

SOUTH DAKOTA BOARD OF REGENTS

Budget and Finance
Consent

AGENDA ITEM: 4 – P
DATE: April 1, 2020

SUBJECT

BHSU and DSU Foundation Operating Agreements

CONTROLLING STATUTE, RULE, OR POLICY

BOR Policy 5:9 - Foundations

BACKGROUND / DISCUSSION

Over the past few months, the Board Office, BHSU, DSU and their respective Foundations have discussed opportunities to improve the agreement/MOU structure between the parties to better promote and foster productive relationships between these Universities and their respective Foundations. As part of that process, the parties reviewed their existing agreements, current operations, and best practices for similarly situation universities/foundations across the country with the intent to structure their operations moving forward in a manner that would best position the Universities and Foundations to accomplish their respective missions. The agreements set forth in Attachments I and II are the products of those efforts.

IMPACT AND RECOMMENDATION

The proposed operating agreements memorialize the desired structural and operational framework between the Universities and their respective Foundations, which were informed by best practices nationally for similarly situated universities/foundations.

Staff recommends approval.

ATTACHMENT

Attachment I – BHSU Foundation Operating Agreement
Attachment II – DSU Foundation Operating Agreement

DRAFT MOTION 20200401_4-P:

I move to approve the BHSU and DSU Foundation Operating Agreements in substantially similar form to those set forth in Attachments I and II, and authorize the General Counsel to approve the final versions thereof.

**OPERATING AGREEMENT
BETWEEN BLACK HILLS STATE UNIVERSITY
AND BLACK HILLS STATE UNIVERSITY FOUNDATION**

THIS AGREEMENT, entered into as of this ____ day of _____, 20__, by and between the Black Hills State Foundation (“Foundation”) and Black Hills State University (“University”), with the approval of the South Dakota Board of Regents (“Regents”).

WHEREAS, the Foundation is an independent, privately incorporated non-profit corporation created to raise, manage, and distribute resources solely to support the various missions of the University.

WHEREAS, the Foundation exists to support the mission and priorities of the University, and providing opportunities for students and the University that would not be available with state funding alone.

WHEREAS, in connection with its fundraising and asset management activities, the Foundation utilizes, in accordance with this Agreement, various University resources and services and works with the University to assist and advise in such activities in furtherance of their common goal(s).

WHEREAS, the services and funds provided by the Foundation for the benefit of the University have a fair market value surpassing the value of the resources and services provided by the University to the Foundation in accordance with this Agreement.

WHEREAS, the Foundation and Regents entered into a July 2012 MOU covering the same subject matter as this Agreement, which MOU shall be replaced and superseded by this Agreement upon its execution and approval.

NOW THEREFORE, in consideration of the mutual commitments contained herein, and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

**ARTICLE I
GOVERNANCE AND AUTHORITY**

1.1 Foundation. The Foundation is a privately incorporated 501(c)(3) nonprofit corporation that exists to secure, manage and distribute private support solely for the benefit of the University. In discharging these functions, the Foundation acts as fiduciary for the University, holding assets in trust and operating only for the benefit of the University. The Foundation Board of Directors (“Foundation Board”) is legally responsible for the performance and oversight of all aspects of Foundation operations. The Foundation operates in accordance with its Articles of Incorporation and Bylaws, copies of which

shall be provided to the University upon execution of this Agreement. Any future amendments to such documents shall also be provided to the University, and to the extent practical, the Foundation will provide the University with an advance copy of any proposed amendments to the Foundation's Articles of Incorporation and Bylaws.

- 1.2 University.** The University is a public institution of higher education which operates under the oversight and governance of the Regents. The Regents are legally responsible for the performance and oversight of all aspects of the University's mission, leadership, and operations, to include the employment, compensation and evaluation of all University employees.

ARTICLE II UNIVERSITY RESOURCES AND SERVICES

- 2.1 University / Foundation Liaison.** The University's Vice President for University Advancement shall serve as the Executive Director of the Foundation (hereinafter referred to as just the "Vice President for University Advancement" for simplicity, notwithstanding the dual role of the position). The Vice President for University Advancement shall report directly to the University President, in consultation with the Foundation Board, and is responsible for coordinating the University's and the Foundation's fundraising efforts and the supervision and coordination of the administrative support provided by the University to the Foundation. The University President will consult with the Foundation Board when hiring the Vice President for University Advancement. The Vice President for University Advancement shall serve as a non-voting ex officio member of the Foundation Board and all of its committees.
- 2.2 University Provided Services.** The University will make available and/or provide to the Foundation, at no cost, the following University personnel and resources:
- a. services by the University President, senior administrators and such support staff as may be necessary and appropriate to support the fundraising, fund management and income distribution functions that the Foundation discharges in trust to benefit the University;
 - b. payroll services, including the allocation of related benefits, for such employees as the Foundation may hire; and
 - c. technology support services as well as online access to such University files as are relevant to the business and purpose of the Foundation.
- 2.3 Additional University Resources and Services.** The University and Foundation may provide additional resources and/or services beyond those set forth herein, upon terms and conditions agreed to by the University and Foundation. The terms of use (including

any rent or reimbursement) of additional resources and/or services shall be set forth in Exhibit A, attached hereto and incorporated herein by this reference as if set forth in full.

ARTICLE III RELATIONSHIP OF THE PARTIES

- 3.1 University Planning.** The Foundation shall be an active and prominent participant in the strategic planning for the University. The Foundation will select any appointees to boards and/or committee positions which are designated to represent the Foundation. The Vice President for University Advancement shall be included as a member of the University President's cabinet and/or senior administrative team.
- 3.2 Foundation Planning.** The University President shall serve as a non-voting ex-officio member of the Foundation Board, and a non-voting ex-officio member of the Foundation's Executive Committee. Other employees of the University may serve on the Foundation Board by mutual agreement between the Foundation and the University President.
- 3.3 Coordination of Fundraising.** The University President shall assume a prominent role in fundraising activities, to include defining the fundraising and philanthropic goals and related activities, working in conjunction with the Vice President for University Advancement and the leadership of the Foundation Board to identify, cultivate and solicit prospects for private gifts.
- The University President, the Vice President for University Advancement, and the Foundation shall plan and execute comprehensive fund raising and donor acquisition programs in support of the mission of the University to include annual giving, major gifts, planned gifts, special projects and capital campaigns as appropriate. The Foundation will promptly receipt and acknowledge all gifts on behalf of the Foundation and the University and provide appropriate recognition of donors. The Vice President for University Advancement is responsible for the coordination of donors' fulfillment of obligations.
- 3.4 Evaluation of Leadership.** The Executive Director of the Regents shall consult with the Foundation Board's leadership when reviewing the performance of the University President. The University President will consult with the Foundation Board when reviewing the performance of the Vice President for University Advancement.
- 3.5 Access to Records.** The Foundation shall establish and enforce policies to protect donor confidentiality and rights. The donor database, as well as other data, materials and information of the Foundation pertaining to past, current or prospective donors, are proprietary to the Foundation and constitute its confidential information and trade secrets.

Access to such information will be provided to select University personnel as necessary for legitimate business purposes. The Foundation and University shall take the steps necessary to monitor and control access to the donor database and to protect the security of the server and software relevant to the database.

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, and in accordance with terms of this Agreement. The University shall, at any time, have access to the financial records of the Foundation as necessary to fulfill the audit rights set forth herein. The University's access shall not include donor specific data such that would provide individually identifiable information about donors or their donations made to the Foundation.

- 3.6 Record Management.** The University will maintain records in accordance with state law and as set forth in the Regents' Records Retention Manual. The Foundation shall be responsible for maintaining all permanent records of the Foundation, including but not limited to, the Foundation's Articles, Bylaws and other governing documents, all necessary documents for compliance with IRS regulations, all gift instruments, and all other Foundation records as required by applicable laws.
- 3.7 Name and Marks.** Each Party is hereby granted a general, non-exclusive, royalty-free license to use the corporate name of the other, specifically Black Hills State University Foundation and/or BHSU Foundation, and its associated logo(s), and Black Hills State University and/or BHSU, and its associated logo(s), in all activities conducted in association with or for the benefit of the other in carrying out this Agreement. Use of the other Party's name must be in a manner that clearly identifies the Parties as separate entities, and neither Party may use the other Party's name to imply approval or action of the other Party. Neither party may delegate, assign, or sublicense the rights granted hereunder without the express written consent from the other Party. This license does not extend to any other names marks of the Parties, and prior written approval must be obtained before using any other name or mark of either Party.
- 3.8 Contractual Obligation.** Neither Party may enter into any contract that would impose a financial or contractual obligation of the other Party without first obtaining the prior written approval of the other Party.

ARTICLE IV ASSET MANAGEMENT

- 4.1 General.** The Foundation Board of Directors is responsible for the control and management of all assets of the Foundation and is bound by the terms, conditions and

restrictions established by donors to the Foundation. Absent unique circumstances, gifts shall be made directly to the Foundation rather than to the University.

4.2 **Acceptance of Gifts.**

- a. *University Obligation(s).* Prior to accepting any gift or other contribution for restricted or designated purposes that may require administration or direct expenditure by the University, or that otherwise imposes any financial or contractual obligation on the University, the Foundation shall obtain the prior written approval of the University President, and where required by policy or law, approval of the Regents.
- b. *Real Property.* The Foundation shall conduct adequate due diligence prior to accepting gifts of real property. All gifts of real property intended to be held, used and/or conveyed to the University/Regents must receive the requisite prior approval of the University and/or Regent as dictated by applicable policy, and where required by law, approval of the Legislature.
- c. *Restricted and Unrestricted Gift Transfers.* The Foundation may make restricted donations to the University. Such donated funds will only be expended by the University pursuant to the terms of such lawful restrictions. The Foundation may also make unrestricted donations to the University. Unrestricted donated funds will be expended under the oversight of the University President in compliance with state law and University/Regents policies. All expenditures noted in this section must comply with the I.R.S. 501(c)(3) code and be consistent with the Foundation's mission to support the University.

4.3 **Transfer of Funds.** The Foundation agrees to transfer funds, both current gifts and income from endowments, to the University on a regular basis as agreed by the Parties, but in no event on a less frequent basis than annually. The Foundation's Treasurer, or other individual(s) to whom such authority has been delegated by the Foundation's Board, shall be responsible for transferring funds as authorized by the Foundation.

4.4 **Expenditures.** All expenditures of the Foundation shall be (1) consistent with the charitable purpose of the Foundation, and (2) not violate restrictions imposed by the donor or the Foundation as to the use or purpose of the specific funds. The Foundation designates the Foundation Treasurer as the individual with signature authority for the Foundation in all financial transactions. The Foundation may supplement or change this designation with written notice to the University.

4.5 **Separate Funds.** All Foundation assets (including bank and investment accounts) shall be held in separate, password protected accounts in the name of the Foundation using Foundation's Federal Employer Identification Number. The financial records of the Foundation shall be kept using a separate chart of accounts. For convenience purposes,

some Foundation expenses may be paid through the University such as payroll and campus charges. These expenses will be paid through accounts clearly titled as belonging to the Foundation and shall be reimbursed by the Foundation on a regular basis, as determined by the parties.

ARTICLE V AUDITS AND REPORTING

- 5.1 Fiscal Year.** The Foundation’s fiscal year will run from January 1 – December 31 and the University’s fiscal year will run from July 1 – June 30. The Foundation will make any adjustments necessitated by the differing fiscal years to allow for its Financial Statements and Schedules to be incorporated into the State of South Dakota’s Comprehensive Annual Financial Review statements as provided in Section 5.4 below.
- 5.2 Report on Distributed Funds.** On a regular basis, which shall not be less frequent than annually, the University shall report to the Foundation on the use of restricted and unrestricted funds transferred to the University. This report shall specify the restrictions on any restricted funds and the uses of such funds.
- 5.3 Report to University President and Regents.** On a regular basis, which shall not be less frequent than annually, the Foundation shall provide a written report to the University President and the Regents setting forth following items:
- a. The annual financial audit report;
 - b. An annual report of Foundation transfers made to the University;
 - c. An annual report on unrestricted funds received by the Foundation;
 - d. An annual report on unrestricted funds available for use during the current fiscal year;
 - e. A list of all of the Foundation’s officers, directors, and employees;
 - f. A list of all state and federal contracts and grants managed by the Foundation;
 - g. An annual report of the Foundation’s major activities;
 - h. An annual report of each real estate purchase or material capital lease, investment, or financing arrangement entered into during the preceding fiscal year for the benefit of the University; and
 - i. An annual report on any litigation threatened or pending against the Foundation.
- 5.4 Annual Audit.** On an annual basis, the Foundation shall have an audit conducted by a qualified, independent certified public accountant who is not a director or officer of the Foundation. The annual audit will be provided on a timely basis to the University and Regents. The Foundation’s Annual Statements may be presented in accordance with the standards promulgated by the Financial Accounting Standards Board (“FASB”). The Foundation is a component unit of the University as defined by the Government Accounting Standards Board (“GASB”). Accordingly, the University, which follows a

GASB format, is required to include the Foundation in its Financial Statements. Therefore, if the Foundation presents its audited Financial Statement under FASB, Schedules reconciling the FASB Statements to GASB standards must be provided to the University and Regents as required by GASB standards. The annual audited Financial Statements and Schedules shall be submitted to the University and Regents in sufficient time to incorporate the same into the State of South Dakota's Comprehensive Annual Financial Review statements.

- 5.5 Separate Audit Rights.** The University agrees that the Foundation, at its own expense, may at any time during the normal business hours conduct or request additional audits or reviews of the University's books and records pertinent to the expenditure of donated funds. The Foundation agrees that the University and the Regents, at its own expense, may, at reasonable times, inspect and audit the Foundation's books and accounting records. Further, the Foundation shall make data available to external auditors as necessary to complete audit responsibilities set forth herein.

ARTICLE VI GENERAL TERMS

- 6.1 Effective Date.** This Agreement shall be effective on the date first set forth above and continue until terminated or as otherwise modified or amended in accordance with the terms hereof. The Parties, or their respective designees, shall meet to review the terms of this Agreement and discuss any necessary adjustments no less frequently than once every five (5) years.
- 6.2 Termination.** This Agreement shall terminate upon the mutual written agreement of the Parties. In addition, either Party may, upon 90 days' prior written notice to the other, terminate this Agreement, and either Party may terminate this Agreement in the event the other Party defaults in the performance of its obligations and fails to cure the default within 30 days after receiving written notice from the non-defaulting party specifying the nature of the default. Should the University choose to terminate this Agreement by providing 90 days' written notice or in the event of a default by the Foundation that is not cured within the time frame set forth above, the Foundation may require the University to pay, within 180 days of written notice, all debt incurred by the Foundation on the University's behalf, including, but not limited to, lease payments, advanced funds, and funds borrowed or specific initiatives. Should the Foundation choose to terminate this Agreement by providing 90 days' written notice or in the event of a default by the University that is not cured within the time frame set forth above, the University may require the Foundation to pay any debt it hold on behalf of the Foundation in a like a manner. The Parties agree that in the event this Agreement terminates, they shall

cooperate with one another in good faith to negotiate a new agreement within six (6) months. Termination of this Agreement does not constitute or cause dissolution of the Foundation.

6.3 Regents' Approval. Prior to the Parties' execution of this Agreement, an unexecuted copy of this Agreement must be approved by the Regents. Furthermore, this Agreement, including any subsequent modifications and restatements of this Agreement, shall be submitted to the Regents for review and approval.

6.4 Modification. Any modification to this Agreement or any exhibits hereto shall be in writing and signed by the Parties.

6.5 Notices. Any notices required under this Agreement may be mailed or delivered as follows:

To the University:

To the Foundation:

6.6 No Joint Venture. At all times and for all purposes of this Agreement, the University and the Foundation shall act in an independent capacity and not as an agent or representative of the other Party.

6.7 Liability. The University and Foundation are independent entities and neither shall be liable for any of the other's contracts, torts, or other act or omissions, or those of the other's members, directors, officers, or employees.

6.8 Dissolution of Foundation. Consistent with the provisions appearing in the Foundation's Bylaws and/or Articles of Incorporation, should the Foundation cease to exist or cease to qualify as an IRS Code §501(c)(3) organization, the Foundation will transfer its assets and property to the University, to a reincorporated successor Foundation organized to benefit the University, or to the State of South Dakota for public purposes, in accordance with South Dakota law.

6.9 Assignment. This Agreement is not assignable by either Party, in whole or in part.

6.10 Governing Law. This Agreement shall be governed by the laws of the State of South Dakota. Any lawsuit pertaining to or affecting this Agreement shall be venued in Circuit Court, Fourth Judicial Circuit, Lawrence County, South Dakota.

6.11 Severability. If any provision of this Agreement is held invalid or unenforceable to any extent, the remainder of this Agreement is not affected thereby and that provision shall be enforced to the greatest extent permitted by law.

6.12 Entire Agreement. This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings of the Parties pertaining thereto.

IN WITNESS WHEREOF, the University and the Foundation have executed this Agreement as of the day and year first above written.

University:

Foundation:

BY: _____
ITS: _____

BY: _____
ITS: _____

Approved by Regents:

BY: _____
ITS: _____

**OPERATING AGREEMENT
BETWEEN DAKOTA STATE UNIVERSITY
AND DAKOTA STATE UNIVERSITY FOUNDATION**

THIS AGREEMENT, entered into as of this ____ day of _____, 20__, by and between Dakota State University Foundation (“Foundation”) and Dakota State University (“University”), with the approval of the South Dakota Board of Regents (“Regents”).

WHEREAS, the Foundation is an independent, privately incorporated non-profit corporation created to raise, manage, and distribute resources solely to support the various missions of the University.

WHEREAS, the Foundation exists to support the mission and priorities of the University, and providing opportunities for students and the University that would not be available with state funding alone.

WHEREAS, in connection with its fundraising and asset management activities, the Foundation utilizes, in accordance with this Agreement, various University resources and services and works with the University to assist and advise in such activities in furtherance of their common goal(s).

WHEREAS, the services and funds provided by the Foundation for the benefit of the University have a fair market value surpassing the value of the resources and services provided by the University to the Foundation in accordance with this Agreement.

WHEREAS, the Foundation and Regents entered into a July 2012 MOU covering the same subject matter as this Agreement, which MOU shall be replaced and superseded by this Agreement upon its execution and approval.

NOW THEREFORE, in consideration of the mutual commitments contained herein, and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

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shall be provided to the University upon execution of this Agreement. Any future amendments to such documents shall also be provided to the University, and to the extent practical, the Foundation will provide the University with an advance copy of any proposed amendments to the Foundation's Articles of Incorporation and Bylaws.

- 1.2 University.** The University is a public institution of higher education which operates under the oversight and governance of the Regents. The Regents are legally responsible for the performance and oversight of all aspects of the University's mission, leadership, and operations, to include the employment, compensation and evaluation of all University employees.

ARTICLE II UNIVERSITY RESOURCES AND SERVICES

- 2.1 University / Foundation Liaison.** The University's Vice President for University Advancement shall serve as the Executive Director of the Foundation (hereinafter referred to as just the "Vice President for University Advancement" for simplicity, notwithstanding the dual role of the position). The Vice President for University Advancement shall report directly to the University President, in consultation with the Foundation Board, and is responsible for coordinating the University's and the Foundation's fundraising efforts and the supervision and coordination of the administrative support provided by the University to the Foundation. The University President will consult with the Foundation Board when hiring the Vice President for University Advancement. The Vice President for University Advancement shall serve as a non-voting ex officio member of the Foundation Board and all of its committees.
- 2.2 University Provided Services.** The University will make available and/or provide to the Foundation, at no cost, the following University personnel and resources:
- a. services by the University President, senior administrators and such support staff as may be necessary and appropriate to support the fundraising, fund management and income distribution functions that the Foundation discharges in trust to benefit the University;
 - b. University facilities, as necessary and appropriate for the performance of the services of the Foundation, including any associated maintenance, custodial, and utilities;
 - c. payroll services, including the allocation of related benefits, for such employees as the Foundation may hire; and
 - d. technology support services as well as online access to such University files as are relevant to the business and purpose of the Foundation.

- 2.3 Additional University Resources and Services.** The University and Foundation may provide additional resources and/or services beyond those set forth herein, upon terms and conditions agreed to by the University and Foundation. The terms of use (including any rent or reimbursement) of additional resources and/or services shall be set forth in Exhibit A, attached hereto and incorporated herein by this reference as if set forth in full.

ARTICLE III RELATIONSHIP OF THE PARTIES

- 3.1 University Planning.** The Foundation shall be an active and prominent participant in the strategic planning for the University. The Foundation will select any appointees to boards and/or committee positions which are designated to represent the Foundation. The Vice President for University Advancement shall be included as a member of the University President's cabinet and/or senior administrative team.
- 3.2 Foundation Planning.** The University President shall serve as a non-voting ex-officio member of the Foundation Board, and a non-voting ex-officio member of the Foundation's Executive Committee. Other employees of the University may serve on the Foundation Board by mutual agreement between the Foundation and the University President.
- 3.3 Coordination of Fundraising.** The University President shall assume a prominent role in fundraising activities, to include defining the fundraising and philanthropic goals and related activities, working in conjunction with the Vice President for University Advancement and the leadership of the Foundation Board to identify, cultivate and solicit prospects for private gifts.

The University President, the Vice President for University Advancement, and the Foundation shall plan and execute comprehensive fund raising and donor acquisition programs in support of the mission of the University to include annual giving, major gifts, planned gifts, special projects and capital campaigns as appropriate. The Foundation will promptly receipt and acknowledge all gifts on behalf of the Foundation and the University and provide appropriate recognition of donors. The Vice President for University Advancement is responsible for the coordination of donors' fulfillment of obligations.

- 3.4 Evaluation of Leadership.** The Executive Director of the Regents shall consult with the Foundation Board's leadership when reviewing the performance of the University President. The University President will consult with the Foundation Board when reviewing the performance of the Vice President for University Advancement.

- 3.5 Access to Records.** The Foundation shall establish and enforce policies to protect donor confidentiality and rights. The donor database, as well as other data, materials and information of the Foundation pertaining to past, current or prospective donors, are proprietary to the Foundation and constitute its confidential information and trade secrets. Access to such information will be provided to select University personnel as necessary for legitimate business purposes. The Foundation and University shall take the steps necessary to monitor and control access to the donor database and to protect the security of the server and software relevant to the database.

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, and in accordance with terms of this Agreement. The University shall, at any time, have access to the financial records of the Foundation as necessary to fulfill the audit rights set forth herein. The University's access shall not include donor specific data such that would provide individually identifiable information about donors or their donations made to the Foundation.

- 3.6 Record Management.** The University will maintain records in accordance with state law and as set forth in the Regents' Records Retention Manual. The Foundation shall be responsible for maintaining all permanent records of the Foundation, including but not limited to, the Foundation's Articles, Bylaws and other governing documents, all necessary documents for compliance with IRS regulations, all gift instruments, and all other Foundation records as required by applicable laws.

- 3.7 Name and Marks.** Each Party is hereby granted a general, non-exclusive, royalty-free license to use the corporate name of the other, specifically _____ and _____, in all activities conducted in association with or for the benefit of the other in carrying out this Agreement. Use of the other Party's name must be in a manner that clearly identifies the Parties as separate entities, and neither Party may use the other Party's name to imply approval or action of the other Party. Neither party may delegate, assign, or sublicense the rights granted hereunder without the express written consent from the other Party. This license does not extend to any other names marks of the Parties, and prior written approval must be obtained before using any other name or mark or either Party.

- 3.8 Contractual Obligation.** Neither Party may enter into any contract that would impose a financial or contractual obligation of the other Party without first obtaining the prior written approval of the other Party.

ARTICLE IV

ASSET MANAGEMENT

- 4.1 General.** The Foundation Board of Directors is responsible for the control and management of all assets of the Foundation and is bound by the terms, conditions and restrictions established by donors to the Foundation. Absent unique circumstances, gifts shall be made directly to the Foundation rather than to the University.
- 4.2 Acceptance of Gifts.**
- a. *University Obligation(s).* Prior to accepting any gift or other contribution for restricted or designated purposes that may require administration or direct expenditure by the University, or that otherwise imposes any financial or contractual obligation on the University, the Foundation shall obtain the prior written approval of the University President, and where required by policy or law, approval of the Regents.
 - b. *Real Property.* The Foundation shall conduct adequate due diligence prior to accepting gifts of real property. All gifts of real property intended to be held, used and/or conveyed to the University/Regents must receive the requisite prior approval of the University and/or Regent as dictated by applicable policy, and where required by law, approval of the Legislature.
 - c. *Restricted and Unrestricted Gift Transfers.* The Foundation may make restricted donations to the University. Such donated funds will only be expended by the University pursuant to the terms of such lawful restrictions. The Foundation may also make unrestricted donations to the University. Unrestricted donated funds will be expended under the oversight of the University President in compliance with state law and University/Regents policies. All expenditures noted in this section must comply with the I.R.S. 501(c)(3) code and be consistent with the Foundation's mission to support the University.
- 4.3 Transfer of Funds.** The Foundation agrees to transfer funds, both current gifts and income from endowments, to the University on a regular basis as agreed by the Parties, but in no event on a less frequent basis than annually. The Foundation's Treasurer, or other individual(s) to whom such authority has been delegated by the Foundation's Board, shall be responsible for transferring funds as authorized by the Foundation.
- 4.4 Expenditures.** All expenditures of the Foundation shall be (1) consistent with the charitable purpose of the Foundation, and (2) not violate restrictions imposed by the donor or the Foundation as to the use or purpose of the specific funds. The Foundation designates the Foundation Treasurer as the individual with signature authority for the Foundation in all financial transactions. The Foundation may supplement or change this designation with written notice to the University.

- 4.5 Separate Funds.** All Foundation assets (including bank and investment accounts) shall be held in separate, password protected accounts in the name of the Foundation using Foundation's Federal Employer Identification Number. The financial records of the Foundation shall be kept using a separate chart of accounts. For convenience purposes, some Foundation expenses may be paid through the University such as payroll and campus charges. These expenses will be paid through accounts clearly titled as belonging to the Foundation and shall be reimbursed by the Foundation on a regular basis, as determined by the parties.

ARTICLE V AUDITS AND REPORTING

- 5.1 Fiscal Year.** The Foundation and the University shall have the same fiscal year, which runs from July 1 – June 30.
- 5.2 Report on Distributed Funds.** On a regular basis, which shall not be less frequent than annually, the University shall report to the Foundation on the use of restricted and unrestricted funds transferred to the University. This report shall specify the restrictions on any restricted funds and the uses of such funds.
- 5.3 Report to University President and Regents.** On a regular basis, which shall not be less frequent than annually, the Foundation shall provide a written report to the University President and the Regents setting forth following items:
- a. The annual financial audit report;
 - b. An annual report of Foundation transfers made to the University;
 - c. An annual report on unrestricted funds received by the Foundation;
 - d. An annual report on unrestricted funds available for use during the current fiscal year;
 - e. A list of all of the Foundation's officers, directors, and employees;
 - f. A list of all state and federal contracts and grants managed by the Foundation;
 - g. An annual report of the Foundation's major activities;
 - h. An annual report of each real estate purchase or material capital lease, investment, or financing arrangement entered into during the preceding fiscal year for the benefit of the University; and
 - i. An annual report on any litigation threatened or pending against the Foundation.
- 5.4 Annual Audit.** On an annual basis, the Foundation shall have an audit conducted by a qualified, independent certified public accountant who is not a director or officer of the Foundation. The annual audit will be provided on a timely basis to the University and Regents. The Foundation's Annual Statements may be presented in accordance with the standards promulgated by the Financial Accounting Standards Board ("FASB"). The

Foundation is a component unit of the University as defined by the Government Accounting Standards Board (“GASB”). Accordingly, the University, which follows a GASB format, is required to include the Foundation in its Financial Statements. Therefore, if the Foundation presents its audited Financial Statement under FASB, Schedules reconciling the FASB Statements to GASB standards must be provided to the University and Regents as required by GASB standards. The annual audited Financial Statements and Schedules shall be submitted to the University and Regents in sufficient time to incorporate the same into the State of South Dakota’s Comprehensive Annual Financial Review statements.

- 5.5 Separate Audit Rights.** The University agrees that the Foundation, at its own expense, may at any time during the normal business hours conduct or request additional audits or reviews of the University’s books and records pertinent to the expenditure of donated funds. The Foundation agrees that the University and the Regents, at its own expense, may, at reasonable times, inspect and audit the Foundation’s books and accounting records. Further, the Foundation shall make data available to external auditors as necessary to complete audit responsibilities set forth herein.

ARTICLE VI GENERAL TERMS

- 6.1 Effective Date.** This Agreement shall be effective on the date first set forth above and continue until terminated or as otherwise modified or amended in accordance with the terms hereof. The Parties, or their respective designees, shall meet to review the terms of this Agreement and discuss any necessary adjustments no less frequently than once every five (5) years.
- 6.2 Termination.** This Agreement shall terminate upon the mutual written agreement of the Parties. In addition, either Party may, upon 90 days’ prior written notice to the other, terminate this Agreement, and either Party may terminate this Agreement in the event the other Party defaults in the performance of its obligations and fails to cure the default within 30 days after receiving written notice from the non-defaulting party specifying the nature of the default. Should the University choose to terminate this Agreement by providing 90 days’ written notice or in the event of a default by the Foundation that is not cured within the time frame set forth above, the Foundation may require the University to pay, within 180 days of written notice, all debt incurred by the Foundation on the University’s behalf, including, but not limited to, lease payments, advanced funds, and funds borrowed or specific initiatives. Should the Foundation choose to terminate this Agreement by providing 90 days’ written notice or in the event of a default by the University that is not cured within the time frame set forth above, the University may

require the Foundation to pay any debt it hold on behalf of the Foundation in a like a manner. The Parties agree that in the event this Agreement terminates, they shall cooperate with one another in good faith to negotiate a new agreement within six (6) months. Termination of this Agreement does not constitute or cause dissolution of the Foundation.

6.3 Regents' Approval. Prior to the Parties' execution of this Agreement, an unexecuted copy of this Agreement must be approved by the Regents. Furthermore, this Agreement, including any subsequent modifications and restatements of this Agreement, shall be submitted to the Regents for review and approval.

6.4 Modification. Any modification to this Agreement or any exhibits hereto shall be in writing and signed by the Parties.

6.5 Notices. Any notices required under this Agreement may be mailed or delivered as follows:

To the University:

To the Foundation:

6.6 No Joint Venture. At all times and for all purposes of this Agreement, the University and the Foundation shall act in an independent capacity and not as an agent or representative of the other Party.

6.7 Liability. The University and Foundation are independent entities and neither shall be liable for any of the other's contracts, torts, or other act or omissions, or those of the other's members, directors, officers, or employees.

6.8 Dissolution of Foundation. Consistent with the provisions appearing in the Foundation's Bylaws and/or Articles of Incorporation, should the Foundation cease to exist or cease to qualify as an IRS Code §501(c)(3) organization, the Foundation will transfer its assets and property to the University, to a reincorporated successor Foundation organized to benefit the University, or to the State of South Dakota for public purposes, in accordance with South Dakota law.

6.9 Assignment. This Agreement is not assignable by either Party, in whole or in part.

6.10 Governing Law. This Agreement shall be governed by the laws of the State of South Dakota. Any lawsuit pertaining to or affecting this Agreement shall be venued in Circuit Court, Third Judicial Circuit, Lake County, South Dakota.

6.11 Severability. If any provision of this Agreement is held invalid or unenforceable to any extent, the remainder of this Agreement is not affected thereby and that provision shall be enforced to the greatest extent permitted by law.

6.12 Entire Agreement. This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings of the Parties pertaining thereto.

IN WITNESS WHEREOF, the University and the Foundation have executed this Agreement as of the day and year first above written.

University:

Foundation:

BY: _____
ITS: _____

BY: _____
ITS: _____

Approved by Regents:

BY: _____
ITS: _____