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11 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of:)

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

14 **Prosecution Team's**
Prehearing Brief

15 **I. INTRODUCTION**

16 The State Water Resources Control Board (State Water Board), Division of Water Rights
17 (Division), Prosecution Team (Prosecution Team) submits this prehearing brief to provide legal
18 arguments in support of Enforcement Action ENF00128, administrative civil liability (ACL)
19 complaint and proposed cease and desist order (CDO) (as amended) issued to Stornetta Family
20 Trust (Stornetta) Stornetta Family Trust (Stornetta) and Mr. Newton Dal Poggetto (Trustees)
21 (referred to collectively hereafter as Diverters). Specifically, this prehearing brief addresses
22 assertions made by the Diverters that the reservoir at issue was constructed by the Soil
23 Conservation Service for soil conservation purposes.

24 **II. DISCUSSION**

25 **DIVERTERS' RESERVIOR IS AN UNAUTHORIZED DIVERSION AND USE OF WATER**
26 **FOR WHICH THE STATE WATER BOARD HAS THE AUTHORITY TO IMPOSE AN**
26 **ADMINISTRATIVE CIVIL LIABILY AND ISSUE A CEASE AND DESIST ORDER**

27 The onstream reservoir located on APN 047-070-018 (Property) collects water during the
28 winter and stores it into the summer. (WR-3, Testimony of Kevin Porzio, p. 3.) The reservoir

1 provides water during times when water would not otherwise be available to the Diverters and that
2 water is available for, and has been used for, stock watering purposes. (WR-3, Testimony of
3 Kevin Porzio, p. 3.) The Diverters do not have an appropriative water right for the reservoir. (WR-
4 11, Administrative Civil Liability Complaint, p. 2.) While the Diverters have a riparian right to
5 surface streams that run through the Property, a riparian right to use water in a stream that abuts
6 the riparian property does not include the right to store flow for later use or the right to flow that
7 which is not naturally available in the stream. (People v. Shirokow (1980) 26 Cal.3d 301; Lux v.
8 Haggin (1886) 69 Cal. 255.)

9 Furthermore, the collection of water to an on-stream reservoir is a diversion explicitly
10 included in the definition of “diversion” provided in Water Code section 5100, subdivision (c),
11 which states:

12 *“Diversion” means taking water by gravity or pumping from a surface stream*
13 *or subterranean stream flowing through a known and definite channel, or*
14 *other body of surface water, into a canal, pipeline, or other conduit, **and***
15 ***includes impoundment of water in a reservoir.** (Emphasis Added)*

16 The Diverters, as the parties that own and administer the Property, are diverting and using water
17 outside of a riparian right, and without the necessary authorization to appropriate water.

18 The State Water Board has authority to impose administrative liability for the unauthorized
19 diversion or use of water and can issue a cease and desist order to prevent future unauthorized
20 diversion or use. Water Code section 1052, subdivision (a), provides:

21 *The diversion or use of water subject to [division2 of the Water Code*
22 *(commencing with section 100) other than as authorized in [division 2] is*
23 *a trespass.*

24 Water Code section 1052, subdivision (b), authorizes the State Water Board to administratively
25 impose civil liability in an amount to exceed \$500 for each day that such a trespass occurs.

26 Furthermore, Water Code section 1831, subdivision (d), authorizes that State Water Board to
27 issue a Cease and Desist Order when “any person is violation or threatening to violate”
28 prohibitions against the unauthorized diversion or use provided in Water Code section 1052.

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2 **INVOLVEMENT OF THE SOIL CONSERVATION DISTRICT DOES NOT ABSOLVE**
3 **DIVERTERS OF THE RESPONSIBILITY TO COMPLY WITH WATER RIGHTS LAWS**

4 During the course of the investigation of the reservoir, the Diverters have asserted that the
5 reservoir was constructed by the Soil Conservation Service for soil conservation purposes. While
6 the Prosecution Team does not know the extent of the involvement of the Soil Conservation
7 Service in the construction of the reservoir, it is clear that the owner of the property at the time the
8 reservoir was constructed would have, at a minimum, had to consent to the construction of the
9 reservoir on the Property. The Soil Conservation District did not assume ownership of the
10 Property or the reservoir constructed thereon. It is more likely, and in keeping with the historic
11 role of soil conservation districts, that the owner of the Property applied to the local soil
12 conservation district to receive funds and/or technical support in order to construct the reservoir.
13 (WR-23, *Getting to the Roots* pp. 26, 27; WR-18, email from Jim Chapman with National Resource
14 Conservation Service.) The U.S. Soil Conservation Service and local conservation districts
15 provided financial and technical assistance services to property owners so that they could make
16 improvements to their property and changes to their land management practices; such
17 improvements included the construction of livestock ponds. (WR-23, *Getting to the Roots*, pp. 26,
18 27; WR-23, Natural Resources Conservation Service Conservation Practice Standard 378, p. 387-
19 2; WR-21, National Resource Conservation Service Engineering Manual, Part 505.14; WR-18,
20 email from Jim Chapman with National Resource Conservation Service.) The owner of the
21 property on which an improvement, such as a reservoir, is constructed is responsible for having or
22 obtaining the appropriate water rights. (WR-19, Agriculture Handbook No. 387, p. 55; WR-20
23 National Resource Conservation Service Engineering Manual Part 505.14; WR-18 email from Jim
24 Chapman with National Resource Conservation Service.) The fact that the Soil Conservation
25 Service or local conservation district funded, designed, and/or constructed the diversion facilities
26 does not absolve the property owner of the responsibility to comply with water rights laws. (Id.)

27 Furthermore, it is difficult to understand why a reservoir would be designed to hold and
28 store water year round strictly for soil conservation purposes. Assuming however that the

1 assertion is correct, the construction of the reservoir for soil conservation purposes (presumably to
2 slow flows and prevent erosion and scouring down-stream) does not convey a right for Diverters
3 to continue to store and then use the waters captured by the reservoir during a season when
4 water would not otherwise be available. (Meridian, Ltd. v. City and County of San Francisco, 13.
5 Cal.2d 424, 449-450.) Soil conservation practices that involve the appropriation of water, such as
6 the construction of an onstream reservoir, are subject to Water Right permit and license
7 requirements. The Division's water rights permit and license files and past State Water Board
8 decisions contain numerous examples of permits and licenses that have been issued for diversion
9 facilities that were constructed by funds from, and with the technical assistance of, the Soil
10 Conservation Service and local conservation districts. (WR-22, State Water Board Decision Nos.
11 930, 936, 1394.)

12 III. CONCLUSION

13 The State Water Board has authority under Water Code sections 1052 and 1831 to impose
14 civil liability for the Diverters past unauthorized diversion and use of water and to issue a cease
15 and desist order to prevent future unauthorized diversion and use. The fact that the reservoir in
16 question may have been constructed by or with assistance from the Soil Conservation Service
17 does not absolve the Diverters of the legal obligation to comply with water rights law nor does it
18 provide legal shelter from the imposition of liability for past violations, nor the issuance of a cease
19 and desist order to ensure future compliance.

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21 Respectfully submitted,

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27 Date: July 9, 2014