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Statement of the Wildlife Heritage Foundation

November 15, 2022

Good morning Chairman and Members of the Water Commission:

My name is Darla Guenzler, Executive Director of the Wildlife Heritage Foundation. Our nonprofit organization is the holder of a conservation easement over a portion of the fee title property owned by Frank Webb Properties LLC

The conservation easement is over a property to provide protection for agricultural and conservation values, explicitly Swainson's Hawks (a species listed as threatened under California law) and other raptors for foraging. This property was preserved through a mitigation process in which project developers, such as residential builders, purchased an easement on this property as mitigation for impacting or destroying foraging habitat for Swainson's Hawks. This is why there are 17 conservation easements over the property.

WHF would like to voice several points in regard to the Department of Water Resources proposed flowage easement. As we consider it, there is a great deal that makes analyzing the impact upon the conservation values of our conservation easement challenging:

1. The flowage easement proposed by the Department of Water Resources is for the "present and future permitted construction and operation of fish passage and floodplain restoration site. We are informed that the water flow can as much as quadruple what we have been told is presently planned. Future construction or floodplain restoration is unclear. Such activities could violate prohibited uses and activities of the conservation easement.
2. The flow of water can uproot vegetation, deposit sediment and debris as well as other impacts that could diminish or destroy habitat values. The proposed easement explicitly states that "the flowage right includes the right to flow water and materials and by said flow erode; or place or deposit earth, debris, sediment, or other materials".

3. Swainson's Hawks and other foraging raptors are dependent upon rodents, rabbits and reptiles – all of which can be drowned in flood waters. Earth and other sediment can fill in their burrows.
4. What monitoring strategies do we need to employ to assess what the impacts of the flowage easement are on the foraging habitat for Swainson's Hawks and other raptors that is the purpose of this conservation easement? What are the restoration strategies if damage is seen or numbers decline?

With regard to the property and easement aspects of the matter:

1. What the flowage easement is proposing to do would be an explicit violation of the conservation easement terms. Since we first learned of the proposed condemnation, DWR changed its position ~~from~~^{to} proposing that the flowage easement would not be senior to the conservation easement. However, that does not solve the problem. As noted in the previous point, we cannot grant such a use. WHF would be in a position of issuing constant Notices of Violation to the State of California and landowner.

There are also appraisal aspects of the matter.

1. The holder of a conservation easement is an owner of property entitled to compensation determined pursuant to Section 1260.220 and Chapter 9 (commencing with Section 1263.010).
2. At the time the conservation easement was created, the landowner sold a certain bundle of its rights and any appraised value of the property is irrevocably impacted. Those rights and their respective value are held by WHF.
3. At a nonprofit, tax-exempt organization, a public charity, and a nationally accredited land trust, WHF cannot give away its charitable assets or suffer a loss of conservation values. In this instance, it means that we must use the proceeds from any condemnation to place the acres lost or impaired and/or enhance the impacted conservation values.

In this instance, the DWR is proposing to condemn a wildlife preserve authorized by the Department of Fish and Wildlife Service in furtherance of state law for the mitigation of dozens of mitigation projects. This conservation easement meets the requirement of "property appropriated to public use" and the California Code of Civil Procedure 1240.510 requires that the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. What is proposed would arguably interfere with the management of the Preserve that was explicitly created in furtherance of state and federal law for a listed species. Accordingly, it is a high order question under California Code of Civil Procedure 1240.610 for the Commission to find that the use proposed is a more necessary public use than the use for which the property is appropriated. How does one evaluate the importance and value of salmon versus Giant Garter Snake and other native species?

Whatever the outcome of the Commission's consideration of the Resolution of Necessity question today, we ask that the Department of Water Resources work with our organization as the conservation easement holder and the landowner to consider how we can collectively ensure that the important conservation values of this property are not impaired which may include, among other things, mitigation for this project (as any other project would have to do when impacting a listed species), monitoring, restoration, and other strategies that may be identified.

Thank you,

A handwritten signature in blue ink, appearing to read "Darla Guenzler", is displayed on a light gray rectangular background.

Darla Guenzler, Ph.D.
Executive Director