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16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA
18

19 **UNITED STATES OF AMERICA,**

20 Plaintiff,

21 v.

22 **STATE OF CALIFORNIA; and**
23 **CALIFORNIA STATE LANDS**
24 **COMMISSION, an agency of the State of**
California,

25 Defendants.
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27
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No. 2:18-cv-00721 WBS DB

STIPULATED PROTECTIVE ORDER

1 1. PURPOSES AND LIMITATIONS

2 Discovery in this action, including the Parties' responses to written discovery and
3 accompanying document production and anticipated depositions, may involve production of
4 confidential, proprietary, for official use only, personally identifiable, or other private or legally
5 protected information for which special protection may be warranted. Accordingly, the Parties
6 hereby stipulate to and petition the Court to enter the following Stipulated Protective Order. The
7 Parties agree that this Stipulated Protective Order is consistent with Local Rule 141.1. It does not
8 confer blanket protection on all disclosures or responses to discovery, the protection it affords
9 from public disclosure and use extends only to the limited information or items that are entitled to
10 confidential treatment under applicable legal principles, and it does not presumptively entitle
11 parties to file Confidential Information under seal.

12 2. DEFINITIONS

13 2.1 "Confidential Information": information (regardless of how it is generated, stored or
14 maintained) or tangible things that a Party in its reasonable and good faith judgment determines
15 includes confidential, proprietary, or other information for which special protection from public
16 disclosure is warranted and justified under Federal Rule of Civil Procedure 26(c); information
17 that is publicly available is not considered "Confidential Information."

18 2.2 "Party": any party to this action, including all of its officers, employees, and counsel.

19 3. SCOPE

20 The protections afforded by this Stipulated Protective Order cover not only those portions of
21 any documents or other materials containing Confidential Information (as defined above), but
22 also (a) any information copied or extracted from those portions of any documents or other
23 materials containing Confidential Information; (b) all copies, excerpts, summaries, or
24 compilations of Confidential Information; and (c) any testimony, conversations, or presentations
25 by parties or their legal counsel that might contain or reveal Confidential Information.

26 4. ACCESS TO AND USE OF CONFIDENTIAL INFORMATION

27 4.1. Basic Principles. A receiving party may use Confidential Information that is disclosed or
28 produced by another party or by a non-party in connection with this case only for prosecuting,

1 defending, or attempting to settle this litigation. Confidential Information may be disclosed only
2 to the categories of persons and under the conditions described in this Stipulated Protective Order.
3 Confidential Information must be stored and maintained by a receiving party at a location and in a
4 secure manner that ensures that access is limited to the persons authorized under this Stipulated
5 Protective Order.

6 4.2. Disclosure of “Confidential” Information or Items. Unless otherwise ordered by the Court
7 or permitted in writing by the designating party, a receiving party may disclose Confidential
8 Information only to:

9 (a) Counsel of Record in this action and any support staff and other employees with an
10 appropriate need to know. If any Counsel of Record, support staff, or other employees cease to
11 represent a party in this action for any reason, such persons shall no longer have access or be
12 authorized to receive any Confidential Information;

13 (b) Parties in this action, but only to the extent that such disclosure is reasonably deemed
14 necessary by such Party’s counsel for the conduct of this litigation.

15 (c) Any experts or consultants retained for this action by counsel to a party or support staff or
16 employees for such an expert or consultant with an appropriate need to know;

17 (d) Any other person mutually authorized by the Parties’ counsel to examine such
18 information;

19 (e) During their depositions, witnesses in this action with an appropriate need to know. Pages
20 of transcribed deposition testimony or exhibits to depositions that reveal Confidential Information
21 must be marked by the court reporter and may not be disclosed to anyone except as permitted
22 under this Stipulated Protective Order;

23 (f) The author or recipient of a document containing the Confidential Information or a
24 custodial or other person who otherwise was legally authorized to possess the information;

25 (g) Companies or contractors providing copying, imaging, e-discovery, or document
26 management services retained by counsel to assist in the duplication or management of material
27 containing or constituting Confidential Information, provided that counsel for the party retaining
28 each such company instructs the company not to disclose any Confidential Information to third

1 parties and to immediately return all originals and copies of any Confidential Material upon the
2 completion of the company's services; and

3 (h) The Court and its personnel, including court reporters.

4 All persons listed in subparagraphs 4.2(c)-(g) to whom Confidential Information is disclosed
5 shall first be required to read the terms of this Stipulated Protective Order and sign a copy of the
6 Acknowledgment of Protective Order and Agreement to Be Bound form, attached hereto as
7 EXHIBIT A. Counsel for the party disclosing Confidential Information to such persons shall
8 retain the original signed Acknowledgment of Protective Order and Agreement to be Bound form
9 and shall provide a copy to counsel for the other Parties or to the signatory upon request.

10 4.3. Filing Confidential Information. A Party may not file in the public record in this action
11 any Confidential Information without first obtaining written permission from the designating
12 party or a court order, secured after appropriate notice to all interested persons. A party seeking to
13 file under seal any Confidential Information must comply with Local Rule 141. Confidential
14 Information may be filed under seal only pursuant to a court order that makes specific findings
15 that the relevant legal standards have been met. See *Kamakana v. City and County of Honolulu*,
16 447 F.3d 1172, 1176 (9th Cir. 2006), *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678-679 (9th
17 Cir. 2010).

18 If a receiving party's request to file designated material under seal pursuant to Local Rule 141
19 is denied by the Court, then the receiving party may file the material in the public record unless
20 (1) the designating party seeks reconsideration within four days of the denial, or (2) as otherwise
21 instructed by the Court.

22 4.4. Filing Motions, Oppositions, and Replies Under Seal. In the event that either party files a
23 motion, opposition, or reply under seal, the provisions of Local Rule 141 shall apply.

24 4.5. Use of Information Subject to Stipulated Protective Order. Use of any information or
25 documents subject to this Stipulated Protective Order, including all information within the scope
26 of Section 3, shall be restricted to use in this litigation (subject to the applicable rules of evidence
27 and subject to the confidentiality of such materials being maintained), and shall not be used by
28 anyone subject to the terms of this Stipulated Protective Order for any purpose outside of this

1 litigation or in any other proceeding between the Parties. Confidential Information is protected
2 from disclosure in response to requests under the Freedom of Information Act or the California
3 Public Records Act. Nothing in this Stipulated Protective Order shall limit or in any way restrict
4 the use of information obtained outside of this litigation that would merit designation of
5 Confidential Information had it been disclosed in discovery in this litigation.

6 5.1 DESIGNATION OF CONFIDENTIAL INFORMATION

7 5.1. Exercise of Restraint and Care in Designating Information for Protection. Each party or
8 non-party that designates information or items for protection as Confidential Information under
9 this Stipulated Protective Order must take care to limit any such designation to specific material
10 that qualifies under the appropriate standards. The designating party must designate for protection
11 as Confidential Information only those parts of material, documents, items, or oral or written
12 communications that qualify for such protection, so that other portions of the material,
13 documents, items, or communications for which protection is not warranted are not swept
14 unjustifiably within the ambit of this Stipulated Protective Order. Mass, indiscriminate, or
15 routinized designations are prohibited. Designations that are shown to be clearly unjustified or
16 that have been made for an improper purpose (e.g., to unnecessarily encumber or delay the case
17 development process or to impose unnecessary expenses and burdens on other parties) may
18 expose the designating party to sanctions. If it comes to a designating party's attention that
19 information or items that it designated for protection as Confidential Information do not qualify
20 for such protection, the designating party must promptly notify all other parties that it is
21 withdrawing the designation.

22 5.2. Manner and Timing of Designations. Except as otherwise provided in this Stipulated
23 Protective Order or as otherwise stipulated by the Parties or ordered by the Court, disclosure of
24 discovery material that qualifies for protection as Confidential Information under this Stipulated
25 Protective Order must be clearly so designated before or when the material is disclosed or
26 produced.

27 (a) Information in documentary form (e.g., paper or electronic documents and deposition
28 exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings): the

1 designating party must affix the word “CONFIDENTIAL” to each page that contains
2 Confidential Information. If only a portion of the material on a page qualifies for such protection,
3 the designating party also must clearly identify the protected portion(s) (e.g., by making
4 appropriate markings in the margins).

5 (b) Testimony given in deposition or in other pretrial or trial proceedings: the designating
6 party must identify on the record, during the deposition, hearing, or other proceeding, all
7 protected testimony, without prejudice to their right to so designate other testimony after
8 reviewing the transcript. Any party or non-party may, within ten days after receiving a deposition
9 transcript, designate portions of the transcript, or exhibits thereto, as Confidential Information.

10 (c) Other tangible items: the designating party must affix in a prominent place on the exterior
11 of the container or containers in which the item is stored the word “CONFIDENTIAL.” If only a
12 portion or portions of the information or item warrant protection, the designating party, to the
13 extent practicable, shall identify the protected portion(s).

14 5.3 Inadvertent Failures to Designate. If a party inadvertently fails to designate material as
15 Confidential Information at the time of production or disclosure, it shall take reasonable steps to
16 notify all receiving parties of its failure within five business days of discovering this inadvertent
17 failure. The designating party shall promptly supply all receiving parties with new copies of any
18 documents bearing corrected confidentiality designations, and the receiving parties shall (at the
19 option of the designating party) return to the designating party or destroy the original materials,
20 and in the latter case certify in writing to the designating party that such information has been
21 destroyed.

22 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

23 6.1. Timing of Challenges. Any party or non-party may challenge the designation of
24 information or materials as Confidential Information at any time. Unless a prompt challenge to a
25 designating party’s confidentiality designation is necessary to avoid foreseeable and substantial
26 harm, unnecessary economic burdens, or a significant disruption or delay of the litigation, a party
27 does not waive its right to challenge a confidentiality designation by electing not to mount a
28 challenge promptly after the original designation is disclosed.

1 6.2. Challenge to Confidentiality Designation. The Parties reserve the right to file a motion to
2 unseal or unredact if either party believes that documents filed under seal or redacted: (a) do not
3 contain Confidential Information defined in Section 2 of this Stipulated Protective Order and/or
4 do not meet the applicable legal standard for sealing, and therefore should be neither sealed nor
5 redacted; or (b) do contain Confidential Information identified in Section 2 of this Stipulated
6 Order, but should be redacted rather than sealed, or redacted differently. The parties shall make a
7 good faith effort to meet and confer regarding any such proposed motion.

8 6.3. Meet and Confer. The parties must make every attempt to resolve any dispute regarding
9 confidential designations without court involvement. Any motion regarding confidential
10 designations or for a protective order must include a certification, in the motion or in a declaration
11 or affidavit, that the movant has engaged in a good faith meet and confer conference with other
12 affected parties in an effort to resolve the dispute without court action. The certification must list
13 the date, manner, and participants to the conference. A good faith effort to confer requires a face-
14 to-face meeting or a telephone conference.

15 6.4. Judicial Intervention. If the parties cannot resolve a challenge without court intervention,
16 the following procedure shall be used: the party opposing designation of the material as
17 Confidential Information may make an application to this Court (to be lodged conditionally under
18 seal if necessary) for an Order that the material specifically identified not be treated as
19 Confidential Information. The designated material shall be treated as Confidential Information
20 until the issue is resolved by Order of this Court or by agreement of the Parties.

21 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER 22 LITIGATION

23 If a receiving party is served with a subpoena or a court order issued in other litigation that
24 compels disclosure of any information or items designated in this action as “CONFIDENTIAL,”
25 that party must:

26 (a) Promptly notify the designating party or parties in writing and include a copy of the
27 subpoena or court order so that the designating party has sufficient time to commence an action in
28 the appropriate court to enjoin disclosure or seek other formal or informal relief.

1 (b) Promptly notify the party who caused the subpoena or order to issue in the other litigation
2 that some or all of the material covered by the subpoena or order is subject to this Stipulated
3 Protective Order and provide a copy of this Stipulated Protective Order with that notification;

4 (c) Cooperate, as permitted by applicable law, with respect to all reasonable procedures
5 sought to be pursued by the designating party or parties whose Confidential Information may be
6 affected, including objecting and seeking a protective order in the litigation in which the
7 subpoena or order issued; and

8 (d) Decline to produce the Confidential Information if an objection has been made until the
9 objection has been resolved unless disclosure, dissemination, or transmission is required by law
10 or court order. Any person, entity or organization who receives “Confidential Information” shall
11 abide by all terms and conditions set forth herein unless otherwise permitted by court order.

12 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

13 If a receiving party learns that, by inadvertence or otherwise, it has disclosed Confidential
14 Information to any person or in any circumstances not authorized under this Stipulated Protective
15 Order, the receiving party must immediately (a) notify in writing the designating party of the
16 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
17 protected material, (c) inform the person or persons to whom unauthorized disclosures were made
18 of all the terms of this Stipulated Protective Order, and (d) request that such person or persons
19 execute the “Acknowledgement of Protective Order and Agreement to Be Bound” that is attached
20 hereto as Exhibit A. In the event that such person or persons do not execute the
21 “Acknowledgement of Protective Order and Agreement to Be Bound” as requested, the receiving
22 party and/or designating party may apply to the Court for appropriate relief to remedy the
23 unauthorized disclosure.

24 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED 25 MATERIAL

26 When a designating party gives notice to receiving parties that certain inadvertently produced
27 material is subject to a claim of privilege or other protection, the obligations of the receiving
28 parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B).

1 10. USE OF CONFIDENTIAL MATERIAL

2 The limitations and restrictions on “Confidential Information” in this Stipulated Protective
3 Order shall not apply with respect to information:

4 (a) If it is publicly available information, whether it becomes public before or after production
5 in this litigation, as a result of publication not involving a violation of this Stipulated Protective
6 Order.

7 (b) If the designating party is authorized to allow the nonconfidential treatment of the
8 information and releases any restrictions on confidentiality; this provision authorizes disclosure
9 by the receiving party only if the designating party’s counsel has stated in writing to the other
10 party that the information is no longer confidential.

11 (c) If the parties have a dispute arising from the use of public information, the parties agree to
12 resolve the dispute pursuant to Section 6 of this Stipulated Order.

13 11. TERMINATION OF LITIGATION AND RETURN OR DESTRUCTION OF
14 DOCUMENTS

15 Anyone to whom Confidential Information has been disclosed in accordance with Section 4 of
16 this Stipulated Protective Order shall maintain Confidential Information pursuant to the terms of
17 this Protective Order, subject to further order by this Court (this provision does not apply to
18 Confidential Information disclosed to and maintained by the Court and its personnel, including
19 court reporters).

20 Within ten (10) days after the final disposition of this action, including any and all appeals, all
21 Confidential Information and copies thereof shall be returned to the party who produced or
22 disclosed it or destroyed, at the option of the party who produced or disclosed it, except as this
23 Court may otherwise order. If destroyed, the receiving party shall certify in writing to the
24 producing party that such information has been destroyed.

25 Notwithstanding this provision, counsel of record may maintain a complete set of written
26 discovery responses and deposition transcripts for their records through the final disposition of
27 this action, including any and all appeals or the time during which an appeal is possible, and for a
28 period of five (5) years after resolution of this case or after any judgment becomes final,

1 whichever is later, provided that such counsel maintain the confidential nature of these materials,
2 as set forth in this Stipulated Protective Order. Within ten (10) days after this time period, counsel
3 of record shall destroy all Confidential Information and copies thereof, except as this Court may
4 otherwise order. The receiving party shall certify in writing to the producing party that such
5 information has been destroyed. The confidentiality obligations imposed by this agreement shall
6 remain in effect until a designating party agrees otherwise in writing or a court orders otherwise.
7 Nothing in this Section shall require counsel for either of the parties to destroy any materials that
8 constitute such counsel's attorney work product that contains or references Confidential
9 Information.

10 12. MISCELLANEOUS

11 12.1. Enforceability Upon Signing. By signing the Stipulated Protective Order, the parties
12 agree to be bound by its terms unless and until those terms are modified by order of the Court.

13 12.2 Right to Further Relief. Nothing in this Order abridges the right of any party to seek its
14 modification or amendment by the Court or by further stipulation of the Parties in the future.

15 12.3. Right to Assert Other Objections. By stipulating to entry of this Order, no party waives
16 any right it otherwise would have to object to disclosing or producing any information or item on
17 any ground not addressed in this Order, nor waives any claim or defense in this case. Similarly,
18 no party waives any right to object on any ground to use in evidence of any of the material
19 covered by this Order, and nothing herein shall be construed to affect in any way the evidentiary
20 admissibility of any document, testimony, or other matter at any proceeding related to this Action.

21 12.4. This order shall constitute a court order authorizing disclosure of information designated
22 as confidential, subject to the protections described herein, for purposes of the Privacy Act,
23 5 U.S.C. § 552a(b)(11) (authorizing disclosure pursuant to the order of a court of competent
24 jurisdiction) and any other state or federal statute or regulation that provides for disclosure
25 pursuant to court order.

26 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.
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1 Dated: July 27, 2018

Respectfully submitted,

2 XAVIER BECERRA
3 Attorney General of California
4 BENJAMIN M. GLICKMAN
5 Supervising Deputy Attorney General

6 */s/ John W. Killeen*
7 JOHN W. KILLEEN
8 Deputy Attorney General
9 *Attorneys for the State Defendants*

10 MCGREGOR W. SCOTT
11 United States Attorney
12 DAVID T. SHELLY
13 Civil Chief, Assistant United States Attorney

14 */s/ Stacy Stoller (signature used by*
15 *permission granted July 27, 2018)*
16 JEFFREY H. WOOD
17 Acting Assistant Attorney General
18 ERIC GRANT
19 Deputy Assistant Attorney General
20 JUSTIN HEMINGER
21 STACY STOLLER
22 PETER J. MCVEIGH
23 Attorneys
24 Environment and Natural Resources Division
25 U.S. Department of Justice
26 *Attorneys for Plaintiff, United States of*
27 *America*

18
19 ORDER

20 Pursuant to the parties' stipulation, IT IS SO ORDERED.

21 IT IS FURTHER ORDERED THAT:

- 22 1. Requests to seal documents shall be made by motion before the same judge who will
23 decide the matter related to that request to seal.
- 24 2. The designation of documents (including transcripts of testimony) as confidential
25 pursuant to this order does not automatically entitle the parties to file such a document with the
26 court under seal. Parties are advised that any request to seal documents in this district is governed
27 by Local Rule 141. In brief, Local Rule 141 provides that documents may only be sealed by a
28 written order of the court after a specific request to seal has been made. L.R. 141(a). However, a

1 mere request to seal is not enough under the local rules. In particular, Local Rule 141(b) requires
2 that “[t]he ‘Request to Seal Documents’ shall set forth the statutory or other authority for sealing,
3 the requested duration, the identity, by name or category, of persons to be permitted access to the
4 document, and all relevant information.” L.R. 141(b).

5 3. A request to seal material must normally meet the high threshold of showing that
6 “compelling reasons” support secrecy; however, where the material is, at most, “tangentially
7 related” to the merits of a case, the request to seal may be granted on a showing of “good cause.”
8 Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096-1102 (9th Cir. 2016);
9 Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178-80 (9th Cir. 2006).

10 4. Nothing in this order shall limit the testimony of parties or non-parties, or the use of
11 certain documents, at any court hearing or trial – such determinations will only be made by the
12 court at the hearing or trial, or upon an appropriate motion.

13 5. With respect to motions regarding any disputes concerning this protective order which
14 the parties cannot informally resolve, the parties shall follow the procedures outlined in Local
15 Rule 251. Absent a showing of good cause, the court will not hear discovery disputes on an ex
16 parte basis or on shortened time.

17 6. The parties may not modify the terms of this Protective Order without the court’s
18 approval. If the parties agree to a potential modification, they shall submit a stipulation and
19 proposed order for the court’s consideration.

20 7. Pursuant to Local Rule 141.1(f), the court will not retain jurisdiction over enforcement
21 of the terms of this Protective Order after the action is terminated.

22 8. Any provision in the parties’ stipulation that is in conflict with anything in this order is
23 hereby DISAPPROVED.

24 Dated: August 8, 2018

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28 DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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EXHIBIT A

ACKNOWLEDGMENT OF PROTECTIVE ORDER AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Eastern District of California on _____ in the case of *United States v. State of California, et al.*, No. 2:18-CV-00721-WBS-CV. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Stipulated Protective Order. I further agree to submit to the jurisdiction of the United States District Court for the Eastern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature:
