

## **OPERATING AGREEMENT**

This OPERATING AGREEMENT (“Agreement”), entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2013, is by and between Montana Tech of The University of Montana (“Tech”), a campus of the Montana University System, and the Montana Tech Foundation (Foundation).

### **RECITALS**

**WHEREAS**, Tech is a public institution of higher learning and a campus of The Montana University System under the oversight of the Board of Regents; and

**WHEREAS**, the Foundation was established in 1967 and is a non-profit corporation under the laws of the State of Montana and a corporation described in Section 501 (c) (3) of the U.S. Internal Revenue Code; and

**WHEREAS**, the Foundation serves as the official development office for Tech and is responsible for the coordination of all fundraising activities conducted for the benefit of the campus, and

**WHEREAS**, the mission of the Foundation is to advance the teaching, research, and public service endeavors of Tech by generating private contributions to supplement the university’s state and federal revenues, and

**WHEREAS**, the Foundation is dedicated to assisting the university in building of the endowment and in addressing, through philanthropic support, the long-term academic and other priorities consistent with the mission and priorities of Tech as articulated to the Foundation from time to time, and

**WHEREAS**, Tech may seek to invest the certain assets of Tech, and the Foundation desires to provide, for a fee, prudent and professional asset investment and management services, and

**WHEREAS**, the specific purpose of Foundation is to:

- A. Champion the mission and vision of Tech.
- B. Build and foster relationships with constituents that the college serves.
- C. Encourage and enable philanthropy.
- D. Represent the donor by ensuring their wishes are followed.
- E. Solicit and accept financial gifts, equipment, real property and professional services.
- F. Generate financial support for special projects, departments and campus salaries in order to enhance the quality of educational programs.
- G. Raise and fund student scholarships and gifts to enhance academic achievement and success.
- H. Manage resources entrusted to the Foundation.

**WHEREAS**, the parties desire to enter into this Agreement defining the relationship between the parties;

**NOW, THEREFORE**, in consideration of the foregoing recitals and the mutual commitments herein contained, the parties agree as follows:

### **Section 1 – Foundation Name, Seal and Logotypes**

Consistent with its mission to help to advance the plans and objectives of Tech, the Foundation is granted the use of the name Montana Tech Foundation; however, the Foundation will operate under its own seal and logotype and shall only use the Tech seal or other identifying marks in the promotion of its business and activities as approved by Tech.

### **Section 2 – Joint Relationships and Responsibilities**

The Foundation and Tech shall share the position of Foundation President/Vice Chancellor of Development and University Relations (VCDUR). The VCDUR will report to the Chancellor of Tech for all development and advancement activities. The VCDUR will be responsible to the Board of Directors of the Foundation for all Foundation activities. The Foundation agrees to reimburse Tech for one-half of the full salary and benefits of the VCDUR. In addition, the Foundation Board of Directors may recommend and, following approval by the Board of Regents, pay a performance bonus to the VCDUR based on the annually approved Board of Regent employment contract. Any approved bonus plus benefits will be funded by the Foundation. The bonus will be paid through the campus payroll and then billed to the Foundation.

The Chancellor of Tech and the Chair of the Board of Directors of the Foundation will appoint a search committee that will screen applicants and make a recommendation of acceptable candidates from which the Chancellor of Tech and the Chair of the Board of Directors of the Foundation will appoint the VCDUR. Should it become necessary to remove the VCDUR from office, the action will be taken jointly by the Chancellor of Tech and the Chair of the Board of Directors of the Foundation following the policies of the campus and Board of Regents. If agreement cannot be reached, the Foundation or Tech may choose to withdraw financial support for this position.

The relationship of the Foundation to Tech under this Agreement shall be that of an independent entity. Foundation, as an independent entity, will have the right to control and determine the method and manner of performing its duties hereunder. Tech's interest is in the results to be achieved. Nothing herein shall be deemed to create any type of partnership, joint venture, agency or any other relationship between the parties other than independent parties contracting on an arm's length basis.

Once a year during a Foundation meeting, the Chancellor will present to the Foundation Board of Directors a list of Tech's fundraising priorities. The Foundation Board of Directors, in conjunction with Foundation executive leadership, will assess the fundraising

feasibility of the priorities and will work with the Chancellor on establishing mutually agreeable goals and priorities.

### **Section 3 – The Foundation’s Relationship and Responsibilities to Tech**

The Foundation’s Board of Directors is responsible for the control and management of all assets of the Foundation, including the prudent management of all gifts consistent with donor intent.

The Foundation is responsible for the performance and oversight of all aspects of its operations based on a comprehensive set of bylaws that address the board’s fiduciary responsibilities, including expectations of individual board members based upon ethical guidelines and policies.

The Foundation is responsible for the employment, compensation, and evaluation of its employees, including the Foundation President. However, the Foundation President position is a shared position with the campus and shall have a campus title of Vice Chancellor of Development and University Relations. The Foundation is responsible for one-half (1/2) of the salary and benefits of the shared position.

Foundation’s responsibilities as administered by the President of the Foundation are to:

- A. Solicit, receive, hold, invest, re-invest, administer and manage funds including both restricted and unrestricted gifts) consistent with the needs and requirements of its donors, and make expenditures to or for the benefit of Tech;
- B. With Tech’s consent, manage Tech funds and other Tech resources to the extent permissible by law, provided that such Tech funds and other resources remain identified in Foundation and Tech records as Tech assets and are managed as outlined in the section ‘Asset Management’ within this agreement;
- C. Conduct its fund raising operations in a manner that is consistent with the mission and priorities of Tech;
- D. Comply with all applicable state and federal laws;
- E. Accept and account and receipt for all gifts, grants and endowments by preparing and maintaining financial and accounting records in accordance with generally accepted accounting principles or other comprehensive Basis of Accounting, as approved by an independent auditor;
- F. Annually submit audited financial statements and a list of the Foundation’s officers and directors to Tech’s Chancellor;
- G. Have a conflict-of-interest policy;
- H. Seek and obtain input from Tech, through its Chancellor, before defining the priorities for Foundation fund raising efforts;

- I. Underwrite no salary supplement for the Chancellor of Tech without approval and public disclosure by the Board of Regents.
- J. Provide office space within the Frank & Ann Gilmore University Relations Center (URC) for the Montana Tech offices of Career Services, Public Relations and Marketing, and Alumni Affairs along with campus access to general conference and meeting facilities.

### **Asset Investment**

When Tech deposits funds with the Foundation for investment purposes, the Foundation may commingle those funds with the Foundation's funds and other funds held by the Foundation in a pooled investment portfolio ("Pooled Investments"). In doing so, it is mutually understood that:

- A. Tech retains ownership of Tech funds;
- B. The Foundation is authorized to invest the Tech funds in the same manner as other the Foundation funds;
- C. Tech funds are subject to the Foundation's administrative fees (currently 2.0% per annum) in accordance with the Foundation's Fund Administration Policies;
- D. Tech funds may be pooled with the Foundation's institutional funds and other funds for the purpose of participating in the Pooled Investments;
- E. There is no trust relationship between the Tech and the Foundation expressed or implied;
- F. Pooled Investments are invested in accordance with the Foundation's investment policy;
- G. There is an inherent risk involved with investing that is beyond the control of the Foundation, including the potential for loss of Tech's principal in the initial investment, loss of subsequent deposits, loss of interest or appreciation, and loss of other financial gains;
- H. Neither party is obligated to offer or accept investment advice to or from the other party;
- I. The Foundation has not and does not hold itself out as an investment advisor or as a professional investment corporation;
- J. The Tech representative for all matters relating to the investment of Tech funds by the Foundation is the Tech Chancellor or designee.

For all Tech funds invested by the Foundation, the Foundation shall provide periodic summaries and confirmations of balances of Tech funds as may be requested or required. The Tech Chancellor may attend any Foundation Board of Directors meeting where decisions or discussion regarding the investment policy may be held. Additionally, the Foundation shall provide Tech with a copy of the most recent investment policy. Upon written notice from the Tech Chancellor or designee requesting withdrawal of Tech funds from the Pooled Investments, the Foundation will withdraw the funds within a reasonable length of time such that removal of the funds may be completed without adversely affecting the remaining investment portfolio.

All gifts made to Foundation on behalf of Tech shall be accounted for and ownership maintained by Foundation; provided, however, that nothing in this Agreement shall be deemed to prevent Foundation from transferring part or all of any such gift items or funds to Tech, or from disposing of part or all of any such gift items or funds, whenever deemed appropriate by Foundation and in keeping with donor restrictions.

The Foundation is the primary depository of private gifts to Tech and will transfer funds to the designated entity within the University in compliance with applicable laws, campus policies, and gift agreements. The Foundation will act to assure the intent of donors is well documented and honored.

### **Other Financial Relationships and Considerations**

When mutually agreed upon, Foundation shall make available to the Chancellor of Tech a Chancellor's Support Fund, in such amount and for such purposes as shall be mutually agreed upon. A sufficient time before adoption of the Foundation annual budget, the Chancellor shall submit to the Foundation the Chancellor's request, specifying the requested amount and purposes of the fund.

Any and all restrictions placed on funds and assets, and/or upon income therefrom, shall be strictly observed, in accordance with the expressed intent of the donor.

To the extent permitted by applicable law, the records of Foundation will be kept confidential to protect the privacy interests of its donors. The Foundation shall establish and enforce policies to protect donor and prospective donor confidentiality and rights.

The Foundation may provide formal training to Deans, Department Heads and other campus personnel designed to improve each individual's fundraising skills. The Foundation's development staff shall work with the Chancellor, executive officers, academic officers, the Athletics Director and other campus personnel to cultivate private financial support for each assigned campus unit and will work to develop and maintain the alumni base for that same unit.

The Foundation will establish, adhere to, and periodically assess its gift-management and acceptance policies. It will promptly acknowledge and issue receipts for all gifts on behalf of the Foundation and Tech and provide appropriate recognition and stewardship of such gifts.

The Foundation will vet the proposed use of donor provided funds to assure that the use of these funds is in accordance with intent of the donor. In performing this duty the Foundation will jointly review the use of funds with appropriate Tech staff. When distributing gift funds to Tech, the Foundation will disclose any terms, conditions, or limitations imposed by donor or legal determination on the gift. Tech will abide by such restrictions and provide appropriate documentation.

The Foundation will receive, hold, manage, invest, and disperse contributions of cash, securities, and other forms of property, including immediately vesting gifts and deferred gifts that are contributed in the form of planned and deferred-gift instruments.

In managing endowed gifts the Foundation will establish asset-allocation, disbursement, and spending policies that adhere to all current and future applicable federal and state laws including the Uniform Prudent Management of Institutional Funds Act (UPMIFA) as amended or modified from time to time.

The Foundation is responsible for establishing a financial plan to underwrite the cost of Foundation programs, operations, and services. The Foundation has the right to assess fees for services and administrative or investment management fees to support its operations.

The Foundation shall maintain, at its own expense, copies of the plans, budgets, and donor and alumni records developed in connection with the performance of its obligations.

The Foundation will provide access to data and records to the University on a need-to-know basis in accordance with applicable laws, Foundation policies, and guidelines. The Foundation will provide copies of its annual report, and other information that may be publicly released.

The Foundation will engage an independent accounting firm annually to conduct an audit of the Foundation's financial and operational records and will provide Tech and the Board of Regents via a copy to the Office of the Commissioner of Higher Education with a copy of the annual audited financial statements.

The Foundation will maintain and enforce a conflict-of-interest policy, that is a policy intended to protect the Foundation's interest when it is entering into a transaction or arrangement that might benefit the private interest of an officer, director, or committee member of the Foundation.

No salary supplement will be provided by the Foundation to the Tech Chancellor without the Board of Regent's approval. All faculty, student or employee compensation must be processed through the campus payroll and approved by administration.

With the explicit approval of the Foundation board, the Foundation may from time to time serve as an instrument for selected activities for Tech including but not limited to the purchasing, developing, or managing real estate for Tech, or Tech-related expansion.

The Foundation may hold licensing agreements and other forms of intellectual property, borrow or guarantee debt issued by their parties, or engage in other activities to increase Foundation revenue with no direct connection to a Tech purpose.

#### **Section 4 – Tech’s Relationship and Responsibilities to the Foundation**

The Chancellor is responsible for communicating the university’s priorities and long-term plans to the Foundation.

Tech recognizes that the Foundation is a separately incorporated nonprofit tax exempt organization with the authority to keep all records and data confidential consistent with the law.

Tech shall include the Foundation as an active and prominent participant in the strategic planning for the university.

The Chancellor of Tech shall serve as an ex-officio, non-voting member of the Foundation board and shall assume a prominent role in fund-raising activities.

Tech’s responsibility as administered by the Chancellor is to employ, as a State of Montana employee, a Vice Chancellor of Development and University Relations (VCDUR) who also serves as President of the Foundation.

In lieu of lease payments for office and meeting space in Frank & Ann Gilmore University Relations Center, Tech agrees to provide:

1. Normal operations and maintenance including landscaping, snow removal, janitorial services and utilities for the Frank & Ann Gilmore University Relations Center; and
2. Computer support, network access, use of the Tech email system, telephone access and other services as reasonably required.

It is understood that the Foundation may request services in addition to those listed above and that Tech may elect to charge the Foundation for those services at a mutually agreed upon rate.

The Chancellor, Vice Chancellors, Deans, Department Heads and other campus personnel will work in conjunction with the leadership of the Foundation to identify, cultivate, and solicit prospects for private gifts.

Tech will actively coordinate its Alumni Relations and Public Relations activities with those of the Foundation in order to develop a programmatic culture within the student,

alumni and private support constituencies that effectively encourages increased philanthropy.

Tech shall provide the Foundation with timely access to alumni data. This access shall include such data as the Foundation and Tech Alumni Relations find necessary to carry out their missions. The Foundation shall not release or otherwise use this data for any purpose outside of that expressly outlined in this Agreement.

In consideration for additional services not specified in this Agreement, which may be performed from time to time by the Foundation, at Tech's request, Tech shall transfer funds to Foundation at such times and in such amounts as may be mutually agreed upon. Such funds shall be budgeted by both parties on an annual basis, and shall be agreed upon in writing. During the term of this agreement Tech will transfer \$14,000 per year to the Foundation to cover accounting costs for non-state athletic related funds managed by the Foundation.

## **Section 5 – Other Matters**

No employee of the Montana University System will hold a voting position within the Foundation.

In the performance of this Agreement, the parties shall not discriminate on the basis of gender, race, color, religion, marital status, sexual orientation, creed, age, political belief, physical or mental handicap, or national or ethnic origin.

This Agreement shall remain in full force and effect until terminated by either of the parties hereto. Either party may terminate this Agreement by giving the other party notice in writing at least thirty (30) days prior to the date of termination.

Any notice to be given to either party hereunder shall be deemed complete when sent by registered or certified mail, return receipt requested, or when served personally upon an officer of the party to be notified.

This Agreement is established to contribute to the coordination of the mutual activities of the Foundation and Tech. To ensure effective achievement of the items of the agreement, Tech and the Foundation officers and board representatives shall hold periodic meetings to foster and maintain productive relationships and to ensure open and continuing communication and alignment of priorities.

Consistent with provisions appearing in the Foundation's bylaws and its articles of incorporation, should the Foundation cease to exist or is no longer a qualified tax exempt organization under Internal Revenue Code 501 (c) (3) organization, the Foundation will transfer its assets and property to the Tech.

The Recitals are incorporated into this Agreement by this reference.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective duly authorized officer or officers as of the day and year first above written.

MONTANA TECH OF THE UNIVERSITY OF MONTANA

\_\_\_\_\_  
Chancellor Dr. Donald M. Blackketter

\_\_\_\_\_  
Date

MONTANA TECH FOUNDATION

\_\_\_\_\_  
Jerry Schuyler  
Chairman, Montana Tech Foundation Board of Directors

\_\_\_\_\_  
Date