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19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA**
 21 **OAKLAND DIVISION**

22	_____)	
23	THE UNITED STATES OF AMERICA,)	Civil Action No. 4-09-CV-00437-PJH
24	Plaintiff,)	
25	v.)	STIPULATED AGREEMENT AND
26	THE CALIFORNIA DEPARTMENT OF)	CONFIDENTIALITY ORDER
27	TRANSPORTATION,)	REGARDING SETTLEMENT
28	Defendant.)	NEGOTIATIONS AND MEDIATION
	_____)	

29 WHEREAS, the United States and the California Department of Transportation
 30 (hereinafter "the Parties") have and will continue to engage in settlement negotiations of the
 31 issues and disputes that gave rise to the claims in this action (hereinafter "Subject Claims"),
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1 including but not limited to mediation of the Subject Claims pursuant to the ADR Local Rules
2 for the Northern District of California.

3 WHEREAS, the Parties recognize that meaningful settlement negotiations require
4 exchanges of information and opinions, offers of settlement or compromise, and other
5 communications between them.

6 WHEREAS, the Parties agree that maintaining the confidentiality of Settlement
7 Communications (as defined herein) generally facilitates the free exchange of information and
8 enhances the likelihood of successful negotiations.

9 ACCORDINGLY, the Parties wish to preserve and provide for the confidentiality of
10 Settlement Communications through this Stipulated Agreement and Confidentiality Order
11 (hereinafter "Stipulated Order").

12 NOW THEREFORE, the Parties do hereby stipulate and agree, and the Court, for good
13 cause appearing, pursuant to its inherent authority, Fed. R. Civ. P 26(c) and Fed. R. Evid. 502,
14 does hereby ORDER as follows:

15 1. For purposes of this Stipulated Order "Settlement Communications" means:

- 16 (a) oral settlement discussions between the Parties concerning the Subject Claims;
17 (b) materials in written or electronic form that are: (i) prepared for purposes of
18 settlement negotiations with respect to the Subject Claims, (ii) exchanged by and
19 between the Parties in settlement negotiations with respect to the Subject Claims,
20 and (iii) labeled in accordance with Paragraph 2;
21 (c) oral communications concerning the Subject Claims between a Party or the
22 Parties and any individual or individuals selected by the Parties or assigned by the
23 Court to mediate or otherwise facilitate negotiation and settlement of the Subject
24 Claims; and
25 (d) materials in written or electronic form that are: (i) prepared for purposes of
26 settlement negotiations with respect to the Subject Claims, (ii) provided by a
27 Party or the Parties to any individual or individuals selected by the Parties or
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1 assigned by the Court to mediate or otherwise facilitate negotiation and settlement
2 of the Subject Claims, and (iii) labeled in accordance with Paragraph 2.

3 2. All written or electronic materials that a Party wishes to have treated as Settlement
4 Communications under this Stipulated Order shall be conspicuously labeled "Settlement
5 Communication - Subject to Confidentiality Order," or with similar language, at the time of the
6 exchange; provided however, that the other Party may dispute, either at the time of designation
7 or later, that the written or electronic material is a Settlement Communication within the
8 meaning of this Stipulated Order.

9 3. Except as otherwise provided in this Stipulated Order, the Party receiving Settlement
10 Communications under this Stipulated Order shall keep them confidential and not disclose them
11 to persons or entities not a Party to this Stipulated Order. The Parties shall take all necessary and
12 appropriate measures to maintain the confidentiality of Settlement Communications and to retain
13 written or electronic material in a secure manner.

14 4. A representative of a Party who obtains Settlement Communications under this
15 Stipulated Order may share such information with those attorneys or employees of the receiving
16 Party who in the opinion of such Party are responsible for these settlement negotiations or for
17 whom such information relates to their official duties, provided that the Party proposing to share
18 the information takes adequate steps to ensure that those attorneys or employees of the Party who
19 receive the information comply with this Stipulated Order. A representative of a Party who
20 obtains Settlement Communications under this Agreement also may share such information with
21 those consultants and experts of the Party who are assisting in the negotiations and who, in the
22 opinion of such Party, require access, provided that any person with whom such information is
23 shared is specifically made aware of, and, prior to receiving the information, agrees in writing to
24 be bound by, the provisions of this Stipulated Order as if he/she were a Party.

25 5. Any Settlement Communication subject to this Stipulated Order may be disclosed to a
26 third party when the provider of the Settlement Communication has given express written
27 permission prior to such disclosure.

1 6. Information otherwise admissible or discoverable or subject to subpoena in any
2 proceeding shall not be rendered inadmissible or non-discoverable or not subject to subpoena
3 because of its use in settlement negotiations in this case. Further, this Stipulated Order shall not
4 prohibit the disclosure of oral communications or written or electronic material already lawfully
5 in the public domain, or developed or existing independent of the Parties' negotiations of the
6 Subject Claims.

7 7. In the event a Party receives a subpoena, court order, in the case of the United States,
8 a FOIA request for Settlement Communications, or in the case of the California Department of
9 Transportation, a California Public Records Act request for Settlement Communications, such
10 Party shall notify the other Party as soon as possible of the request and of that Party's proposed
11 response.

12 8. Pursuant to Fed. R. Evid. 502, the sharing of Settlement Communications by and
13 between the Parties shall not result in a waiver of any attorney-client privilege or attorney work
14 product protection applicable to the Settlement Communication prior to its exchange with the
15 other Party under this Stipulated Order. Further, any unauthorized disclosure of Settlement
16 Communications under this Stipulated Order shall not result in a waiver of any attorney-client
17 privilege or attorney work product protection applicable to the Settlement Communication prior
18 to its exchange with the other Party and unauthorized disclosure.

19 9. Nothing in this Stipulated Order limits the full application of Fed. R. Evid. 408 to
20 Settlement Communications.

21 10. Nothing in this Stipulated Order limits the right of the United States to take any
22 action to enforce the laws of the United States or to protect public health, safety, welfare or the
23 environment. Further, nothing in this Stipulated Order limits the United States from complying
24 with the requirements or established government policies of public participation regarding
25 settlement agreements.

26 11. Nothing in this Stipulated Order limits the right of the State of California to take any
27 action to enforce the laws of the State of California or to protect public health, safety, welfare or
28 the environment. Further, nothing in this Stipulated Order limits the State of California from

1 complying with the requirements or established government policies of public participation
2 regarding settlement agreements.

3 12. Either Party may terminate settlement negotiations at any time, and may apply to this
4 Court to terminate this Order; provided, however, that a Party shall notify the other Party in
5 writing of its intention to make application to the court to terminate this Stipulated Order at least
6 60 days in advance of making application; and provided further, that the confidentiality and
7 notice obligations imposed under this Stipulated Order shall remain in full force and effect,
8 without regard to whether this Stipulated Order has been terminated, with respect to all
9 Settlement Communications made or exchanged prior to the date of termination.

10 13. This Stipulated Order shall remain in effect upon the conclusion of these
11 proceedings.

12 14. The undersigned representative of each Party certifies that he or she is authorized to
13 enter into this Stipulated Agreement and to execute for and bind the Party whom he or she
14 represents.

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18 PURSUANT TO STIPULATION, IT IS SO ORDERED.
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22 Date: 9/21/09



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Respectfully submitted,

FOR PLAINTIFF THE UNITED STATES OF AMERICA:

Date: September 15, 2009

/s/ Davis H. Forsythe
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FOR DEFENDANT THE CALIFORNIA DEPARTMENT OF TRANSPORTATION:

Date: September 15, 2009

/s/ Janet Wong
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