

3 MR. BUCKMAN: Michael Buckman. I'm a member
4 of the Science Team and I'm also Senior Environmental
5 Engineering Unit.

6 Ms. West mentioned in her pre-brief, but I
7 didn't hear it followed up in the testimony of

8 Mr. Porzio or Mr. Miller. What type of stream?

9 Ms. West mentioned specifically that the stream dries
10 up, and I would like -- the question is for Mr. Miller
11 or Mr. Porzio as to the nature of the stream, because I
12 did not see that in your testimony. Maybe just a basic
13 characteristic of the stream.

14 MR. MILLER: Yeah. You know, maybe it didn't
15 come out in the presentation, but the USGS topographic
16 map, the blue line stream that Kevin was referring to is
17 not a solid line -- solid blue line but a dashed blue
18 line, which the USGS uses to indicate intermittent
19 streams or ephemeral streams that do not flow year
20 round.

21 MR. BUCKMAN: Thank you.

22 CO-HEARING OFFICER MOORE: Okay. I had one
23 question about one of the exhibits, Exhibit No. WR-22.
24 And either Mr. Miller or Mr. Porzio can respond to this
25 question: What was the purpose of introducing these

1 past State Water Board decisions?

2 MS. WEST: I think I can speak to this. I'm
3 sorry.

4 CO-HEARING OFFICER MOORE: Yes.

5 MS. WEST: Because these were cited in my
6 pre-hearing brief, and that's why they were included; so
7 I thought I would speak to this issue, if that's
8 acceptable.

9 CO-HEARING OFFICER MOORE: Yes.

10 MS. WEST: These Water Rights decisions were
11 cited by me in my pre-hearing brief as examples of
12 decisions where the State Water Board had issued permits
13 to projects in which the Soil Conservation District,
14 local district, or Soil Conservation Service generally
15 had played a role in the projects, whether it be the --
16 and it also demonstrates that generally the role played
17 was a design or finance role.

18 And that these projects still obtained water
19 rights back at the time that they were constructed in
20 the early dates. I believe one of them is in 1959. And
21 just generally were cited for the general proposition
22 that these types of projects are still subject to water
23 rights permitting and authorization.

24 CO-HEARING OFFICER MOORE: Is there anything
25 in these decisions that indicated the purpose or use of

1 stockwatering erosion control and other uses that have
2 been discussed today?

3 MS. WEST: Yes. All of these permits were for
4 some additional -- for some beneficial use such as
5 stockwatering or irrigation. I don't -- off the top of
6 my head would have to look at each one to see what
7 beneficial use the appropriation was made for, but they
8 each have an associated beneficial use.

9 There is not, to my recollection, much
10 discussion about the additional soil conservation or
11 erosion benefits that these types of projects generally
12 have.

13 CO-HEARING OFFICER MOORE: Okay. That answers
14 my question.

15 If there's no more questions on Prosecution
16 Team's direct testimony, I was going to suggest maybe
17 it's a good time to take a break. Everyone can stretch,
18 maybe go out look at the sunshine, and we can reconvene
19 at ten until 11:00 to keep this thing going. Does that
20 sound okay? And then we'll begin with Dal Poggetto's
21 opening statement and direct testimony at that time.

22 MR. KIRK: Thank you, Mr. Moore.

23 MS. WEST: Thank you.

24 (Whereupon a recess was taken.)

25 CO-HEARING OFFICER MOORE: Welcome back. I

1 know I'm a little early. It appears to me that everyone
2 has reconvened, so we'll get the meeting back in
3 session. We're all eager to move this thing forward.
4 Thanks for reconvening.

5 And, with that, Mr. Kirk, you can start off
6 with your opening statement and direct testimony.

7 MR. KIRK: Thank you very much, Mr. Moore.
8 And thanks to everyone for being here and taking the
9 time, though we think it is a waste of time.

10 We will agree that all of the unauthorized
11 water diversion investigations in 2011, being a
12 significant accomplishment, is something that needs to
13 be done and more of it needs to be done. We agree with
14 that. However, this is a situation that went terribly
15 awry to the point where it is a terrible abuse of State
16 power.

17 The history of this indicates that a letter
18 was sent to Mr. Dal Poggetto August 18th, 2011. He
19 never saw it. He never got it. However, when the ACL
20 and CDO was sent and served Registered Mail, served on
21 Mr. Dal Poggetto the following March, he replied
22 immediately with a letter that is attached to our
23 documents as an exhibit. And he addresses this, and
24 "Let's do this."

25 And that's been consistent, frankly, with our

1 approach to this case. That is, this is a situation
2 where the Soil Conservation District constructed a dam;
3 the property owners didn't do anything different. From
4 1964 until the present day, there has been nothing
5 changed for the use of the water.

6 When Mr. Dal Poggetto received the ACL and the
7 CDO, he said, "We'll do what you want as long as you'll
8 take off the \$22,800 fine. That's just not fair. We
9 haven't been doing anything. We haven't been doing
10 anything other than keeping this property in nearly
11 natural condition."

12 There have been some stock on the property.
13 There have been some cattle, but for the most part --
14 and the pictures reflect this -- this property has been
15 kept in its natural condition.

16 The only objection we have here -- and, again,
17 I think this is reflected in briefs. The only problem
18 we have had throughout this case is an imposition of
19 \$22,800 against a property owner who didn't do anything.
20 They didn't appropriate water out to irrigate. They
21 didn't appropriate water out to sell to anybody. They
22 didn't do anything, other than not mess with the Soil
23 Conservation District's dam.

24 If you take the \$22,800 fine away, then, we
25 said, immediately we will do what we need to do; file

1 the appropriate papers. But that agreement was never
2 reached because the State would never take off the
3 \$22,800 fine.

4 There are lots of cases -- and, again, the
5 unauthorized diversion investigation has many, many,
6 many different situations where people have unauthorized
7 use of water. They've irrigated vineyards. They've
8 irrigated all kinds of agricultural products. And
9 that's unauthorized; that's not right, and we appreciate
10 the State Board's attempts to enforce those issues.
11 However, this is a situation where an innocent landowner
12 has been penalized.

13 As soon as he was aware of a problem that
14 existed, he said, "Let's deal with it, but take the fine
15 off. I'm not going to pay a fine." That's really the
16 only reason we're here, ladies and gentlemen.

17 And to the extent -- and we have not filed the
18 stockpond registration application until just recently
19 because we were hoping that we'd be able to reach an
20 agreement, but that agreement was never made. And we
21 knew that we needed to file something, and so finally we
22 did.

23 But it was really the power of the State, the
24 abuse of power of the State over us saying, "You haven't
25 done anything for the last -- what? -- 50 years, so now

1 we're going to fine you \$23,000, and you have to file
2 with us."

3 We said, "Fine. We'll file with you. But
4 we're not going to pay the \$22,800." And that's why
5 we're here today.

6 Mr. Dal Poggetto's testimony will go back and
7 talk about the fact that he never received any
8 August 18, 2011, letter. As soon as he did get the ACL,
9 he responded to it. As soon as no settlement or
10 discussion was productive, he hired me. I sent my
11 letter of -- it's also addressed September 3rd, 2013.
12 Again, we have tried to work with the State Board. The
13 power of a \$22,800 fine has prevented us from moving
14 forward and getting over this.

15 With that, I'd like to ask some questions with
16 Mr. Dal Poggetto. Fair enough?

17 CO-HEARING OFFICER MOORE: All right.

18 DIRECT EXAMINATION OF DAL POGGETTO

19 BY MR. KIRK:

20 Q. Attached as an exhibit to our brief is the
21 written testimony of Newton Dal Poggetto. I think it's
22 marked as Exhibit D. Did you help prepare this?

23 A. Yes.

24 Q. Is it true and correct?

25 A. Yes.

1 Q. Did you know Gary Kiser?

2 A. Yes, for about 60 years.

3 Q. Okay. When this issue arose, did you talk
4 with Mr. Kiser?

5 A. Yes.

6 Q. And what did you two discuss?

7 MS. WEST: Okay. I'm going to object that
8 this is a hearsay discussion. He's pointing out that
9 he's testifying what Mr. Kiser said, and Mr. Kiser is
10 not here for me to cross-examine.

11 MR. KIRK: And I appreciate that. Generally
12 speaking, in administrative hearings I think this type
13 of discussion is allowed. I think all of the evidence
14 thus far points to Mr. Kiser's reliability.

15 MS. WEST: It's allowed to support non-hearsay
16 evidence in the record, and I would ask for an offer of
17 proof of what that non-hearsay record is.

18 CO-HEARING OFFICER MOORE: Counselor, I'm
19 interested because this is unusual. We don't have the
20 opportunity to actually question Mr. Kiser; but, you
21 know, this is substantive information for the hearing.

22 STAFF COUNSEL MEJIA: Mr. Hearing Officer and
23 Madam Vice Chair, for the benefit of counsel, I would
24 like to make clear what the standard is for the
25 acceptance of hearsay evidence during an administrative

1 proceeding as set forth in Government Code section
2 11513, subdivision (d). And it states as follows:

3 Hearsay evidence may be used for the purpose of
4 supplementing or explaining other evidence but over
5 timely objection shall not be sufficient in itself
6 to support a finding unless it would be admissible
7 over objection in civil actions. An objection is
8 timely if made before submission of the case or in
9 that consideration.

10 So, Mr. Hearing Officer, consistent with your
11 inquiry, my advice would be that certainly an offer of
12 proof might be appropriate, but that's the standard that
13 governs the potential admissibility of hearsay in a
14 proceeding such this.

15 CO-HEARING OFFICER MOORE: Okay. I'm going to
16 allow the questioning to continue.

17 MR. KIRK: Thank you, Counsel.

18 CO-HEARING OFFICER MOORE: This is qualified
19 appropriately.

20 BY MR. KIRK:

21 Q. What did you and Mr. Kiser discuss?

22 A. We met in my home office. And since I'd known
23 him since he was a teen-ager, I said, "Gary, what
24 happened?"

25 And he said, "Oh, yeah. I built the dam out

1 there."

2 And the Kiser's and the Stornettas, both Swiss
3 Italians, both have known each other for
4 multi-generations in the valley, and -- and Gary was
5 hired by the U.S. Soil Conservation Service. His office
6 was next to mine for my first few years of law practice.
7 And he said the Soil Conservation Service wanted to
8 build a dam because of the erosion in that little
9 stream/creek that's there.

10 And the farmers, like the Stornettas and all
11 farmers in the valley up to that time, about 14 years
12 that I was aware of it, were delighted to have a
13 government spend money on their property and improve
14 their property without any expense to them. They were
15 very highly regarded in the valley.

16 And so Gary was running his bulldozer and
17 other heavy equipment; that was his business, and he
18 built the dam. And he told me he built it. And he
19 built a good dam, and he was proud of it.

20 Q. Thank you, Mr. Dal Poggetto.

21 When you were first notified by the State
22 Water Board that an administrative liability complaint
23 had been filed against you and a Cease and Desist Order
24 had been requested against you, what was your response?

25 A. My response was to find some expert legal

1 representation because, as the trustee of the Stornetta
2 Trust, I had -- and in other matters prior to this --
3 employed counsel. And I asked the counsel that I
4 employed, "Who knows about water rights?" And that's
5 how I met Mr. Kirk, and I retained him shortly
6 thereafter.

7 Q. Did you first, however, write the letter dated
8 April 2nd, 2012, to the Department of Water Rights?

9 A. Yes.

10 Q. Okay. That's what we've marked as Exhibit B;
11 correct?

12 A. Yes. B, yes.

13 Q. So am I correct in understanding that you
14 received service of the ACL on March 26 and then on
15 April 2nd you responded?

16 A. Yes.

17 Q. Is there any reason why you wouldn't have
18 responded to the letter that allegedly was sent to you?

19 A. No. I would have been pleased to respond, and
20 I would have replied to them sooner.

21 Q. Okay. You have agreed to do what the Water
22 Board requests if they would reduce the fine; correct?

23 A. Yes.

24 Q. Okay. Were you involved with the property in
25 1964?

1 A. No.

2 Q. Why is Mr. Kiser not here today?

3 A. Because his wife, as of about last Wednesday,
4 she said, "Gary is dying." And I asked if I could see
5 him.

6 She said, "He will not get out of bed."

7 He retired about two years ago, and I knew
8 that because I've known him casually over the years.
9 And I know his wife, and she's very concerned because
10 she is living alone with him and he's given up on life.
11 He's 76 years old. And I had no idea he was not in good
12 health. I asked her what was the problem, and she
13 didn't really respond and was very sad. And that was
14 it. I'm very touched by it.

15 Q. The declaration of Mr. Kiser that we've marked
16 as an exhibit, you've read that; right?

17 A. Yes, I have.

18 Q. And is that consistent with what you and he
19 discussed?

20 A. Yes.

21 Q. Okay. You've reviewed what we've marked as
22 Exhibit A. That is my letter to Yvonne West dated
23 September 3, 2013, in which we state: "My client will
24 agree to register the stockpond."

25 Do you remember that?

1 A. Yes.

2 Q. Okay. And you gave me authority to make that
3 offer; correct?

4 A. Correct.

5 Q. Okay. How was the water on the property used
6 when you first became owner or trustee for the Stornetta
7 Family Trust, owners of the property?

8 A. Well, I don't know if it was used. The
9 property had been leased for dry cattle grazing by Alex
10 Stornetta, the owner, years before when after he sold
11 his dairy herd and went out of the dairy business. And
12 Mitchell Mulas and his family were leasing that land,
13 and I don't know that it was written or not. Later I
14 wrote a lease, a simple lease, a grazing lease.

15 But that land had been used for years for dry
16 cattle, heifers, and other dry cattle. And there was a
17 well on the property, I knew, and there was like an old
18 bathtub or a container next to the well. And there was
19 power to the property at that time.

20 So I, of my own knowledge, don't know how the
21 property was used or whether -- where the water came
22 from, except maybe the cows went down and drank at the
23 edge of the pond. Because I don't know whether they
24 used a well or not. PG&E has since removed the power,
25 so -- I don't know.

1 Q. How is the water on the property used today?

2 A. I don't think it is used, unless Mulas's cows
3 go down and drink a little, if they can get through the
4 weeds.

5 Q. Okay. You heard -- I think it was
6 Mr. Miller's testimony about the studies regarding the
7 cost of providing water for the production of wine
8 grapes and olive oil.

9 You haven't been producing any wine grapes or
10 olive oil, have you, on that property?

11 A. No. It's a beautiful thought.

12 Q. You have registered the pond as a stockpond,
13 correct, or at least applied to register?

14 A. Yes. Yes.

15 Q. And if there are limitations on the size of
16 the stockpond and your pond, the Stornetta pond is too
17 large, you will agree to reduce the size; correct?

18 A. Sure. Yes.

19 Q. Is it fair to say that you want to comply with
20 the Water Board directives --

21 A. Yes.

22 Q. -- except to the extent of paying a \$22,800
23 fine?

24 A. Yeah. That is an absolute bullying,
25 ridiculous decision taken by the State.

1 MR. KIRK: Those are all the questions I have.

2 CO-HEARING OFFICER MOORE: Okay. With that,
3 that completes the direct testimony of Dal Poggetto.

4 MR. KIRK: I would like to submit the exhibits
5 that we've presented as well.

6 MS. WEST: My objection stands as I've said
7 earlier.

8 CO-HEARING OFFICER MOORE: Yes, with respect
9 to the hearsay.

10 You know, it's a very difficult circumstance,
11 Mr. Dal Poggetto, about your life-long friend. I think
12 I speak for all of us.

13 MR. DAL POGGETTO: If I might add, as a
14 fiduciary and trustee of the trust, which I don't
15 welcome, I have the obligation not to waste the estate's
16 money. And I felt it would be in violation of my
17 fiduciary duty to give in to this sort of demand.

18 CO-HEARING OFFICER MOORE: Okay. Thank you
19 for that.

20 And so with that, it's time for the --

21 MS. McCUE: Excuse me.

22 CO-HEARING OFFICER MOORE: Yes.

23 MS. McCUE: Could we just clarify your
24 exhibits that you're introducing? You had submitted
25 some in July that were numbered 1, 2 and 3, and then the

1 most recent were A, B, C and D; so what exactly are you
2 submitting?

3 MR. KIRK: A, B, C and D. The only difference
4 is the 1, 2 and 3 were A, B and C and we added the D,
5 which was the written testimony of Mr. Dal Poggetto.

6 MS. McCUE: I think they're in a slightly
7 different order. Can we just clarify, instead of --

8 MR. KIRK: Certainly.

9 MS. McCUE -- the Prosecution Team has referred
10 to them.

11 STAFF COUNSEL MEJIA: Perhaps, for clarity of
12 the record, if you could just go through each exhibit
13 and indicate what it is.

14 MR. KIRK: Absolutely.

15 Exhibit A is my letter to Yvonne West dated
16 September 13, 2013;

17 Exhibit B is Mr. Dal Poggetto's letter to the
18 Department of Water Rights dated April 2, 2012;

19 Exhibit C is Mr. Kiser's Declaration; and

20 Exhibit D is the summary of Mr. Dal Poggetto's
21 testimony.

22 MS. McCUE: Can I make just one clarifying
23 thing. So Exhibit A, I think, was your original Exhibit
24 2, is that correct, on July 10?

25 MR. KIRK: To tell you the truth, I don't know

1 that.

2 MS. McCUE: All right. Thank you.

3 MS. WEST: I would also like to state that if
4 Mr. Kirk is not going to move Exhibit 3, which was part
5 of his original submittal into the record as evidence,
6 then I would move to move it in on behalf of the Water
7 Rights Enforcement staff. It is my letter in response
8 to Mr. Kirk's letter dated September 26, 2013.

9 CO-HEARING OFFICER MOORE: And we'll call that
10 Exhibit E or --

11 MS. WEST: Mr. Kirk already submitted it. If
12 he's not planning on moving it into evidence, I will
13 make a motion to move it in.

14 STAFF COUNSEL MEJIA: I think for the clarity
15 of the record, Mr. Hearing Officer, I would advise that
16 moving it into evidence is one part of it, but then if
17 you're inclined to accept the last exhibit it could be
18 marked -- I believe the last exhibit of the Prosecution
19 Team was WR-27. I suggest, yes, that you mark it
20 whatever you want.

21 MR. KIRK: And I don't have any objection to
22 that.

23 STAFF COUNSEL MEJIA: I suggest that the
24 letter be marked as WR-29.

25 CO-HEARING OFFICER MOORE: Okay. That sounds

1 good, and with my Co-Hearing Officer. We'll accept
2 Exhibits A through D by Dal Poggetto and the
3 September 26, 2013 letter by Ms. West as WR-29 as
4 Prosecution Team's exhibit.

5 (Whereupon the above-referenced exhibits were
6 admitted into evidence by the Hearing Officer.)

7 CO-HEARING OFFICER MOORE: Thanks for that
8 clarification, Ms. McCue.

9 Okay. At this point I would like to offer,
10 first, the Prosecution Team any cross-examination of Dal
11 Poggetto.

12 MS. WEST: Thank you.

13 I'm going to walk over to Mr. Dal Poggetto and
14 provide him our staff Exhibit WR-6 for him to review.
15 I'll be right back.

16 CROSS-EXAMINATION OF MR. DAL POGGETTO

17 BY MS. WEST:

18 Q. Mr. Dal Poggetto, I am showing you the
19 Division Enforcement staff Exhibit WR-6. Mr. Miller has
20 testified to the fact that -- oh. Mr. Porzio and
21 Mr. Miller have testified to the fact this is an address
22 list to addresses to which the notice letter exhibit --
23 included as, I believe, Exhibit WR-5 was mailed by the
24 Division.

25 Can you please read the name and address that

1 I have circled into the record.

2 A. Yes.

3 Q. Do you want to go ahead and do that?

4 A. That is my home address. And I rarely receive
5 any mail at that address. My real address is 670 B,
6 West Napa Street, in Sonoma.

7 Q. But that is your home address?

8 A. Yeah, that's my home address.

9 Q. And how long have you lived there?

10 A. Sixty years.

11 Q. And you do receive mail at that address?

12 A. Pardon?

13 Q. Do you receive mail at that address?

14 A. I receive advertising flyers and some bills.
15 Yes.

16 Q. Okay. And we also have our exhibits from the
17 Napa County Recorder's Office, which has the same
18 address. I believe we included that in our ParcelQuest
19 that is the ownership information on file, or the
20 address information on file for Mr. Dal Poggetto.

21 Does anyone else at your house receive this
22 mail? Is there anyone else that can receive mail at
23 your address?

24 A. Yes, several people. And that's why I rarely
25 look at that mailbox.

1 Q. And it is the same address at which --

2 A. But it's still there.

3 Q. But did you receive the initial ACL and CDO at
4 that address as well?

5 A. What?

6 Q. The initial ACL and CDO that was mailed to you
7 was sent Certified Mail to that address as well. Did
8 you receive that?

9 A. Oh, I think I would. I don't think I -- I
10 don't know how I got your Certified Mail letter that
11 came there. But Certified Mail, we usually go down to
12 the post office to pick it up because the postman will
13 not deliver a Certified letter to a mailbox.

14 Q. Okay. I will go ahead and get that back from
15 you.

16 A. Sure. So chances are I didn't get it there.

17 Q. I would at this point draw your attention to
18 the letter that you did write to the State Water Board
19 that you have included, I believe, in your Exhibit B,
20 just acknowledging your receipt of that initial ACL and
21 CDO. I thought that you had made statements there to
22 the effect that your secretary received it at your
23 house, but I'm not seeing it now.

24 A. Yeah.

25 Q. Okay. Just moving along.

1 When you received -- what did you do when you
2 received the original ACL and CDO? I believe that you
3 discuss it in this letter as well.

4 A. What did I do?

5 Q. What was your reaction?

6 MR. KIRK: Can you clarify the question?

7 BY MS. WEST:

8 Q. When you received the original ACL and CDO,
9 did you respond with a letter to the State Water Board?

10 A. When I received this letter?

11 MR. KIRK: The ACL and CDO which you got by
12 Certified Mail.

13 THE WITNESS: Oh, yeah.

14 MR. KIRK: How did you respond?

15 THE WITNESS: I imagine that -- I don't have a
16 specific recollection, but I imagine the first thing I
17 did was pick up the telephone and call Mr. Kirk and tell
18 him about it.

19 BY MS. WEST:

20 Q. Would you have --

21 A. And I responded when I knew there was
22 something to respond to.

23 Q. You say you didn't delay or wait. Basically,
24 what I'm asking, would you have responded differently
25 had the party names been listed or shown as --

1 differently than they were? Would you have had a
2 different reaction or response?

3 A. I don't understand the question.

4 Q. Mr. Kirk alleges there was a great
5 misunderstanding and confusion upon receiving that ACL.

6 A. I have a very difficult time hearing you when
7 you are so close to the mic.

8 Q. I'm sorry. They've asked me to be close to
9 the mic because it doesn't pick it up.

10 Mr. Kirk stated in his argument that there was
11 a lot of confusion upon receipt of the ACL, and I'm
12 asking: Would you have responded differently had the
13 ACL and CDO contained the Stornetta Family Trust name
14 instead of your name? If it had named the trust
15 correctly, would you have responded differently?

16 A. I don't know because it didn't happen. I
17 doubt it. If I understood what it was, I would have
18 responded as I did, by promptly doing something about
19 it.

20 Q. But you did reply; you did do something about
21 it?

22 A. Yeah. As soon as I knew there was something
23 to respond to, I did.

24 Q. Thank you. You testified just now to not --
25 that you were not personally involved in the property in

1 1969; is that correct?

2 A. Yes, I was not involved with the property. I
3 was Mr. Stornetta's and Matula Stornetta's attorney from
4 about -- sometime in 1989 until their deaths, though I
5 had known them as a child.

6 Q. Great. So you don't have any personal
7 knowledge of whether or not Mr. Stornetta sought
8 financial assistance for the construction of the
9 reservoir or whether Mr. Stornetta consented to the
10 construction of the reservoir?

11 MR. KIRK: This is really calling for
12 speculation at this point in time. We've gone over
13 this, and there's isn't any basis for this question
14 other than pure conjecture.

15 CO-HEARING OFFICER MOORE: Okay. I actually
16 think there is enough open-endedness to Mr. Kiser's
17 statement that -- there is an allegation in that
18 statement of no personal involvement; so there is a
19 question of what that means.

20 So can you rephrase your question?

21 BY MS. WEST:

22 Q. I'm asking Mr. Dal Poggetto if he has any
23 personal knowledge of whether or not the Stornettas
24 consented to the construction of that reservoir, if they
25 have any personal knowledge of what happened in 1964 in

1 reference to the reservoir period?

2 A. No. I really had no contact with the
3 Stornettas during the 60s, before that and after that.
4 I knew them, yeah. And I wasn't their attorney during
5 that time.

6 CO-HEARING OFFICER MOORE: That's fine.

7 BY MS. WEST:

8 Q. Great. Thank you. You just testified that
9 you were familiar with the family and you were
10 acquainted with the family?

11 A. Yes.

12 Q. Had you ever been to the property prior to
13 your inspection with our staff?

14 A. Yes. I've been out there two and three times.

15 Q. Have you ever -- what was your purpose of
16 going to the property?

17 A. Well, basically it was the first time to look
18 about fishing for catfish.

19 Q. And did you fish for catfish that day?

20 A. And I found out that there was yellow catfish
21 planted there, which are mainly bone, and so I didn't go
22 out there.

23 Q. Have you gone out for a picnic? Swimming?

24 A. Yeah, I've been out there. Not swimming.
25 I've been out there to a birthday party that -- Al

1 Stornetta had, I think, his 90th birthday, or
2 thereabouts, out there; and he invited my wife and me
3 out there.

4 Q. Was the party near the reservoir?

5 A. Yeah, it was close by. There was a picnic
6 table set up away under a tree. Not that close but --
7 in fact, I think I mentioned it to your assistants
8 there.

9 Q. Okay. You did previously just state that you,
10 as the trustee for the property, have written some lease
11 agreements for cattle grazing on the property. Is that
12 correct that you were involved in writing some lease
13 agreements for the property for grazing cattle?

14 A. Involved in what?

15 MR. KIRK: Writing lease agreements for the
16 cattle.

17 THE WITNESS: Yeah. I did a written simple
18 lease to the Mitchell Mulas family, oh, sometime in the
19 '90s, probably.

20 BY MS. WEST:

21 Q. Do you recall the term of that lease? Was it
22 a year-round lease?

23 A. Yeah. The original lease, I guess, between
24 the Mulases, who have been neighbors and long-time
25 friends, was oral, I assume. I never saw it. And I

1 think the first lease I did, I think they were getting
2 3,000 a year; and that was probably what I did. And
3 there still is a -- the same repeated lease. And the
4 lease this last year, I raised the rent to \$6,000.

5 Q. Mr. Dal Poggetto, you recently -- you
6 testified that you recently filed a application for
7 stockpond registration on the property. And I have a
8 copy of what you have filed, and in that registration
9 you make some statements to the effect that you recently
10 requested records from the U.S. Conservation Soil
11 Service concerning the property.

12 A. Yes. I tried diligently, and many telephone
13 conversations, and volunteered to go to Petaluma where
14 their office is now and help them search the records to
15 try to find out something about that pond. And I have a
16 concern about who owns that dam, whether they have any
17 claim or right on it.

18 Q. Were you successful in finding any records at
19 all?

20 A. No. I was told by a nice lady over there --
21 and had at least two conversations with her to see if
22 they could find any records about the dam and about what
23 they did, and she politely told me that she'd spent
24 quite a bit of time and couldn't find anything.

25 Q. Okay.

1 A. And for me not to bother to come over to see
2 them.

3 Q. Thank you, Mr. Dal Poggetto.

4 There's some confusion -- and I'm not sure
5 that you're going to be able to clear it up for us. You
6 had stated that Mr. Kisler said he was an employee of
7 the U.S. Conservation Service. Mr. Kisler's declaration
8 says he was an employee of the Soil Conservation
9 Service, or District, and there's a significant kind of
10 difference.

11 A. Shaffer?

12 Q. Mr. Kisler?

13 MR. KIRK: Kiser.

14 MS. WEST: Mr. Kiser? Sorry.

15 THE WITNESS: Yeah.

16 BY MS. WEST:

17 Q. Mr. Kiser. Do you know whether he was an
18 employee of the U.S. Soil Conservation Service?

19 A. I never saw anything in writing, no. I just
20 know he told me that he was hired to put in the dam.
21 And it was done by the -- what I assumed was still the
22 U.S. Soil Conservation Service, that I've known, been in
23 the valley since the 40s.

24 Q. Do you know what his position was as an
25 employee? Do you know any further information on what

1 his position was? If he was --

2 A. No. No. I don't know anything about that.

3 Q. And you don't have any familiarity with the
4 Soil Conservation District at that time in the 1950s?

5 A. No. No.

6 Q. Well, then, I have questions I can't ask you;
7 so I'm going to move along.

8 A. All right.

9 Q. One thing that you just testified to is you
10 had mentioned in your previous testimony that there is
11 no power available for a well located on the property.

12 A. That's correct. I received a notice from
13 PG&E, oh, eight or nine months ago that they were
14 discontinuing any service of the property. There was
15 nothing out there. I don't know when they stopped
16 providing service. In fact, I don't know if there ever
17 really was service out there.

18 Q. Right.

19 A. But I assumed there was because of the well,
20 but that's all that's there.

21 Q. So is there any other source of water for the
22 cattle?

23 A. Pardon?

24 Q. Is there any other souce of water for the
25 cattle on the property other than the reservoir?

1 A. The well, it's right -- right -- maybe 50
2 yards or less from the pond.

3 Q. And you just testified that the well is not
4 operable and hasn't been but you're not sure how long?

5 A. I don't know that it is. There's an old tub
6 there, which I vaguely recall as being a bathtub, to put
7 water in.

8 Q. But your testimony today is that there is no
9 power to that well?

10 A. There is no power. I know that because --

11 Q. Thank you.

12 A. -- I received a notice from PG&E that they've
13 shut the power off.

14 Q. Thank you very much.

15 A. The availability. Not that there was power
16 but the availability, yeah.

17 MS. WEST: Okay. I believe that's all of my
18 questions for Mr. Dal Poggetto.

19 CO-HEARING OFFICER MOORE: Okay. At this time
20 I'd like to open up for staff questions.

21 MS. FARWELL: Thank you, Mr. Moore. I have a
22 couple of questions.

23 MS. FARWELL: Jane Farwell, Environmental
24 Scientist. I have a couple of questions for you,
25 Mr. Dal Poggetto.

1 First of all, are you aware of any maintenance
2 that has been done to the reservoir?

3 MR. DAL POGGETTO: To my knowledge there has
4 never been any maintenance to the reservoir.

5 MS. FARWELL: Okay.

6 MR. DAL POGGETTO: But I don't really know too
7 much about it.

8 MS. FARWELL: Okay. My other question is --
9 and I think you responded to this as a result of
10 Mr. Kirk's questions, but just so I'm super clear: Do
11 the cattle use the stream pond year round?

12 MR. DAL POGGETTO: Well, I've never seen any
13 cattle drink in the pond. I haven't been out there that
14 often, but I'm assuming that at some time that if I were
15 a cow I would go down and drink the water if it were
16 there and if there weren't any water in the tub that was
17 there.

18 MS. FARWELL: Right. Right. Right. That's
19 their source of water supply.

20 MR. DAL POGGETTO: But I've never seen it
21 happen.

22 MS. FARWELL: Okay. Real good. Thank you,
23 sir.

24 MR. DAL POGGETTO: It's a nice thought.

25 CO-HEARING OFFICER MOORE: Okay. Any other

1 questions from staff?

2 CO-HEARING OFFICER SPIVY-WEBER. I have a
3 question.

4 When you became the trustee of the Stornetta
5 Trust, to your knowledge had the Stornettas owned the
6 property -- owned the property for -- I don't know for
7 how long, but had there ever been any other ownership of
8 the property?

9 MR. DAL POGGETTO: Well, as a practical
10 matter, no. The Stornettas only owned about 900 acres,
11 of which this 187-acre parcel was a latter purchase.
12 Charlie Stornetta Sr. started purchasing property in
13 1912. I have the deeds and records from there. He
14 bought three little broken-down dairy ranches and made
15 one out of it.

16 When they bought this Napa County property, I
17 don't know. And it was after, I think, his death,
18 probably purchased by his two sons, Alexander and
19 Charles Jr., and they owned it together.

20 And I know that because Al Stornetta --
21 Alexander, who owned it at the time of his death,
22 divided his partnership with his brother Charles, who
23 lived in Napa County; and they more or less divided this
24 parcel in half. And it was just done by them informally
25 and by a deed at the title company in about 1986 or '7,

1 before I started representing them.

2 And the only reason I knew about it was
3 because we were wondering who was going to pay for a
4 fence to divide off the property between them.

5 MR. KIRK: If I can clarify. Do you know when
6 the Stornettas purchased the property?

7 MR. DAL POGGETTO: No.

8 CO-HEARING OFFICER MOORE: Good. If there's
9 no other questions from staff, I just had one question.
10 Because you've told us about not being aware of the
11 August letter and, you know, I understand, you know, the
12 issues here with the mail and everything. But I'm
13 looking at the timeline, and there was, according to
14 staff, a February 2012 visit to the site; so that was
15 before the ACL/CDO was mailed. So I was wondering if
16 you had a chance to visit with staff during that
17 February inspection?

18 MR. DAL POGGETTO: A chance to visit?

19 MR. MOORE: Yeah. When the staff inspected
20 your property, were you there in February of 2012 to
21 allow them on the property?

22 MR. DAL POGGETTO: No. I was there in
23 October. There were two nice gentlemen that took the
24 pictures. I saw them take the pictures, which were
25 pretty nice.

1 MS. WEST: Let me clarify.

2 CO-HEARING OFFICER MOORE: Yes. Thank you.

3 MS. WEST: That February 16, 2012, initial
4 inspection report, that is when we produced the initial
5 -- that is after sending the letter, before sending the
6 ACL, we produced an initial inspection report. It was a
7 desktop investigation without a site visit based on the
8 topographical maps and the aerial photos viewed.

9 The visits that occurred with Mr. Dal Poggetto
10 did not occur until after the ACL/CDO was issued.

11 CO-HEARING OFFICER MOORE: Okay. Good.
12 That's just for my clarification, because I see a
13 timeline and I see the word "inspection," so I just
14 wanted to make sure for the record that that was a
15 desktop inspection that preceded the correspondence of
16 the Certified Mail. Okay.

17 MS. WEST: That is correct.

18 CO-HEARING OFFICER MOORE: Okay. And did you
19 receive any phone calls before receiving the CDO/ACL
20 package?

21 MR. DAL POGGETTO: No.

22 CO-HEARING OFFICER MOORE: Okay. That's all
23 for my questions.

24 MS. WEST: Are we are ready to move on?

25 CO-HEARING OFFICER MOORE: Yes. Let me get my

1 timeline back. So if there are no more questions or
2 cross-examination of Dal Poggetto, at this point we can
3 do rebuttal testimony from the Prosecution Team.

4 MS. WEST: Thank you. Before I move on -- I
5 have my rebuttal argument and some of them are supported
6 -- are illustrated through a PowerPoint; but before I
7 move on I'm going to ask a few clarifying questions of
8 staff, specifically of Mr. Porzio.

9 REDIRECT EXAMINATION BY PROSECUTION TEAM

10 BY MS. WEST:

11 Q. Board Member Moore just asked some questions
12 about phone calls, and I wanted to know from you: Did
13 we have a phone number or other contact information of
14 Mr. Dal Poggetto besides his home residential address
15 that was used for both the letter and the ACL, the
16 initial ACL?

17

18 A. (Mr. Porzio) There was no available
19 information that we could find, other than the address.

20 Q. Okay. Now I'm going to ask a question of both
21 Mr. Miller and Mr. Porzio. I'm going to show them what
22 I believe is Dal Poggetto's Exhibit B. Specifically, I
23 am referring to the April 2nd letter from Mr. Dal
24 Poggetto to the Water Board. I'm going to show it to
25 both of the witnesses.

1 And I would ask you both to respond whether or
2 not you have ever seen that letter prior to these
3 proceedings, or these submissions and these proceedings?

4 A. (Mr. Miller) No, I have not. This is Aaron
5 Miller.

6 A. (Mr. Porzio) Kevin Porzio. I have not seen
7 this document either.

8 MS. WEST: Thank you.

9 Michael Buckman. Mr. Buckman, this would be a
10 good time if you could pull up the slide presentation
11 that I provided to you labeled "Rebuttal."

12 REBUTTAL BY PROSECUTION TEAM

13 (Thereupon an overhead presentation was
14 presented as follows:)

15 MS. WEST: In Mr. Kirk's arguments today,
16 we've heard a number of legal arguments that I'd like to
17 take some time to respond to. And I'd like to
18 respond -- you've also -- we heard a lot of discussion
19 about what were confidential settlement discussions
20 between the Prosecution Team and Dal Poggetto. I am not
21 going to go into the details of those discussions
22 because, as I say, they were confidential settlement
23 discussions.

24 I would like to bring to your attention,
25 however, that we did demonstrate earlier in the

1 testimony that we have settled a number of these types
2 of enforcement cases for reduced liability.

3 This is a situation where doing nothing can
4 get you in trouble in the eyes of the law.

5 MR. KIRK: I object. Is this argument or is
6 this testimony?

7 CO-HEARING OFFICER MOORE: This is a rebuttal.
8 You'll have a chance to cross-examine.

9 MS. WEST: This is a rebuttal argument. And
10 some testimony, in addition, was provided by staff.

11 MR. KIRK: Okay.

12 MS. WEST: I would like to briefly address
13 legal arguments raised by Mr. Kirk through the late
14 submission of a pre-hearing brief and the arguments made
15 here today. As I stated previously, many of the
16 arguments were addressed in my September 26, 2013,
17 letter submitted by Mr. Kirk in Dal Poggetto Exhibit 3,
18 which has now been reidentified as Water Rights Exhibit
19 29, I believe.

20 None of the issues raised by Mr. Kirk amount
21 to a legal defense or excuse for the violations alleged
22 in the ACL notice complaint and CDO. We heard testimony
23 that the initial reservoir letter was provided to
24 Mr. Dal Poggetto at his residence, the same address at
25 which he received the ACL and CDO. I would contend that

1 property in this case. We can see no evidence
2 suggesting there has been any taking of property by the
3 U.S. Government or the local Soil Conservation Service.

4 I'd like to put into the record Public
5 Resource Code section 9001. Under the authorizing act
6 of Soil Conservation District, it specifically provides
7 that soil conservation districts may build projects for
8 soil conservation with the consent of the property
9 owner.

10 I would like to submit into evidence not only
11 the current Public Resource Code section, but I also
12 have statutes from 1951 and 1953 containing the same
13 language which provides authority to soil conservation
14 districts for such projects only with the consent of the
15 property owner. I believe that this would be designated
16 WR-30.

17 CO-HEARING OFFICER MOORE: We'll accept that
18 into evidence as Exhibit WR-30.

19 (Whereupon the above-referenced exhibit was
20 was admitted into evidence.)

21 MR. KIRK: We'll stipulate to the Soil
22 Conservation District should get consent of the owner
23 before building a dam. Not a problem.

24 CO-HEARING OFFICER MOORE: Reasonable people
25 can agree.

1 MR. KIRK: That's what you'd like to think.

2 MS. WEST: Mr. Kirk previously argued,
3 erroneously, that the dam and reservoir, because they
4 were constructed with the involvement of the Soil
5 Conservation District, were not required to file a
6 Statement of Diversion and Use. He made this argument
7 in his legal brief under Water Code section 1252.1.
8 However, the plain meaning of the language of this
9 statute does not exempt soil conservation practices from
10 permit and license requirements but simply establishes
11 the granting of a water right permitting water license
12 does not convey with it the ability to interfere with
13 upstream soil conservation practices, for those
14 practices themselves would not be appropriate -- an
15 appropriation of water for which a water right permit
16 and license is required.

17 I could go into more detail on this provision,
18 but I think that it's clear to the Board that the plain
19 meaning of the statute's intent was not to absolve
20 water erosion or soil conservation projects from the
21 need to obtain a water right permit and license.

22 --oOo--

23 I've included in my brief examples of Division
24 water right permits and licenses filed -- past ones --
25 the State Water Board has issued where reservoirs were

1 constructed from funds or with the technical assistance
2 of the Soil Conservation Service and local conservation
3 districts.

4 Furthermore, even if a reservoir were
5 constructed solely for soil conservation purposes, that
6 does not convey a right to continue to impound water and
7 to use it for stockwatering purposes without an
8 appropriative right to do so. This was established in
9 "Meridian Ltd v. City and County of San Francisco," 13
10 Cal.2d 424.

11 --oOo--

12 The impoundment of water. Another argument
13 that Mr. Kirk asserts is that the impoundment of water
14 in a reservoir is not a diversion. Again, this argument
15 is briefly discussed in my letter to Mr. Kirk. Water
16 Code section 5100, division (c), specifically includes
17 the impoundment of water in a reservoir within this
18 definition of "diversion."

19 The impoundment of water is an appropriation
20 because water is being captured in a reservoir, and by
21 so capturing that water it is no longer available for
22 downstream users and water rights holders and is an
23 appropriation.

24 Furthermore, there is a change of use here,
25 something that Mr. Kirk has asserted repeatedly that

1 there has been no change of use and we have no changed
2 conditions and the property owner has taken no action.
3 Again, here there is a change.

4 While the type of beneficial use of the water
5 before and after the construction of the reservoir is
6 still stockwatering, the uses change. And it has
7 changed in character because after the construction of
8 the reservoir water is now available year round to this
9 property for stockwatering and other beneficial uses, as
10 we've heard Mr. Dal Poggetto discuss. He's used the
11 reservoir for recreation, esthetics. Simply put, this
12 property would not have water year round. You could not
13 lease cattle year round on the property without the
14 presence of this reservoir.

15 Lastly, to address some of the -- well, one of
16 the other issues I'd like to address is the contention
17 that the actions of a local soil conservation district
18 is attributable to the State and it therefore exempts
19 the Stornetta Family Trust from obtaining the
20 appropriative water rights authority at the time of
21 construction and now in present day.

22 Local, state, and even federal agencies, with
23 very limited exception, are all subject to the State
24 Water Board's permit and licensing regulations. And
25 even if the Soil Conservation District were to have

1 taken ownership of the property and then constructed the
2 dam and the reservoir for soil conservation, water
3 storage and subsequent beneficial use such as
4 stockwatering, they still would have been required to
5 obtain an appropriative water right from the State Water
6 Board.

7 Moreover, Mr. Kirk's assertion that the
8 reservoir built by the Soil Conservation District had
9 made some sort of riparian right to the property owner
10 to continue the stockwatering purposes from that
11 reservoir without obtaining a permit and license, as he
12 has asserted in his brief, is not a tenable argument.

13 Soil conservation districts are local special
14 districts established through grass roots efforts of
15 landowners that petition county governments for special
16 district status similar to the water districts and
17 irrigation districts. The authorizing statute for soil
18 conservation districts is set out in Public Resource
19 Code section 9161 and forward.

20 If the State Water Board were to accept
21 Mr. Kirk's assertion, it would result in a significant
22 number of local entities being able to construct
23 diversion and storage facilities and obtain riparian
24 rights to water bodies created by such projects without
25 regard to the existing appropriative rights system.

1 current property owner is still required.

2 You know, we've established that the reservoir
3 is a diversion of water for which an appropriative water
4 right is required. Mr. Kirk has stated they're more
5 than willing to comply; they just don't want to pay any
6 liability. I understand that provision. And I also
7 understand the past involvement of soil conservation
8 districts and the Soil Conservation Service.

9 I do want to highlight that this Board and the
10 Legislature have both acknowledged that that was a
11 factor in the past. The Soil Conservation Service was
12 encouraging property owners to build facilities.
13 Historically, that assistance has been limited to
14 finance and technical assistance for construction. They
15 don't go in and take over a property.

16 But, regardless, the Legislature has
17 acknowledged that encouragement, and they've provided a
18 significant period of time in which property owners
19 could come into compliance for stockponds that were
20 constructed and such. That period vetted in 1998 under
21 the Water Code, and then the Board reacted with
22 additional leniency in providing an expedited
23 registration process for these types of facilities.

24 Dal Poggetto, as attorney for the trust, has
25 failed to comply with either one of those. This

1 violation has been ongoing and occurring for a long
2 period of time. There was opportunity to come into
3 compliance. I understand that nobody in this room was
4 responsible for that property at this time and nobody
5 can speak to what was done or not done, either at the
6 point of construction of the dam, during the grace
7 period where these types of stockponds could have
8 registered with the State Board and gotten their
9 priority date, the previous priority date; but what we
10 can speak to is that it has been an ongoing and existing
11 violation since the 1960s that Dal Poggetto -- the
12 Division took efforts and provided notice to Dal
13 Poggetto of violations. And those efforts took time,
14 money and staff effort.

15 There is an expedited process to come into
16 compliance, but no steps were taken until just recently
17 to avail themselves of that process and to register the
18 stockpond. So we find ourselves in the unenviable
19 position of exerting a lot of time and effort to bring a
20 property into compliance. And that effort is justified
21 by the State Water Board policy on North Coast streams.

22 We've established it as a priority; we've
23 identified that there are important cumulative impacts
24 for these types of facilities, and there's important
25 regulatory need to bring them into compliance with our

1 reporting structure and our registration structure so
2 that the State Board can regulate intelligently.

3 And that's where we are today. Thank you.

4 CO-HEARING OFFICER MOORE: Thank you,
5 Ms. West.

6 Would Dal Poggetto like to cross-examine the
7 rebuttal testimony?

8 MR. KIRK: That's all right, your Honor.
9 Really, all we want to do is close. Everybody has spent
10 a whole lot of time on this.

11 CO-HEARING OFFICER MOORE: Okay. I hear you.
12 I just want to afford you an opportunity to do rebuttal
13 testimony at this time.

14 MR. KIRK: What I can do is state that our
15 arguments have been that the Soil Conservation District
16 built this dam. There was no evidence other than that.
17 An appropriation of water behind that dam does not
18 require a permit.

19 Water Code section 1252.1 says:

20 The appropriator cannot take any action to prevent
21 or interfere with soil conservation practices above
22 the point of diversion in the watershed in which
23 such stream or other sources originate which
24 practices do not themselves constitute an
25 appropriation for which a permit is required by

1 this party.

2 Okay. That's fairly simple, but it's also
3 preliminary. As soon as you have a stockpond, then a
4 stockpond registration would be appropriate.

5 Our second argument is that we don't need to
6 file a Diversion and Use Statement because the stockpond
7 registration suffices for that purpose. And that,
8 again, is in Water Code section 5101(b), again exempting
9 livestock stockpond use.

10 We originally said we will register for a
11 stockpond. The reason we did not was because even if we
12 agreed to do that they would still slap us with the
13 \$22,800 fine. And that was never reduced. That kind of
14 leverage put on a citizen by the State is unfair; it's
15 inappropriate.

16 If in fact there was proof that we had
17 conversations, if we had notice, if we had any
18 communications prior to the levying of the \$22,800 fine,
19 then the State's case would be better taken. But at
20 this point in time all we have is two or three
21 negotiations where we said we'll do the stockpond
22 registration; not a problem, but reduce your fine, and
23 we could never reach that agreement.

24 The State's enforcement powers have to be
25 intelligent; they have to be informed, and in this case

1 they were not.

2 CO-HEARING OFFICER MOORE: That's your closing
3 statement. And you have the opportunity to
4 cross-examine the rebuttal statement.

5 Do you have any questions for Dal Poggetto?

6 MS. WEST: No. I believe that I addressed
7 both of those arguments earlier. The registration of a
8 stockpond does not exempt a statement of filing until
9 there is actual registration, and that prior diversions
10 would not be subject to an exemption.

11 And, in addition, a provision concerning soil
12 conservation practices is, again, not binding on any
13 relevancy actions here. The intent behind that
14 provision is simply to put the appropriators on notice
15 that they don't have a right to interfere with upstream
16 soil conservation projects that aren't an appropriation
17 of water. Again, it's not a situation here that's
18 relevant here.

19 CO-HEARING OFFICER MOORE: Okay. Any
20 questions from staff or our Co-Hearing Officer?

21 Okay. So, as I mentioned before, we're not
22 going to have closing statements today. Closing briefs
23 are due 30 days following the date the transcripts are
24 released. Ms. Toliver, I'm not sure what time frame you
25 would be -- or if you're at liberty to predict.

1 THE REPORTER: I can't tell you right now.

2 CO-HEARING OFFICER MOORE: Probably on the
3 order of weeks; right?

4 THE REPORTER: Yes.

5 CO-HEARING OFFICER MOORE: So we'll
6 encourage -- oh. Make sure we have each other's contact
7 information so we can get them in a timely manner.

8 So closing briefs are due 30 days following
9 the date the transcripts are released and are limited to
10 a maximum of ten pages of double-spaced, 12-point Arial
11 font. That's the standardization.

12 The court reporter estimates -- or will, you
13 know, provide an estimate of the amount of time after
14 this hearing; and at this point the State Water Board
15 will take this matter under submission. Board staff
16 will prepare a proposed order for consideration by the
17 full Board. The participants in this hearing will be
18 sent notice of the Board's proposed order in this matter
19 and the date of the Board meeting at which the proposed
20 order will be considered.

21 After the State Board adopts an order, at that
22 point any interested person has 30 days within which to
23 submit a written petition for reconsideration by the
24 State Board.

25 I want to thank you all for your interest and

1 cooperation and participation in this hearing and for
2 traveling to attend and submitting your true and
3 affirmed testimony.

4 And, you know, at this point I declare the
5 hearing adjourned. And have a nice day.

6 MR. KIRK: Thanks everybody.

7 (The hearing was adjourned at 12:01 p.m.)

8 --oOo--

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1 REPORTER'S CERTIFICATE

2
3 I, Jacqueline Toliver, a Certified Shorthand
4 Reporter for the State of California, do hereby certify:

5 That I am disinterested person herein; that
6 the foregoing State Water Resources Control Board
7 Hearing was reported in shorthand by me, a duly
8 qualified Certified Shorthand Reporter, and thereafter
9 transcribed into typewritten form by means of
10 computer-aided transcription.

11 I further certify that I am not of counsel
12 or attorney for any of the parties to said hearing or in
13 any way interested in the outcome of said hearing.

14 IN WITNESS WHEREOF, I have hereunto set my
15 hand this 22nd day of September 2014.

16
17
18
19
20 _____
21 JACQUELINE TOLIVER
22 Certified Shorthand Reporter
23 License No. 4808
24
25