AGENDA ITEM or FINAL CONTRACT REVIEW SUBMITTAL FORM

Agenda Item: Execution of Gunnison Sage grouse Common Interest

Action Requested: Other Approval by the Board

Parties to the Agreement: State of CO, Gunnison County Attorney, Stockgrowers Assn, State of Utah

Term Begins: **Term Ends:** **Grant Contract #:**

Summary:

Common Interest Agreement in anticipation of joint participation in litigation between the State of Colorado, Gunnison County, Gunnison County Stockgrowers', the State of Utah, and San Juan County, Utah.

Fiscal Impact:

Submitted by: Laura Seymour for David Baumgarten **Submitter's Email Address:** lseymour@gunnisoncounty.org

Finance Review: ○ Required ◉ Not Required

Comments:

Reviewed by: Discharge Date:

County Attorney Review: ◉ Required ○ Not Required

Comments:
ok db 12/9/15 Expands existing County, State, Stockgrowers' agreement to include additional, aligned parties.
Requires: Ratification of DB signature

Reveiwed by: GUNCOUNTY1\dBaumgarten Discharge Date: 12/9/2015 Certificate of Insurance Required Yes ○ No ◉

County Manager Review:

Comments:

Reveiwed by: GUNCOUNTY1\mbirnie Discharge Date: 12/10/2015

○ Consent Agenda ◉ Regular Agenda ○ Worksession Time Allotted: 5 minutes

Agenda Date: 12/15/2015

Revised April 2015

COMMON INTEREST AGREEMENT IN ANTICIPATION OF JOINT PARTICIPATION IN LITIGATION BETWEEN THE STATE OF COLORADO, GUNNISON COUNTY, COLORADO, THE GUNNISON COUNTY STOCKGROWERS' ASSOCIATION, INC., THE STATE OF UTAH, AND SAN JUAN COUNTY, UTAH

This Common Interest Agreement In Anticipation of Joint Participation in Litigation ("Agreement") is entered into by and between the undersigned parties, the State of Colorado, Gunnison County, a political subdivision of the State of Colorado, the Gunnison County Stockgrowers' Association, Inc., the State of Utah, and San Juan County, Utah (collectively, "Parties"; individually, "Party") on this ____ day of November, 2015. This Agreement memorializes certain understandings reached among the Parties and their counsel with respect to their common interests in connection with subject matter about which litigation is anticipated. This Agreement supersedes all other agreements, whether written or oral, between the Parties hereto relating to the subject matter hereof.

Whereas the Parties wish to work cooperatively and to pursue their common interests in anticipated litigation regarding federal actions and decisions concerning the Gunnison sage-grouse; and

Whereas the Parties believe that sharing of confidential and privileged information and documents among themselves through their attorneys will be mutually beneficial to the Parties in the pursuit of their interests and objectives; therefore, the Parties agree as follows:

1. Statement of common interest. These understandings, which are the subject of this Agreement, are to further the Parties' common legal interest in anticipated litigation regarding federal decisions and actions concerning the Gunnison sage-grouse. The Parties have determined that they have certain common, closely parallel, or identical interests in federal regulatory actions, decisions, and rules concerning the Gunnison sage-grouse including the determination by the United States Fish and Wildlife Service ("Service" or "FWS") to add the Gunnison sage-grouse to the endangered and threatened species list under authority provided by the federal Endangered Species Act, 16 U.S.C. §§ 1531-1540. 79 Fed. Reg. 69192 (Nov. 20, 2014). The Parties have also determined that they have common, closely parallel, or identical interests in the pursuit of a legal challenge to the FWS determination to list the Gunnison sage-grouse and to designate critical habitat for the species (the "Legal Matter").

2. Privilege from disclosure. The Parties agree it is their intention that all Privileged Communications (as defined below) made in connection with these common interests are privileged from disclosure by the attorney-client privilege, attorney work product doctrine, joint defense privilege, common interest privilege, and any other applicable privilege or protection.

3. Privileged Communications. It is the intention and understanding of the Parties and their counsel that all work product of or communications made between any member of a client entity and a member of another client entity relating to the development and implementation of common strategies, including before the execution of this Agreement, whether offensive, defensive, or negotiation-related, including but not limited to information and communication contained in documents, memoranda, correspondence, drafts, notes, reports, factual

summaries, transcript digests, communication among counsel or counsel and clients including their employees, consultants, board members, commissioners, officials and advisors, or the sharing or exchange via any media including but not limited to electronic media, as well as any other material and information which could otherwise be protected from disclosure to third parties are, and will remain, confidential and protected from disclosure to any third party by their clients' respective attorney-client and attorneys' work product privileges ("Privileged Communications").

4. Exchange of information. The Parties agree that it is in their mutual best interests to cooperate with each other to the extent permitted by law and to share information protected by the attorney-client privilege, the joint defense privilege, the work product doctrine, the common interest doctrine fiduciary law principles, joint plaintiffs privilege, the allied lawyer doctrine, deliberative process privilege and settlement negotiation privilege, and all other applicable privileges, protections or doctrines. To further their common interests, the Parties intend to exchange privileged and work product information orally, electronically, and in written form, through formal and informal correspondence including but not limited to personal meetings and conferences, telephone conversations and conferences, and written and electronic correspondence. The Parties would not disclose to each other such Privileged Communications but for their mutual and common interests in the Legal Matter and but for the undertakings of this Agreement.

5. Confidential Treatment and Nondisclosure.
    a. The Parties acknowledge and agree that this Agreement is intended to facilitate the exchange of information and ideas among counsel and employees, assistants and professionals engaged from time to time by any of them, which exchange of information and ideas is deemed essential to the development of a common strategy or strategies, both offensive and defensive or negotiation-related, with respect to the Legal Matter. Any Privileged Communications exchanged by counsel pursuant to this Agreement shall not be used by any Party for purposes unrelated to the Legal Matter. The Parties acknowledge and agree that the attorney-client privilege and work product doctrine shall apply to all Privileged Communications. It is intended that all Privileged Communications remain confidential in accordance with the terms of this Agreement, and it is on this basis that all Privileged Communications are made between and among the respective counsel and employees, assistants, and professionals engaged by them.
    b. The Parties and their counsel will make all reasonable efforts to maintain the confidentiality of the Privileged Communications. Each Party agrees to maintain the confidentiality of all Privileged Communications and shall also instruct counsel that none of the Privileged Communications obtained or developed by any of the Parties, counsel, employees, assistants and professionals as a result of this Agreement shall be disclosed to third parties without the written consent of the undersigned Parties and counsel.
    c. Any Party or counsel receiving a third-party request or demand for disclosure of Privileged Communications subject to this Agreement shall, except to the extent

prohibited by law, report such request forthwith to all signatory counsel and shall utilize all reasonable means and legal processes to maintain the confidentiality of such communications, including but not limited to opposing any requests for or motions to compel production of such communications or, when appropriate, seeking a protective order to prevent disclosure of such communications.

d. All persons permitted access to Privileged Communications shall be advised that the communications are subject to the terms of this Agreement. Neither of the Parties shall permit any person to have access to Privileged Information if that access would waive or breach the confidentiality of the Privileged Communications.

6. No waiver of privileges. Any exchange of information in connection with such joint efforts is not intended to waive any attorney/client or attorney work product protection or other protection from disclosure to third parties which may be otherwise available. No Party has authority to waive any applicable privilege on behalf of any other Party, nor shall any waiver of applicable privileges by the conduct of any Party be construed to apply to any other Party.

7. This Agreement. This Agreement and all drafts hereof are Privileged Communications and shall be treated accordingly.

8. Prior Communications. This Agreement memorializes earlier oral agreements between the Parties and their counsel pursuant to which work product of the Parties or communications in furtherance of Parties' common interest were transmitted, and the Agreement applies to all previous sharing of such materials and communications among the Parties and their counsel.

9. Separate and Independent Representation. Each Party understands and acknowledges that it is represented by its own attorneys in this Legal Matter. The attorneys representing the other Party owe a duty of loyalty only to their own respective client or clients. Each Party further understands and acknowledges that the attorneys representing the other Party have the right and may have the obligation to take actions against the interest(s) of the other Party, including but not limited to generating and disclosing information to third parties. The Parties recognize each Party's independent right to act with respect to the Legal Matter. Accordingly, nothing in this Agreement shall obligate any Party to participate in any joint activity relating to the Legal Matter, disclose any information or take any particular action with respect to the Legal Matter.

10. Choice of Law. All work performed by the undersigned counsel and their respective clients and consultants pursuant to this Agreement and communications among the undersigned counsel and their clients and/or consultants in connection with this undertaking shall be conducted and protected pursuant to the attorney-client privilege and work product doctrine as recognized by the United States Court of Appeals for the Tenth Circuit and the Colorado Supreme Court.

11. Modifications. Modifications of this Agreement can be made if such modifications are in writing and all of the counsel signatory to this Agreement provide written consent to such changes.

12. Duration. The Parties agree that this Agreement shall remain in effect until completion of the Legal Matter and any related litigation to final non-appealable judgment or to final negotiated resolution related to such proceeding, whichever is later. All Privileged Communications provided to a Party or counsel shall be returned, if requested by the furnishing Party, at the conclusion thereof.

13. Withdrawal. The Parties expressly acknowledge that as the Legal Matter develops, they may determine that they no longer have common interests. Accordingly, any Party is free to withdraw from this Agreement upon giving express written notification to the other Party to this Agreement, in which case this Agreement shall no longer be operative as to future communications between the Parties, but shall continue to protect all Privileged Communications covered by this Agreement and disclosed to or by the withdrawing Party prior to the receipt of the withdrawing Party's notification of withdrawal. Such withdrawal by a Party does not terminate this Agreement.

14. Enforcement. The Parties agree that a breach of the provision of this Agreement by a Party will cause irreparable harm to the other Party and therefore agree that injunctive relief is an appropriate means by which to enforce this Agreement. The Parties further agree, however that this paragraph is not intended to limit the rights of remedies of the Parties to enforce this Agreement.

15. Successors and Assigns. This Agreement shall inure to the benefit of and be binding on the successors or assigns of the Parties. Additional parties may be added to this Agreement with the advance written consent of all other Parties.

16. Effective date. This Agreement is effective in its original form as of November ___, 2015 as to each Party and its counsel below and, as to any additional Parties as of the date of execution by that additional Party and its counsel.

This Agreement is executed by the Parties by and through their counsel. Each counsel executing this Agreement on behalf of a Party warrants that he or she is duly authorized by such Party to do so and that such Party has agreed to be bound hereby. This Agreement may be executed in counterparts, all of which shall comprise one Agreement.

Lisa Reynold

Lisa A. Reynolds
Assistant Attorney General
State of Colorado
11/11/15
Date

David Baumgarten

David Baumgarten
County Attorney
Gunnison County, Colorado
11/11/15
Date

Deborah L. Freeman

Deborah L. Freeman
Trout, Raley, Montaño, Witwer & Freeman, P.C.
Counsel for Gunnison County Stockgrowers' Association, Inc.

11·11·15
Date

Kathy A.F. Davis
Assistant Attorney General
Counsel for State of Utah and San Juan County, Utah

11/24/15
Date