

1 JOSEPH P. RUSSONIELLO (CSBN 44332)  
 United States Attorney  
 2 JOANN M. SWANSON (CSBN 88143)  
 Chief, Civil Division  
 3 CLAIRE T. CORMIER (CSBN 154364)  
 Assistant United States Attorney

\*\*E-FILED 12/30/2009\*\*

4 150 Almaden Boulevard, Suite 900  
 5 San Jose, California 95113  
 Telephone: (408) 535-5082  
 6 Facsimile: (408) 535-5081  
 7 claire.cormier@usdoj.gov

Attorneys for Defendant United States of America

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 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN JOSE DIVISION

12 GARY NIVA and ALINKA NIVA, as )  
 Administrators of the Estate of ERIC )  
 13 AUSTIN NIVA, deceased, )  
 14 Plaintiffs, )  
 15 v. )  
 16 UNITED STATES OF AMERICA, )  
 DEPARTMENT OF THE INTERIOR, )  
 17 BUREAU OF LAND MANAGEMENT, )  
 18 Defendants. )  
 19 \_\_\_\_\_ )

No. C 03-0908 RS

**STIPULATION FOR COMPROMISE  
 SETTLEMENT AND RELEASE OF  
 FEDERAL TORT CLAIMS ACT  
 CLAIMS PURSUANT TO 28 U.S.C. §  
 2677; ~~PROPOSED~~ ORDER**

20 It is hereby stipulated by and between each of the undersigned plaintiffs (meaning any  
 21 person -- other than the plaintiffs' counsel, and the defendant and its counsel -- signing this  
 22 agreement waiving and releasing claims or potential claims against the United States, whether  
 23 such person is a party to this civil action or not) and the United States of America, by and  
 24 through their respective attorneys, as follows:

25 1. The parties to this Stipulation do hereby agree to settle and compromise each and  
 26 every claim of any kind, whether known or unknown, arising directly or indirectly from the acts  
 27 or omissions that gave rise to the above-captioned action under the terms and conditions set forth  
 28 in this Stipulation.

STIPULATION OF SETTLEMENT; ~~PROPOSED~~ ORDER  
 C 03-0908 RS

1           2. This Stipulation is not, is in no way intended to be, and should not be construed as an  
2 admission of liability or fault on the part of the United States, its agents, servants, or employees,  
3 and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by  
4 all parties for the purpose of compromising disputed personal injury and wrongful death claims  
5 under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

6           3. In consideration for the plaintiffs' agreement to accept the terms and conditions of this  
7 settlement, the United States agrees to pay the cash sum of One million seven hundred fifty  
8 thousand Dollars (\$1,750,000.00) (hereinafter "Settlement Amount") based upon the terms and  
9 conditions set forth below in Paragraph 3.

10           a. Within three business days after counsel for the United States receives (1) this  
11 Stipulation signed by all parties to said document; (2) the Social Security numbers or tax  
12 identification numbers of plaintiffs and their attorneys; (3) a fully executed waiver and release  
13 from each State, private entity, and private individual for any and all past, present, and future  
14 claims or liens for reimbursement or payment any such State, private entity, or private individual  
15 may have arising from any benefits or payments made to or on behalf of Eric Niva by any such  
16 State, private entity, or private individual; (4) a fully executed waiver and release from any State,  
17 private entity, or private individual, who has or may have now or in the future a claim or cause of  
18 action against the United States (and its agents, servants, and employees) arising out of the  
19 subject matter of the above-captioned action, including any claim for contribution,  
20 indemnification, or subrogation; (6) a court order indicating that the Probate Court has approved  
21 this Stipulation; and (6) an authorization by the Attorney General or his designee to conclude  
22 negotiations and to consummate the settlement, counsel for the United States will send a formal  
23 request requesting that a check in the Settlement Amount of One million seven hundred fifty  
24 thousand Dollars (\$1,750,000.00) be issued made payable to Alinka and Gary Niva and their  
25 attorney John C. Stein. The check for the Settlement Amount will be mailed to the United States  
26 Attorney for the Northern District of California to hold until such time as the plaintiffs' counsel  
27 have filed a motion or stipulation with the United States District Court for the Northern District  
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1 of California to dismiss this action in its entirety with prejudice, with each party to bear its own  
2 costs, expenses, and fees, including any costs, expenses, and fees incurred in obtaining court  
3 approval of the settlement.

4           b. The parties agree that any attorneys' fees owed by the plaintiffs in their Federal  
5 Tort Claims Act suit against the United States shall not exceed 25% of the Settlement Amount.  
6 28 U.S.C. § 2678. The parties further agree that any such attorneys' fees, along with any costs  
7 and expenses of said action against the United States and any costs, expenses, or fees associated  
8 with obtaining any court approval of this settlement, shall be paid out of the Settlement Amount  
9 paid pursuant to this Paragraph 3, and not in addition thereto. The parties agree that any fees for  
10 legal services incurred in this action, and in any court proceedings reviewing the settlement for  
11 approval purposes, shall be considered attorneys' fees and not costs, shall be subject to the  
12 provisions of 28 U.S.C. § 2678, and shall be paid out of the Settlement Amount and not in  
13 addition thereto.

14           c. The plaintiffs stipulate and agree that they are legally responsible for any and  
15 all past, present, and future liens or claims for payment or reimbursement, including any past,  
16 present, and future liens or claims for payment or reimbursement by any public entity or body,  
17 including any federal, State, or local government, including Medicare and Medicaid, any  
18 insurance company, and any private individual or entity, arising from the injuries that are the  
19 subject matter of this action. The plaintiffs stipulate and agree that they will satisfy or resolve  
20 any and all past, present, and future liens or claims for payment or reimbursement asserted by any  
21 public entity or body, including any federal, State, or local government, including Medicare and  
22 Medicaid, any insurance company, and any private individual or entity. The plaintiffs and their  
23 attorneys represent that, as of the date they sign this Stipulation, they have made a diligent search  
24 and effort to determine the identity of any individual or entity that has or may have a lien or  
25 claim for payment or reimbursement arising from the injuries that are the subject matter of this  
26 action. The plaintiffs and their attorneys agree that, no later than thirty (30) days from the date  
27 any past, present, or future lien or claim for payment or reimbursement is paid or resolved by the  
28 plaintiffs, they will provide to the United States evidence that said lien or claim has been

1 satisfied or resolved and that said lienholder or claimant has waived and released such lien or  
2 claim. The evidence required by the terms of this Paragraph may be satisfied by a letter from  
3 plaintiffs' attorneys representing to counsel for the United States that such lien or claim has been  
4 satisfied or resolved and that the lienholder or claimant has waived and released such lien and  
5 claim.

6 4. Plaintiffs and their guardians, heirs, executors, administrators, or assigns do hereby  
7 accept the Settlement Amount set forth above in Paragraph 3 in full settlement, satisfaction, and  
8 release of any and all claims, demands, rights, and causes of action of whatsoever kind and  
9 nature, including any claims for personal injury or wrongful death, any claims for pre-judgment  
10 or post-judgment interest, and any claims for fees, costs, and expenses, whether incurred in the  
11 district court, the court of appeals, or in any other court proceedings, arising from, and by reason  
12 of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, death,  
13 or damage to property, and the consequences thereof, which the plaintiffs or their heirs,  
14 executors, administrators, or assigns may have or hereafter acquire against the United States of  
15 America, the United States Department of the Interior, the Bureau of Land Management, or their  
16 agents, servants, and employees on account of the same subject matter that gave rise to the  
17 above-captioned action. Plaintiffs and their guardians, heirs, executors, administrators, and  
18 assigns do hereby further agree to reimburse, indemnify, and hold harmless the United States of  
19 America, the United States Department of the Interior, the Bureau of Land Management, and  
20 their agents, servants, and employees from and against any and all such claims, causes of action,  
21 liens, rights, or subrogated or contribution interests (whether such claims, causes of action, liens,  
22 right, subrogated interests, or contribution interests sound in tort, contract, or statutory) incident  
23 to, or resulting or arising from, the acts or omissions that gave rise to the above-captioned action,  
24 including claims or causes of action for the alleged personal injury or wrongful death of Eric  
25 Niva.

26 5. This compromise settlement is specifically subject to each of the following conditions:

27 a. The Attorney General or the Attorney General's designee must approve the  
28 terms of the settlement and authorize the attorney representing the United States to negotiate and

1 consummate a settlement for the amount and upon the terms and conditions agreed upon by the  
2 parties, as set forth in this Stipulation.

3           b. The parties must agree in writing to the terms, conditions, and requirements of  
4 this Stipulation. The parties stipulate and agree that the Stipulation and the compromise  
5 settlement are null and void in the event the parties cannot agree on the terms, conditions, and  
6 requirements of this Stipulation. The terms, conditions, and requirements of this Stipulation are  
7 not severable and the failure to agree, fulfill, or comply with any term, condition, or requirement  
8 renders the entire Stipulation and the compromise settlement null and void. The parties must  
9 agree to the terms, conditions, and requirements of the Stipulation before the attorneys for the  
10 United States will seek settlement authority from the Attorney General or the Attorney General's  
11 designee.

12           c. Plaintiffs must be alive at the time the check for the Settlement Amount is  
13 transmitted by counsel for the United States to plaintiffs' counsel. In the event of the death of  
14 any of the plaintiffs prior to the date of such transmission, the entire Stipulation and the  
15 compromise settlement are null and void.

16           d. In the event there are any currently known liens or claims for payment or  
17 reimbursement, including any liens or claims by Medicaid (or the State equivalent) or Medicare,  
18 and any claims by private entities or private individuals, arising out of the subject matter that  
19 gave rise to the above-captioned action, whether disputed by plaintiffs as legally valid or not,  
20 plaintiffs must obtain a release and waiver from any State, private entity, or private individual  
21 who claims to have such lien or claim. For purposes of this Stipulation, such lien or claim  
22 includes but is not limited to, a claim or cause of action for reimbursement for any payments  
23 made to or on behalf of the plaintiffs or Eric Niva or a claim or cause of action for  
24 reimbursement for any goods or services provided or furnished to or on behalf of the plaintiffs or  
25 Eric Niva. This condition is for the benefit of the United States exclusively. The United States  
26 will provide the form of Release and Waiver, or any changes to the form required by the United  
27 States, to be used by the plaintiffs in obtaining a Release and Waiver from any State, private  
28 entity, or private individual who claims to have such lien or claim. Prior to the attorney for the

1 United States seeking approval from the Attorney General or his designee, the plaintiffs must  
2 provide the United States with either (i) all such releases and waivers required by this paragraph,  
3 or (ii) a written representation by plaintiffs' counsel stating, after a diligent search of counsel's  
4 law firms' records and files and of the plaintiffs' personal records and files, that no such liens or  
5 claims are currently known to exist.

6 e. The United States District Court for the Northern District of California must  
7 agree to dismiss the district court action with prejudice, with each party bearing its own fees,  
8 costs, and expenses. The Order of dismissal of the above-referenced civil action must expressly  
9 provide that the District Court shall not retain jurisdiction over this action, the settlement, or any  
10 other matter pertaining to this action or the settlement.

11 f. The Probate Court for the State of California must issue an order approving this  
12 Stipulation.

13 6. The parties agree that, upon notice from the attorney for the United States that the  
14 United States Attorney's Office has received the check for the amount of the Settlement Amount,  
15 the plaintiffs' attorneys shall file with the United States District Court for the Northern District of  
16 California a dismissal of this action in its entirety with prejudice, with each party bearing its own  
17 costs, expenses, and fees. Upon the filing of such dismissal, the attorney for the United States  
18 shall transmit to plaintiffs' counsel said check in the amount of the Settlement Amount. Subject  
19 to the terms and conditions set forth in Paragraph 3, above, plaintiffs' attorneys agree to distribute  
20 the Settlement Amount to the plaintiffs after paying or resolving any lien or claim for  
21 reimbursement or payment for which plaintiffs have agreed to be legally responsible under the  
22 terms of this Stipulation.

23 7. The parties agree that this Stipulation, including all the terms and conditions of this  
24 compromise settlement and any additional agreements relating thereto, may be made public in  
25 their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5  
26 U.S.C. § 552a(b).

27 8. The provisions of California Civil Code Section 1542 are set forth below:

28 "A general release does not extend to claims which the creditor does not know or

1 suspect to exist in his favor at the time of executing the release, which if known  
2 by him must have materially affected his settlement with the debtor."

3 Plaintiffs, having been apprised of the statutory language of Civil Code Section 1542 by their  
4 attorneys, and fully understanding the same, nevertheless elect to waive the benefits of any and  
5 all rights they may have pursuant to the provision of that statute and any similar provision of  
6 federal law. Plaintiffs understand that, if the facts concerning injuries or liability for damages  
7 pertaining thereto are found hereinafter to be other than or different from the facts now believed  
8 by them to be true, the Agreement shall be and remain effective notwithstanding such material  
9 difference.

10 9. This instrument shall constitute the entire agreement between the parties, and it is  
11 expressly understood and agreed that the agreement has been freely and voluntarily entered into  
12 by the parties hereto with the advice of counsel, who have explained the legal effect of this  
13 agreement. The parties further acknowledge that no warranties or representations have been  
14 made on any subject other than as set forth in this Agreement. This Agreement may not be  
15 altered, modified or otherwise changed in any respect except by writing, duly executed by all of  
16 the parties or their authorized representatives.

17 10. It is contemplated that this Stipulation may be executed in several counterparts, with  
18 a separate signature page for each party. All such counterparts and signature pages, together,  
19 shall be deemed to be one document.

20 Respectfully submitted,

21 JOSEPH P. RUSSONIELLO  
22 UNITED STATES ATTORNEY

23 DATED: December 30, 2009

24 BY: /s/ Claire T. Cormier  
25 Claire T. Cormier  
26 Assistant United States Attorney  
27 Attorney for Defendant, United States of America  
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1 **Approved as to Form:**

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THE BOCCARDO LAW FIRM LLP

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5 DATED: November 3, 2009

BY: /s/ John C. Stein  
JOHN C. STEIN  
Attorney for Plaintiff

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DATED: November 3, 2009

/s/ Gary Niva

GARY NIVA

Plaintiff

DATED: November 3, 2009

/s/ Gary Niva

GARY NIVA, as Administrator of the Estate of

ERIC AUSTIN NIVA, deceased,

Plaintiff

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DATED: November 3, 2009

/s/ Alinka Niva  
ALINKA NIVA  
Plaintiff

DATED: November 3, 2009

/s/ Alinka Niva  
ALINKA NIVA, as Administrator of the Estate of  
ERIC AUSTIN NIVA, deceased,  
Plaintiff

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~~PROPOSED~~ ORDER

Upon stipulation of the parties and good cause appearing, IT IS SO ORDERED.

DATED: December 30, 2009



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RICHARD SEEBORG  
United States Magistrate Judge