

MODEL

MODEST FORM 5 LLC*

MINING VENTURE LIMITED LIABILITY COMPANY AGREEMENT

BETWEEN

XCO AND YCO

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¹ *Model Form Mining Venture Agreement* (Rocky Mt. Min. L. Fdn. 1984) [hereinafter Form 5].

² *Model Form Exploration, Development and Mine Operating Agreement Form 5A* (Rocky Mt. Min. L. Fdn. 1996) [hereinafter Form 5A].

³ *Exploration, Development and Mining Limited Liability Company (Model Form 5A LLC)* (Rocky Mt. Min. L. Fdn. 1998) [hereinafter Form 5A LLC].

This discussion draft was prepared by the authors of, and should be read together with, Alex Ritchie, James F. Cress & Paul Smith, "Form 5 LLC: A Modest Proposal for a Limited Liability Company Agreement Based on Form 5," 53 *Rocky Mt. Min. L. Inst.* 13-1 (2007) (hereinafter Modest Form Paper). Comments on this discussion draft can be sent to the Rocky Mountain Mineral Law Foundation c/o jim.cress@hro.com.

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~~MINING VENTURE~~ LIMITED LIABILITY COMPANY AGREEMENT
OF
XYCO LLC

~~THIS AGREEMENT~~ This Limited Liability Company Agreement (this “Agreement”) is made as of _____ (the “Effective Date”) between XCO, a _____ corporation, (“XCO”) and YCO, a _____ corporation, (“YCO”).

RECITALS

- A. XCO owns certain Properties in [County], [State] of which Properties are described in **Exhibit A** and defined in **Section ~~1.21~~ 1.31**.
- B. YCO wishes to participate with XCO in the exploration, evaluation, development and mining of mineral resources within the Properties or any other properties acquired pursuant to the terms of this Agreement, ~~and XCO is willing to grant such right to YCO.~~
- C. XCO and YCO wish to form and operate a limited liability company to own the Properties and conduct the operations thereon contemplated by this Agreement.

~~NOW, THEREFORE, in~~ In consideration of the covenants and agreements contained herein, XCO and YCO agree as follows:

**ARTICLE I
DEFINITIONS**

- 1.1** ~~1.1~~ “Accounting Procedure” means the procedures set forth in **Exhibit B**.
- 1.2** “Act” means the Delaware Limited Liability Company Act, 6 Del. C. § 18-101, *et seq.*, as it may be amended.
- 1.3** ~~1.2~~ “Affiliate” means any person, partnership, limited liability company, joint venture, corporation or other form of enterprise which directly or indirectly controls, is controlled by, or is under common control with, a ~~Participant~~ Member. For purposes of the preceding sentence, “control” means possession, directly or indirectly, of the power to direct or cause direction of management and policies through ownership of voting securities, contract, voting trust or otherwise.
- 1.4** ~~1.3~~ “Agreement” means this ~~Venture~~ Limited Liability Company Agreement, including all amendments and modifications thereof, and all schedules and exhibits, which are incorporated herein by this reference.
- 1.5** ~~1.4~~ “Area of Interest” means the area described in Part 2 of **Exhibit A**.
- 1.6** ~~1.5~~ “Assets” means the Properties, Products and all other real and personal property, tangible and intangible, held ~~for~~ by the ~~benefit of the Participants hereunder~~ Company.

1.7 ~~1.6~~ **“Budget”** means a detailed estimate of all costs to be incurred by the ~~Participants~~ Company with respect to a Program and a schedule of cash advances to be made by the ~~Participants~~ Members with respect to such Program.

1.8 **“Business Account”** means the account maintained in accordance with the Accounting Procedure.

1.9 **“Capital Account”** means the capital account maintained for each Member in accordance with Treas. Reg. § 1.704-1(b)(2)(iv).

1.10 **“Code”** means the Internal Revenue Code of 1986, as amended from time to time. Any reference herein to a specific section or sections of the Code shall be deemed to include a reference to any corresponding provision of future law.

1.11 **“Company”** means [XYCO LLC], the Delaware limited liability company governed by this Agreement.

1.12 **“Confidential Information”** means all information, data, knowledge and know-how (including, but not limited to, formulas, patterns, compilations, programs, devices, methods, techniques and processes) that derive independent economic value, actual or potential, as a result of not being generally known to, or readily ascertainable by, third parties and which are the subject of efforts that are reasonable under the circumstances to maintain their secrecy, including without limitation all analyses, interpretations, compilations, studies and evaluations of such information, data, knowledge and know-how generated or prepared by or on behalf of either Member, the Manager or the Company.

1.13 **“Continuing Obligations”** means obligations or responsibilities that are reasonably expected to continue or arise after Operations on a particular area of the Properties have ceased or are suspended, such as future monitoring, stabilization, or Environmental Compliance.]

1.14 ~~1.7~~ **“Development”** means all preparation for the removal and recovery of Products, including the construction or installation of a mill or any other improvements to be used for the mining, handling, milling, processing or other beneficiation of Products.

1.15 **“Environmental Compliance”** means action performed during or after Operations to comply with the requirements of all Environmental Laws or contractual commitments related to reclamation of the Properties or other compliance with Environmental Laws.]

1.16 **“Environmental Laws”** means Laws aimed at reclamation or restoration of the Properties; abatement of pollution; protection of the environment; protection of wildlife, including endangered species; ensuring public safety from environmental hazards; protection of cultural or historic resources; management, storage or control of hazardous materials and substances; releases or threatened release of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances as wastes into the environment, including without limitation, ambient air, surface water and groundwater; and all other laws relating to the manufacturing,

processing, distribution, use, treatment, storage, disposal, handling or transport of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances or wastes.]

1.17 [“Environmental Liabilities” means any and all claims, actions, causes of action, damages, losses, liabilities, obligations, penalties, judgments, amounts paid in settlement, assessments, costs, disbursements, or expenses (including, without limitation, attorneys’ fees and costs, experts’ fees and costs, and consultants’ fees and costs) of any kind or of any nature whatsoever that are asserted against the Company, either Member or the Manager, by any person or entity other than the other Member, alleging liability (including, without limitation, liability for studies, testing or investigatory costs, cleanup costs, response costs, removal costs, remediation costs, containment costs, restoration costs, corrective action costs, closure costs, reclamation costs, natural resource damages, property damages, business losses, personal injuries, penalties or fines) arising out of, based on or resulting from (i) the presence, release, threatened release, discharge or emission into the environment of any hazardous materials or substances existing or arising on, beneath or above the Properties and/or emanating or migrating and/or threatening to emanate or migrate from the Properties to off-site properties; (ii) physical disturbance of the environment; or (iii) the violation or alleged violation of any Environmental Laws.]⁴

1.18 ~~1.8~~—“Exploration” means all activities directed toward ascertaining the existence, location, quantity, quality or commercial value of deposits of Products.

1.19 ~~1.9~~—“Initial Contribution” means that capital contribution each ~~Participant~~Member has made or agrees to make pursuant to **Section 5.1**.

~~**1.20** 1.10—“Joint Account” means the account maintained in accordance with the Accounting Procedure showing the charges and credits accruing to the Participants.~~

1.21 ~~1.11~~—“Management Committee” means the committee established under **Article VII**.

~~**1.22** 1.12—“Manager” means the person or entity appointed under Article VIII to manage Operations, or any successor Manager.~~ “Manager” means the person or entity appointed under **Article VIII** from time to time as the manager of the Company.

1.23 “Member” and “Members” mean XCO and YCO and any other person or entity admitted as a substituted or additional Member of the Company under this Agreement.

1.24 “Membership Interest” means, with respect to any Member: (i) that Member’s status as a Member; (ii) that Member’s Capital Account and share of the profits, losses and other items of income, gain, loss, deduction and credits of, and the right to receive distributions (liquidating or otherwise) from the Company under the terms of this Agreement; (iii) all other rights, benefits and privileges enjoyed by that Member in its capacity as a Member, including that Member’s rights to vote, consent and approve those matters described in this Agreement;

⁴ Definitions of “Continuing Obligations,” “Environmental Compliance,” “Environmental Laws” and “Environmental Liabilities” have been included from Form 5A and Form 5A LLC. See *infra* note 14.

and (iv) all obligations, duties and liabilities imposed on that Member under this Agreement in its capacity as a Member.

1.25 ~~1.13~~ "Mining" means the mining, extracting, producing, handling, milling or other processing of Products.

1.26 ~~1.14~~ "Net Proceeds" means certain amounts calculated as provided in **Exhibit D**, which may be payable to a ParticipantMember under **Section 6.4(b)(2ii)**.

1.27 ~~1.15~~ "Operations" means the activities carried out by the Company under this Agreement.

~~1.16—"Participant" and "Participants" mean the persons or entities that from time to time have Participating Interests.~~

1.28 ~~1.17~~ "Participating Percentage Interest" means the percentage interest ~~representing the operating ownership interest of a Participant in Assets, and all other rights and obligations arising under this Agreement~~ of a Member in certain allocations of profits and losses and other items of income, gain, loss or deduction and certain distributions of cash or property, representing the Membership Interest of a Member in the Company, as such interest may from time to time be adjusted hereunder. Participating Percentage Interests shall be calculated to three decimal places and rounded to two (e.g., 1.519% rounded to 1.52%). Decimals of .005 or more shall be rounded up to .01, decimals of less than .005 shall be rounded down. The initial Participating Percentage Interests of the ParticipantsMembers are set forth in **Section 6.1**.

1.29 ~~1.18~~ "Prime Rate" means the interest rate quoted as "Prime" by ~~the~~ _____ Bank, at its head office, as said rate may change from day to day (which quoted rate may not be the lowest rate at which ~~the Bank~~ such bank loans funds).

1.30 ~~1.19~~ "Products" means all ores, minerals and mineral resources produced from the Properties under this Agreement.

1.31 ~~1.20~~ "Program" means a description in reasonable detail of Operations to be conducted and objectives to be accomplished by the Manager for a year or any longer period.

1.32 ~~1.21~~ "Properties" means those interests in real property described in Part 1 of **Exhibit A** and all other interests in real property within the Area of Interest which are acquired and held subject to this Agreement.

~~1.22—"Transfer" means sell, grant, assign, encumber, pledge or otherwise commit or dispose of.~~

~~1.23—"Venture" means the business arrangement of the Participants under this Agreement.~~

1.33 "Transfer" means to sell, grant, assign, encumber, pledge or otherwise commit or dispose of. With respect to a Membership Interest or any economic interest therein, a Transfer also shall include the transfer of a direct or indirect or beneficial equity interest in a Member if

the transfer, either alone or in conjunction with other such transfers made after the transferor first became a Member, results in a change in control of such Member. For purposes hereof, “change in control” means, with respect to a Member: (i) a transfer, directly or indirectly (including by merger), of all or substantially all of the assets of such Member (including, but not limited to a transfer in liquidation of such Member); or (ii) the transfer, directly or indirectly, of at least 51% or more of the voting interests in such Member, whether by sale, merger, consolidation or contract.

1.34 “Treasury Regulations” or “Treas. Regs.” means regulations issued by the United States Department of Treasury under the Code. Any reference herein to a specific section or sections of the Treasury Regulations shall be deemed to include a reference to any corresponding provision of future regulations under the Code.

1.35 ~~1.24~~ [Other Definitions]

ARTICLE II REPRESENTATIONS AND WARRANTIES; TITLE TO ASSETS

2.1 Capacity of ~~Participants~~Members. ~~Each~~As of the ~~Participants~~Effective Date, each of the Members represents and warrants as follows:

- (a) ~~that~~ it is a corporation duly incorporated and in good standing in its state of incorporation and ~~that it~~ is qualified to do business and is in good standing in those states where necessary in order to carry out the purposes of this Agreement;
- (b) ~~that~~ it has the capacity to enter into and perform this Agreement and all transactions contemplated herein and that all corporate and other actions required to authorize it to enter into and perform this Agreement have been properly taken;
- (c) ~~that~~ it will not breach any other agreement or arrangement by entering into or performing this Agreement; and
- (d) ~~that~~ this Agreement has been duly executed and delivered by it and is valid and binding upon it in accordance with its terms.

2.2 Representations and Warranties of XCO. As of the Effective Date, XCO makes the following representations and warranties ~~effective the date hereof~~to YCO:

- (a) With respect to those Properties XCO owns in fee simple, if any, XCO is in exclusive possession of and owns such Properties free and clear of all defects, liens and encumbrances except those specifically identified on Part 1 of **Exhibit A**.
- (b) With respect to those Properties in which XCO holds an interest under leases or other contracts: (i) XCO is in exclusive possession of such Properties; (ii) XCO has not received any notice of default of any of the terms or provisions of such contracts; (iii) XCO has the authority under such contracts to perform fully its obligations under this Agreement; (iv) to

the best of XCO's knowledge and belief, such contracts are valid and are in good standing; and (v) to the best of XCO's knowledge ~~and belief~~, the properties covered thereby are free and clear of all defects, liens and encumbrances except for those specifically identified on Part 1 of **Exhibit A** or in such contracts. XCO has delivered to YCO all information concerning title to the Properties in XCO's possession or control, including, but not limited to, true and correct copies of all leases or other contracts relating to the Properties of which XCO has knowledge.

(c) With respect to unpatented mining claims located by XCO that are included within the Properties, except as provided in Part 1 of **Exhibit A** and subject to the paramount title of the United States: (i) the unpatented mining claims were properly laid out and monumented; (ii) all required location and validation work was properly performed; (iii) location notices and certificates were properly recorded and filed with appropriate governmental agencies; (iv) all assessment work required to hold the unpatented mining claims has been performed in a manner consistent with that required of the Manager pursuant to **Section 8.2(k)** of this Agreement through the assessment year ending September 1, ____; (v) all affidavits of assessment work and other filings required to maintain the claims in good standing have been properly and timely recorded or filed with appropriate governmental agencies; (vi) the claims are free and clear of defects, liens and encumbrances arising by, through or under XCO; and (vii) XCO has no knowledge of conflicting claims. Nothing in this **Section 2.2(c)**, however, shall be deemed to be a representation or a warranty that any of the unpatented mining claims contains a discovery of minerals. With respect to those unpatented mining claims that were not located by XCO or an Affiliate of XCO, but are included within the Properties, XCO makes the foregoing representations and warranties (with the foregoing exceptions) to the best of its knowledge and belief.

(d) With respect to the Properties, there are no pending or threatened actions, suits, claims or proceedings.

The representations and warranties set forth above shall survive the execution and delivery of any documents of Transfer provided under this Agreement.

2.3 Disclosures. Each of the ~~Participants~~Members represents and warrants that it is unaware of any material facts or circumstances which have not been disclosed in this Agreement, which should be disclosed to the other ~~Participant~~Member in order to prevent the representations in this **Article II** from being materially misleading.

2.4 Record Title. Title to the Assets shall be held ~~as follows: [See Commentary]~~by the Company.⁵

2.5 Joint Loss of Title. Any failure or loss of title to the Assets, and all costs of defending title, shall be charged to the Joint Business Account, except that ~~all~~in the event of costs and losses arising out of or resulting from any breach of the representations and warranties of XCO, XCO shall be charged to XCO; immediately make an additional capital contribution to the Company of the amount of such costs and losses incurred by the Company, and shall indemnify

⁵ See infra note 16 regarding timing considerations in contribution of Properties to the Company.

the Company, YCO and its Affiliates for any such costs and losses incurred by the Company, YCO or its Affiliates. Any such capital contributions shall be considered as part of XCO's contribution of the Properties under Section 5.1, and for that reason shall not increase the Percentage Interest of XCO or be credited to XCO's Capital Account.⁶

ARTICLE III NAME, PURPOSES AND TERM

3.1 General. ~~XCO and YCO hereby enter into this Agreement for the purposes hereinafter stated, and they~~ The Company has been duly organized pursuant to the Act by the filing of its certificate of formation in the Office of the Delaware Secretary of State by an authorized person. The Members agree that all of their rights with respect to the Company and all of the Operations on or in connection with the Properties or the Area of Interest shall be subject to and governed by this Agreement. To the fullest extent permitted by the Act, this Agreement shall control as to any conflict between this Agreement and the Act or as to any matter provided for in this Agreement that is also provided for in the Act.⁷

3.2 Name. The name of ~~this Venture~~ the Company shall be ~~the _____ Venture.~~ "[XYCO LLC]." The Manager shall accomplish any filings or registration required by applicable ~~assumed or fictitious name~~ statutes ~~and similar statutes~~ where the Company conducts any Operations.

3.3 Purposes. This ~~Agreement~~ Company is ~~entered into~~ formed for the following purposes and for no others, and shall serve as the exclusive means by which the ~~Participants~~ Members, or either of them, accomplish such purposes:

- (a) to conduct Exploration within the Area of Interest,
- (b) to acquire additional Properties within the Area of Interest,
- (c) to evaluate the possible Development of the Properties,
- (d) to engage in Development and Mining Operations on the Properties,

⁶ As in the equivalent provisions of Form 5, Form 5A and Form 5A LLC, this section makes XCO responsible for any breach of its title warranties, but in a slightly different manner than the previous agreements. Form 5A LLC in Section 3.4 of the Members Agreement provides that the breaching member will indemnify the other member against title failure. The authors have added to the indemnity a capital contribution obligation by XCO for costs and losses arising from breach of its title warranties, because the costs and losses of title failure will generally be borne by the Company rather than YCO.

⁷ Section 3.1 was significantly modified from Form 5 consistent with the concepts in the Delaware Limited Liability Company Act, Del. Code Ann. tit. 6 §§ 18-101, et. seq. [hereinafter the DLLCA], that give maximum effect to the ability of the parties to contract around the default rules in the DLLCA, and to eliminate all duties other than the implied duty of good faith and fair dealing. See DLLCA § 18-1101; Modest Form Paper, § 13.05[1].

(e) to engage in marketing Products, [to the extent permitted by Article XI]⁸,
and

(f) [to complete and satisfy all Environmental Compliance obligations and Continuing Obligations affecting the Properties, and]⁹

(g) ~~(f)~~ to perform any other activity necessary, appropriate, or incidental to any of the foregoing.

3.4 Limitation. Unless the ~~Participants~~Members otherwise agree in writing, the Operations shall be limited to the purposes described in Section 3.3, and nothing in this Agreement shall be construed to enlarge such purposes.

3.5 Effective Date and Term. The effective date of this Agreement shall be the date first recited above. The term of ~~this Agreement shall be for 20 years from the effective date and for so long thereafter as Products are produced from the Properties, unless the Agreement is earlier terminated as herein provided.~~the Company shall be perpetual, unless earlier terminated pursuant to Section 12.1.¹⁰

3.6 Registered Agent; Offices. The initial registered office and registered agent of the Company shall be as set forth in the Company's certificate of formation. The Manager may from time to time designate a successor registered office and registered agent and may amend the certificate of formation of the Company to reflect any such change. The location of the principal place of business of the Company shall be at such location as the Manager shall from time to time select.

ARTICLE IV RELATIONSHIP OF THE ~~PARTICIPANTS~~MEMBERS

4.1 No State-Law Partnership. Nothing contained in this Agreement shall be deemed to constitute either ~~Participant~~Member the partner of the other, ~~nor, except as otherwise herein expressly provided, to constitute either Participant the agent or legal representative of the other, nor to create any fiduciary relationship between them.. It is not the intention of the Participants to create, nor shall this Agreement be construed to create, or to create~~ any mining, commercial or other partnership. ~~Neither Participant~~ (other than a partnership for federal and state tax purposes). ~~Except~~^{*} pursuant to the authority expressly granted herein or as otherwise agreed in writing between the ^{*}Members, neither Member shall have any authority to act for the

⁸ This language from Form 5 is based on tax considerations that are not applicable to an LLC. This language and Section 3.3(e) generally may need to be revised to reflect how the parties address taking of mineral production in kind. See *infra* Sections 11.2 and 11.3 and notes 30, 31 and 32.

⁹ The expansion of the purposes of the Company to include Environmental Compliance has been added from Form 5A LLC. See *infra* note 14.

¹⁰ The concept from Form 5 that the Company will continue for 20 years from the effective date and for so long thereafter as Products are produced from the Properties has been relocated to Section 12.1, the dissolution provision.

Company or another Member or to assume any obligation or responsibility on behalf of the ~~other Participant, except as otherwise expressly provided herein. The rights, duties, obligations and liabilities of the Participants shall be several and not joint or collective. Each Participant shall be responsible only for its obligations as herein set out and shall be liable only for its share of the costs and expenses as provided herein, it being the express purpose and intention of the Participants that their ownership of Assets and the rights acquired hereunder shall be as tenants in common. Each Participant shall indemnify, defend and hold harmless the other Participant, its directors, officers, employees, agents and attorneys from and against any and all losses, claims, damages and liabilities arising out of any~~ ~~act or any assumption of liability by the indemnifying~~ ~~Participant~~, ~~or any of its directors, officers, employees, agents and attorneys done or undertaken, or apparently done or undertaken, on behalf of the~~ ~~other Participant, except~~ ~~pursuant to the authority expressly granted herein or as otherwise agreed in writing between the~~ ~~Participants.~~ Company or the other Members, solely by virtue of being a Member.¹¹

4.2 Federal Tax Elections and Allocations. ~~Without changing the effect of Section 4.1, the Participants agree that their relationship shall constitute a tax partnership within the meaning of Section 761(a) of the United States Internal Revenue Code of 1954, as amended~~ The Company shall be treated as a partnership for federal income tax purposes. Tax elections and allocations shall be made as set forth in **Exhibit C**.

4.3 State Income Tax. The ~~Participants~~ Members also agree that, to the extent permissible under applicable law, their relationship shall be treated for state income tax purposes in the same manner as it is for Federal income tax purposes.

4.4 Tax Returns. The Tax Matters Partner, as defined in **Exhibit C**, shall prepare and shall file, after approval of the Management Committee, any tax returns or other tax forms required.

4.5 Other Business Opportunities. Except as expressly provided in this Agreement, each ~~Participant~~ Member and the Manager shall have the right independently to engage in and receive full benefits from business activities, whether or not competitive with the Operations, without consulting the other. The doctrines of ~~"~~“corporate opportunity”~~”~~ or ~~"~~“business opportunity”~~”~~ shall not be applied to any other activity, venture, or operation of either ~~Participant~~ Member or the Manager, and, except as otherwise provided in ~~Section 12.6,~~ 12.4, neither ~~Participant~~ Member nor the Manager shall have any obligation to ~~the other~~ any Member with respect to any opportunity to acquire any property outside the Area of Interest at any time, or within the Area of Interest after the termination of ~~this Agreement~~ the Company. Unless otherwise agreed in writing, no ~~Participant~~ Member or the Manager shall have any obligation to mill, beneficiate or otherwise treat any Products ~~or any other Participant's share of Products~~ in any facility owned or controlled by ~~such Participant~~ the Manager or any Member.

¹¹ The indemnification provision contained in Section 4.1 of Form 5 has been moved to Section 4.9(c) below to coordinate such provision with the other indemnifications contained in the Modest Form.

4.6 Waiver of Right to Partition. The ~~Participants~~Members hereby waive and release all rights of partition, or of sale in lieu thereof, or other division of Assets, including any such rights provided by statute.

4.7 ~~Transfer or Termination of Rights to Properties of Membership Interests.~~ Except as otherwise provided in this Agreement, neither ~~Participant~~Member shall Transfer all or any part of its ~~interest in the Assets or this Agreement or otherwise permit or cause such interests to terminate~~Membership Interest.

4.8 Implied Covenants; No Additional Duties. There are no implied covenants contained in this Agreement other than those of the contractual covenant of good faith and fair dealing. No Manager shall have any fiduciary or other duties to the Company except as specifically provided by this Agreement, and the Manager's and Members' duties and liabilities otherwise existing at law or in equity are restricted and eliminated by the provisions of this Agreement to those duties and liabilities specifically set forth in this Agreement.¹² Notwithstanding any contrary provision of this Agreement, in carrying out any duties hereunder, the Manager and Members shall not be liable to the Company nor to any Member for breach of any duty for the Manager's or any such Member's good faith reliance on the provisions of this Agreement, the records of the Company, or such information, opinions, reports or statements presented by any other Member, Manager, officer or employee of the Company, or the Management Committee or other committee of the Company, or by any other person as to matters such Member or the Manager reasonably believes are within such other person's professional or expert competence. The preceding sentence shall in no way limit any person's right to rely on information to the extent provided in Section 18-406 of the Act.

4.9 Liabilities; Indemnification.¹³

(a) No Member or Manager of the Company, or any combination of the foregoing, shall be personally liable under any judgment of a court, or in any other manner, for any debt, obligation or liability of the Company, whether such liability or obligation arises in contract, tort or otherwise, solely by reason of being a Member or Manager of the Company or any combination of the foregoing.

(b) The Company shall indemnify, defend and hold harmless each Member and Manager, and their respective directors, officers, employees, agents and attorneys from and against any and all third party losses, claims, damages and liabilities arising out of or relating to (i) the Company or the Operations, including without limitation Environmental Liabilities and Continuing Obligations,¹⁴ (ii) any Properties assigned to a Member as an objecting Member

¹² The second sentence of Section 4.8 was inserted to restrict duties to those set forth in the Modest Form consistent with DLLCA § 18-1101(a). See Modest Form Paper, § 13.05[1].

¹³ This new Section 4.9 and the revisions to Section 6.6 constitute a proposal to reconcile various perceived inconsistencies regarding the complex allocation of risk scheme in Form 5, Form 5A and Form 5A LLC. See Modest Form Paper, § 13.05[2]-[3].

¹⁴ The definitions "Environmental Liabilities," "Environmental Laws" and "Continuing Obligations" are not present in Form 5, but instead are incorporated from Form 5A and Form 5A LLC. The Modest Form does not,

pursuant to **Section 14.1**, but only to the extent arising out of or relating to Operations, including without limitation Environmental Liabilities and Continuing Obligations, conducted prior to the date of such assignment, and (iii) any reimbursements by one Member to the other Member or Manager of any of the foregoing pursuant to **Section 6.6**, except in any case of clauses (i) through (iii) above to the extent such losses, claims, damages or liabilities arise out of or result from any conduct described in any of clauses (i) through (iii) of **Section 4.9(c)** below. In all cases of this **Section 4.9(b)** and without limiting **Section 6.6**, indemnification shall be provided only out of and to the extent of the net assets of the Company and no Member shall have any personal liability whatsoever on account thereof. Notwithstanding the foregoing, the Company's indemnification pursuant to this **Section 4.9(b)** as to third party claims shall be only with respect to such loss, liability or damage that is not otherwise compensated by insurance carried for the benefit of the Company.

(c) Subject to **Section 4.8**, each Member shall indemnify, defend and hold harmless [the Company,¹⁵] the other Member, and such other Member's directors, officers, employees, agents and attorneys from and against any and all losses, claims, damages and liabilities arising out of or relating to (i) any unauthorized* act or any assumption of liability by the indemnifying* Member (including in its capacity as a Manager)*, or any of its directors, officers, employees, agents and attorneys done or undertaken, or apparently done or undertaken, on behalf of the* Company or the other Member, except pursuant to the authority expressly granted herein or as otherwise agreed in writing between the Members, (ii) any breach by such Member of any of its representations or warranties set forth in this Agreement or (iii) any breach by such Member of any covenant contained in this Agreement caused by or attributable to such Member's willful misconduct or gross negligence, including in its capacity as a Manager.

(d) NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, NO PERSON OR ENTITY OTHER THAN A MEMBER SHALL HAVE THE RIGHT TO ENFORCE ANY REPRESENTATION OR WARRANTY OF A MEMBER HEREUNDER, OR ANY OBLIGATION OF A MEMBER TO CONTRIBUTE CAPITAL HEREUNDER, TO FUND CONTINUING OBLIGATIONS, TO REIMBURSE OR INDEMNIFY ANY OTHER MEMBER HEREUNDER, AND SPECIFICALLY NEITHER THE COMPANY NOR ANY LENDER OR OTHER THIRD PARTY SHALL HAVE ANY SUCH RIGHTS, IT BEING EXPRESSLY UNDERSTOOD THAT THE REPRESENTATIONS AND WARRANTIES, AND THE CONTRIBUTION, REIMBURSEMENT AND INDEMNIFICATION OBLIGATIONS SET FORTH IN **ARTICLES II AND XIII** AND

however, include the significantly revised scheme for allocating environmental risk between the parties that was adopted in Form 5A and Form 5A LLC. The inclusion of the environmental definitions from Form 5A LLC is merely intended to clarify what liabilities are covered by the allocation present in Form 5. The Modest Form also includes Form 5A provisions in Sections 8.2(p), (q) and (r) providing for the establishment of an environmental compliance fund and the satisfaction by the Company of its Environmental Liabilities and Continuing Obligations, and other provisions regarding environmental compliance, which the authors viewed as desirable and non-controversial. See Modest Form Paper, § 13.04[3].

¹⁵ The Company is a beneficiary of this indemnity because otherwise the entire economic interest in the LLC of the member to be indemnified remains at risk if claims for which one member should be solely liable are brought against the LLC. The parties may prefer to exclude the Company from the indemnity and have their investment in the LLC at risk for actions of the other member.

SECTIONS 5.1, 5.2, 5.3, 6.4, 6.6, 6.7, 9.7, 9.8, 10.2, 10.3 AND 12.5 SHALL BE ENFORCEABLE ONLY BY A MEMBER AGAINST ANOTHER MEMBER (WHICH, NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, ARE IN ALL SUCH CASES FOR THE BENEFIT OF THE MEMBERS). FOR THE AVOIDANCE OF DOUBT, THE COMPANY SHALL BE BOUND BY ARTICLES II AND XIII AND SECTIONS 5.1, 5.2, 5.3, 6.4, 6.6, 6.7, 9.7, 9.8, 10.2, 10.3 AND 12.5. BUT SHALL HAVE NO RIGHT TO ENFORCE THOSE PROVISIONS AGAINST A MEMBER, SUCH RIGHTS BEING EXCLUSIVELY VESTED IN THE MEMBERS. [ANY MEMBER MAY BRING A DIRECT ACTION AGAINST ANY OTHER MEMBER WITH RESPECT TO ANY OF ARTICLES II OR XIII OR SECTIONS 5.1, 5.2, 5.3, 6.4, 6.6, 6.7, 9.7, 9.8, 10.2, 10.3 OR 12.5 WITHOUT THE REQUIREMENT TO BRING A DERIVATIVE ACTION OR OTHERWISE SATISFY THE REQUIREMENTS OF SECTIONS 18-1001 THROUGH 18-1004 OF THE ACT OR OTHER SIMILAR REQUIREMENTS.]

ARTICLE V
CONTRIBUTIONS BY ~~PARTICIPANTS~~MEMBERS

5.1 ~~Partieipants~~Members Initial Contributions. XCO, as its Initial Contribution, hereby contributes the Properties to the ~~purposes~~capital of ~~this Agreement~~the Company. The agreed value of XCO's Initial Contribution is \$ _____. YCO, as its Initial Contribution, shall contribute the first \$ _____ hereunder, which sum shall be used to fund Programs and Budgets approved pursuant to **Article IX**. [Such contributions shall be made as follows:
_____]¹⁶

5.2 Failure to Make Initial Contribution.¹⁷ Upon YCO's failure to make its Initial Contribution in accordance with the provisions of ~~Article IX shall be deemed to be a withdrawal of YCO from this Agreement and the termination of its Participating Interest hereunder.~~ Upon such eventSection 5.1 and **Article IX**, [if YCO does not cure such failure within 30 days after notice by XCO of such failure,¹⁸] YCO shall be deemed to have resigned from the Company in breach of such sections of this Agreement [within the meaning of Sections 18-306(2) and 18-

¹⁶ Consideration should be given to the timing of the Initial Contributions by the Members. Forms 5 and 5A adopt an "earn in" approach where YCO's interest vests only after YCO completes the expenditure of its Initial Contribution on Operations. Parties desiring the "earn in" approach in an LLC must specify the timing of the Initial Contributions of the parties in this section and the intended affect of that timing on the voting and other rights arising from the parties' membership interests in the LLC described in other sections. In this regard, note that the bracketed language in Section 5.4 prohibits the return of capital contributions and may also need to be modified. See Modest Form Paper § 13.04[6][c].

¹⁷ Note that Section 5.2, consistent with the authors' interpretation of the equivalent language in Form 5, limits YCO's liability under Section 6.6 to obligations accruing prior to YCO's decision not to complete its Initial Contribution (although YCO bears 100% of such liabilities up to the amount of its Initial Contribution). This liability sharing arrangement was revised in Form 5A and should be re-examined in connection with the Modest Form.

¹⁸ The 30 day cure right was taken from Form 5A.

502(c) of the Act¹⁹]. As a consequence, the Company shall acquire YCO's entire Membership Interest, free and clear of security interests* or other encumbrances arising by, through or under *YCO, except those to which both Members have given their written consent after the Effective Date, and such Membership Interest shall be cancelled. YCO is entitled to receive no distribution upon such resignation or any further consideration from the Company. Upon such resignation, YCO shall have no further right, title or interest in the Company or indirect interest in the Assets. ~~YCO's withdrawal's resignation~~ shall be effective upon such failure, but such ~~withdrawal resignation~~ shall not relieve YCO of its obligation ~~to XCO~~ to fund Operations up to the amount of YCO's agreed contribution to an adopted Program and Budget, nor shall such ~~withdrawal resignation~~ relieve YCO of its responsibility to ~~fund and satisfy its share of liabilities to third persons (whether such accrues before or after such withdrawal) arising out of Operations conducted~~ reimburse XCO as provided in **Section 6.6** for third party losses, claims, damages and liabilities existing or arising out of actions, occurrences or events occurring prior to YCO's ~~withdrawal's resignation~~. Notwithstanding **Section 6.6**, YCO shall ~~fund and satisfy~~ reimburse XCO for 100% of such losses, claims, damages and liabilities until it has contributed the full amount of its Initial Contribution, and thereafter ~~it shall fund and satisfy such liabilities~~ in proportion to its initial Participating Percentage Interest set forth in **Section 6.1**. Except as provided in the preceding two sentences, YCO's ~~withdrawal's resignation~~ shall relieve YCO from any other obligation to make contributions or provide reimbursement to XCO hereunder.

5.3 Additional Cash Contributions. At such time as YCO has contributed the full amount of its Initial Contribution, the ~~Participants~~Members, subject to any election permitted by **Section 6.3**, shall be obligated to contribute funds to adopted Programs in proportion to their respective Participating Percentage Interests.

5.4 Return of Contributions.[No Member shall be entitled to the return of any part of its capital contributions or to be paid interest in respect of either its Capital Account or its capital contributions.] No unrepaid capital contribution shall constitute a liability of the Company, the Manager or any Member. A Member is not required to contribute or to lend cash or property to the Company to enable the Company to return any Member's capital contributions. The provisions of this Section 5.4 shall not limit a Member's rights or obligations under Article XII.²⁰

5.5 5.4 Personnel. [See Commentary to Form 5]

ARTICLE VI PERCENTAGE INTERESTS ~~OF PARTICIPANTS~~

¹⁹ This language invokes these provisions of the DLLCA to minimize the risk that loss of YCO's membership interest will be construed as an unenforceable penalty. See infra note 21.

²⁰ This provision was added to replace a provision present in the Article XII termination provisions of Form 5 that the authors found less appropriate in the context of a limited liability company.

6.1 Initial ~~Participating~~Percentage Interests. The ~~Participants~~Members shall have the following initial ~~Participating~~Percentage Interests:

XCO - 50%
YCO - 50%

6.2 Changes in ~~Participating~~Percentage Interests. A ~~Participant's~~Participant's ~~Member's~~Percentage Interest shall be changed as follows:

- (a) As provided in **Section 5.2** or **6.5**; or
- (b) Upon an election by a ~~Participant~~Member pursuant to **Section 6.3** to contribute less to an adopted Program and Budget than the percentage reflected by its ~~Participating~~Percentage Interest; or
- (c) In the event of default by a ~~Participant~~Member in making its agreed-upon contribution to an adopted Program and Budget, followed by an election by the other ~~Participant~~Member to invoke **Section 6.4(b)**; or
- (d) Upon the Transfer by a ~~Participant~~Member of all or less than all of its ~~Participating~~Membership Interest in accordance with **Article XV**; or
- (e) ~~Acquisition of less than all of the Participating Interest of the other Participant, however arising.~~Upon the issuance of additional Membership Interests in the Company with the unanimous consent of the Members.

6.3 Voluntary Reduction in ~~Participation~~Percentage Interest. Except with respect to a ~~Participant~~Member's obligation to make its Initial Contribution, as to which no election is permitted, a ~~Participant~~Member may elect, as provided in **Section 9.5**, to limit its contributions to an adopted Program and Budget as follows:

- (a) To some lesser amount than its respective ~~Participating~~Percentage Interest;
- or
- (b) ~~Not at all.~~By not contributing any amount to the adopted Program and Budget.

If a ~~Participant~~Member elects to contribute to an adopted Program and Budget some lesser amount than its ~~respective Participating~~proportionate share of such Program and Budget based on its Percentage Interest, or not ~~at all~~to contribute any amount, the ~~Participating~~Percentage Interest of ~~that Participant~~such Member shall be recalculated at the time of election by dividing: (i) the sum of (a) the agreed value of the ~~Participant~~Member's Initial Contribution under **Section 5.1**, plus (b) the total of all of the ~~Participant~~Member's contributions under **Section 5.3**, and plus (c) the amount, if any, the ~~Participant~~Member elects to contribute to the adopted Program and Budget; by (ii) the sum of (a), (b) and (c) above for all ~~Participants~~Members; and then multiplying the result by one hundred. The ~~Participating~~Percentage Interest of the other ~~Participant~~Member shall thereupon become the difference between 100% and the recalculated ~~Participating~~Percentage Interest.

6.4 Default in Making Contributions.

(a) ~~If a Participant~~ Subject to an election properly made under Section 6.3, if a Member defaults in making a contribution or cash call required by an approved Program and Budget, the non-defaulting ParticipantMember may advance the defaulted contribution on behalf of the defaulting ParticipantMember and treat the same, together with any accrued interest, as a demand loan to the defaulting Member bearing interest from the date of the advance at the rate provided in **Section 10.3**. The failure to repay said loan upon demand shall be a default. ~~Each Participant hereby grants to the other a lien upon its interest in the Properties and a security interest in its rights under this Agreement and in its Participating Interest in other Assets, and the proceeds therefrom, to secure any loan made hereunder, including interest thereon, reasonable attorneys fees and all other reasonable costs and expenses incurred in recovering the loan with interest and in enforcing such lien or security interest, or both. A non-defaulting Participant~~ A non-defaulting Member may elect ~~the any~~ applicable remedy under ~~this Section 6.4(a) or under 6.4(b), or, to the extent a Participant has a lien or security interest under applicable law, it shall be entitled to its~~ b) or Section 6.7 or any other rights and remedies available to such Member at law ~~and/or~~ in equity. All such remedies shall be cumulative. The election of one or more remedies shall not waive the election of any other remedies. ~~Each Participant hereby irrevocably appoints the other its attorney in fact to execute, file and record all instruments necessary to perfect or effectuate the provisions hereof.~~

(b) The ParticipantsMembers acknowledge that if a ParticipantMember defaults in making a contribution, or a cash call, or in repaying a loan, as required hereunder, it will be difficult to measure the damages resulting from such default. In the event of such default, as reasonable liquidated damages, the non-defaulting ParticipantMember may, with respect to any such default not cured within 30 days after notice to the defaulting ParticipantMember of such default, elect one of the following remedies by giving notice to the defaulting ParticipantMember:

(i) For a default relating exclusively to an Exploration Program and Budget, the non-defaulting ParticipantMember may elect to have the defaulting ~~Participant's Participating Member's Percentage~~ Interest permanently reduced ~~as provided in Section 6.3, and further reduced by multiplying the result by the following percentage by a percentage equal to the percentage that otherwise would apply under Section 6.3, multiplied by the following factor:~~ _____. Amounts treated as a loan pursuant to **Section 6.4(a)** and interest thereon shall be included in the calculation of the defaulting ParticipantMember's reduced Participating Percentage Interest. The non-defaulting Participant's Participating Member's Percentage Interest shall, at such time, become the difference between 100% and the further reduced Participating Percentage Interest. Such reductions shall be effective as of the date of the default.

(ii) For a default relating to a Program and Budget covering in whole or in part Development or Mining, at the non-defaulting ParticipantMember's election, the defaulting ParticipantMember shall be deemed to have ~~withdrawn from the Venture and to have automatically relinquished its Participating Interest to the non-defaulting Participant;~~ resigned from the Company in breach of

Sections 10.2 and 10.3 of this Agreement within the meaning of Section 18-306(2) and 18-502(c) of the Act and, as a consequence, shall have its entire Membership Interest cancelled for no consideration as provided in Section 12.2 of this Agreement²¹; [provided, however, the defaulting ~~Participant~~Member shall have the right to receive only from _____% of Net Proceeds, if any, and not from any other source, an amount equal to the defaulting ~~Participant~~Member's aggregate contribution pursuant to Sections 5.1 and 5.3. Upon receipt of such amount the defaulting ~~Participant~~Member shall thereafter have no further Membership Interest or other right, title or interest in ~~Assets or under this Agreement.~~the Company.²²]

6.5 Elimination of Minority Interest. Upon the reduction of its ~~Participating~~Percentage Interest to less than _____%, a ~~Participant~~Member shall be deemed to have ~~withdrawn~~resigned from the Company in breach of Section 9.5 of this Agreement ~~and shall relinquish its entire Participating Interest. Such relinquished Participating Interest shall be deemed to have accrued automatically to the other Participant~~[within the meaning of Sections 18-306(2) and 18-502(c) of the Act²³] and, as a consequence, shall have its entire Membership Interest cancelled for no consideration as provided in Section 12.2 of this Agreement.

6.6 Continuing Obligations and Liabilities~~Upon Adjustments of Participating Interests.~~~~Any reduction of a Participant's Participating Interest under this.~~ Each Member shall be liable to the other Member (including in its capacity as a Manager) to reimburse and pay to such other Member its respective share, based on Percentage Interests, of any and all third party losses, claims, damages and liabilities arising out of or relating to (a) the Company or the Operations, including without limitation Environmental Liabilities and Continuing Obligations, incurred by such other Member, and (b) any Properties assigned to the other Member as an objecting Member pursuant to Section 14.1, but only to the extent in the case of this clause (b) arising out of or relating to Operations, including without limitation Environmental Liabilities and Continuing Obligations, conducted prior to the date of such assignment. The reimbursement obligation of a Member under this Section 6.6 shall apply whether or not any such losses, claims, damages or liabilities accrue before or after the resignation or deemed resignation of such Member, the Transfer by such Member of all or any portion of its

²¹ Sections 18-306(2) and 18-502(c) of the DLLCA permit an LLC agreement to provide that the interest of any member who fails to make any contribution that the member is obligated to make will be subject to the consequences specified in the LLC agreement, including the reduction, elimination or "forfeiture" of the member's entire membership interest in the LLC. This provision of the Modest Form takes advantage of this flexible remedy afforded by the Act, which may help address concerns that the previous provision of Form 5 may have been an unenforceable penalty. See Modest Form Paper, § 13.05[4][b].

²² This proviso in Form 5 may have been intended to avoid a penalty or forfeiture upon the relinquishment of the entire interest in the joint venture. Although the parties may have business reasons to permit a defaulting party to recover its prior contributions from net proceeds, the proviso may no longer be required solely to avoid a forfeiture, for the reasons discussed *supra* note 21.

²³ See *supra* note 21.

Membership Interest, the dissolution or liquidation of the Company, or any reduction of such Member's Percentage Interest, but in each case only to the extent not indemnified by the Company pursuant to **Section 4.9(b)**, and not to the extent such losses, claims, damages and liabilities arise out of conduct of the Member requesting reimbursement described in any of clauses (i) through (iii) of **Section 4.9(c)**. For purposes of this **Section 6.6**, such Member's share of such liability shall be equal to its Percentage Interest at the time such liability was incurred (or as to any such liabilities arising or existing prior to the Effective Date, such Member's initial Percentage Interest), except as otherwise provided in **Section 5.2**. Any resignation or deemed resignation of a Member, any Transfer by such Member or all or any portion of its Membership Interest, or any reduction of a Member's Percentage Interest under this **Article VI** shall not relieve such ~~Participant of its share of any liability, whether it accrues before or after such reduction, arising out of Operations conducted prior to such reduction. For purposes of this Article VI, such Participant's share of such liability shall be equal to its Participating Interest at the time such liability was incurred. The increased Participating Interest accruing to a Participant as a result of the reduction of the other Participant's Participating Interest shall be free of royalties, liens* or other encumbrances arising by, through or under* such other Participant, other than those existing at the time the Properties were acquired or those to which both Participants have given their written consent. An adjustment to a Participating Interest need not be evidenced during the term of this Agreement by the execution and recording of appropriate instruments, but each Participant's Participating Interest shall be shown in books of the Manager. However, either Participant, at any time upon the request of the other Participant, shall execute and acknowledge instruments necessary to evidence such adjustment in form sufficient for recording in the jurisdiction where the Properties are located.~~ Member of its share of any such liability accruing before such resignation, Transfer or reduction. Notwithstanding the foregoing, the provisions of this **Sections 6.6** shall apply only in the case that the Member requesting reimbursement is finally determined to be personally liable for such losses, claims, damages or liabilities, and shall not be construed as a waiver or reduction of the limitations under the Act or other applicable law of the liability of a Member or the Manager for Company obligations.²⁴

6.7 Grant of Security Interest. Each Member hereunder grants to the other a security interest in its Membership Interest, and any accessions thereto and any proceeds and products therefrom, to secure each and every obligation of such Member hereunder. Each Member hereby authorizes the other to file and record all financing statements, continuation statements or other instruments necessary or desirable to perfect or effectuate the provisions hereof. In connection with any foreclosure, transfer in lieu, or other enforcement of rights in the security interest granted in this **Section 6.7**, notwithstanding any contrary provision in **Article XV**, the acquiring person or entity shall, at the election of the remaining Member, automatically be admitted as a Member in the Company without any further action of the defaulting Member; provided, that the defaulting Member shall take all action that the non-defaulting Member may reasonably request to effectuate the admission of the transferee as a Member of the Company.

²⁴ This provision is intended to combine and refine Sections 6.6 and 12.4 of Form 5 in the context of an LLC. Although the provision retains the Form 5 concept that a Member is responsible for its percentage interest share of liabilities for which any other Member or the Manager may become personally liable, the revised provision makes clear that a Member's liability is limited to reimbursement and is not intended to waive the limited liability of an LLC.

**ARTICLE VII
MANAGEMENT COMMITTEE**

7.1 Organization and Composition. The ~~Participants~~Members hereby establish a Management Committee to determine overall policies, objectives, procedures, methods and actions under this Agreement. The Management Committee shall consist of _____ member(s) appointed by XCO and _____ member(s) appointed by YCO. Each ~~Participant~~Member may appoint one or more alternates to act in the absence of a regular member. Any alternate so acting shall be deemed a member of the Management Committee. Appointments shall be made or changed by notice to the other ~~Participant~~Member. Members of the Management Committee shall not be considered managers under the Act in such capacity, but derive all of their right, power and authority from the Members. No Member or member of the Management Committee shall have the power to bind the Company. All documents and instruments executed on behalf of the Company shall be signed by the Manager or by an officer or employee to whom the Manager has delegated the general or specific authority.

7.2 Decisions. Each ~~Participant~~Member, acting through its appointed member(s) shall have one vote on the Management Committee. Unless otherwise provided in this Agreement, the vote of the ~~Participant~~Member with a Participating Percentage Interest over _____ % shall determine the decisions of the Management Committee.

7.3 Meetings. The Management Committee shall hold regular meetings at least annually in _____, or at other mutually agreed places. The Manager shall give _____ days' notice to the ~~Participants~~Members of such regular meetings. Additionally, either ~~Participant~~Member may call a special meeting upon _____ day's notice to the Manager and the other ~~Participant~~Member. In case of emergency, reasonable notice of a special meeting shall suffice. There shall be a quorum if at least one member representing each ~~Participant~~Member is present. Each notice of a meeting shall include an itemized agenda prepared by the Manager in the case of a regular meeting, or by the ~~Participant~~Member calling the meeting in the case of a special meeting, but any matters may be considered with the consent of all ~~Participants~~Members. Meetings of the Management Committee may be held by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting by such communications equipment shall constitute presence in person at the meeting. The Manager shall prepare minutes of all meetings and shall distribute copies of such minutes to the ~~Participants~~Members within _____ days after the meeting. The minutes, when signed by all ~~Participants~~Members, shall be the official record of the decisions made by the Management Committee and shall be binding on the Manager and the ~~Participants~~Members. If personnel employed in operations are required to attend a Management Committee meeting, reasonable costs incurred in connection with such attendance shall be a Venture Company cost. All other costs shall be paid by the ~~Participants~~Members individually.

7.4 Action Without Meeting. ~~In lieu of meetings, the Management Committee may hold telephone conferences, so long as all decisions are immediately confirmed in writing by the Participants.~~ Any action required or permitted to be taken at a meeting of the Management Committee may be taken without a meeting and without prior notice if the action is evidenced by a written consent describing the action taken, signed by the member or members of the Management Committee having the requisite Percentage Interest to take such action at a meeting

at which all of the members of the Management Committee were present and voted; provided that notice of all actions taken by less than unanimous written consent shall be provided to all members of the Management Committee (other than members of the Management Committee executing such consent) not later than 10 days after the taking of such action. Action taken under this Section shall be effective when members of the Management Committee holding the requisite Percentage Interest have signed the consent, unless the consent specifies a different effective date.²⁵

7.5 Matters Requiring Approval. Except as otherwise delegated to the Manager in **Section 8.2**, the Management Committee shall have exclusive authority to determine all management matters related to ~~this Agreement~~the Company.

ARTICLE VIII MANAGER

8.1 Appointment. The ~~Participants~~Members hereby appoint _____ as the Manager with overall management responsibility for Operations. _____ hereby agrees to serve until it resigns as provided in **Section 8.4**.

8.2 Powers and Duties of Manager. Subject to the terms and provisions of this Agreement, the Manager shall have the following powers and duties which shall be discharged in accordance with adopted Programs and Budgets:

- (a) The Manager shall manage, direct and control Operations.
- (b) The Manager shall implement the decisions of the Management Committee, shall make from Company funds all expenditures necessary to carry out adopted Programs, and shall promptly advise the Management Committee if ~~it~~the Company lacks sufficient funds for the Manager to carry out its responsibilities under this Agreement.
- (c) The Manager shall: (i) purchase or otherwise acquire all material, supplies, equipment, water, utility and transportation services required for Operations, such purchases and acquisitions to be made on the best terms available, taking into account all of the circumstances; (ii) obtain such customary warranties and guarantees as are available in connection with such purchases and acquisitions; and (iii) keep the Assets free and clear of all liens and encumbrances, except for those existing at the time of, or created concurrent with, the acquisition of such Assets, or mechanic's or materialmen's liens which shall be released or discharged in a diligent manner, or liens and encumbrances specifically approved by the Management Committee.

²⁵ Section 7.4 was added to provide for action by less than unanimous consent, and that notice of any such consent should be provided to the member holding the minority interest. While action by less than unanimous consent is provided for under DLLCA § 18-302(d), it may be inconsistent with the business expectations of the parties. See Modest Form Paper, § 13.06[2].

(d) The Manager shall conduct such title examinations and cure such title defects as may be advisable in the reasonable judgment of the Manager.

(e) The Manager shall: (i) make or arrange for all payments required by leases, licenses, permits, contracts and other agreements related to the Assets; (ii) pay all taxes, assessments and like charges on Operations and Assets except taxes determined or measured by a ~~Participant~~Member's sales revenue or net income. If authorized by the Management Committee, the Manager shall have the right to contest in the courts or otherwise, the validity or amount of any taxes, assessments or charges if the Manager deems them to be unlawful, unjust, unequal or excessive, or to undertake such other steps or proceedings as the Manager may deem reasonably necessary to secure a cancellation, reduction, readjustment or equalization thereof before the Manager shall be required to pay them, but in no event shall the Manager permit or allow title to the Assets to be lost as the result of the nonpayment of any taxes, assessments or like charges; and (iii) shall do all other acts reasonably necessary to maintain the Assets.

(f) The Manager shall: (i) apply for all necessary permits, licenses and approvals; (ii) comply with applicable federal, state and local laws and regulations; (iii) notify promptly the Management Committee of any allegations of substantial violation thereof; and (iv) prepare and file all reports or notices required for Operations. The Manager shall not be in breach of this provision if a violation has occurred in spite of the Manager's good faith efforts to comply, and the ~~manager~~Manager has timely cured or disposed of such violation through performance, or payment of fines and penalties.

(g) The Manager shall prosecute and defend, but shall not initiate without consent of the Management Committee, all litigation or administrative proceedings arising out of Operations. The non-managing ~~Participant~~Member shall have the right to participate, at its own expense, in such litigation or administrative proceedings. The non-managing ~~Participant~~Member shall approve in advance any settlement involving payments, commitments or obligations in excess of \$_____ in cash or value.

(h) The Manager shall ~~provide~~obtain insurance for the benefit of the ~~Participants~~Company as provided in **Exhibit E** or as may otherwise be determined from time to time by the Management Committee.

(i) The Manager may dispose of Assets, whether by abandonment, surrender or Transfer in the ordinary course of business, except that Properties may be abandoned or surrendered only as provided in **Article XIV**. However, without prior authorization from the Management Committee, the Manager shall not: (i) dispose of Assets in any one transaction having a value in excess of \$_____; (ii) enter into any sales contracts or commitments for Product, except as permitted in **Section 11.2**11.3; (iii) dissolve or begin a liquidation of the ~~Venture~~Company; or (iv) dispose of all or a substantial part of the Assets necessary to achieve the purposes of the ~~Venture~~Company.

(j) The Manager shall have the right to carry out its responsibilities hereunder through agents, Affiliates or independent contractors.

(k) The Manager shall perform or cause to be performed during the term of this Agreement all assessment and other work required by law in order to maintain the unpatented mining claims included within the Properties. The Manager shall have the right to perform the assessment work required hereunder pursuant to a common plan of exploration and continued actual occupancy of such claims and sites shall not be required. The Manager shall not be liable on account of any determination by any court or governmental agency that the work performed by the Manager does not constitute the required annual assessment work or occupancy for the purposes of preserving or maintaining ownership of the claims, provided that the work done is in accordance with the adopted Program and Budget. The Manager shall timely record with the appropriate county and file with the appropriate United States agency, affidavits in proper form attesting to the performance of assessment work or notices of intent to hold in proper form, and allocating therein, to or for the benefit of each claim, at least the minimum amount required by law to maintain such claim or site.

(l) If authorized by the Management Committee, the Manager may: (i) locate, amend or relocate any unpatented mining claim or mill site or tunnel site, (ii) locate any fractions resulting from such amendment or relocation, (iii) apply for patents or mining leases or other forms of mineral tenure for any such unpatented claims or sites, (iv) abandon any unpatented mining claims for the purpose of locating mill sites or otherwise acquiring from the United States rights to the ground covered thereby, (v) abandon any unpatented mill sites for the purpose of locating mining claims or otherwise acquiring from the United States rights to the ground covered thereby, (vi) exchange with or convey to the United States any of the Properties for the purpose of acquiring rights to the ground covered thereby or other adjacent ground, and (vii) convert any unpatented claims or mill sites into one or more leases or other forms of mineral tenure pursuant to any ~~federal~~Federal law hereafter enacted.

(m) The Manager shall keep and maintain all required accounting and financial records pursuant to the Accounting Procedure and in accordance with customary cost accounting practices in the mining industry.

(n) The Manager shall keep the Management Committee advised of all Operations by submitting in writing to the Management Committee: (i) monthly progress reports which include statements of expenditures and comparisons of such expenditures to the adopted Budget; (ii) periodic summaries of data acquired; (iii) copies of reports concerning Operations; (iv) a detailed final report within ___ days after completion of each Program and Budget, which shall include comparisons between actual and budgeted expenditures and comparisons between the objectives and results of Programs; and (v) such other reports as the Management Committee may reasonably request. At all reasonable times the Manager shall provide the Management Committee or the representative of any ~~Participant~~Member, upon the request of any member of the Management Committee, access to, and the right to inspect and copy all maps, drill logs, core tests, reports, surveys, assays, analyses, production reports, operations, technical, accounting and financial records, and other information acquired in Operations. In addition, the Manager shall allow the non-managing ~~Participant~~Member, at the latter's sole risk and expense, and subject to reasonable safety regulations, to inspect the Assets and Operations at all reasonable times, so long as the inspecting ~~Participant~~Member does not unreasonably interfere with Operations.

(o) The Manager shall maintain Capital Accounts of the Members in accordance with Exhibit C.

(p) [The Manager shall prepare an Environmental Compliance plan for all Operations consistent with the requirements of any applicable laws or contractual obligations and shall include in each Program and Budget sufficient funding to implement the Environmental Compliance plan and to satisfy the financial assurance requirements of any applicable law or contractual obligation pertaining to Environmental Compliance. To the extent practical, the Environmental Compliance plan shall incorporate concurrent reclamation of Properties disturbed by Operations.]

(q) [The Manager shall undertake to perform Continuing Obligations when and as economic and appropriate, whether before or after termination of the Company. The Manager shall have the right to delegate performance of Continuing Obligations to persons having demonstrated skill and experience in relevant disciplines. As part of each Program and Budget submittal, the Manager shall specify in such Program and Budget the measures to be taken for performance of Continuing Obligations and the cost of such measures. The Manager shall keep the other Member reasonably informed about the Manager's efforts to discharge Continuing Obligations. Authorized representatives of each Member shall have the right from time to time to enter the Properties to inspect work directed toward satisfaction of Continuing Obligations and audit books, records, and accounts related thereto.]

(r) [The funds that are to be deposited into the Environmental Compliance Fund shall be maintained by the Manager in a separate, interest bearing cash management account, which may include, but is not limited to, money market investments and money market funds, or in longer term investments if approved by the Management Committee. Such funds shall be used solely for Environmental Compliance and Continuing Obligations, including the committing of such funds, interests in property, insurance or bond policies, or other security to satisfy Laws regarding financial assurance for the reclamation or restoration of the Properties, and for other Environmental Compliance requirements.]²⁶

(s) ~~(e)~~ The Manager shall undertake all other activities reasonably necessary to fulfill the foregoing.

The Manager shall not be in default of any duty under this **Section 8.2** if its failure to perform results from the failure of the non-managing **ParticipantMember** to perform acts or to contribute amounts required of it by this Agreement.

8.3 Standard of Care. The Manager shall conduct all Operations in a good, workmanlike and efficient manner, in accordance with sound mining and other applicable industry standards and practices, and in accordance with the terms and provisions of leases, licenses, permits, contracts and other agreements pertaining to Assets. ~~The~~ Notwithstanding anything in this Agreement to the contrary, the Manager shall not be liable to the nonmanaging **ParticipantMember or the Company** for any breach of this Agreement or other act or omission

²⁶ Environmental and Continuing Obligation provisions in Sections 8.2(p), (q) and (r) have been added from Form 5A LLC. See supra note 14.

resulting in damage or loss except to the extent caused by or attributable to the Manager's willful misconduct or gross negligence.

8.4 Resignation; Deemed Offer to Resign. The Manager may resign upon ___ months' prior notice to the other ParticipantMember, in which case the other ParticipantMember may elect to become the new Manager by notice to the resigning ParticipantMember within ___ days after the notice of resignation. If any of the following shall occur, the Manager shall be deemed to have offered to resign, which offer shall be accepted by the other ParticipantMember, if at all, within 90 days following such deemed offer:

- (a) The ParticipatingPercentage Interest of the Manager becomes less than 50%; or
- (b) The Manager fails to perform a material obligation imposed upon it under this Agreement and such failure continues for a period of 60 days after notice from the other ParticipantMember demanding performance; or
- (c) The Manager fails to pay or contest in good faith ~~its~~Company bills and Company debts within 60 days after they are due; or
- (d) A receiver, liquidator, assignee, custodian, trustee, sequestrator or similar official for a substantial part of its assets is appointed and such appointment is neither made ineffective nor discharged within 60 days after the making thereof, or such appointment is consented to, requested by, or acquiesced in by the Manager; or
- (e) The Manager commences a voluntary case under any applicable bankruptcy, insolvency or similar law now or hereafter in effect; ~~or~~ consents to the entry of an order for relief in an involuntary case under any such law or to the appointment of or taking possession by a receiver, liquidator, assignee, custodian, trustee, sequestrator or other similar official of any substantial part of its assets; ~~or~~ makes a general assignment for the benefit of creditors; ~~or~~ fails generally to pay its or ~~Venture~~the Company's debts as such debts become due; or takes corporate or other action in furtherance of any of the foregoing; or
- (f) Entry is made against the Manager of a judgment, decree or order for relief affecting a substantial part of its assets by a court of competent jurisdiction in an involuntary case commenced under any applicable bankruptcy, insolvency or other similar law of any jurisdiction now or hereafter in effect.

8.5 Payments To Manager. The Manager shall be compensated for its services and reimbursed for its costs hereunder in accordance with the Accounting Procedure.

8.6 Transactions With Affiliates. If the Manager engages Affiliates to provide services hereunder, it shall do so on terms no less favorable than would be the case with unrelated persons in arm's-length transactions or on terms that have been approved by the non-managing Member.

8.7 Activities During Deadlock. If the Management Committee for any reason fails to adopt a Program and Budget, subject to the contrary direction of the Management Committee

and to the receipt of necessary funds, the Manager shall continue Operations at levels comparable with the last adopted Program and Budget. For purposes of determining the required contributions of the [ParticipantsMembers](#) and their respective [ParticipatingPercentage](#) Interests, the last adopted Program and Budget shall be deemed extended.

ARTICLE IX PROGRAMS AND BUDGETS

9.1 Initial Program and Budget. The initial Program and Budget, which has been adopted by the [ParticipantsMembers](#), is attached as **Exhibit F**.

9.2 Operations Pursuant to Programs and Budgets. Except as otherwise provided in **Section 9.8** and **Article XIII**, Operations shall be conducted, expenses shall be incurred, and Assets shall be acquired only pursuant to approved Programs and Budgets. [Each Program and Budget adopted pursuant to this Agreement shall provide for accrual of reasonably anticipated Environmental Compliance expenses for all Operations contemplated under the Program and Budget.](#)²⁷

9.3 Presentation of Programs and Budgets. Proposed Programs and Budgets shall be prepared by the Manager for a period of one year or any longer period. Each adopted Program and Budget, regardless of length, shall be reviewed at least once a year at the annual meeting of the Management Committee. During the period encompassed by any Program and Budget, and at least ____ months prior to its expiration, a proposed Program and Budget for the succeeding period shall be prepared by the Manager and submitted to the [ParticipantsMembers](#). Each such proposed Program and Budget shall be in a form and degree of detail substantially similar to **Exhibit F**.

9.4 Review and Approval of Proposed Programs and Budgets. Within __ days after submission of a proposed Program and Budget, each [ParticipantMember](#) shall submit to the Management Committee:

- Budget: or
- (a) Notice that the [ParticipantMember](#) approves the proposed Program and Budget; or
 - (b) Proposed modifications of the proposed Program and Budget; or
 - (c) Notice that the [ParticipantMember](#) rejects the proposed Program and Budget.

If a [ParticipantMember](#) fails to give any of the foregoing responses within the allotted time, the failure shall be deemed to be an approval by the [ParticipantMember](#) of the Manager's proposed Program and Budget. If a [ParticipantMember](#) makes a timely submission to the Management Committee pursuant to **Section 9.4(b)** or **(c)**, then the Management Committee shall seek to develop a Program and Budget acceptable to the [ParticipantsMembers](#).

²⁷[The concept of an Environmental Compliance fund is not present in Form 5, but has been included here from Form 5A LLC. See supra note 14.](#)

9.5 Election to Participate. By notice to the Management Committee within 20 days after the final vote adopting a Program and Budget, a ~~Participant~~Member may elect to contribute to such Program and Budget in some lesser amount than its respective ~~Participating~~Percentage Interest, or ~~not at all~~may elect not to contribute any amount, in which cases its ~~Participating~~Percentage Interest shall be recalculated as provided in **Article VI**. If a ~~Participant~~Member fails to so notify the Management Committee, the ~~Participant~~Member shall be deemed to have elected to contribute to such Program and Budget in proportion to its respective ~~Participating~~Percentage Interest as of the beginning of the period covered by the Program and Budget. [A Member shall be obligated to contribute to any Program and Budget in at least the amount required to maintain its Percentage Interest at ___%, failing which it shall suffer the consequence provided in Section 6.5.²⁸]

9.6 Deadlock on Proposed Programs and Budgets. If the ~~Participants~~Members, acting through the Management Committee, fail to approve a Program and Budget by the beginning of the period to which the proposed Program and Budget applies, the provisions of **Sections 8.7** and ~~12.2~~12.1(c) shall apply.

9.7 Budget Overruns; Program Changes. The Manager shall immediately notify the Management Committee of any material departure from an adopted Program and Budget. If the Manager exceeds an adopted Budget by more than 10%, then the excess over 10%, unless directly caused by an emergency or unexpected expenditure made pursuant to **Section 9.8** or unless otherwise authorized by the Management Committee, shall be ~~for~~at the sole ~~account~~cost and expense of the Manager and ~~such excess~~ shall not be included in the calculations of the ~~Participating~~Percentage Interests. Budget overruns of 10% or less shall be borne by the ~~Participants~~Members in proportion to their respective ~~Participating~~Percentage Interests as of the time the overrun occurs.

9.8 Emergency or Unexpected Expenditures. In case of emergency, the Manager may take any reasonable action it deems necessary to protect life, limb or property, to protect the Assets or to comply with law or government regulation. The Manager may also make reasonable expenditures for unexpected events which are beyond its reasonable control and which do not result from a breach by it of its standard of care. The Manager shall promptly notify the ~~Participants~~Members of the emergency or unexpected expenditure, and the Manager shall be reimbursed for all resulting costs by the ~~Participants~~Company, which cost shall be funded by the Members making additional capital contributions to the Company in proportion to their respective ~~Participating~~Percentage Interests at the time the emergency or unexpected expenditures are incurred.

ARTICLE X ACCOUNTS AND SETTLEMENTS

²⁸ The required Percentage Interest should be the same as the minimum Percentage Interest in Section 6.5. This provision has been added to obligate each member to contribute to Programs and Budgets to the extent of at least the specified minimum Percentage Interest, in order to permit the elimination of minority interests under DLLCA §§ 18-306(2) and 18-502(c).

10.1 Monthly Statements. The Manager shall promptly submit to the Management Committee monthly statements of account reflecting in reasonable detail the charges and credits to the ~~Joint~~Business Account during the preceding month.

10.2 Cash Calls. On the basis of the adopted Program and Budget, the Manager shall submit to each ~~Participant~~Member prior to the last day of each month, a billing for estimated cash requirements for the next month. Within 10 days after receipt of each billing, each ~~Participant~~Member shall advance to the Manager as a capital contribution to the Company its proportionate share of the estimated amount. Time is of the essence of payment of such billings. The Manager shall at all times maintain a cash balance approximately equal to the rate of disbursement for up to ____ days. All funds in excess of immediate cash requirements shall be invested in interest-bearing accounts with _____ Bank, for the benefit of the ~~Joint~~Business Account.²⁹

10.3 Failure to Meet Cash Calls. ~~A Participant~~Except as provided in Section 9.5, a Member that fails to meet cash calls in the amount and at the times specified in **Section 10.2** shall be in default, and the amounts of the defaulted cash call shall bear interest from the date due at an annual rate equal to ____ percentage points over the Prime Rate, but in no event shall said rate of interest exceed the maximum permitted by law. The non-defaulting ~~Participant~~Member shall have those rights, remedies and elections specified in **Section 6.4**.

10.4 Audits. Upon request made by any ~~Participant~~Member within 24 months following the end of any calendar year (or, if the Management Committee has adopted an accounting period other than the calendar year, within 24 months after the end of such period), the Manager shall order an audit of the accounting and financial records for such calendar year (or other accounting period). All written exceptions to and claims upon the Manager for discrepancies disclosed by such audit shall be made not more than 3 months after receipt of the audit report. Failure to make any such exception or claim within the 3 month period shall mean the audit is correct and binding upon the ~~Participants~~Members and the Company. The audits shall be conducted by a firm of certified public accountants selected by the Manager, unless otherwise agreed by the Management Committee.

ARTICLE XI DISTRIBUTIONS; DISPOSITION OF PRODUCTION

11.1 Distributions. The aggregate amount of all distributions to the Members of cash and the timing of such distributions shall be determined by the Management Committee. Cash distributions shall be made to the Members in accordance with their respective Percentage Interests. In kind distributions to the Members of Products shall be governed by Section 11.2.

²⁹ Note that Form 5A LLC provides that excess funds may be invested at the discretion of the Manager.

11.2 ~~11.1 Taking Distributions In Kind~~³⁰. ~~Each Participant.~~ [At the discretion of the Manager, each Member shall be distributed and take in kind or separately dispose of its share of all Products in accordance with its Participating each such Member's Percentage Interest. Any extra expenditure incurred by the Company in the taking in kind or separate disposition by any Participant Member of its proportionate share of Products shall be borne reimbursed to the Company by such Participant Member. [Nothing in this Agreement shall be construed as providing, directly or indirectly, for any joint or cooperative marketing or selling of Products or permitting the processing of Products of any parties person other than the Participants Company at any processing facilities constructed by the Participants Company pursuant to this Agreement.]³¹ The Manager shall give the Participants Members notice at least 10 days in advance of the delivery date upon which their respective shares of Products will be available. for distribution. [Notwithstanding the foregoing, except as provided in Section 11.3, no Member shall have the right to demand a distribution in kind.]

11.3 ~~11.2 Failure of Participant Member to Take In Kind~~-. If a Participant Member fails to take in kind; pursuant to Section 11.2, the Manager shall have the right, but not the obligation, [for a period of time consistent with the minimum needs of the industry, but not to exceed one year,³² to purchase the Participant Member's share for its own account or to sell such share as agent for the Participant Member at not less than the prevailing market price in the area. Subject to the terms of any such contracts of sale then outstanding, during any period that the Manager is purchasing or selling a Participant Member's share of production, the Participant Member may elect by notice to the Manager to take in kind. The Manager shall be entitled to deduct from proceeds of any sale by it for the account of a Participant Member reasonable expenses incurred in such a sale.

ARTICLE XII

~~WITHDRAWAL AND TERMINATION~~ RESIGNATION AND DISSOLUTION

12.1 ~~Termination by Expiration or Agreement~~ Dissolution-. ~~This Agreement shall terminate as expressly provided in this Agreement, unless earlier terminated by written agreement.~~

12.2 ~~Termination by Deadlock~~. The Company shall be dissolved upon the occurrence of any of the following:

³⁰ Taking in kind is no longer required for tax reasons. The authors believe that some parties may want to require distribution of mineral products in kind for business reasons and thus have retained this provision. The parties are free to negotiate the provision, including whether taking in kind will be mandatory or at the discretion of the Manager. See Modest Form Paper, § 13.04[6][a].

³¹ Under Section 761(a) of the Code, the processing of Products for third parties (i.e. other than co-owners or joint venture members) would prevent the parties from electing not to be taxed as a partnership. Under Form 5 and Form 5A, which used a joint venture format and which preserved the parties' flexibility to elect not to be taxed as a partnership, this provision was necessary for tax purposes. In the LLC format, which does not permit the parties to elect not to be taxed as a partnership, this provision is not necessary unless desired for business reasons.

³² This limitation was added to Form 5 because it was necessary for tax purposes. This limitation is not necessary in the Modest Form, unless desired for business reasons.

- (a) on the later of (i) the date that is 20 years from the Effective Date, and (ii) the date that Products are no longer being produced from the Properties;
- (b) upon the unanimous agreement of the Members; or
- (c) ~~at the election of either Member by written notice to the other Member,~~ if the Management Committee fails to adopt a Program and Budget for ___ months after the expiration of the latest adopted Program and Budget, ~~either Participant may elect to terminate this Agreement by giving notice of termination to the other Participant.~~

~~12.3—Withdrawal~~

12.2 Resignation. ~~A Participant may elect to withdraw as a Participant from this Agreement by giving notice to the other Participant.~~ Member may elect to resign as a Member of the Company by giving written notice to the other Member of the effective date of ~~withdrawal~~ resignation, which shall be the later of the end of the then current Program and Budget or at least 30 days after the date of the notice. Upon such ~~withdrawal, this Agreement shall terminate, and the withdrawing Participant shall be deemed to have transferred to the remaining Participant, without cost and free and clear of royalties, liens~~ resignation, the Company shall acquire the resigning Member's entire Membership Interest, free and clear of security interests or other encumbrances arising by, through or under such ~~withdrawing Participant~~ resigning Member, except those ~~exceptions to title described in Part 1 of Exhibit A and those~~ to which both ~~Participants~~ Members have given their written consent after the ~~date of this Agreement, all of its Participating Interest in the Assets and in this Agreement. Any withdrawal under this Section 12.3 shall not relieve the withdrawing Participant of its share of liabilities to third persons (whether such~~ Effective Date, and such Membership Interest shall be cancelled. The resigning Member is entitled to receive no distribution upon such resignation or any further consideration from the Company. Any such resignation under this Section 12.2 shall not relieve the resigning Member of its obligations under Section 4.9(c) and 6.6 (whether any liability with respect thereto accrues before or after such ~~withdrawal~~ resignation) arising out of Operations conducted prior to such ~~withdrawal. For purposes of this Section 12.3, the withdrawing Participant's share of such liabilities shall be equal to its Participating Interest at the time such liability was incurred.~~ resignation.

~~12.4—Continuing Obligations.~~ ~~On termination of this Agreement under Section 12.1 or 12.2, the Participants shall remain liable for continuing obligations hereunder until final settlement of all accounts and for any liability, whether it accrues before or after termination, if it arises out of Operations during the term of the Agreement.~~

12.3 12.5 Disposition of Assets on Liquidation and Termination After Dissolution. ~~Promptly after termination under Section 12.1 or 12.2, the Manager~~³³ Upon the dissolution of the Company under Section 12.1, the Manager shall appoint in writing one or more liquidators (who may be a Member or Manager) who shall have the authority set forth in Section 12.6. The

³³ The liquidation provisions of Form 5 have been significantly revised to provide for the appointment of a liquidator, to grant the liquidator broad authority, and to coordinate with other tax-related provisions. See Modest Form Paper, § 13.05[4][c]

liquidator shall take all action necessary to wind up the activities of the VentureCompany, and all costs and expenses incurred in connection with the liquidation and termination of the VentureCompany shall be expenses chargeable to the Venture. ~~In accordance with Exhibit C, any Participant that has a negative Capital Account balance when the Venture is terminated for any reason shall contribute to the Assets of the Venture an amount sufficient to raise such balance to zero. The Assets~~Company. The liquidator may determine which assets, if any, are to be distributed in kind, and shall sell or otherwise dispose of all other assets of the Company. All gain or loss with respect to the assets (including assets distributed in kind) shall be allocated among the Members in accordance with the applicable provisions of **Exhibit C**. Should a Member have a deficit balance in its Capital Account (after giving effect to such allocations of gain or loss), the Member shall not be obligated to make a contribution to the Company to restore all or any part of such Capital Account deficit.³⁴ The assets of the Company shall first be paid, applied, or distributed in satisfaction of all liabilities of the VentureCompany to third parties (or to making reasonable provision for the satisfaction thereof) and then to satisfy any debts, obligations, or liabilities owed to the Participants. ~~Before distributing any funds or Assets to Participants, the Manager* shall have the right to* segregate amounts which, in the Manager's reasonable judgment, are necessary to discharge continuing obligations or to purchase for the account of Participants, bonds or other securities for the performance of such obligations. The foregoing shall not be construed to include the repayment of any Participant's capital contributions or Capital Account balance~~Members. Thereafter, any remaining cash and all other Assets shall be distributed (~~in undivided interests unless otherwise agreed~~) to the Participants, first in the ratio and to the extent of their respective Capital Accounts and then in proportion to their respective Participating Interests, subject to any dilution, reduction, or termination of such Participating Interests as may have occurred pursuant to the terms of this Agreement. ~~No Participant shall receive a distribution of any interest in Products or proceeds from the sale thereof if such Participant's Participating Interest therein has been terminated pursuant to this Agreement.~~to the Members in accordance with **Section 4.2 of Exhibit C**. Each Member* shall have the right to* designate another Person to receive any property that otherwise would be distributed in kind to that Member pursuant to this Section 12.3. Upon the completion of the winding up of the Company, the liquidator shall cancel the certificate of formation of the Company and take such other actions as may be reasonably necessary to terminate the continued existence of the Company.

12.4 12.6 Non-Compete Covenants. A ParticipantMember that ~~withdraws~~resigns from the Company pursuant to **Section 12.3-12.2** or is deemed to have ~~withdrawn~~resigned pursuant to **Section 5.2** or **6.5**, or a Member that transfers or forfeits its entire Membership Interest, shall not directly or indirectly acquire any interest in property within the Area of Interest for 12 months after the effective date of ~~withdrawal. If a withdrawing Participant, or the Affiliate of a withdrawing Participant~~the resignation, forfeiture or transfer. If a resigning, forfeiting or transferring Member, or any Affiliate of the foregoing, breaches this **Section 12.6,12.4**, such ParticipantMember or Affiliate shall be obligated to offer to convey to the ~~non-~~

³⁴ Form 5 had included a deficit restoration obligation, but this obligation was eliminated in both Form 5A and Form 5A LLC, ostensibly because it was inconsistent with the parties' business deal, and was not necessary for tax purposes. See Form 5A LLC, Section 13.11; Form 5A, Commentary to Exhibit C. The Modest Form adopts the approach taken by Form 5A and Form 5A LLC. See Modest Form Paper, § 13.08.

~~withdrawing Participant~~other Member, without cost, any such property or interest so acquired. Such offer shall be made in writing and can be accepted by ~~the non-withdrawing Participant~~such other Member at any time within 45 days after it is received by such ~~non-withdrawing Participant~~other Member.

12.5 ~~12.7~~ **Right to Data After Termination.** After ~~the~~ termination of ~~this Agreement~~the continued existence of the Company pursuant to ~~Section 12.1 or 12.2,~~**12.3**, each ~~Participant~~Member shall be entitled to copies of all information acquired hereunder before the effective date of termination not previously furnished to it, but a ~~terminating or withdrawing Participant~~resigning Member, or a Member that forfeits or transfers its entire Membership Interest, shall not be entitled to any such copies after any ~~other termination or any withdrawal~~such resignation.

12.6 ~~12.8~~ **Continuing Authority.** ~~On termination of this Agreement under Section 12.1 or 12.2 or the deemed withdrawal of a Participant pursuant to Section 5.2, 6.4(b)(2) or 6.5 or the withdrawal of a Participant pursuant to Section 12.3, the Manager~~From and after the dissolution of the Company under Section 12.1, the liquidator shall have the power and authority, ~~subject to control of~~of the Members, Manager and the Management Committee, ~~if any,~~ to do all things on behalf of the ~~Participants~~Company which are reasonably necessary or convenient to: ~~(a) wind up Operations~~ (a) wind up the Operations and the Company, (b) continue to operate the Properties and other Assets of the Company during the winding up of the Operations and the Company and (b) complete any transaction and satisfy any obligation, unfinished or unsatisfied, at the time of such ~~termination or withdrawal~~dissolution, if the transaction or obligation arises out of Operations prior to such ~~termination or withdrawal~~dissolution. The ~~Manager~~liquidator shall have the power and authority to grant or receive extensions of time or change the method of payment of an already existing liability or obligation, prosecute and defend actions on behalf of the ~~Participants and the Venture~~Company, mortgage Assets, and take any other reasonable action in any matter with respect to ~~which the former Participants continue to have, or appear or are alleged to have, a common interest or a common liability~~the Company or the Operations.

ARTICLE XIII ACQUISITIONS WITHIN AREA OF INTEREST

13.1 **General.** Any interest or right to acquire any interest in real property within the Area of Interest acquired during the term of this Agreement by or on behalf of a ~~Participant~~Member or any Affiliate shall be subject to the terms and provisions of this Agreement.

13.2 **Notice to Nonacquiring Participant Member.** Within _____ days after the acquisition of any interest or the right to acquire any interest in real property wholly or partially within the Area of Interest (except real property acquired by or on behalf of the ManagerCompany pursuant to a Program), the acquiring ~~Participant~~Member shall notify the other ~~Participant~~Member of such acquisition. The acquiring ~~Participant~~Member's notice shall describe in detail the acquisition, the lands and minerals covered thereby, the cost thereof, and the reasons why the acquiring ~~Participant~~Member believes that the acquisition of the interest is in the best interests of the ~~Participants~~Members under this Agreement. In addition to such notice,

the acquiring ParticipantMember shall make any and all information concerning the acquired interest available for inspection by the other ParticipantMember.

13.3 Option Exercised. If, within _____ days after receiving the acquiring ParticipantMember's notice, the other ParticipantMember notifies the acquiring ParticipantMember of its election to ~~accept a proportionate interest~~ participate in the acquired interest ~~equal to its Participating Interest~~, the acquiring ParticipantMember or its Affiliate shall convey to the ~~other Participant~~ Company (or to the other Member or another entity as mutually agreed by the Members), by special warranty deed, ~~such~~ hits entire acquired interest (or if to the other Member, a proportionate undivided interest therein. The based on the Percentage Interests of the Members). If conveyed to the Company, the acquired interest shall become a part of the Properties for all purposes of this Agreement immediately upon the notice of such other ParticipantMember's election to ~~accept the proportionate interest~~ participate therein. Such other ParticipantMember shall promptly pay to the acquiring ParticipantMember its proportionate share based on Percentage Interests of the latter's actual out-of-pocket acquisition costs.

13.4 Option Not Exercised. If the other ParticipantMember does not give such notice within the _____ day period set forth in **Section 13.3**, ~~neither such Member nor the Company~~ shall have ~~no any~~ interest in the acquired interest, and the acquired interest shall not be a part of the Properties or otherwise be subject to this Agreement.

ARTICLE XIV ABANDONMENT AND SURRENDER OF PROPERTIES

14.1 Surrender or Abandonment of Property. The Management Committee may authorize the Manager to surrender or abandon part or all of the Properties. If the Management Committee authorizes any such surrender or abandonment over the objection of a Participant, ~~the Participant that desires to abandon or surrender~~ Member, the Company shall assign to the objecting ParticipantMember, by special warranty deed and without cost to the surrendering ParticipantMember, all of the ~~surrendering Participant~~ Company's interest in the property to be abandoned or surrendered, and the abandoned or surrendered property shall cease to be part of the Properties and the Company shall have no further right, title or interest therein.

14.2 Reacquisition. If any Properties are abandoned or surrendered under the provisions of this **Article XIV**, then, unless this Agreement is earlier terminated, neither ParticipantMember nor any Affiliate thereof shall acquire any interest in such Properties or a right to acquire such Properties for a period of _____ years following the date of such abandonment or surrender. If a ParticipantMember reacquires any Properties in violation of this **Section 14.2**, the other ParticipantMember may elect by notice to the reacquiring ParticipantMember within 45 days after it has actual notice of such reacquisition, to have such properties ~~made subject~~ contributed to the ~~terms of this Agreement~~ Company. In the event such an election is made, the reacquired properties shall thereafter be treated as Properties, and the costs of reacquisition shall be borne solely by the ~~reacquiring Participant and shall not be included for purposes of calculating the Participants' respective Participating Member required to contribute such Properties to the Company, but shall not be credited to the Capital Account of~~

the contributing member or taken into account for purposes of calculating the Members' respective Percentage Interests.³⁵

ARTICLE XV TRANSFER OF INTEREST

15.1 General. A ParticipantMember shall have the right to Transfer to any third party all or any part of its Membership Interest or any economic interest ~~in or to this Agreement, its Participating Interest, or the Assets therein (including its right to receive distributions of cash or property from the Company)~~, solely as provided in this **Article XV**.

15.2 Limitations on Free Transferability. The Transfer right of a ParticipantMember in **Section 15.1** shall be subject to the following terms and conditions:

(a) No ~~transferee~~ Transfer of ~~all or any part of the interest of a Participant in this Agreement, any Participating Interest, or the Assets~~ shall have the rights of a Participant's Membership Interest or any economic interest therein shall be valid or recognized by the Company unless and until the transferring ParticipantMember has provided to the other ParticipantMember notice of the Transfer, and ~~except as provided in Sections 15.2(g) and 15.2(h)~~, the transferee, as of the effective date of the Transfer, has committed in writing to be bound by this Agreement to the same extent as the transferring ParticipantMember;

(b) No ParticipantMember, without the consent of the other ParticipantMember, shall make a Transfer which shall cause termination of the ~~tax~~ Company as a partnership established by the provisions of Section 4.2 for Federal income tax purposes;

(c) No Transfer permitted by this **Article XV** shall relieve the transferring ParticipantMember of its share of any liability, whether accruing before or after such Transfer, which arises out of Operations conducted prior to such Transfer, including without limitation as provided in Section 6.6;

(d) As provided in **Exhibit C**, ~~Article IV~~, the transferring ParticipantMember and the transferee shall bear all tax consequences of the Transfer;

(e) In the event of a Transfer of less than all of a Participating Member's Membership Interest, the transferring ParticipantMember and its transferee shall thereafter act and be treated as one Participant;

~~(f) — No Participant shall Transfer any interest in this Agreement or the Assets except by Transfer of part or all of its Participating Interest; Member, with the Member with the greater Percentage Interest hereby appointed the agent and attorney-in-fact of the Member with the lesser Percentage Interest with respect to the exercise of all rights to vote, consent, approve or otherwise make any decisions with respect to the management or Operations or the Company;~~

³⁵ The parties may wish to negotiate a different business deal concerning reacquired properties. The provisions relating to Capital Accounts and allocations should be modified as appropriate.

(f) ~~(g)~~ If the Transfer is the grant of a security interest ~~by mortgage, deed of trust, pledge, lien or other encumbrance of any interest in this Agreement, any Participating on a Membership Interest or the Assets~~ to secure a loan or other indebtedness of a ~~Participant in a bona fide transaction~~ Member, such security interest or encumbrance shall be subordinate to the terms of ~~this Agreement and the rights and interests of the other Participant hereunder. Upon any pledge securing any obligation of the Company or any obligation of the granting Member to the Company or the other Member to the extent arising out or relating to the Company. In connection with~~ any foreclosure, transfer in lieu, or other enforcement of rights in the security interest, the acquiring third party shall be ~~deemed to have assumed the position of the encumbering Participant with respect to this Agreement and the other Participant, and it shall comply with and be bound by the terms and conditions of this Agreement;~~ bound by the terms of this Agreement, including without limitation, Section 15.3, and shall acquire only the rights of an assignee of the Membership Interest, and shall not, without the unanimous approval of the remaining Members, be admitted to the Company as a Member.³⁶

~~(g)~~ ~~(h)~~ ~~If a~~ No Member shall enter into any sale or other commitment or ~~disposition~~ agree to dispose of Products or proceeds from the sale of Products by ~~a Participant~~ such Member upon distribution to it pursuant to ~~Article XI creates if such sale or other commitment will create~~ in a third party a security interest in Products or proceeds therefrom prior to any such distribution, ~~such sales, commitment or disposition shall be subject to the terms and conditions of this Agreement;~~ and

~~(h)~~ ~~(i)~~ If, contrary to **Section 15.2(b)**, a Transfer is made which causes termination of the ~~tax~~ Company as a partnership established by Section 4.2, for Federal income tax purposes, the transferring ~~Participant~~ Member shall indemnify, defend and hold harmless the other ~~Participant~~ Member and its Affiliates from and against any and all loss, cost, expense or damage arising from such termination.

~~(i)~~ ~~(j)~~ Only United States currency shall be used for Transfers for consideration.

15.3 Preemptive Acquisition Right.³⁷ Except as otherwise provided in **Section 15.4**, if a ~~Participant~~ Member desires to Transfer all or any part of its ~~interest in this Agreement, any Participating Interest, or the Assets, the other Participant shall have a preemptive~~ Membership Interest (including without limitation a Transfer in connection with the foreclosure or other enforcement of rights in a pledge, security interest or other encumbrance granted pursuant to Section 15.2(f)), the other Member shall have the first right to acquire such interests as provided in this **Section 15.3**.

(a) A ~~Participant~~ Member intending to Transfer all or any part of its ~~interest in this Agreement, any Participating Interest, or the Assets~~ Membership Interest subject to this

³⁶ The drafter should alternatively consider an absolute prohibition on pledges by a Member of its Membership Interest without the consent of the other Member.

³⁷ Note the “preemptive right” has been renamed an “acquisition right” consistent with more common usage. A preemptive right would typically apply to additional interests to be issued by the Company.

Section 15.3 shall promptly notify the other ParticipantMember of its intentions. The notice shall state the price and all other pertinent terms and conditions of the intended Transfer, and shall be accompanied by a copy of the proposed offer or contract for sale. The other ParticipantMember shall have _____ days from the date such notice is delivered to notify the transferring ParticipantMember whether it elects to acquire the offered interest at the same price and on the same terms and conditions as set forth in the notice. If it does so elect, the Transfer shall be consummated promptly after notice of such election is delivered to _____ the transferring ParticipantMember.

(b) If the other ParticipantMember fails to so elect within the period provided for in **Section 15.3(a)**, the transferring ParticipantMember shall have _____ days following the expiration of such period to consummate the Transfer to a third party at a price and on terms no less favorable than those offered by the transferring ParticipantMember to the other ParticipantMember in the notice required in **Section 15.3(a)**.

(c) If the transferring ParticipantMember fails to consummate the Transfer to a third party within the period set forth in **Section 15.3(b)**, the preemptive acquisition right of the other ParticipantMember in such offered interest shall be deemed to be revived. Any subsequent proposal to Transfer such interest shall be conducted in accordance with all of the procedures set forth in this ~~Section 5.3.~~ 15.3.

15.4 Exceptions to Preemptive Acquisition Right. **Section 15.3** shall not apply to the following:

(a) Transfer by a ParticipantMember of all or any part of its ~~interest in this Agreement, any Participating Membership Interest, or the Assets~~ to an Affiliate;

(b) Incorporation of a ParticipantMember, or corporate merger, consolidation, amalgamation or reorganization of a ParticipantMember by which the surviving entity shall possess substantially all of the stock, or all of the property rights and interests, and be subject to substantially all of the liabilities and obligations of that ParticipantMember;

(c) The grant by a ParticipantMember of a pledge, security interest ~~in any interest in this Agreement, any Participating Interest, or the Assets by mortgage, deed of trust, pledge, lien~~ or other encumbrance in such Membership Interest; or

(d) A sale or other commitment or disposition of Products or proceeds from sale of Products by a ParticipantMember upon distribution to it pursuant to **Article XI**.

ARTICLE XVI DISPUTES³⁸

(See Commentary 1 to Form 5 and Commentary in the Accompanying Paper)

³⁸ As stated in the commentary to Form 5, Form 5 does not include any particular method for resolving disputes, but it does include sample language regarding arbitration. See Modest Form Paper, § 13.07 regarding some particular arbitration and litigation considerations for Delaware LLCs.

**ARTICLE XVII
CONFIDENTIALITY**

17.1 General. ~~The financial terms of this Agreement and all information obtained in connection with the performance of this Agreement shall be the exclusive property of the Participants and, except as provided in Section 17.2, shall not be disclosed to any third party or the public.~~ Each Member and Manager will keep confidential and not use, reveal, provide or transfer to any third party any Confidential Information it obtains or has obtained concerning the Company or the other Member without the prior written consent of the other ~~Participant~~ Member, which consent shall not be unreasonably withheld.³⁹

17.2 Exceptions. The consent required by **Section 17.1** shall not apply to a disclosure:

(a) To ~~an Affiliate,~~ a consultant, contractor or subcontractor, officer, director or employee of the Company, the Manager or any Member or any of their respective Affiliates that has a bona fide need to be informed;

(b) To any third party to whom the disclosing ~~Participant~~ Member or Manager contemplates a Transfer of all or any part of its ~~interest in or to this Agreement, its Participating Membership~~ Interest; or the Assets;

(c) To any actual or potential lender, underwriter or investors for the sole purpose of evaluating whether to make a loan to or investment in the disclosing Member or the Company; or

(d) ~~(e)~~ To a governmental agency or to the public which the disclosing Participant Member or Manager believes in good faith is required by pertinent law or regulation or the rules of any stock exchange;

In any case to which this **Section 17.2** is applicable, the disclosing ~~Participant~~ Member or Manager shall give notice to the other ~~Participant~~ Member concurrently with the making of such disclosure. As to any disclosure pursuant to **Section 17.2(a) or (b) or (c)**, only such ~~confidential information~~ Confidential Information as such third party shall have a legitimate business need to know shall be disclosed and such third party shall first agree in writing to protect the ~~confidential information~~ Confidential Information from further disclosure to the same extent as the ~~Participants~~ Members are obligated under this **Article XVII**, and the disclosing Member or Manager shall be responsible and liable for any use or disclosure of the Confidential Information by such parties in violation of this Agreement and such other writing.

17.3 Duration of Confidentiality. ~~The provisions of this Article XVII shall apply during the term of this Agreement and for two years following termination of this Agreement pursuant to Section 12.1 or 12.2, and shall continue to apply to any Participant who withdraws, who is deemed to have withdrawn, or who Transfers its Participating Interest, for two years~~

³⁹ The Modest Form includes the definition from Form 5A LLC of Confidential Information, but avoids the complicated dichotomy and variation on rights and obligations with respect to "Business Information", "Member Information", "Enhancements" etc.

~~following the date of such occurrence.~~ The provisions of this Article XVII shall apply to a Member or Manager until the earlier of (a) the date that is two years after the cancellation of the certificate of formation of the Company (notwithstanding the resignation of such Member or Manager or the Transfer by such Member of its entire Membership Interest), and (b) the date that is two years after the resignation of such Member or Manager or, in the case of a Member, the Transfer by such Member of its entire Membership Interest; provided that with respect to any Confidential Information that constitutes “trade secrets” of a Member (or of the Company, to the extent distributed or otherwise assigned to a Member pursuant to this Agreement) under the Uniform Trade Secrets Act or similar applicable laws, the provisions of this Article XVII shall survive indefinitely.

ARTICLE XVIII GENERAL PROVISIONS

18.1 Notices* ~~All notices, payments and other required communications (*“Notices”)~~ ~~to the Participants* shall be in writing, and shall be *addressed respectively as follows: All Notices shall be *~~ All notices, payments and other required communications (*“Notices”) ~~to the Members or Manager* shall be in writing, and shall be *~~ given (i) by personal delivery to the ~~Participant~~ applicable Member or Manager, or (ii) by electronic communication, with a confirmation sent by registered or certified mail return receipt requested, or (iii) by registered or certified mail return receipt requested. All Notices shall be effective and shall be deemed delivered ~~(i)~~ (ia) if by personal delivery on the date of delivery if delivered during normal business hours, and, if not delivered during normal business hours, on the next business day following delivery, ~~(ii)~~ (ib) if by electronic communication on the next business day following receipt of the electronic communication, and ~~(iii)~~ (ic) if solely by mail on the next business day after actual receipt. A ~~Participant~~ Member or Manager may change its address by Notice to the other ~~Participant~~ Member.

18.2 Interpretation. The singular shall include the plural, and the plural the singular wherever the context so requires, and the masculine, the feminine, and the neuter genders shall be mutually inclusive.

18.3 Currency. All references to “dollars” or “\$” herein shall mean lawful currency of the United States of America.

18.4 Headings. The subject headings of the Sections and Subsections of this Agreement and the Paragraphs and Subparagraphs of the Exhibits to this Agreement are included for purposes of convenience only, and shall not affect the construction or interpretation of any of its provisions.

18.5 18.2 Waiver. The failure of a ~~Participant~~ Member or Manager to insist on the strict performance of any provision of this Agreement or to exercise any right, power or remedy upon a breach hereof shall not constitute a waiver of any provision of this Agreement or limit the ~~Participant~~ Member’s or Manager’s right thereafter to enforce any provision or exercise any right.

18.6 18.3 Modification. No modification of this Agreement shall be valid unless made in writing and duly executed by all of the ParticipantsMembers.

18.7 18.4 Force Majeure. Except for ~~the~~any obligation to make payments when due hereunder, the obligations of a ParticipantMember or the Manager shall be suspended to the extent and for the period that performance is prevented by any cause, whether foreseeable or unforeseeable, beyond its reasonable control, including, without limitation, labor disputes (however arising and whether or not employee demands are reasonable or within the power of the participantMember or Manager to grant); acts of God; laws, regulations, orders, proclamations, instructions or requests of any government or governmental entity; judgments or orders of any court; inability to obtain on reasonably acceptable terms any public or private license, permit or other authorization; curtailment or suspension of activities to remedy or avoid an actual or alleged, present or prospective violation of federal, state or local environmental standards; acts of war or terrorism or conditions arising out of or attributable to war or terrorism, whether declared or undeclared; riot, civil strife, insurrection, insurgency or rebellion; fire, explosion, earthquake, storm, flood, sink holes, drought, hurricane, tsunami or other adverse weather condition; delay or failure by suppliers or transporters of materials, parts, supplies, services or equipment or by contractors' or subcontractors' shortage of, or inability to obtain, labor, transportation, materials, machinery, equipment, supplies, utilities or services; accidents; breakdown of equipment, machinery or facilities; or any other cause whether similar or dissimilar to the foregoing. The affected ParticipantMember or Manager shall promptly give notice to the other ParticipantMember of the suspension of performance, stating therein the nature of the suspension, the reasons therefor, and the expected duration thereof. The affected ParticipantMember or Manager shall resume performance as soon as reasonably possible. During the period of suspension the obligations of the ParticipantsMembers to advance funds pursuant to **Section 10.2** shall be reduced to levels consistent with Operations.

18.8 18.5 Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Delaware, except for its rules pertaining to conflicts of laws.

18.9 18.6 Rule Against Perpetuities. Any right or option to acquire any interest in real or personal property under this Agreement must be exercised, if at all, so as to vest such interest in the acquirer within 21 years after the ~~effective date of this Agreement~~Effective Date.

18.10 18.7 Further Assurances. Each ~~of~~Member and the ParticipantsManager agrees to take from time to time such actions and execute such additional instruments as may be reasonably necessary or convenient to implement and carry out the intent and purpose of this Agreement.

18.11 18.8 Survival of Terms and Conditions. The following Sections shall survive the dissolution, liquidation and termination of ~~this Agreement~~the Company, any Transfer of a Membership Interest or other interest in the Company to the full extent necessary for their enforcement and the protection of the ParticipantMember, Manager or other person in whose favor they run: **Sections 2.2, 2.3, 4.5, 4.8, 4.9, 6.4, 6.6, 6.7, 10.3, 12.2, 12.3, 12.4, 12.5, 12.6, 12.7 and 12.8, 12.5 and 12.6, the second sentence of Section 8.3, and Articles XVI, XVII and XVIII.**

18.12 No Third Party Beneficiaries. Except as specifically provided in Sections 4.9 and 15.2(h), this Agreement is for the sole benefit of the Members and the Manager, and no other Person, including without limitation, any creditor of any Member, is intended to be a beneficiary of this Agreement or shall have any rights hereunder.

18.13 ~~**18.9**~~ **Entire Agreement; Successors and Assigns.** This Agreement, together with the Exhibits hereto, contains the entire understanding of the ~~Participants~~ Members and the Manager with respect to the Company and supersedes all prior agreements and understandings ~~between the Participants~~ relating to the subject matter hereof. This Agreement shall be binding upon and inure to the benefit of the respective successors and permitted assigns of the ~~Participants~~ Members and the Manager. In the event of any conflict between this Agreement and any Exhibit attached hereto, the terms of this Agreement shall be controlling.

~~**18.10 Memorandum.** At the request of either Participant, a Memorandum or short form of this Agreement, as appropriate, which shall not disclose financial information contained herein, shall be prepared and recorded by Manager. This Agreement shall not be recorded.~~

[Signatures on Next Page]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

ATTEST:

XCO

Secretary

By: President

~~ATTEST:~~

~~XCO~~

YCO

Secretary

By: President

MEMORANDUM OF VENTURE AGREEMENT

~~NOTICE IS HEREBY GIVEN that under that certain Mining Venture Agreement ("Agreement") made and entered into effective as of the _____ day of _____, 19____, ("effective date") by and between XCO, a _____ corporation ("XCO") and YCO a _____ corporation ("YCO"), the Participants have agreed and do hereby agree to undertake mineral Exploration, Development and, if warranted, Mining of Products within the exterior boundaries of the area described in Part 2 of Exhibit A ("Area of Interest"). The Agreement shall be the exclusive means by which the Participants, or either of them or any Affiliate, engage in any activity within the Area of Interest (except as otherwise provided by paragraph 13 below); acquire interests in real property within the Area of Interest; engage in marketing Products, to the extent permitted by the Agreement; or engage in any other lawful purposes related or incidental to the foregoing. The Agreement shall continue for 20 years from the effective date and for so long thereafter as Products are produced from lands subject to the Agreement, including the real property and interests described in Part 1 of Exhibit A ("Properties"), unless the Agreement is earlier terminated according to its terms.~~

~~This memorandum is executed for the purpose of affording notice of the existence of the Agreement and the terms and provisions thereof, which terms and provisions are incorporated herein by reference for all purposes. This memorandum is not intended to alter or vary the terms of the Agreement. All capitalized words in this memorandum have the same meaning as assigned to them in the Agreement. Some of the terms and provisions of the Agreement are hereby summarized as follows:~~

~~1. XCO, as its Initial Contribution, hereby contributes the Properties described in Part 1 of Exhibit A to the purposes of the Agreement. YCO, as its Initial Contribution, is hereby obligated to contribute the first cash to the Venture which shall be used to fund Programs and Budgets.~~

~~2. The Participants shall have the following initial Participating Interests:~~

~~XCO _____ 50%
YCO _____ 50%~~

~~3. A Participant's Participating Interest shall be changed in any of the following instances:~~

~~(i) _____ Upon YCO's failure to make its Initial Contribution required by Section 5.1 of the Agreement;~~

~~(ii) _____ Upon an election by a Participant to contribute less to an adopted Program than the percentage reflected by its Participating Interest;~~

~~(iii) _____ In the event of default by a Participant in making its agreed upon contribution to an adopted Program, followed by an election by the other Participant to invoke remedies permitted by Section 6.4 of the Agreement;~~

~~(iv) Transfer by a Participant of less than all of its Participating Interest in accordance with Article XV of the Agreement; or~~

~~(v) Acquisition by a Participant of less than all of the Participating Interest of the other Participant, however arising.~~

~~4. Upon reduction of a Participant's Participating Interest to less than _____%, such Participant shall be deemed to have withdrawn from the Venture pursuant to Section 6.5 of the Agreement.~~

~~5. If a Participant defaults in making a contribution or cash call required by an approved Program and Budget, pursuant to Section 6.4(a) of the Agreement the nondefaulting Participant may advance the defaulted contribution on behalf of the defaulting Participant and treat the same, together with any accrued interest, as a demand loan bearing interest from the date of the advance at the rate provided in Section 10.3 of the Agreement. The failure to repay said loan upon demand shall be a default. Each Participant hereby grants to the other a lien upon its interest in the Properties and a security interest in its rights under the Agreement and in its Participating Interest in other Assets, and the proceeds therefrom, to secure any loan made under said Section 6.4(a), including interest thereon, reasonable attorneys fees and all other reasonable costs and expenses incurred in enforcing such lien or security interest, or both. Each Participant hereby irrevocably appoints the other its attorney in fact to execute, file and record all instruments necessary to perfect or effectuate the provisions of Section 6.4 of the Agreement.~~

~~6. Except as otherwise expressly provided in the Agreement, each Participant shall have the right independently to engage in and receive full benefits from business activities, whether or not competitive with Operations, without consulting the other. The doctrines of "corporate opportunity" or "business opportunity" shall not be applied to any other activity, venture, or operation of either Participant, and, neither Participant shall have any obligation to the other with respect to any opportunity to acquire any property outside the Area of Interest at any time, or except as otherwise provided in paragraph 11, within the Area of Interest after the termination of this Agreement.~~

~~7. Nothing contained in the Agreement shall be deemed to constitute either Participant the partner of the other (except for federal or state tax purposes), nor, except as otherwise therein expressly provided, to constitute either Participant the agent or legal representative of the other, nor to create any fiduciary relationship between them. It is not the intention of the Participants to create, nor shall the Agreement be construed to create, any mining, commercial or other partnership. Neither Participant shall have any authority to act for or to assume any obligation or responsibility on behalf of the other Participant, except as otherwise expressly provided therein. The rights, duties, obligations and liabilities of the Participants shall be several and not joint or collective. Each Participant shall be responsible only for its obligations as set out in the Agreement and shall be liable only for its share of the costs and expenses as provided therein, it being the express purpose and intention of the Participants that their ownership of the Assets and the rights acquired under the Agreement shall be as tenants in common.~~

~~8. — The Participants hereby waive and release all rights of partition or sale in lieu thereof or other division of Assets, including any such rights provided by statute.~~

~~9. — Except as otherwise provided in the Agreement, neither Participant shall permit or cause all or any part of its interest in the Assets to be sold, exchanged, encumbered, surrendered, abandoned, or otherwise terminated.~~

~~10. — Each Participant shall take in kind or separately dispose of its share of all Products in accordance with its Participating Interest.~~

~~11. — A Participant that withdraws pursuant to Section 12.3, or is deemed to have withdrawn pursuant to Section 5.2 or 6.5, shall not directly or indirectly acquire any interest in real property within the Area of Interest for 12 months after the effective date of withdrawal. If a withdrawing Participant, or the Affiliate of a withdrawing Participant, breaches this restriction, such Participant or Affiliate shall be obligated to offer to convey to the non-withdrawing Participant, without cost, any such property or interest acquired in such breach. Such offer shall be made in writing and can be accepted by the non-withdrawing Participant at any time within 45 days after it receives such offer.~~

~~If any of the Properties are abandoned or surrendered pursuant to Section 14.1 of the Agreement, neither a Participant nor an Affiliate shall acquire any interest (or rights to acquire interests) in such Properties for a period of two years following the date of such abandonment or surrender. If a Participant reacquires any Properties (or rights to acquire Properties) in violation of Section 14.2, the other Participant shall have the right, within 45 days after it has actual notice of such reacquisition, to have such Properties made subject to the Agreement.~~

~~12. — Any interest or option to acquire any interest in real property within the Area of Interest acquired during the term of the Agreement by or on behalf of a Participant or any Affiliate shall be offered to the nonacquiring Participant for inclusion in the Agreement as part of the Properties. If within _____ days after receiving notice of such acquisition (except pursuant to an adopted Program) the nonacquiring Participant gives notice to the acquiring Participant that it elects to accept a proportionate interest therein, the acquired property shall become subject to the terms and provisions of this Agreement. If the nonacquiring Participant fails to give such notice within the _____ day period, it shall have no interest in the acquired property and the acquired property shall not become part of the Properties or otherwise subject to this Agreement.~~

~~13. — Pursuant to Section 14.1 of the Agreement, the Management Committee may authorize the Manager to surrender or abandon part or all of the Properties. If the Management Committee authorizes any such surrender or abandonment over the objection of a Participant, the Participant that desires to abandon or surrender shall assign to the objecting Participant, by special warranty deed and without cost to the other Participant, all of the surrendering Participant's Interest in the Properties to be abandoned or surrendered and the abandoned or surrendered property shall cease to be part of the Properties.~~

~~14. — A Participant may Transfer to any third party all or any part of its interest in or to the Agreement, any Participating Interest, or the Assets solely as provided in Article XV of the Agreement. All Transfers shall be subject to the following terms and conditions:~~

~~(i) No transferee of all or any part of the interest of a Participant in the Agreement, any Participating Interest, or the Assets shall have the rights of a Participant unless and until the transferring Participant has provided to the other Participant notice of the Transfer, and the transferee, as of the effective date of the Transfer, has committed in writing to be bound by the Agreement to the same extent and nature as the transferring Participant;~~

~~(ii) No Participant, without the consent of the other Participant, shall make a Transfer which shall cause termination of the tax partnership established by the Agreement;~~

~~(iii) In the event of a Transfer of less than all of a Participating Interest, the transferring Participant and its transferee shall act and be treated as one Participant;~~

~~(iv) No Participant shall Transfer any interest in the Agreement or the Assets except by Transfer of part or all of its Participating Interest;~~

~~(v) If the Transfer is the grant of a security interest by mortgage, deed of trust, pledge, lien or other encumbrance of any interest in the Agreement, any Participating Interest, or the Assets to secure a loan or other indebtedness of a Participant, such security interest shall be subordinate to the terms of the Agreement and the rights and interests of the other Participant thereunder. Upon any foreclosure or other enforcement of rights in the security interest, the acquiring third party shall be deemed to have assumed the position of the encumbering Participant with respect to the Agreement and the other Participant, and it shall comply with the terms and conditions applicable to a Transfer under Article XV of the Agreement;~~

~~(vi) If a sale or other commitment or disposition of Products or proceeds from the sale of Products by a Participant upon distribution to it pursuant to Article XI creates in a third party a security interest in Products or proceeds therefrom prior to such distribution, such sales, commitment or disposition shall be subject to the terms and conditions of Article XV of the Agreement.~~

~~15. Except as otherwise provided in paragraph 16 below, if a Participant desires to Transfer all or any part of its interest in the Agreement, any Participating Interest, or the Assets, the other Participant shall have a preemptive right to acquire such interests by notifying the transferring Participant within _____ days after receiving notice of the intended Transfer that it elects to acquire the offered interest. If the other Participant fails to so elect within such period, the transferring Participant shall have _____ days thereafter to consummate the Transfer to a third party at a price and on terms no less favorable to the other Participant than those set forth in the notice. If the transferring Participant fails to consummate the Transfer to a third party within the period allowed, the preemptive right of the other Participant in such offered interest shall be deemed to be revived.~~

~~16. Paragraph 15 above shall not apply to the following:~~

~~(vii) A Transfer by a Participant of all or any part of its Participating Interest to an Affiliate.~~

~~(viii) Incorporation of a Participant, or corporate merger, consolidation, amalgamation or reorganization of a Participant by which the surviving entity shall possess substantially all of the stock, or all of the property, rights and interests, and be subject to substantially all of the liabilities and obligations of that Participant.~~

~~(ix) A grant by a participant of a security interest in any interest in the Agreement, any Participating Interest or the Assets by mortgage, deed of trust, pledge, lien or other encumbrance or security agreement.~~

~~(x) A sale or other commitment or disposition of Products or proceeds from the sale of Products by a Participant upon distribution to it.~~

~~17. The Agreement shall terminate upon the happening of any of the following events:~~

~~(xi) The mutual consent of the Participants.~~

~~(xii) An election by a Participant to terminate the Agreement upon the failure of the Management Committee to adopt a Program and Budget for _____ months after the expiration of the latest adopted Program and Budget.~~

~~(xiii) The deemed withdrawal of a Participant pursuant to Section 6.5 of the Agreement.~~

~~(xiv) The deemed withdrawal of a Participant pursuant to Section 6.4(b)(2) of the Agreement following a default in making a contribution relating to a Development or Mining Program and Budget.~~

~~(xv) The withdrawal of a Participant pursuant to Section 12.3 of the Agreement.~~

~~(xvi) Expiration of the Agreement at the end of its term.~~

~~18. A copy of the Agreement is on file with the Manager whose address is:~~

~~EXECUTED effective as of the date first above written.~~

~~XCO:~~

~~By: _____~~

~~YCO:~~

~~By: _____~~

STATE OF _____)
_____) ss.
COUNTY OF _____)

_____The foregoing instrument was acknowledged before me this _____ day of
_____, 19__, by _____,
of XCO, a _____ corporation, for and on behalf of the corporation.

_____) Notary Public

My Commission Expires:

STATE OF _____)
_____) ss.
COUNTY OF _____)

_____The foregoing instrument was acknowledged before me this _____ day of
_____, 19__, by _____,
of YCO, a _____ corporation, for and on behalf of the corporation.

_____) Notary Public

~~MY COMMISSION EXPIRES:~~ EXHIBIT A

PROPERTY DESCRIPTION AND AREA OF INTEREST

PART 1 - Property Description

PART 2 - Area of Interest

EXHIBIT B

ACCOUNTING PROCEDURE

The financial and accounting procedures to be followed by the Manager and the ~~Participants~~Members under the Agreement are set forth below. References in this Accounting Procedure to Sections and Articles are to those located in this Accounting Procedure unless it is expressly stated that they are references to the ~~Venture~~ Agreement.

~~ARTICLE I~~ARTICLE XIX
GENERAL PROVISIONS

1.1 ~~19.1~~General Accounting Records. The Manager shall maintain detailed and comprehensive cost accounting records in accordance with this Accounting Procedure, including general ledgers, supporting and subsidiary journals, invoices, checks and other customary documentation, sufficient to provide a record of revenues and expenditures and periodic statements of financial position and the results of operations for managerial, tax, regulatory or other financial reporting purposes. Such records shall be retained for the duration of the period allowed the ~~Participants~~Members for audit or the period necessary to comply with tax or other regulatory requirements. The records shall reflect all obligations, advances and credits of the ~~Participants~~Members.

1.2 ~~19.2~~Bank Accounts. The Manager shall maintain one or more separate bank accounts for the payment of all expenses and the deposit of all cash receipts for the ~~Venture~~Company.

1.3 ~~19.3~~Statements and Billings. The Manager shall prepare statements and bill the ~~Participants~~Members as provided in Article X of the Agreement. Payment of any such billings by any ~~Participant~~Member, including the Manager, shall not prejudice such ~~Participant~~Member's right to protest or question the correctness thereof for a period not to exceed twenty-four (24) months following the calendar year during which such billings were received by the ~~Participant~~Member. All written exceptions to and claims upon the Manager for incorrect charges, billings or statements shall be made upon the Manager within such twenty-four (24) month period. The time period permitted for adjustments hereunder shall not apply to adjustments resulting from periodic inventories as provided in Article V.

~~ARTICLE II~~ARTICLE XX
CHARGES TO ~~JOINT~~BUSINESS ACCOUNT

Subject to the limitations hereinafter set forth, the Manager shall charge the ~~Joint~~Business Account with the following:

2.1 ~~20.1~~Rentals, Royalties and Other Payments. All property acquisition and holding costs, including filing fees, license fees, costs of permits and assessment work, delay rentals, production royalties, including any required advances, and all other payments made by the Manager which are necessary to acquire or maintain title to the Assets.

2.2 ~~20.2~~ Labor and Employee Benefits.

(a) Salaries and wages of the Company's or the Manager's employees directly engaged in Operations, including salaries or wages of employees who are temporarily assigned to and directly employed by same.

(b) The Manager's s or the Company's, as applicable, cost of holiday, vacation, sickness and disability benefits, and other customary allowances applicable to the salaries and wages chargeable under **Sections 2.2(a) and 2.12**. Such costs may be charged on a "when and as paid basis" or by "percentage assessment" on the amount of salaries and wages. If percentage assessment is used, the rate shall be applied to wages or salaries excluding overtime and bonuses. Such rate shall be based on the Manager's s or the Company's, as applicable, cost experience and it shall be periodically adjusted at least annually to ensure that the total of such charges does not exceed the actual cost thereof to the Manager or the Company, as applicable.

(c) The Manager's s or the Company's, as applicable, actual cost of established plans for employees' group life insurance, hospitalization, pension, retirement, stock purchase, thrift, bonus (except production or incentive bonus plans under a union contract based on actual rates of production, cost savings and other production factors, and similar non-union bonus plans customary in the industry or necessary to attract competent employees, which bonus payments shall be considered salaries and wages under Sections 2.2(a) or 2.12; rather than employees' benefit plans) and other benefit plans of a like nature applicable to salaries and wages chargeable under Sections 2.2(a) or 2.12, provided that the plans are limited to the extent feasible to those customary in the industry.

(d) Cost of assessments imposed by governmental authority which are applicable to salaries and wages chargeable under **Sections 2.2(a) and 2.12**, including all penalties except those resulting from the willful misconduct or gross negligence of the Manager.

2.3 ~~20.3~~ Materials, Equipment and Supplies. The cost of materials, equipment and supplies (herein called "Material") purchased from unaffiliated third parties or furnished by the Manager or any ParticipantMember as provided in **Article III**. The Manager shall purchase or furnish only so much Material as may be required for immediate use in efficient and economical Operations. The Manager shall also maintain inventory levels of Material at reasonable levels to avoid unnecessary accumulation of surplus stock.

2.4 ~~20.4~~ Equipment and Facilities Furnished by Manager. The cost of machinery, equipment and facilities owned by the Manager and used in Operations or used to provide support or utility services to Operations charged at rates commensurate with the actual costs of ownership and operation of such machinery, equipment and facilities. Such rates shall include costs of maintenance, repairs, other operating expenses, insurance, taxes, depreciation and interest at a rate not to exceed _____ percent (___%) per annum. Such rates shall not exceed the average commercial rates currently prevailing in the vicinity of the Operations.

2.5 ~~20.5~~ Transportation. Reasonable transportation costs incurred in connection with the transportation of employees and material necessary for the Operations.

2.6 ~~20.6~~ Contract Services and Utilities. The cost of contract services and utilities procured from outside sources, other than services described in **Sections 2.9** and **2.13**. If contract services are performed by the Manager or an Affiliate thereof, the cost charged to the JointBusiness Account shall not be greater than that for which comparable services and utilities are available in the open market within the vicinity of the Operations. The cost of professional consultant services procured from outside sources in excess of \$25,000 shall not be charged to the JointBusiness Account unless approved by the Management Committee.

2.7 ~~20.7~~ Insurance Premiums. Net premiums paid for insurance required to be carried for Operations for the protection of the ParticipantsManager and the Members. When the Operations are conducted in an area where the Manager or the Company, as applicable, may self-insure for Workmen's Compensation and/or Employer's Liability under state law, the Manager may elect to include such risks in its self-insurance program and shall charge its costs or the Company's costs, as applicable, of self-insuring such risks to the JointBusiness Account provided that such charges shall not exceed published manual rates.

2.8 ~~20.8~~ Damages and Losses. All costs in excess of insurance proceeds necessary to repair or replace damage or losses to any Assets resulting from any cause other than the willful misconduct or gross negligence of the Manager. The Manager shall furnish the Management Committee with written notice of damages or losses as soon as practicable after a report thereof has been received by the Manager.

2.9 ~~20.9~~ Legal and Regulatory Expense. Except as otherwise provided in **Section 2.13**, all legal and regulatory costs and expenses incurred in or resulting from the Operations or necessary to protect or recover the Assets of the VentureCompany. All attorney's fees and other legal costs to handle, investigate and settle litigation or claims, including the cost of legal services provided by the Manager's legal staff, and amounts paid in settlement of such litigation or claims in excess of \$25,000 shall not be charged to the JointBusiness Account unless approved by the Management Committee.

2.10 ~~20.10~~ Audit. Cost of annual audits under Section 10.4 of the Venture-Agreement if approved by all of the ParticipantsManagement Committee.

2.11 ~~20.11~~ Taxes. All taxes (except income taxes) of every kind and nature assessed or levied upon or in connection with the Assets, the production of Products or Operations, ~~which have been paid by the Manager for the benefit of the Participants. Each Participant is separately responsible for income taxes which are attributable to its respective Participating Interest.~~

2.12 ~~20.12~~ District and Camp Expense (Field Supervision and Camp Expenses). A pro rata portion of (i) the salaries and expenses of the Manager's superintendent and other employees serving Operations whose time is not allocated directly to such Operations, and (ii) the costs of maintaining and operating an office (herein called "the Manager's Project Office") and any necessary suboffice and (iii) all necessary camps, including housing facilities for employees, used for Operations. The expense of those facilities, less any revenue therefrom, shall include depreciation or a fair monthly rental in lieu of depreciation of the investment. The total of such charges for all properties served by the Manager's employees and facilities shall be apportioned to the JointBusiness Account on the basis of a ratio, the numerator of which is the

direct labor costs of the Operations and the denominator of which is the total direct labor costs incurred for all activities served by the Manager.

2.13 ~~20.13~~ Administrative Charge.

(a) Each month, the Manager shall charge the ~~Joint~~Business Account a sum for each phase of Operations as provided below, which shall be a liquidated amount to reimburse the Manager for its home office overhead and general and administrative expenses to conduct each phase of the Operations, and which shall be in lieu of any management fee:

(i) Exploration Phase - _____ percent (___%) of Allowable Costs up to \$_____, and _____ percent of Allowable Costs over \$_____.

(ii) Development Phase - _____ percent (___%) of Allowable Costs up to \$_____, and _____ percent of Allowable Costs over \$_____.

(iii) Major Construction Phase - _____ percent (___%) of Allowable Costs up to \$_____, and _____ percent of Allowable Costs over \$_____.

(iv) Mining Phase - _____ percent (___%) of Allowable Costs up to \$_____, and _____ percent of Allowable Costs over \$_____.

(b) The term "Allowable Costs" as used in this **Section 2.13** for a particular phase of Operations shall mean all charges to the ~~Joint~~Business Account excluding (i) the administrative charge referred to herein; (ii) depreciation, depletion or amortization of tangible or intangible assets; (iii) amounts charged in accordance with **Sections 2.1** and **2.9**.⁴⁰ The Manager shall attribute such Allowable Costs to a particular phase of Operations by applying the following guidelines:

(i) The exploration phase shall cover those activities conducted to ascertain the existence, location, extent or quantity of any deposit of ore or mineral. Such phase shall cease when a commercially recoverable reserve is determined to exist.

(ii) The development phase shall cover those activities conducted to access a commercially feasible ore body or to extend production of an existing ore body, and to construct or install related fixed assets.

(iii) The major construction phase shall include all activities involved in the construction of a mill, smelter or other ore processing facilities.

(iv) The mining phase shall include all other activities not otherwise covered above, including activities conducted after mining operations have ceased.

⁴⁰ Consider excluding charges for marketing costs consistent with Form 5A LLC.

(c) Various phases of Operations may be conducted concurrently, in which even the administrative charge shall be calculated separately for Allowable Costs attributable to each phase.⁴¹

(d) ~~(d)~~ The monthly administration charge determined for each phase of Operations shall be equitably apportioned among all of the properties served during such monthly period on the basis of a ratio, the numerator of which is the direct labor costs charged to a particular property and the denominator of which is the total direct labor costs incurred for all properties served by the Manager.

(e) ~~(d)~~ The following is a representative list of items comprising the Manager's principal business office expenses that are expressly covered by the administrative charge provided in this **Section 2.13**:

(i) Administrative supervision, which includes services rendered by managers, department supervisors, officers and directors of the Manager for Operations, except to the extent that such services represent a direct charge to the ~~Joint~~Business Account, as provided for in **Section 2.2**;

(ii) Accounting, data processing, personnel administration, billing and record keeping in accordance with governmental regulations and the provisions of the ~~Venture~~ Agreement, and preparation of reports;

(iii) The services of tax counsel and tax administration employees for all tax matters, including any protests, except any outside professional fees which the Management Committee may approve as a direct charge to the ~~Joint~~Business Account;

(iv) Routine legal services rendered by outside sources and the Manager's legal staff not otherwise charged to the ~~Joint~~Business Account under **Section 2.9**; and

(v) Rentals and other charges for office and records storage space, telephone service, office equipment and supplies.

(f) ~~(e)~~ The Management Committee shall annually review the administration charges and shall amend the methodology or rates used to determine such charges if they are found to be insufficient or excessive.

2.14 [Environmental Compliance Fund. Costs of reasonably anticipated Environmental Compliance which, on a Program basis, shall be determined by the Management Committee and shall be based on proportionate contributions in an amount sufficient to establish a fund, which through successive proportionate contributions during the life of the Company, will pay for ongoing Environmental Compliance conducted during Operations and which will aggregate the reasonably anticipated costs of mine closure, post-Operations Environmental

⁴¹ Section 2.13(c) has been added from Form 5A LLC.

Compliance and Continuing Obligations. The Manager shall invest such amounts on behalf of the Members as provided in Subsection 8.2(r) of the Agreement.]⁴²

2.15 ~~20.14~~ **Other Expenditures.** Any reasonable direct expenditure, other than expenditures which are covered by the foregoing provisions, incurred by the Manager for the necessary and proper conduct of Operations.

~~ARTICLE III~~ **ARTICLE XXI**
BASIS OF CHARGES TO ~~JOINT~~ BUSINESS ACCOUNT

3.1 ~~21.1~~ **Purchases.** Material purchased and services procured from third parties shall be charged to the ~~Joint~~ Business Account by the Manager at invoiced cost, including applicable transfer taxes, less all discounts taken. If any Material is determined to be defective or is returned to a vendor for any other reason, the Manager shall credit the ~~Joint~~ Business Account when an adjustment is received from the vendor.

3.2 ~~21.2~~ **Material Furnished by ~~or Transferred to~~ the Manager or a Participant Member.** Any Material furnished by the Manager or ~~Participant~~ any Member from its stocks or ~~transferred to the Manager or Participant~~ distributed to either Member by the Company shall be priced on the following basis:

(a) New Material: New Material transferred from the Manager or ~~Participant~~ Member shall be priced F.O.B. the nearest reputable supply store or railway receiving point, where like Material is available, at the current replacement cost of the same kind of Material, exclusive of any available cash discounts, at the time of the transfer (herein called, ~~"~~ "New Price" ~~"~~).

(b) Used Material.

(1) Used Material in sound and serviceable condition and suitable for reuse without reconditioning shall be priced as follows:

a) Used Material transferred by the Manager or ~~Participant~~ a Member shall be priced at seventy-five percent (75%) of the New Price;

b) Used Material ~~transferred to the Manager or Participant~~ distributed to either Member shall be priced (i) at seventy-five percent (75%) of the New Price if such Material was originally charged to the ~~Joint~~ Business Account as new Material, or (ii) at sixty-five percent (65%) of the New Price if such Material was originally charged to the ~~Joint~~ Business Account as good used Material at seventy-five percent (75%) of the New Price.

(2) Other used Material which, after reconditioning will be further serviceable for original function as good secondhand Material, or which is serviceable for

⁴² Environmental and Continuing Obligation provisions have been included from Form 5A LLC. See supra note 14.

original function but not substantially suitable for reconditioning shall be priced at 50 percent (50%) of New Price. The cost of any reconditioning shall be borne by the transferee.

(3) All other Material, including junk, shall be priced at a value commensurate with its use or at prevailing prices. Material no longer suitable for its original purpose but usable for some other purpose shall be priced on a basis comparable with items normally used for such other purposes.

(c) Obsolete Material. Any Material which is serviceable and usable for its original function, but its condition is not equivalent to that which would justify a price as provided above shall be priced by the Management Committee. Such price shall be set at a level which will result in a charge to the JointBusiness Account equal to the value of the service to be rendered by such Material.

3.3 21.3 Premium Prices. Whenever Material is not readily obtainable at published or listed prices because of national emergencies, strikes or other unusual circumstances over which the Manager has no control, the Manager may charge the JointBusiness Account for the required Material on the basis of the Manager's direct cost and expenses incurred in procuring such Material and making it suitable for use. The Manager shall give written notice of the proposed charge to the ParticipantsCompany prior to the time when such charge is to be billed to the Members, whereupon any ParticipantMember shall have the right, by notifying the Manager within ten days of the delivery of the notice from the Manager, to furnish at the usual receiving point all or part of its proportionate share, based on Percentage Interests, of Material suitable for use and acceptable to the Manager.

3.4 21.4 Warranty of Material Furnished by the Manager or ParticipantsMembers. Neither the Manager nor any ParticipantMember warrants the Material furnished beyond any dealer's or manufacturer's warranty and no credits shall be made to the JointBusiness Account for defective Material until adjustments are received by the Manager from the dealer, manufacturer or their respective agents.

ARTICLE IV~~**ARTICLE XXII**~~ **DISPOSAL OF MATERIAL**

4.1 22.1 Disposition Generally. The Manager shall have no obligation to purchase ~~a~~ Participant's interest in any surplus Material from the Company. The Management Committee shall determine the disposition of major items of surplus Material, provided the Manager shall have the right to dispose of normal accumulations of junk and scrap Material either by sale or by ~~transfer~~ distributing such Material to the ParticipantsMembers as provided in **Section 4.2**.

4.2 22.2 Distribution to ParticipantsMembers. Any Material to be distributed to the ParticipantsMembers shall be made in proportion to their respective Participating Percentage Interests, and corresponding credits shall be made to the JointBusiness Account on the basis provided in **Section 3.2**.

4.3 22.3 Sales. Sales of Material to third parties shall be credited to the JointBusiness Account at the net amount received. Any damages or claims by the Purchaser shall be charged back to the JointBusiness Account if and when paid.

ARTICLE V ~~ARTICLE XXIII~~
INVENTORIES

5.1 ~~23.1~~ Periodic Inventories, Notice and Representations. At reasonable intervals, inventories shall be taken by the Manager, which shall include all such Material as is ordinarily considered controllable by operators of mining properties and the expense of conducting such periodic inventories shall be charged to the ~~Joint~~Business Account. The ~~manager~~Manager shall give written notice to the ~~Participants~~Members of its intent to take any inventory at least thirty (30) days before such inventory is scheduled to take place. A ~~Participant~~Member shall be deemed to have accepted the results of any inventory taken by the Manager if the ~~Participant~~Member fails to be represented at such inventory.

5.2 ~~23.2~~ Reconciliation and Adjustment of Inventories. Reconciliation of inventory with charges to the ~~Joint~~Business Account shall be made, and a list of overages and shortages shall be furnished to the Management Committee within six (6) months after the inventory is taken. Inventory adjustments shall be made by the Manager to the ~~Joint~~Business Account for overages and shortages, but the Manager shall be held accountable to the ~~Venture~~Company only for shortages due to lack of reasonable diligence.

EXHIBIT C

TAX MATTERS

ARTICLE I
EFFECT OF THIS EXHIBIT

This Exhibit shall govern the relationship of the Members and the Company with respect to tax matters and the other matters addressed herein. Except as otherwise indicated, capitalized terms used in this Exhibit shall have the meanings given to them in the Agreement. In the event of a conflict between this Exhibit and the other provisions of the Agreement, the terms of this Exhibit shall control.

ARTICLE II~~ARTICLE XXIV~~
TAX MATTERS PARTNER

2.1 24.1 Designation of Tax Matters Partner. The Manager is hereby designated the tax matters partner (~~hereinafter "the "TMP"~~) as defined in Section 6231(a)(7) of the Code and shall be responsible for, make elections for, and prepare and file any federal and state tax returns or other required tax forms following approval of the Management Committee. In the event of any change in Manager, the ~~Participant~~Member serving as ~~manager~~Manager at the end of a taxable year shall continue as TMP with respect to all matters concerning such year unless the TMP for that year is required to be changed pursuant to applicable Treasury Regulations. The TMP and the other ~~Participants~~Member shall use ~~their~~reasonable best efforts to comply with the responsibilities outlined in this ~~section~~Article II and in Sections ~~6222~~6221 through ~~6232~~6233 of the Code (including any Treasury ~~regulations~~Regulations promulgated thereunder) and in doing so shall incur no liability to any other ~~Party~~party.

2.2 24.2 Notice.~~The Participants~~ Each Member shall furnish the TMP with such information (including information specified in Section 6230(e) of the Code) as it may reasonably request to permit it to provide the Internal Revenue Service with sufficient information to allow proper notice to the ~~Participants~~Members in accordance with Section 6223 of the Code. The TMP shall keep each ~~Participant~~Member informed of all administrative and judicial proceedings for the adjustment at the partnership level of partnership items in accordance with Section 6223(g) of the Code.

2.3 24.3—Inconsistent Treatment of Partnership Tax Item. If an administrative proceeding contemplated under Section 6223 of the Code has begun, and the TMP so requests, ~~the Participants~~each Member shall notify the TMP of ~~their~~its treatment of any partnership item on ~~their~~its federal income tax return ~~in a manner which~~that is inconsistent with the treatment of that item on the partnership return.

2.4 24.4 Extensions of Limitation Periods. The TMP shall not enter into any extension of the period of limitations as provided under Section 6229 of the Code without first giving reasonable advance notice to ~~all~~the other ~~Participants~~Member of such intended action.

2.5 ~~24.5~~ Requests for Administrative Adjustments. ~~No Participant~~Neither Member shall file, pursuant to Section 6227 of the Code, a request for an administrative adjustment of partnership items for any ~~partnership~~taxable year of the Company without first notifying ~~all other Participants. If all other Participants agree~~the other Member. If the other Member agrees with the requested adjustment, the TMP shall file the request for administrative adjustment on behalf of the ~~partnership~~Company. If ~~unanimous~~ consent is not obtained within ~~thirty (30) days after notice from the proposing Member~~, or within the period required to timely file the request for administrative adjustment, if shorter, ~~any Participant~~either Member, including the TMP, may file ~~at that~~ request for administrative adjustment on its own behalf.

2.6 ~~24.6~~ Judicial Proceedings. ~~Any Participant~~Either Member intending to file a petition under Section 6226, 6228 or other sections of the Code with respect to any partnership item, or other tax matters involving the ~~partnership~~Company, shall notify the other ~~Participants~~Member of such intention and the nature of the contemplated proceeding. If the TMP is the ~~Participant~~Member intending to file such petition, such notice shall be given within a reasonable time to allow the other ~~Participants~~Member to participate in the choosing of the forum in which such petition will be filed. If ~~the Participants~~both Members do not agree on the appropriate forum, then the appropriate forum shall be decided ~~by majority vote. Each Participant shall have a vote~~ in accordance with ~~its Participating Interest in the partnership. If a majority cannot agree~~Section 7.2 of the Agreement. If a deadlock results, the TMP shall choose the forum. If ~~any Participant~~either Member intends to seek review of any court decision rendered as a result of a proceeding instituted under the preceding part of this ~~Section 1.6, Paragraph~~, such ~~Participant~~Member shall notify the other ~~Participants~~Member of such intended action.

2.7 ~~24.7~~ Settlements. The TMP shall not bind ~~any~~the other ~~Participant~~Member to a settlement agreement without first obtaining the written ~~concurrence~~consent of any such ~~Participant~~. ~~Any other Participant~~Member. Either Member who enters into a settlement agreement for its own account with respect to any partnership items, as defined by Section 6231(a)(3) of the Code, shall notify the other ~~Participants~~Member of such settlement agreement and its terms within ninety (90) days from the date of settlement.

2.8 ~~24.8~~ Fees and Expenses. The TMP shall not engage legal counsel, certified public accountants, or others on behalf of the Company without the prior ~~written~~ consent of ~~a majority of the Participants. Any Participant~~the Management Committee. Either Member may engage legal counsel, certified public accountants, or others ~~on~~in its own behalf and at its sole cost and expense. Any reasonable item of expense, including but not limited to fees and expenses for legal counsel, certified public accountants, and others which the TMP incurs (after proper consent by the Management Committee as provided above) in connection with any audit, assessment, litigation, or other proceeding regarding any partnership item, shall constitute proper charges to the ~~Joint Business~~Account and shall be borne by the Participants Company and funded by capital contributions by the Members as any other item which constitutes a direct charge to the ~~Joint Business~~Account pursuant to the Agreement. Notwithstanding anything in the Agreement to the contrary, the Joint Account allocation shall be borne by the Participants based upon a daily weighted average of each Participant's Participating Interest, in the partnership for the tax year in question.

2.9 ~~24.9~~ **Survival.** The provisions of ~~this Article I~~ the foregoing paragraphs, including but not limited to the obligation to payfund fees and expenses contained in Section 1.8, Paragraph 2.8, shall survive the termination of the partnership Company or the termination of any Participant'either Member's interest in the partnership Company and shall remain binding on the ParticipantsMembers for a period of time necessary to resolve with the Internal Revenue Service or the Department of the Treasury any and all matters regarding the federal income taxation of the partnership Company for the applicable tax year(s).

ARTICLE III~~**ARTICLE XXV**~~
TAX ELECTIONS AND ALLOCATIONS

~~25.1—Tax Partnership Election*. It is understood and agreed that the *Participants* intend to create a partnership for United States federal and state income tax purposes, and, unless otherwise agreed to hereafter by *all Participants, no Participant shall make an election to be, or have the arrangement evidenced hereby, excluded from the application of any provisions of Subchapter K of the Internal Revenue Code of 1954, as amended (the "Code"), or any equivalent state income tax provision*. It is understood and agreed that the *Participants* intend to create a partnership for federal and state *and* income tax purposes only.*~~

3.1 **Company Election***. It is understood and agreed that the *Members* intend to create a partnership for United States federal and state income tax purposes, and, unless otherwise agreed to hereafter by *both Members, no Member shall take any action to change the status of the Company as a partnership under Treas. Reg. § 1.7701-3 or similar provision of state law*. It is understood and agreed that the *Members* intend to create a partnership for federal and state** income tax purposes only.* The Manager shall file with the appropriate office of the Internal Revenue Service, a partnership income tax return covering the Operations. The ParticipantsMembers recognize that ~~this~~the Agreement may be subject to state income tax statutes. The Manager shall file with the appropriate ~~office~~offices of the state agencies any required partnership state income tax returns. Each Member* agrees to furnish to the Manager *any information it may have relating to Operations* as shall be required for proper preparation of such returns. The Manager shall furnish to the other *Member for its* review a copy of each proposed income tax return at least two weeks prior to the date the return is filed.*

~~Each Participant* agrees to furnish to the Manager *such information which it may have relating to operations* as shall be required for proper preparation of such returns. The Manager shall furnish to the other *Participants for their* review a copy of each proposed income tax return at least two weeks prior to the date the return is filed.*~~

3.2 ~~25.2~~ **Tax Elections.** The Participants~~elect~~Company shall make the following elections for purposes of all partnership income tax returns:

(a) To use the _____ accrual method of accounting;

(b) ~~To adopt the _____ year as the annual accounting period,~~Pursuant to the provisions at Section 706(b)(1) of the Code, to use as its taxable year the _____

year ended _____ . In this connection, XCO represents that its taxable year is the year ending _____ and YCO represents that its taxable year is the year ending _____ .

(c) To deduct currently all ~~exploration and~~ development expenses to the extent possible under ~~Sections 616, 617, and 291~~Section 616 of the Code, ~~and~~.

(d) Unless the ~~Participants~~Members unanimously agree otherwise, to compute the allowance for depreciation in respect of all ~~eligible recovery property under this Agreement subject to depreciation in accordance with the Accelerated Cost Recovery System. Allowances for depreciation will be computed~~depreciable Assets using the maximum accelerated tax depreciation ~~table~~method and the shortest life permissible, ~~and or, at the election of the Manager, using the units of production method of depreciation.~~

(e) To treat advance royalties as deductions from gross income for the year paid or accrued to the extent permitted by law. ~~The Manager agrees to consult with the other Participants prior to making any other elections required by this Agreement.~~

(f) To adjust the basis of property of the Company with respect to a Member under Section 754 of the Code at the request of either Member;

(g) To amortize over the shortest permissible period all organizational expenditures and business start-up expenses under Sections 195 and 709 of the Code;

Any other election required or permitted to be made by the Company under the Code or any state tax law shall be made as determined by the Management Committee.

Each Member shall elect under Section 617(a) of the Code to deduct currently all exploration expenses. Each Member reserves the right to capitalize its share of development and/or exploration expenses of the Company in accordance with Section 59(e) of the Code, provided that a Member's election to capitalize all or any portion of such expenses shall not affect the Member's Capital Account.

3.3 Allocations to Members~~Allocations to Participants~~. Allocations for ~~tax~~Capital Account purposes shall be in accordance with the following:

(a) Exploration expenses and development ~~costs~~cost deductions shall be allocated ~~as deductions~~ among the ~~Participants~~Members in accordance with their respective contributions to such expenses and costs.

(b) Depreciation ~~expenses~~and amortization deductions with respect to a depreciable Asset shall be allocated ~~as a deduction~~ among the ~~Participants~~Members in accordance with their respective contributions to the adjusted basis of the Asset which gives rise to the depreciation ~~expense~~.

~~(c) The qualified investment for investment tax credit purposes with respect to any Asset shall be allocated among the Participants in accordance with their respective contributions to the qualified investment (as defined in the Code) in such Asset, amortization or loss deduction.~~

~~(c)~~ ~~(d)~~ Production and operating ~~costs~~cost deductions shall be allocated ~~as deductions~~ among the ~~Participants~~Members in accordance with their respective contributions to such costs.

(d) Deductions for depletion (to the extent of the amount of such deductions that would have been determined for Capital Account purposes if only cost depletion were allowable for federal income tax purposes) shall be allocated to the Members in accordance with their respective contributions to the adjusted basis of the depletable property. Any remaining depletion deductions shall be allocated to the Members so that, to the extent possible, the Members receive the same total amounts of percentage depletion as they would have received if percentage depletion were allocated to the Members in proportion to their respective shares of the gross income used as the basis for calculating the federal income tax deduction for percentage depletion.

~~(e) Cost depletion shall be allocated to the Participants in accordance with their respective contributions to the adjusted basis for depletion purposes of each depletable Asset (as defined in Section 614 of the Code), and statutory depletion in excess of cost depletion shall be allocated to each Participant in ratio to the respective depletion allowance which would be allowable if each Participant were to be allowed depletion on the sales value of its share of Products sold, taking into account its share of costs and expenses otherwise allocated hereunder, provided that the amount of statutory depletion shall not exceed the respective Participant's gross income from the Properties as defined in Code Section 613(e) times the statutory depletion rate in Code Section 613(b).~~Subject to Subparagraph 3.3(g) below, gross income on the sale of production shall be allocated in accordance with the Members' rights to share in the proceeds of such sale.

~~(f) All costs and expenses which are not described in (a) through (e) above, shall be allocated among the Participants in accordance with their respective contributions to such costs and expenses.~~Except as provided in Subparagraph 3.3(g), below, gain or loss on the sale of a depreciable or depletable asset shall be allocated so that, to the extent possible, the net amount reflected in the Members' Capital Account with respect to such property (taking into account the cost of such property, depreciation, amortization, depletion or other cost recovery deductions and gain or loss) most closely reflects the Members' Percentage Interests.

~~(g) The provision for taking production in kind, as provided elsewhere in this Agreement, is recognized as each Participant's right to determine the market for a proportionate share of the sales. All items of income, deductions, and credits arising from such marketing of production shall be recognized by the partnership and shall be allocated respectively to the Participant who designated such market.~~Gains and losses on the sale of all or substantially all the Assets of the Company shall be allocated so that, to the extent possible, the Members' resulting Capital Account balances are in the same ratio as their relative Percentage Interests ("Balance Capital Accounts") after taking into account such sale. In making the allocations under this Subparagraph 3.3(g), to the extent necessary to Balance Capital Accounts, gain and loss shall be calculated on an asset-by-asset basis, and any property contributed by a Member shall be treated as a separate asset from the property contributed by or created with funds contributed by the other Member. If the Company does not have sufficient items of gain and loss to Balance Capital Accounts, the liquidator may take other actions, as it

determines are reasonably appropriate, to Balance Capital Accounts, including reallocating items among the Members or creating notional items of income, gain, deduction and loss and allocating those items in accordance with this **Subparagraph 3.3(g)**.

~~(h) Except as provided in (1) and (2) immediately below, items of income, gain and/or loss reported by the partnership on federal and state partnership returns shall be allocated to the Participants realizing or bearing such items as provided in this Agreement. The Members acknowledge that expenses and deductions allocable under the preceding provisions of this **Paragraph 3.3** may be required to be capitalized into production under Section 263A of the Code. With respect to such capitalized expenses or deductions, the allocation of gross income on the sale of production shall be adjusted, in any reasonable manner consistently applied by the Manager, so that the same net amount (subject possibly to timing differences) is reflected in the Capital Accounts as if such expenses or deductions were instead deductible and allocated pursuant to the preceding provisions of this **Paragraph 3.3**.~~

~~(1) — Gain and/or loss arising from each sale, abandonment, or other disposition of Assets shall be allocated to each Participant in such a manner as will reflect the gain and/or loss that would have been includable in such Participant's respective income tax return if the Participants hereto (a) had elected to be excluded from Subchapter K of the Code and/or any similar provisions of applicable state laws, and (b) had made the same elections that were made by the partnership pursuant to Section 1.2 above. The computation of gain and/or loss shall take into account each Participant's share of the proceeds derived from each sale or other disposition, selling expenses and the Participant's respective contributions to the unadjusted cost basis of such Asset, less any allowed or allowable depreciation, amortization or other deductions which have been allocated to each Participant.~~

~~(2) — If the application of the preceding paragraph (1) results in the allocation of gains and/or losses in excess of the "ceiling limitation" imposed by Treasury Regulation Section 1.704-1(c)(i), the Participants agree that the entire gains and/or losses shall be determined at the partnership level. If such a determination results in a partnership gain, such gain shall be allocated to the Participant or Participants who otherwise would have been allocated a gain under the provisions of such Paragraph. If such a determination results in a partnership loss, such loss shall be allocated to the Participant or Participants who otherwise would have been allocated a loss under such Paragraph.~~

~~(i) Any recapture of depreciation, exploration under Section 617, and any other item of deduction or credit shall be allocated among the Participants in accordance with their sharing of the depreciation, exploration, or other item of deduction or credit which is recaptured. All deductions and losses that are not otherwise allocated in this **Paragraph 3.3** shall be allocated among the Members in accordance with their respective contributions to the costs producing each such deduction or to the adjusted basis of the Asset producing each such loss.~~

~~(j) Any recapture of exploration expenses under Section 617(b)(1)(A) of the Code, and any disallowance of depletion under Section 617(b)(1)(B) of the Code, shall be borne by the Members in the same manner as the related exploration expenses were allocated to, or claimed by, them.~~

(k) All other items of income and gain shall be allocated to the Members in accordance with their Percentage Interests.

(l) If the Members' Percentage Interests change during any taxable year of the Company, the distributive share of items of income, gain, loss and deduction of each Member shall be determined in any manner (1) permitted by Section 706 of the Code, and (2) agreed by both Members. If the Members cannot agree on a method, the method shall be determined by the Manager in consultation with the Company's tax advisers, with preference given to the interim closing-of-the-books method except where application of that method would result in undue administrative expense in relationship to the amount of the items to be allocated.

(m) For purposes of this Paragraph 3.3, items financed through indebtedness of, or from revenues of, the Company shall be treated as funded from contributions made by the Members to the Company in accordance with their Percentage Interests. "Nonrecourse deductions," as defined by Treas. Reg. § 1.704-2(b)(1) shall be allocated between the Members in proportion to their Percentage Interests.

3.4 Regulatory Allocations. Notwithstanding the provisions of Paragraph 3.3 to the contrary, the following special allocations shall be given effect for purposes of maintaining the Members' Capital Accounts.

(a) If either Member unexpectedly receives any adjustments, allocations, or distributions described in Treas. Reg. § 1.704-1(b)(2)(ii)(d)(4), § 1.704-1(b)(2)(ii)(d)(5) or § 1.704-1(b)(2)(ii)(d)(6), which result in a deficit Capital Account balance, items of income and gain shall be specially allocated to each such Member in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Capital Account deficit of such Member as quickly as possible. For the purposes of this Subparagraph 3.4(a), each Member's Capital Account balance shall be increased by the sum of (i) the amount such Member is obligated to restore pursuant to any provision of the Agreement, and (ii) the amount such Member is deemed to be obligated to restore pursuant to the penultimate sentences of Treas. Reg. §§ 1.704-2(g)(1) and 1.704-2(i)(5).

(b) If there is a net decrease in partnership minimum gain for a taxable year of the Company, each Member shall be allocated items of income and gain for that year equal to that Member's share of the net decrease in partnership minimum gain, all in accordance with Treas. Reg. § 1.704-2(f). If, during a taxable year of the Company, there is a net decrease in partner nonrecourse debt minimum gain, any Member with a share of that partner nonrecourse debt minimum gain as of the beginning of the year shall be allocated items of income and gain for the year (and, if necessary, for succeeding years) equal to that partner's share of the net decrease in partner nonrecourse debt minimum gain, all in accordance with Treas. Reg. § 1.704-2(i)(4). Pursuant to Treas. Reg. § 1.704-2(i)(1), deductions attributable to "partner nonrecourse liability" shall be allocated to the Member that bears the economic risk of loss for such liability (or is treated as bearing such risk).

(c) If the allocation of deductions to either Member would cause such Member to have a deficit Capital Account balance at the end of any taxable year of the Company (after all other allocations provided for in this Article III have been made and after giving effect

to the adjustments described in Subparagraph 3.4(a), such deductions shall instead be allocated to the other Member.

3.5 Curative Allocations. The allocations set forth in Paragraph 3.4 (the “Regulatory Allocations”) are intended to comply with certain requirements of the Treasury Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of income, gain, loss or deduction pursuant to this Paragraph. Therefore, notwithstanding any other provisions of this Article III (other than the Regulatory Allocations), the Manager shall make such offsetting special allocations of income, gain, loss or deduction in whatever manner it determines appropriate so that, after such offsetting allocations are made, each Member’s Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and all items were allocated pursuant to Paragraph 3.3 without regard to Paragraph 3.4.

3.6 Tax Allocations. Except as otherwise provided in this Paragraph 3.6, items of taxable income, deduction, gain and loss shall be allocated in the same manner as the corresponding item is allocated for book purposes under Paragraphs 3.3, 3.4 and 3.5 of the corresponding item determined for Capital Account purposes.

(a) Recapture of tax deductions arising out of a disposition of property shall, to the extent consistent with the allocations for tax purposes of the gain or amount realized giving rise to such recapture, be allocated to the Members in the same proportions as the recaptured deductions were originally allocated or claimed.

(b) To the extent required by Section 704(c) of the Code, income, gain, loss, and deduction (including depreciation, depletion and amortization) with respect to property contributed to the Company by a Member and with respect to property revalued in accordance with Treas. Reg. § 1.704-1(b)(2)(iv)(f) (collectively referred to as “Adjusted Properties”) shall be allocated between the Members so as to take account of the variation between the adjusted tax basis of the Adjusted Property to the Company and its fair market value at the time of contribution or revaluation in accordance with the provisions of Sections 704(b) and 704(c) of the Code and Treas. Reg. § 1.704-3(b)(1). Any income, gain, loss or deduction attributable to an Adjusted Property (exclusive of such items allocated to eliminate the difference between the adjusted tax basis and the fair market value in accordance with the preceding sentence) shall be allocated in the same manner as such gain or loss would be allocated under Paragraph 3.3. To the extent that allocations of tax items are required pursuant to Section 704(c) of the Code to be made other than in accordance with the allocations under Paragraphs 3.3, 3.4 and 3.5 of the corresponding items for Capital Account purposes, this Paragraph 3.6(b) shall be made in accordance with the method available under Treas. Reg. § 1.704-3 which most closely approximates the allocations set forth in Paragraphs 3.3, 3.4 and 3.5.

(c) Depletion deductions with respect to contributed property shall be determined without regard to any portion of the property’s basis that is attributable to precontribution expenditures by XCO that were capitalized under Code Sections 616(b), 59(e) and 291(b). Deductions attributable to precontribution expenditures by XCO shall be calculated

under such Code Sections as if XCO continued to own the depletable property to which such deductions are attributable, and such deductions shall be reported by the Company and shall be allocated solely to XCO.

(d) The Members understand the allocations of tax items set forth in this Paragraph 3.6, and agree to report consistently with such allocations for federal and state tax purposes.

~~ARTICLE IV~~**ARTICLE XXVI**
CAPITAL ACCOUNTS; LIQUIDATION

~~26.1—Charges and Credits. A separate capital account shall be established and maintained for each Participant and shall be, from time to time, credited with:~~

4.1 Capital Accounts.

~~(a) the tax basis of the Participant's interest in the Asset contributed to the partnership;~~A separate Capital Account shall be established and maintained by the TMP for each Member. Such Capital Account shall be increased by (i) the amount of money contributed by the Member to the Company, (ii) the fair market value of property contributed by the Member to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take subject to under Code Section 752) and (iii) allocations to the Member under Paragraphs 3.3, 3.4 and 3.5 of Company income and gain (or items thereof), including income and gain exempt from tax; and shall be decreased by (iv) the amount of money distributed to the Member by the Company, (v) the fair market value of property distributed to the Member by the Company (net of liabilities secured by such distributed property and that the Member is considered to assume or take subject to under Code Section 752), (vi) allocations to the Member under Paragraphs 3.3, 3.4 and 3.5 of expenditures of the Company not deductible in computing its taxable income and not properly chargeable to a Capital Account, and (vii) allocations of Company loss and deduction (or items thereof), excluding items described in (vi) above and percentage depletion to the extent it exceeds the adjusted tax basis of the depletable property to which it is attributable. The Members agree that the net fair market value of the property contributed by XCO to the Company pursuant to Section 3.1(a) of the Agreement is

~~(b) all amounts contributed by the Participant to pay the costs and expenditures arising pursuant to this Agreement;~~In the event that the Capital Accounts of the Members are computed with reference to the book value of any Asset which differs from the adjusted tax basis of such Asset, then the Capital Accounts shall be adjusted for depreciation, depletion, amortization and gain or loss as computed for book purposes with respect to such Asset in accordance with Treas. Reg. § 1.704-1(b)(2)(iv)(g).

~~(c) all income or gains allocated to that Participant under Section 2.3 above and debited with;~~In the event any interest in the Company is transferred in accordance with the terms of the Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest, except as provided in Treas. Reg. § 1.704-1(b)(2)(iv)(1).

~~(1) — all losses, expenses, and deductions allocated to that Participant under Section 2.3 above. However, statutory (percentage) depletion deductions shall not be charged to a Participant's capital account to the extent that such statutory depletion deductions exceed the Participant's adjusted tax basis in each of the depletable Assets;~~

~~(2) — cash received by that Participant with respect to partnership Assets or by distribution from the partnership; and~~

~~(3) — the partnership's tax basis, if any, of Assets distributed by the partnership to that Participant.~~

(d) In the event property, other than money, is distributed to a Member, the Capital Accounts of the Members shall be adjusted to reflect the manner in which the unrealized income, gain, loss and deduction inherent in such property (that has not been reflected in the Capital Accounts previously) would be allocated among the Members if there was a taxable disposition of such property for the fair market value of such property (taking Section 7701(g) of the Code into account) on the date of distribution. For this purpose the fair market value of the property shall be determined as set forth in **Paragraph 4.2(a)** below.

(e) In the event the Management Committee designates a Supplemental Business Arrangement area within the Area of Interest as described in **Section 10.13** of the Agreement, the Management Committee shall appropriately segregate Capital Accounts to reflect that designation and shall make such other modifications to the Agreement as are appropriate to reflect the manner of administering Capital Accounts in accordance with the terms of this **Exhibit C**.

(f) XCO is contributing to the Agreement certain depletable properties with respect to which XCO currently has an adjusted tax basis which may consist in part of depletable expenditures and in part of expenditures capitalized under Code Sections 616(b), 291(b) and/or 59(e). For purposes of maintaining the Capital Accounts, the Company's deductions with respect to contributed property in each year for (i) depletion, (ii) deferred development expenditures under Section 616(b) attributable to pre-contribution expenditures, (iii) amortization under Section 291(b) attributable to pre-contribution expenditures, and (iv) amortization under Section 59(e) attributable to pre-contribution expenditures shall be the amount of the corresponding item determined for tax purposes pursuant to **Subparagraph 3.6(c)** multiplied by the ratio of (A) the book value at which the contributed property is recorded in the Capital Accounts to (B) the adjusted tax basis of the contributed property (including basis resulting from capitalization of pre-contribution development expenditures under Sections 616(b), 291(b), and 59(e)).

(g) The foregoing provisions, and the other provisions of the Agreement relating to the maintenance of Capital Accounts and the allocations of income, gain, loss, deduction and credit, are intended to comply with Treas. Reg. § 1.704-1(b), and shall be interpreted and applied in a manner consistent with such Treasury Regulation. In the event the Management Committee shall determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto, are computed in order to comply with such Treasury Regulation, the Management Committee may make such modification, provided that it

is not likely to have a material effect on the amount distributable to either Member upon liquidation of the Company pursuant to **Paragraph 4.2**.

(h) If the Members so agree, upon the occurrence of an event described in Treas. Reg. § 1.704-1(b)(2)(iv)(f)(5), the Capital Accounts shall be restated in accordance with Treas. Reg. § 1.704-1(b)(2)(iv)(f) to reflect the manner in which unrealized income, gain, loss or deduction inherent in the assets of the Company (that has not been reflected in the Capital Accounts previously) would be allocated among the Members if there were a taxable disposition of such assets for their fair market values, as determined in accordance with Subparagraph 4.2(a). For purposes of Paragraph 3.3, a Member shall be treated as contributing the portion of the book value of any property that is credited to the Member's Capital Account pursuant to the preceding sentence. Following a revaluation pursuant to this Subparagraph 4.1(h), the Members' shares of depreciation, depletion, amortization and gain or loss, as computed for tax purposes, with respect to property that has been revalued pursuant to this Subparagraph 4.1(h) shall be determined in accordance with the principles of Code Section 704(c) as applied pursuant to Subparagraph 3.6(b).

~~4.2 26.2 Liquidation. If, upon a liquidation of the partnership pursuant to the terms of this Agreement, the capital account balance of each and every Participant (stated as a percentage of the capital account balances of all Participants), is not equal to each and every Participant's ownership interest, all the Participants hereby agree and obligate themselves as follows:~~Liquidation

~~(a) Any Participant with a negative capital account balance, that is, a balance less than zero, shall contribute an amount of cash to the partnership sufficient to achieve a zero balance capital account. In the event the Company is dissolved pursuant to Section 12.3 of the Agreement then, notwithstanding any other provision of the Agreement to the contrary, the following steps shall be taken (after taking into account any transfers of Capital Accounts pursuant to Sections 5.2, 6.4, or 6.5 of the Agreement):~~

~~(a) (b) Following the contribution pursuant to paragraph (a) above, if the capital account balance of each Participant (stated as a percentage of the capital account balances of all Participants) is not in the same ratio as each such Participant's Participating Interest, then unless the participants mutually agree that this paragraph will not apply, the partnership capital accounts~~The Capital Accounts of the Members shall be adjusted to reflect how any gain or loss would have been which would be realized by the Company and allocated (pursuant to Section 2.3(h), above) if such to the Members pursuant to the provisions of Article III of this Exhibit C if the Assets had been sold at their fair market value at the time of liquidation. The Participants shall agree upon the fair market value of the Assets of the partnership, shall be determined by agreement of both Members provided, however, that in the event that the Participants Members fail to agree, on* the fair market value of *any Asset, its fair market value shall be determined by a nationally recognized independent engineering firm acceptable to all Participants shall determine* the fair market value of *such Assets or other qualified independent party approved by both Members.

~~(c) Following the preliquidation adjustments pursuant to paragraph (b) above (or if the Participants mutually agree, pursuant to paragraph (a) above), if the capital account~~

~~balances of each Participant (stated as a percentage of the capital account balances of all Participants) is not equal to each Participant's Participating Interest, then each Participant whose capital account balance is less than its Participating Interest shall, upon ten (10) days notice by the Manager, contribute a sufficient amount of cash to the partnership to cause such Participant's capital account balance and Participating Interest to be in parity.~~

~~(b) (d) Notwithstanding anything contained in this Agreement, expressed or implied to the contrary, it is expressly agreed and understood that, after~~After making the foregoing adjustments and/or contributions ~~provided for in this Article, all remaining partnership, and after taking into account all allocations under Article III, including Subparagraph 3.3(g) and giving effect to all sales or distributions of production through the date of the final distribution, all remaining~~ Assets shall be distributed to the ~~Participants in accordance with their capital accounts~~Members in accordance with the balances in their Capital Accounts. Unless otherwise expressly agreed by both Members, with respect to any asset distributed in kind, each Member shall receive an undivided interest in such Asset in equal to the Member's Percentage Interest at the time of distribution. Assets distributed to the Members shall be deemed to have a fair market value equal to the value assigned to them pursuant to Subparagraph 4.2(a) above.

(c) All distributions to the Members in respect of their Capital Accounts shall be made in accordance with the time requirements of Treas. Reg. §§ 1.704-1(b)(2)(ii)(b)(2) and (3).

4.3 Deemed Terminations. Notwithstanding the provisions of Paragraph 4.2, if the "liquidation" of the Company results from a deemed termination under Section 708(b)(1)(B) of the Code, then (i) Subparagraphs 4.2(a) and (b) shall not apply, (ii) the Company shall be deemed to have contributed its assets to a new partnership in exchange for an interest therein, and immediately thereafter, distributing interests therein to the purchasing party and the non-transferring Members in proportion to their interests in the Company in liquidation thereof, (iii) the new partnership shall continue pursuant to the terms of the Agreement and this Exhibit.

ARTICLE V~~ARTICLE XXVII~~ SALE OR ASSIGNMENT

~~27.1—Agreement Not to Terminate. The Participants~~The Members agree that if ~~any~~either one of them makes a sale or assignment of its ~~Participating~~Ownership Interest under ~~this~~the Agreement, and such sale or assignment ~~will be structured so as not to cause~~causes a termination under Section 708(b) (1)(B) of the Code. ~~If a Section 708(b) (1)(13) termination is caused, the terminating Participant will~~Member shall indemnify the ~~nonterminating Participant~~non-terminating Member and save it harmless on an after-tax basis for any increase in taxes, ~~interest, and penalties or decrease in credits to the nonterminating Participant to the non-terminating Member~~ caused by the termination of the ~~partnership. The indemnification, if any, shall be computed in a cash flow basis taking into consideration the liability for tax on any indemnification proceeds received by the nonterminating Participants.~~Company.

**~~ARTICLE XXVIII—
CORRESPONDENCE~~**

~~28.1—Correspondence.~~ All correspondence relating to the preparation and filing of the partnership's income tax return(s) shall be forwarded to:

~~_____XCO:~~

~~_____YCO:~~

EXHIBIT D

NET PROCEEDS CALCULATION

1. **Income and Expenses.** Net Proceeds shall be calculated by deducting from the gross revenues realized (or deemed to be realized) from the sale (or deemed sale) of Products, such costs and expenses attributable to Exploration, Development, Mining, and the marketing of Products as would be deductible under generally accepted accounting principles and practices consistently applied as employed by the Manager of the Properties, including without limitation:

(a) All costs and expenses of replacing, expanding, modifying, altering or changing from time to time the Mining facilities. Costs and expenses of improvements (such as haulage ways or mill facilities) that are also used in connection with workings other than the Properties shall be charged to the Properties only in the proportion that their use in connection with the Properties bears to their total use.

(b) Ad valorem real property and unsecured personal property taxes, and all taxes, other than income taxes, applicable to Mining of the Properties, including without limitation all state mining taxes, sales taxes, severance taxes, royalties, license fees and governmental levies of a similar nature.

(c) Allowance for overhead in accordance with **Section 2.12** of the Accounting Procedure.

(d) All expenses incurred relative to the sale of Products, including an allowance for commissions at rates which are normal and customary in the industry.

(e) All amounts payable to the ~~Manager of the Properties~~[remaining Member](#) during Mining pursuant to any applicable operating or similar agreement in force with respect thereto.

(f) The actual cost of investment prior to beginning of Mining which shall include all expenditures for Exploration and Development of the Properties incurred by the ~~nonwithdrawing Participant~~[non-resigning Member](#) subsequent to the ~~withdrawing Participant~~[resigning Member](#) acquiring a Net Proceeds interest.

(g) Interest on monies borrowed or advanced for costs and expenses, at an annual rate equal to _____ percentage points above the Prime Rate, but in no event in excess of the maximum permitted by law.

(h) An allowance for reasonable working capital and inventory.

(i) ~~Reasonably anticipated reclamation costs.~~[\[Costs of funding the Environmental Compliance Fund as provided in the Accounting Procedure.\]](#)⁴³

⁴³ [Environmental and Continuing Obligation provisions have been included from Form 5A LLC. See supra note 14.](#)

- (j) Actual costs of Operations.
- (k) Rental, royalty, production, and purchase payments.

It is intended that the ~~Manager of the Properties~~remaining Member shall recoup from net cash flow all of its contributions for Exploration, Development, Mining, and marketing Products before any Net Proceeds are distributed to any person holding a Net Proceeds interest. No deduction shall be made for income taxes, depreciation, amortization or depletion. If in any year after the beginning of Mining of the Properties an operating loss relative thereto is incurred, the amount thereof shall be considered as and be included with outstanding costs and expenses and carried forward in determining Net Proceeds for subsequent periods. If Products are processed by the ~~Manager of the Properties~~remaining Member, or are sold to an Affiliate of the ~~Manager~~remaining Member, then, for purposes of calculating Net Proceeds, such Products shall be deemed conclusively to have been sold at a price equal to fair market value to arm's length purchasers FOB the concentrator for the Properties, and Net Proceeds relative thereto shall be calculated without reference to any profits or losses attributable to smelting or refining.

2. **Payment of Net Proceeds.** Payments of Net Proceeds shall commence in the calendar year next following the calendar year in which Net Proceeds are first realized, and shall be made 45 days following the end of each calendar quarter during which Net Proceeds are realized, and shall be subject to adjustment, if required, at the end of each calendar year. The recipient of such Net Proceeds payments shall have the right to audit such payments within the time and in the manner provided in Section 10.4 of the Agreement.

3. **Definitions.** All capitalized words and terms used herein have the same meaning as in the Agreement to which this **Exhibit D** is attached.

EXHIBIT E
INSURANCE

The Manager shall, at all times while conducting Operations, comply fully with the applicable worker's compensation laws and purchase, or provide through self-insurance, protection for the ~~Participants~~Members comparable to that provided under standard form insurance policies for (i) comprehensive public liability and property damage with combined limits of _____ Dollars for bodily injury and property damage; (ii) automobile insurance with combined limits of _____ Dollars; and (iii) adequate and reasonable insurance against risk of fire and other risks ordinarily insured against in similar operations. If the Manager elects to self-insure, it shall charge to the ~~Joint~~Business Account an amount equal to the premium it would have paid had it secured and maintained a policy or policies of insurance on a competitive bid basis in the amount of such coverage. Each ~~Participant~~Member shall self-insure or purchase for its own account such additional insurance as it deems necessary.

EXHIBIT F
INITIAL PROGRAM AND BUDGET

Legend:	
<u>Insertion</u>	
Deletion	
* Moved from *	
* <u>Moved to</u> *	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	1232
Deletions	1118
Moved from	16
Moved to	16
Style change	0
Format changed	0
Total changes	2382