

# Staff Report 40

## **PROPOSED ACTION:**

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Consideration of an Agreement between the State of California, acting by and through the California State Lands Commission, the City and County of San Francisco, acting as a charter city and acting by and through the San Francisco Port Commission, and India Basin Investment, LLC, for certain parcels located within and adjacent to India Basin and the San Francisco Bay, in the city and county of San Francisco.

## **PARTIES:**

- The City and County of San Francisco (City)
- The City and County of San Francisco, acting by and through the San Francisco Port Commission (Port)
- The State of California, acting by and through the California State Lands Commission (Commission)
- India Basin Investment, LLC (Developer)

## **PROPOSED AGREEMENT:**

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The parties to the proposed Public Trust Exchange and Title Settlement Agreement for India Basin (Agreement) are the State of California, acting by and through the Commission, the City and County of San Francisco, acting as a charter city (City) and acting by and through the San Francisco Port Commission (Port), and India Basin Investment, LLC (Developer). The Agreement concerns approximately 40 acres of filled and submerged land situated in the city and county of San Francisco adjacent to India Basin and the San Francisco Bay (Project Area).

The India Basin Mixed-Use Project is located within the Bayview Hunters Point neighborhood just northwest of the Hunters Point Shipyard and northeast of Hunters Point Hill. The India Basin Mixed-Use Project Environmental Impact Report (EIR), prepared by the City, included two main components: 900 Innes Avenue and the India Basin Shoreline Park, which is being developed by the San Francisco

Recreation and Park Commission (RecPark), and 700 Innes and the India Basin Open Space, which is being developed by the Developer. The two main components collectively encompass about 40 acres of filled lands adjacent to the Bay. The overall India Basin Project's goal is to ensure that all properties eventually look, feel, and operate as an integrated parks system.

The Agreement will consolidate and confirm Public Trust land holdings, which are presently disorganized or disputed. Consolidation of Public Trust parcels will achieve various trust objectives, including shoreline and habitat restoration and protection, public access to the India Basin shoreline, and the creation of important linkages between open spaces and trails along the Bay shoreline.

The Agreement will place or confirm the trust on approximately 7.7 acres of filled former tidelands along the shoreline and place a Public Trust easement on approximately 14.3 acres of adjacent submerged lands (Trust Addition Lands). The submerged lands will become full fee trust lands if remediated. The Agreement will terminate the trust interests, or confirm as non-trust, approximately 17.8 acres within the Project Area (Trust Termination Lands).

Key terms of the proposed Agreement provide that:

1. The City will quitclaim its interests to the Commission.
2. The Developer will quitclaim its interests to the Commission and quitclaim a Public Trust easement over the adjacent submerged lands.
3. The Commission will convey by patent to the City its interests in the Trust Addition Lands and the Adjacent Submerged Lands, to be held by the Port subject to the Public Trust and Burton Act Trust.
4. The Commission will convey by patent to the City a portion of the Trust Termination Lands, free of any Public Trust interests, for public projects that may not be consistent with the terms of the common law Public Trust or the Burton Act trust.
5. The Commission will then convey by patent the remainder of the Trust Termination Lands to the Developer, free of any Public Trust interests.

## **BACKGROUND:**

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The lands in the Project Area include a patchwork of historic tide and submerged lands subject to the Public Trust, historic tide and submerged lands that are no longer subject to the Public Trust, historic tide and submerged lands in which the

Public Trust status is uncertain, and lands that were above the ordinary high-water mark at statehood and are not subject to the Public Trust. The proposed Agreement is intended to settle a bona fide title dispute among the Commission, City, Port, and Developer.

Although the Commission and Port agree that certain land is subject to or free from the Public Trust, the Public Trust status on large portions of the filled tidelands and adjacent submerged lands is uncertain and disputed. Currently, a portion of the waterfront could be sold into private ownership and cut off from public access and other shoreline areas could be sold if the City's charter were amended. Other lands separated from the shore are potentially restricted by the Public Trust and cannot be used for the non-trust development essential to revitalize the India Basin area.

Beginning in 1863, the State authorized a large portion of sovereign tidelands within the India Basin area to be sold to private parties by the Commissioners of Swamp and Overflowed Lands, pursuant to Chapter 325, Statutes of 1863 (1863 Act), and by the Board of Tide Land Commissioners (BTLC), pursuant to Chapter 543, Statutes of 1868 (BTLC Act). The continued existence of the Public Trust on the lands conveyed under the 1863 Act and on the submerged lands conveyed under the BTLC Act is uncertain and disputed.

The Developer owns former tidelands and approximately 14 acres of submerged land within the Project Area derived from these Acts. The Developer also owns non-trust historic uplands within the Project Area.

The City owns lands likely free of the trust within the Project Area and lands that are likely subject to a Public Trust easement. In 1986, the City acquired approximately 10 acres of privately owned lands within the Project Area for streets and a shoreline park. These park lands are under the jurisdiction of the City acting by and through the San Francisco Recreation and Park Commission.

Other parcels within the Project Area were reserved from sale by the State for public street purposes under the BTLC Act and remain subject to the Public Trust. These lands are held by the Port as Public Trust lands subject to Chapter 1333, Statutes of 1968 (Burton Act) and are separated by non-trust or disputed BTLC blocks. The Burton Act conveyed to the City all Public Trust lands under the control of the San Francisco Port Authority, a former state agency. This grant in trust transferred over 1,000 acres of filled tidelands and a vast area of unfilled Bay. These BTLC street fragments are "paper streets." They have never been developed as streets open to the public, and, in fact, much of the paper street fragments remain submerged. The Port may also own a Public Trust easement on the lands sold under the 1863 Act.

One small area of the shoreline, Filled Parcel 9, requires remediation before it will be suitable for the Commission and the City to accept as Public Trust lands. This parcel is not expected to be included in the initial closing; instead, the Developer and the Commission will establish a Public Trust easement over Filled Parcel 9. After remediation, the Commission may accept the parcel into trust. Or, if Filled Parcel 9 is not remediated to an acceptable standard within 10 years, then the Developer will make a payment into the Kapiloff Land Bank Fund. Payments into the Kapiloff Fund as part of a title settlement are reserved to purchase outstanding interests in tide and submerged lands that further public trust purposes. If this contingency occurs, the payment does not relieve the Developer of its obligation to remediate and convey Filled Parcel 9.

The City has approved a development agreement with the Developer for a term of 15 years, with two extension options for another 15 years. Under the development agreement, the Developer will attain the vested right to develop the Project in return for specified community benefits, including affordable housing and parks.

## **LEGAL ANALYSIS:**

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The historic conveyances of the State's tidelands into private ownership under the 1863 Act and the BTLC Act, and the partial reclamation of those lands, has created a bona fide dispute about the present configuration of Trust lands within the Project Area. The 1863 Act is entirely silent on the Public Trust. The purposes of the Act do not appear to be related to navigation, waterborne commerce, or fisheries. California courts have generally held that such an Act does not authorize the sale of lands outside of the Public Trust, but no court has specifically interpreted the 1863 Act. The BTLC Act later authorized the sale of lands waterward of the 1863 Act area. The BTLC Act is thought to have removed lands sold and filled from the Public Trust. But again, no court has interpreted the BTLC Act, and the BTLC Act's effect on lands that were never filled is especially questionable. Finally, the City has argued that the later BTLC Act may have caused a change in the legal status of lands sold under the 1863 Act. Thus, in combination, the 1863 Act and the BTLC Act raise substantial uncertainty as to the legal status of most of the Project Area.

The historic facts at India Basin do not clarify the legal status. Though the State conveyed most of the tidelands within the Project Area into private ownership in the 1800s, the area remained unfilled and undeveloped for many years. Historic photographs show that most of the area was not filled above the waterline until the 1950s and 1960s, 80 to 90 years after they were sold into private ownership. Little development has occurred today other than some public infrastructure. This

factual history raises additional questions about the legal effect of the 1863 and BTLC Acts on the sold lands.

The proposed Agreement would resolve the trust uncertainties and expand the trust to include all the filled lands along the shoreline as well as the adjacent submerged lands. The Agreement would confirm or impress the Public Trust on the lands of greatest value to the Trust.

Pursuant to Section 5 of Chapter 310, Statutes of 1987, the Commission is authorized to terminate the State's Public Trust interests on granted lands held by the City in exchange for lands of equal or greater value that are useful for trust purposes. Because the City does not have the legal authority to terminate the State's Public Trust interests, the Commission must take title to the proposed Trust Termination Lands and may then, as part of an exchange, terminate the Public Trust interests. Simultaneously, the Commission will convey the Trust Addition Lands to the City, to be held by the Port subject to the Public Trust and the Burton Act Trust. The proposed Agreement details this exchange.

To comply with Section 5 of Chapter 310, Statutes of 1987, and California Constitution, article X, section 3, the Commission must make the following findings before it approves the Agreement.

- 1) The proposed Trust Termination Lands have been filled and reclaimed.
- 2) The proposed Trust Termination Lands are cut off from access to the waters of San Francisco Bay.
- 3) The proposed Trust Termination Lands constitute a relatively small portion of the granted tide and submerged lands.
- 4) The proposed Trust Termination Lands are no longer needed or required for the promotion of the Public Trust for commerce, navigation, and fisheries or the Burton Act Trust.
- 5) No substantial interference with trust uses and purposes will ensue by virtue of the exchange.
- 6) The proposed Trust Addition Lands have a value equal to or greater than the value of the proposed Trust Termination Lands.

The Commission's authorization of the Agreement is statutorily exempt from the California Environmental Quality Act (CEQA). Public Resources Code section 21080.11 exempts "settlements of title and boundary problems by the State Lands Commission and ... exchanges and leases in connection with those settlements" from CEQA. Settling a title dispute, as described above, is the purpose of the

Agreement. Neither the Developer nor the City will invest significant resources into the area until these problems are settled.

## **STAFF ANALYSIS AND RECOMMENDATION:**

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The India Basin Mixed-Use Project requires the Developer to construct a network of new and improved parks and open spaces within the Project Area. The Project will extend the Blue Greenway portion of the San Francisco Bay Trail, which connects China basin to Candlestick Point, including pedestrian and bicycle connections along the shoreline.

The Developer will improve portions of the Trust Addition Lands adjacent to the waterfront into enhanced wetlands (India Basin Open Space). The lower edge of the shoreline will remain in a natural state with enhancements for public access and shoreline habitat. The shoreline would include natural areas suitable for existing and new habitats, diverse ecologies, waterfront access, and would be adaptable to accommodate sea level rise. Proposed enhancements to the India Basin Open Space include sand dunes, bird islands, a recreational beach area, a boat launch, a bioengineered breakwater, and new wetlands and ponds. A terraced boardwalk and overlooks are proposed at the top of the bank allowing visitors to experience the tidal marshes without disturbing the habitat. The bank of the east shoreline will include a perched beach sand area for recreation at the Bay's edge. In the southern section of the park, adjacent to the perched beach, a structure will accommodate concessions, kayak rentals, and amenities for the public visiting the India Basin Open Space. All of these planned activities and improvements are consistent with the common law Public Trust and Burton Act. A large portion of the India Basin Open Space is not currently subject to the Public Trust and could be sold into private ownership.

Another public feature of the proposal will encompass both Trust Addition and Trust Termination Lands: the Big Green, a publicly owned space located between the proposed residential and commercial development and the India Basin Open Space. The Big Green will expand the India Basin Open Space into a waterfront park supporting grasslands, a wet meadow, and recreational areas such as a children's play area, an off-leash dog area, boardwalks, trails, a children's play area, a fitness loop, and several small gathering places.

Immediately adjacent to the Big Green and located on Trust Termination lands, will be a centrally located plaza area that would be used as a public market. The public market, while privately owned and managed, will be publicly accessible with an emphasis on retail, food and beverage, and cultural events to activate the adjacent open space. RecPark will partner with the Developer to maintain the land

and integrate this park into the larger India Basin park network. The Big Green will be built out in phases commensurate with the development of the adjacent residential and commercial uses.

Through this Agreement and adjacent developments, the City intends to create a series of contiguous, integrated waterfront parks, including both the India Basin Open Space and the Big Green. The India Basin Open Space and the Big Green will be placed under Port jurisdiction for Public Trust purposes, but operated, maintained, and managed by RecPark. In addition, the City, through RecPark as co-project sponsor under the India Basin Mixed-Use Project EIR, intends to develop and improve the neighboring 900 Innes and India Basin Shoreline Park, each as described in the India Basin Mixed-Use Project EIR, collectively referred to as the “India Basin Park System.” The City also expects to add additional land to the India Basin Park System in the future by connecting it to an adjacent shoreline park known as the Northside Park, which will be completed as part of the Candlestick/Hunters Point Shipyard redevelopment project. When the City acquires the Northside Park, the City will include that property as part of the India Basin Park System that is managed and operated by RecPark.

The Project will also extend the Blue Greenway portion of the San Francisco Bay Trail to include pedestrian and bicycle connections to and along the shoreline. The lower edge of the shoreline will remain in a natural state with enhancements for public access and shoreline habitat.

Finally, the Agreement will allow the Developer and the City to create a large mixed-use development in southern San Francisco that will include 200,000 square feet of office space; 1,575 housing units, some mix of which will be affordable; new public streets; and a new metro transit plaza. The Project is anticipated to generate roughly 3,500 construction jobs and 1,200 permanent jobs.

### **ENVIRONMENTAL JUSTICE:**

A multi-year public engagement process informed the India Basin programming and design. In 2014, the India Basin Waterfront Task Force was established, comprising Bayview-Hunters Point community leaders, local landowners, and nonprofit parks partners. The Task Force created a Waterfront Study to inform and guide park improvements along the India Basin shoreline, with the goal of ensuring a seamless experience through coordinated connections, trails, and consistent wayfinding signage among seven planned park properties in the India Basin area. The Agreement directly enables the development of one park, India Basin Open Space, and indirectly enables the creation or improvements of the others by promoting public and facilitating private investment.

Through this process, the Task Force worked with the community to garner input and feedback. With support provided by the Developer and the A. Philip Randolph Institute, the Task Force expanded attendance and reach a broad segment of the community, allowing for increased access to meetings through door-to-door canvassing and providing transportation to the meetings.

RecPark and its nonprofit partners attended community events and festivals to collect public feedback outside planned meetings. During these broad canvassing events, the City sought community perspectives on needs, priorities, and amenities to enhance the recreational experience at these parks. RecPark continues to hold community meetings and engagement efforts to collect feedback on the park design to ensure that the designs remain relevant and reflective of the neighborhood's priorities.

In 2018, recognizing the impact of a major public park investment on historically underserved neighborhoods, RecPark and the Project team began a planning process to create an Equitable Development Plan (EDP). The EDP Leadership Committee comprises a coalition of Bayview-Hunters Point local leaders with expertise in workforce training, business development, youth development, public arts, and local history. The Committee meets monthly and discusses strategy development with public agencies, local organizations, philanthropies, and partners. Acting as local consultants with deep community ties across Bayview-Hunters Point, the Leadership Committee provides direction on present and future parks sites at India Basin, as well as helping to plan ongoing engagement events.

The EDP will combine a strategic plan and implementation roadmap to guide investments within and outside of the parks. By focusing on equitable development, India Basin Waterfront Parks strive to mitigate potential negative consequences of community investment through the implementation of an array of anti-displacement strategies. The Project's design, planning and engagement goals will leverage the India Basin Parks to ensure they benefit and reflect the existing community.

### **CONCLUSION:**

Commission staff has reviewed the information submitted for the proposed Agreement, including an appraisal of the interests in the Trust Termination Lands and the Trust Addition Lands. Portions of the Trust Addition Lands are presently subject to or potentially subject to the Trust and other portions are not subject to the Trust. However, the effects of 19th century statutes and human activity since then on the Public Trust is uncertain and in dispute. Litigation would be protracted and costly with uncertain results.



The proposed Trust Termination Lands within the Project Area are no longer tidelands or navigable, are relatively useless for Public Trust purposes, and total approximately 17.8 acres—some of which are or may be free of the Public Trust—, a relatively small amount of the acreage granted to the City under the Burton Act. The public is physically unable to navigate or fish on the Trust Termination Lands, and no Public Trust use has been identified for these filled lands, which have remained vacant for decades. The Agreement does not create a substantial interference with Public Trust uses, including public rights of navigation and fishing.

The Parties have conducted independent studies and valuations of their respective factual and legal positions relating to the disputed title and boundary claims. Appraisals and property interest evaluation studies reviewed or completed by Commission staff have shown that the monetary value of the lands and interests to be exchanged into the Public Trust under this Agreement is equal to or greater than the monetary value of the lands and interests to be exchanged out of the Public Trust.

As described in the preceding paragraphs and in the proposed Agreement, the facts support each of the findings the Commission must make pursuant to Chapter 310. Commission legal staff and the Attorney General's Office have reviewed the proposed Agreement and believe all necessary legal elements have been met. Staff therefore recommends that the Commission approve the Agreement, in substantially the form on file at the Commission's Sacramento Office, and authorize its execution and the execution and recordation of all documents necessary to implement it. In addition, by consolidating Public Trust holdings and furthering beneficial development to provide jobs and housing, staff recommends the Commission find that the Agreement is in the best interests of the Public Trust and the State.

## **OTHER PERTINENT INFORMATION:**

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1. The State, acting by and through the Commission, is authorized under section 5 of Chapter 310, Statutes of 1987, to enter into the proposed Public Trust and Title Settlement Agreement.
2. The City and County of San Francisco Board of Supervisors approved the Agreement through BOS Ordinance 252-18, adopted by the Board of Supervisors on October 23, 2018. The Port approved the Agreement through Resolution No. 18-60, adopted by the San Francisco Port Commission on October 23, 2018. The San Francisco Recreation and Park Commission approved the Agreement through Resolution No. 1810-007 adopted on October 18, 2018.

3. The City and the Developer have entered into a development agreement for the Project Site. The Commission is not a party to the development agreement.
4. This action is consistent with Strategy 1.2 of the Commission's Strategic Plan to provide that the current and future management of granted lands, including through strategic partnerships with trustee and harbor districts, is consistent with evolving Public Trust principles and values, particularly amid challenges relating to climate change, sea-level rise, public access, complex land use planning, and marine freight transportation systems; and with Strategy 1.3 to protect, expand, and enhance appropriate public use and access to and along the State's inland and coastal waterways.
5. Staff recommends that the Commission find that entering into the Agreement is exempt from the requirements of CEQA as a statutorily exempt project. The project is exempt because it involves the settlement of title and boundary problems.

Authority: Public Resources Code section 21080.11.

6. An EIR, State Clearinghouse No. 2016062003, was prepared for this project by the San Francisco Planning Department. The San Francisco Planning Department certified the EIR and approved the overall project on July 26, 2018. On October 16, 2018, the San Francisco Board of Supervisors affirmed certification of the EIR on appeal.

## **EXHIBIT:**

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- A. Location and Site Map of Trust Addition Lands and Trust Termination Lands

## **RECOMMENDED ACTION:**

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It is recommended that the Commission:

### **CEQA FINDING:**

Find that the Agreement is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a statutorily exempt project pursuant to Public Resources Code section 21080.11, settlement of title and boundary problems, because the lands at issue are the subject of a bona fide title dispute and that the Agreement is in lieu of the costs, delay, and uncertainties of title and boundary litigation.

**PUBLIC TRUST AND STATE’S BEST INTERESTS:**

Find that the Agreement, consistent with the authorizations below, will confirm in trust the lands with greatest value to the Public Trust and remove from the trust the lands that have been filled, reclaimed and cut off from access to the water limiting their relative value for the promotion of the Public Trust; that the property interests confirmed into the trust will promote and enhance trust uses along the currently neglected India Basin shoreline and have an equal or greater value than the lands removed from the trust; that the Agreement will settle a bona fide dispute and avoid costly and uncertain litigation; and that the Agreement is therefore consistent with the Public Trust Doctrine and in the best interests of the State.

**AUTHORIZATION:**

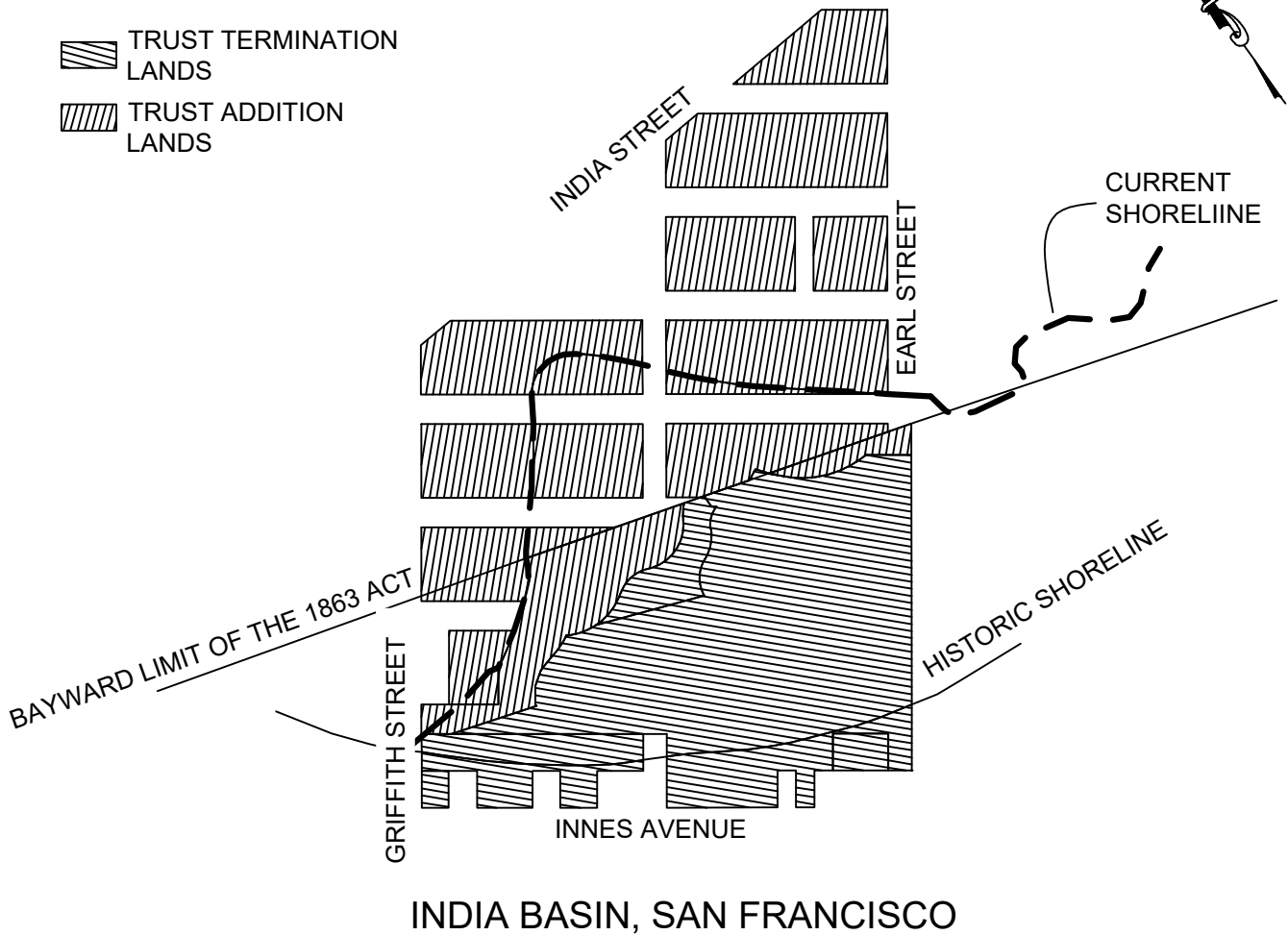
1. Find that, with respect to the proposed Public Trust Land Exchange Agreement, which findings shall be effective when the Agreement is recorded:
  - a. The proposed Trust Termination Lands have been filled and reclaimed.
  - b. The proposed Trust Termination Lands are cut off from access to the waters of the San Francisco Bay.
  - c. The proposed Trust Termination Lands constitute a relatively small portion of the lands granted to the City and County.
  - d. The proposed Trust Termination Lands are no longer needed or required for the promotion of the Public Trust for commerce, navigation, and fisheries or the Burton Act Trust.
  - e. No substantial interference with trust uses and purposes will ensue by virtue of the Agreement.
  - f. The proposed Trust Addition Lands have a value equal to or greater than the value of the proposed Trust Termination Lands.
2. Approve and authorize the execution, acknowledgment, and recordation of the Public Trust Exchange and Title Settlement Agreement for India Basin, in substantially the form of the copy on file with the Commission, and the acceptance, execution, acknowledgment, and recordation of all associated deeds on behalf of the Commission.
3. Authorize and direct Commission staff and/or the California Attorney General to take all necessary or appropriate actions on behalf of the Commission, including the execution, acknowledgment, acceptance, and recordation of all

documents as may be necessary or convenient to carry out the Agreement;  
and to appear on behalf of the Commission in any legal proceedings relating to  
the subject matter of the Agreement.

NO SCALE

# SITE

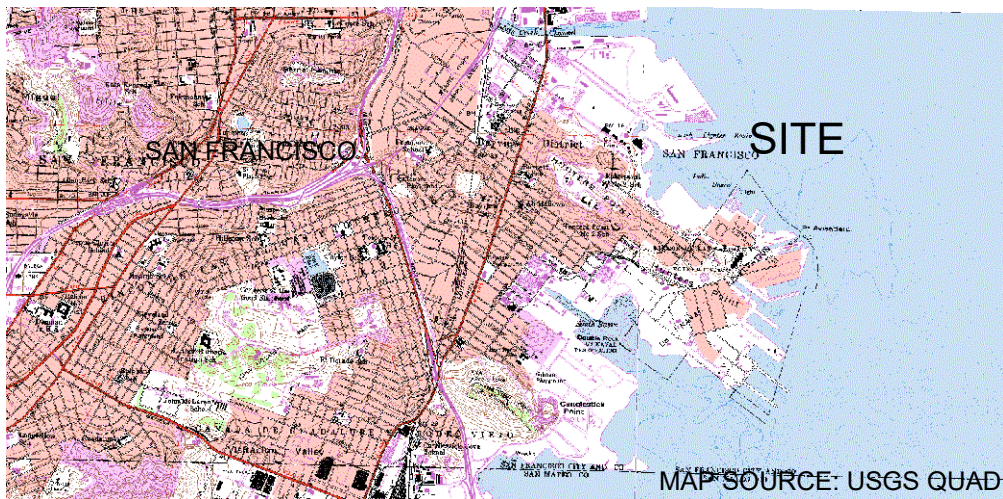
## SAN FRANCISCO BAY



## INDIA BASIN, SAN FRANCISCO

NO SCALE

# LOCATION



THIS EXHIBIT IS SOLELY FOR PURPOSES OF GENERALLY DEFINING THE LEASE PREMISES, IS BASED ON UNVERIFIED INFORMATION PROVIDED BY THE LESSEE OR OTHER PARTIES AND IS NOT INTENDED TO BE, NOR SHALL IT BE CONSTRUED AS, A WAIVER OR LIMITATION OF ANY STATE INTEREST IN THE SUBJECT OR ANY OTHER PROPERTY.

# EXHIBIT A

G11-01  
PUBLIC TRUST  
EXCHANGE AND TITLE  
SETTLEMENT  
AGREEMENT FOR  
INDIA BASIN  
SAN FRANCISCO COUNTY



DJF 1/14/2021