

A Comparison of Swainson's Hawk Conservation Easements

County of Sacramento

City of Elk Grove

Summary Report



Shannon McClure

Summer 2010

## **Purpose**

Sacramento County and its cities have implemented Swainson's hawk mitigation programs over the last decade under the California Environmental Quality Act (CEQA). These programs operate outside of a monitoring framework provided by a habitat conservation plan approved by wildlife regulatory agencies. Thousands of acres have been protected through conservation easements that are designed to preserve open space habitat in perpetuity. However, little research has been conducted to assess the success of these conservation easements. Friends of the Swainson's Hawk (FOSH) is engaged in an evaluation of these programs and this summary report is the first step.

FOSH's purpose for this report is to summarize the legal instruments used to conserve mitigation land, create a database cataloging the conservation easements, inform project members about possible compliance issues, and to inform FOSH about potential issues for discussion with the local jurisdiction using the conservation easements to comply with CEQA obligations.

## **Method**

In order to accomplish FOSH's purposes, I first reviewed FOSH's model Swainson's Hawk conservation easement prepared by Jim Pachl. This provided me with a better understanding of what an ideal conservation easement should include. I then compared FOSH's model easement to 10 easements provided by the City of Elk Grove and 8 easements provided by the Sacramento County, generated for the respective SWH habitat mitigation programs of City and County to comply with CEQA for loss of SWH habitat due to urban development. From there, I was able to identify boilerplate language, identify elements missing from FOSH's model easement, and identify unique elements. I then verified with the Elk Grove and Sacramento County clerk recorder's offices that each of the easements was recorded. I made an Excel spreadsheet summarizing the recorded easements and, for greater clarity, wrote summaries on each of the easements to be used when in the field. The summaries highlight key issues for each of the properties. I reviewed easements in the Yolo County Habitat/Natural Community Conservation Plan Joint Powers Authority (Yolo County JPA) program as a comparison point. Finally, I

reviewed the Swainson's hawk ordinances for Elk Grove and Sacramento County in order to prepare this summary report.

## **Key Issues**

During the review process, the following key issues were identified as important to FOSH.

1. Agriculture
  - a) What crops may be planted/cultivated?
  - b) What plant and animal species are allowed on the property?
  - c) What facilities and equipment are allowed on the property?
2. California Department of Fish and Game (CDFG)
  - a) Is CDFG named as a third-party beneficiary?
  - b) What rights, if any, does CDFG have?
3. Natural Resources
  - a) May the grantor alter the surface topography?
  - b) May the grantor lease air, oil, and mineral rights?
4. Scientific Research
  - a) Who, if anyone, can conduct scientific research on the property?
5. Water
  - a) May the grantor maintain irrigation systems?
  - b) Is the grantor required to preserve water quality?
  - c) May the grantor alter natural watercourses?
  - d) May the grantor lease water rights?
6. Others
  - a) May the grantor hunting and fish or allow others to do so on the CE property?
  - b) May the grantor lease the property?
  - c) Are there any known prior encumbrances?
  - d) Is there a development envelope on which the grantor may construct a residence?
  - e) Are there other species protected by a conservation easement on the same land that would indicate double counting for mitigation credits?

Of these issues, the most important to FOSH involve cropping, water and double counting of land for different mitigation purposes. All easements restrict agricultural uses which reduce foraging value for SWH, for example excluding orchards and vineyards; some restrict rice; none require production of alfalfa, the highest value Swainson's Hawk foraging crop. Likewise, the easements vary in restrictions on water and on use of the land for other conservation easements.

## **Comparison**

The restrictions enumerated in the conservation easements vary quite substantially. However, some similarities can be found between grantees or easement holders. The main easement holders are California Department of Fish and Game (CDFG), the City of Elk Grove, Sacramento Valley Conservancy (SVC), and The Nature Conservancy (TNC).

### **1. CDFG – Bryte Ranch**

CDFG is named as a third-party beneficiary in several conservation easements, but the only easement actually held by CDFG is Bryte Ranch, a mitigation bank located east of Elk Grove. On the whole, the document is very thorough. It specifically prohibits alteration of the surface topography, natural resource development, paving, use of vehicles, and transferring/leasing water rights.

FOSH has several questions about this easement that include:

- a) Is Bryte Ranch double counting for multiple species? Bryte Ranch was originally created to preserve vernal pool habitat and other species were added later. Further research in the field is necessary to determine whether double counting is occurring.
- b) Is CDFG monitoring compliance? FOSH field visit to the site by volunteers raised questions about the quality of the habitat and the presence of Swainson's Hawks in the area that would use the mitigation land.

- c) Does Bryte Ranch conform to the Elk Grove ordinance requirement that CDFG approve mitigation land? While the bank itself was approved by CDFG, is there documentation that CDFG found it adequate for offsetting impacts of development in Elk Grove? According to the attached map published by CDFG, Bryte Ranch is located outside of the suitable Swainson's hawk habitat area agreed to by DFG and the City of Elk Grove.

## 2. City of Elk Grove

Of all the conservation easements, those held by the City of Elk Grove are the least restrictive. First, they allow for natural resource development. This means that the grantor or a lessee may explore and extract natural resources such as oil, gas, and minerals. Importantly, most easements contain a provision limiting this natural resource development to 200 or 500 feet in depth, thus protecting the surface topography. Second, although all the conservation easements protect water quality with a boilerplate clause, the City of Elk Grove easements allow water rights to be transferred up to a five-year period.

According to the Elk Grove Municipal Code § 16.130.40, the city must be named as a beneficiary and a qualified non-profit organization must hold the easement in trust. Therefore, it makes little sense that the City of Elk Grove holds these easements itself. Despite this inconsistency, the newer easements held by the City of Elk Grove show improvements in that they name CDFG as a third-party beneficiary and allow access for scientific research. FOSH should consider asking the City of Elk Grove to transfer the easements to a non-profit organization.

## 3. SVC

The conservation easements held by SVC are generally beneficial for the Swainson's hawk. For instance, the easements have provisions providing that CDFG be involved in decisions to transfer and in dispute resolution. In addition, the easements list all known

prior encumbrances and indicate that no additional easements be granted. On the other hand, the SVC easements are missing provisions on hunting and signs. This is not to say that the SVC easements are inadequate; however, FOSH should inquire further into these issues.

#### 4. TNC

Of the Sacramento County conservation easements, those held by TNC are the most restrictive. They include a list of prohibited crops and clauses restricting vehicle use, topography alteration, and leases. Further, water rights may only be transferred for a maximum of one year and the property, as a whole, cannot be leased for more than five years. While these restrictions clearly benefit the Swainson's hawk, the TNC easements do not name CDFG as a third-party beneficiary and do not include a provision that allows for scientific research. FOSH should inquire further into the consequence of these missing elements.

### **Evaluation**

Compared to the Sacramento County conservation easements, the easements located in Yolo County are by far more consistent and restrictive. The Yolo County easements are very close to the FOSH model conservation easement. Each of the Yolo County easements names CDFG and Habitat JPA—that is, if Habitat JPA is not the easement holder—as third-party beneficiaries with the right of enforcement. Additionally, most include a copy of the present conditions report, which summarizes the biology of the property and a list of known prior encumbrances. Also, most do not allow additional CE easements to be granted, which prevents double dipping. Finally, each easement provides greater restrictions on agricultural use and natural resource development than the Sacramento County easements.

The Yolo County easements raise questions for FOSH to research further. Some areas for concern include the grantor's reserved right to hunt and to bring utilities across the property. In addition, some easements permit a development envelope where the grantor does not have to

follow all the restrictions that apply to the easement area. However, the development envelope is not moveable, located in an area suitable to the grantee, limited in acreage, and cannot be used in a manner that will negatively effect the easement area.

Overall, the Yolo County conservation easements are superior to the Sacramento County easements, but all have some potential inadequacies. Assuming that jurisdictions in Sacramento County will continue to preserve Swainson's hawk habitat via conservation easements, FOSH should advise that the following provisions become standard:

- a) no degradation of water quality and no alteration of natural watercourses,
- b) no alteration of surface topography and no natural resource development,
- c) no antennas/towers/windmills, no vehicles and no paving,
- d) limited hunting and fishing,
- e) limited agricultural use (e.g. no rice, restrictions on crops like corn and safflower that have very limited utility for Swainson's Hawks),
- f) list of known prior encumbrances,
- g) CDFG as a third-party beneficiary with the right of enforcement, and
- h) annual monitoring compliance reports.