

COMMISSIONER OF PUBLIC LANDS  
STATE LAND OFFICE  
STATE OF NEW MEXICO

BUSINESS PLANNING LEASE No. BL-1775

This Lease is entered into by and between the New Mexico Commissioner of Public Lands ("Lessor") and Solo Investments, LLC, a New Mexico limited liability company ("Lessee"). This lease is made effective as of the 1<sup>st</sup> day of January, 2007.

1. **DEFINITIONS.** Definitions set forth in State Land Office Rule 9, 19.2.9.7 NMAC-are-incorporated-herein-unless otherwise defined below.

a. **Assignment** means any direct or indirect transfer of Lessee's interest in this Lease or improvements, including but not limited to any conditional transfer or transfer by operation of law and specifically including any express conveyance or other disposition of this Lease; the transfer of Lessee's interest by merger, consolidation, or similar business combination; any transaction by which the majority or the controlling ownership of Lessee is transferred.

b. **Collateral Assignment** means the conditional assignment to a creditor as security for a debt of Lessee's personal property interest in the Leasehold Estate.

c. **Effective Date** is the date shown in the opening paragraph above and is the date upon which the parties agree that this Lease becomes binding and effective, regardless of the dates of signatures.

d. **Hazardous Material** means oil, petroleum products, explosives, inflammables, PCBs, asbestos, formaldehyde, radioactive materials or waste, or other hazardous, toxic, or contaminated materials, substances, pollutants or wastes, including without limitation any substance, waste, or material which is defined or listed as a "hazardous substance", "hazardous water", "hazardous material", "toxic substance", or "regulated substance" in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, and the Federal Clean Water Act, as amended.

e. **Improvements** means any of the following:

(1) any item of tangible property developed, placed, or constructed by a Lessee on or for the benefit of Trust lands including, but not limited to, buildings, roadways, utilities and permanent equipment and fixtures; and,

(2) any water rights appurtenant to the Leased Premises, including without limitation any water rights developed or used on the Land; and

(3) any other rights or privileges obtained or developed in connection with a Lessee's use of Trust lands including, but not limited to, development rights and approvals.

f. **Improvement value credit** is a credit approved by the Commissioner to be given to a Lessee at an auction of an interest in the Land, or to be paid to a Lessee by a subsequent lessee, purchaser, or other successor in interest other than Lessor, for the value of designated improvements. Valuation of certain improvements and the Improvement Value Credit shall be determined as set forth in Paragraph 14 of this Lease. The amount, if any, of any improvement value credit shall rest in Lessor's reasonable discretion consistent with State Land Office Rule 9 (1.2.9 NMAC) and Paragraph 14 below.

g. **Holding Over** means, upon the expiration, termination, or cancellation of this Lease, any act or conduct of Lessee, including, but not limited to, any unapproved entry upon, occupancy, or use of all or any part of the Land by Lessee, or its agents, or by any of Lessee's improvements if unapproved or required or ordered removed.

h. **Land or Leased Premises** means the surface estate of certain Trust land located in Doña Ana County, New Mexico, as more particularly described in Exhibit "A" attached hereto, together with all Permanent Improvements.

i. **Lease Anniversary** means an anniversary of the Effective Date of this Lease.

j. **Leasehold Estate** means the contractual rights and obligations of Lessee under this Lease, which is a personal property interest and is not a real property interest.

k. **Local Government** means the County of Doña Ana and City of Las Cruces.

l. **Market Value** means the most probable price, as of a specific date, in cash for which the specified property should sell, assuming in the case of land the sale of a fee simple estate, after reasonable exposure in a competitive market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self interest, and assuming that neither is under undue duress.

m. **Project** means (1) applying to the City of Las Cruces (the "City") for annexation of the Land into the City, provided that the City is legally permitted to do so, and using reasonable efforts to obtain approval of such annexation; (2) preparing a master plan for development of the Land and submitting such plan to the Local Government for approval and using reasonable efforts to obtain

approval of such plan; (3) applying for, and using reasonable efforts to obtain, approval from the Local Government of reasonably desirable zoning of the Land; (4) at Lessee's discretion, applying for, and using reasonable efforts to obtain, approval from the Local Government of subdivision of the Land; and (5) at Lessee's discretion, constructing the infrastructure necessary or desirable for any approved subdivision of the Land.

n. **Project Plans** means plans that govern the use and development of the Land to accomplish the Project, including, but not limited to, a master plan and any related studies, any subdivision plat(s), any other land use plans required by the Local Government; any application for annexation for and terms of annexation; and any amendment or modification of any such master plan, subdivision plat or other land use plan. Prior to submittal to any Local Government, Project Plans must be approved by Lessor.

o. **ROWs** means rights-of-way and easements. ROWs do not create or convey a fee simple interest in the Land, but shall in all cases be limited to a specified use and terminate after a fixed number of years or when the specified use ceases, as Lessor may deem appropriate.

p. **SLO** means the New Mexico State Land Office.

q. **SLO Rules** means all current and future constitutional provisions, statutes, regulations and rules governing Trust land.

r. **Trust** means the land trust established and confirmed by the Enabling Act, Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310.

## 2. LEASE.

2.1 Lessor grants Lessee the right to use, enter upon and conduct activities with respect to the Land in accordance with the terms, conditions, covenants and reservations of this Lease, which right is subject to all existing and valid rights and reservations of record at the State Land Office or the Local Government and all rights and reservations stated in this Lease.

2.2 This Lease is not subject to public use under an easement issued by Lessor to the New Mexico Department of Game and Fish.

2.3 If more than one person or entity is denominated as Lessee, all such persons or entities shall be jointly and severally liable under this Lease.

2.4 This Lease includes, as additional terms, the provisions of all applicable SLO Rules.

### **3. Reservations.**

**3.1** Lessor reserves all minerals, including but not limited to oil, natural gas, helium, carbon dioxide, coal and lignite, uranium, saline, brine, copper, iron, lead, talc, barite, gold and silver, precious and semi-precious stones, caliche, building stones, shale, clay, sand, gravel and rock for crushing, and further reserves geothermal resources and other natural resources and deposits of whatsoever kind, located in, under, or upon the Leased Premises. Lessor further reserves all rights of access, ingress, and egress over, through, or across the Leased Premises that are or may become necessary or convenient to the exploration, development, conservation, or production of any such minerals or resources, including the right to grant rights of way for such purposes.

**3.2** Lessor reserves the right to grant rights-of-way and easements over, upon, or across the Leased Premises for any purposes whatsoever, including, but not limited to, public highways, railroads, tramways, telephone, telegraph, and power lines, irrigation works, conservation, environmental or remediation studies or work, sewer lines, drainage ditches, mining, or logging. Lessor's exercise of this right during the term of this lease shall conform to any land use plans that Lessor, Lessee and the Local Government have approved.

**3.3** Lessor reserves all right, title and interest in or to the Land not expressly leased to Lessee under this Lease.

**3.4** This Lease is also subject to all rights, reservations and encumbrances of record at the State Land Office or in Dona Ana County and the rights of way and encumbrances specifically set forth in Paragraph 4 below.

### **4. LEASE SUBJECT TO PRE-EXISTING SLO LEASES AND EASEMENTS.**

This Lease is subject to all existing easements, rights of way and other encumbrances as shown in the attached Exhibit "B."

**5. WATER RIGHTS.** No water rights shall be used, placed, or developed on the Leased Premises without the express, written consent of Lessor. All water appropriated shall be pursuant to state law and regulations. Any water rights used, placed, or developed on the Leased Premises are herein and hereby deemed to belong to Lessor, and all such rights shall be developed in the name of Lessor. Lessee agrees to execute any documents necessary to effectuate the intent of this provision.

**6. CONDITION OF LAND.** Lessee leases the Land based on Lessee's own inspection of, and judgment regarding, the Land in its "AS IS" condition with all faults, including the environmental condition of the Land. Lessor makes no representations or warranties of any kind or nature whatsoever with regard to the condition of the Land or its fitness or suitability for any particular use.

**7. STATUS OF LESSOR.** Lessee acknowledges that Lessor is a governmental entity who holds and manages the Land pursuant to the terms and obligations of the Trust. Lessee acknowledges that compliance with this Lease includes, as additional terms, compliance with the provisions of all applicable SLO Rules, statutes, constitutional provisions and the Enabling Act.

**8. TERM.** The term of this Lease shall begin on the Effective Date and end exactly five years later on the 1<sup>st</sup> day of January, 2012 (the "Term"), unless terminated earlier as provided in this Lease.

**9. RENT; TIME IS OF THE ESSENCE; INTEREST AND LATE FEE.**

**9.1 Base Rent.** Lessee shall pay annual Rent to Lessor for each year of this Lease in the amount of thirty-seven thousand five hundred dollars (\$37,500). Rent will be payable in quarterly installments and will be due on the first day of the calendar quarter (being the first day of the month on which the calendar quarter begins), except the rental payment for the initial quarter (or partial quarter) will be due at the signing of this Lease. The amount due for any quarterly payment will be determined by computing the daily rental rate for the appropriate lease year and multiplying that figure by the number of days in the quarter. Once the exact amount of rent has been determined, the parties will make any adjustments to the quarterly payments already made by adding to or subtracting from the amount due in the next subsequent quarterly payment.

**9.2 Time is of the essence; Quarterly Reports** in the performance of Lessee's obligations under this Lease. Lessee shall submit brief quarterly reports to the SLO regarding the Project Status at the conclusion of each quarter of this lease, beginning with the end of the first full calendar quarter after the Effective Date. Each report shall include a short description of progress in obtaining and impediments to Project approval, and a strategy for addressing any impediments and shall also provide Lessor with information regarding any upcoming Local Governing Body meetings related to the Project and other upcoming events of significance to the Project.

**9.3 Interest and Late Fee.** Interest on delinquent Rent amounts shall accrue from the date the payment becomes due at the rate of one percent (1%) per month or any fraction of a month until received by Lessor in full. In addition, Lessee shall also pay a late fee equal to ten percent (10%) of the quarterly amount past due, prorated over the period from the due date to the date on which the payment is postmarked (or, if not mailed, the date on which it is received). Such proration shall be calculated by determining the daily portion of 10% of the quarterly payment and multiplying that by the number of days the payment is late. For example, the quarterly payment is \$5000, 10% of that is \$500; the daily rate is \$500 divided by 91 = \$5.49. If the payment is ten days late, the penalty is \$54.90. All interest and late fees that may become due under this lease shall be considered additional rent under this Lease.

## 10. LIEN.

**10.1** To secure the payment of any Rent that becomes due, and to satisfy all reasonable costs incurred by Lessor in recovering said Rent, Lessor shall have a contractual lien on any and all Improvements. The contractual lien created by this Paragraph shall be subordinate only to the Statutory Lien in favor of Lessor created by NMSA 1978, § 19-7-34. Any security interest granted in any improvement, including a Collateral Assignment, will be subordinate to both the Statutory Lien and the Rent Lien. Lessor agrees to work with Lessee's Lender, investors, or prospective secured parties to make satisfactory arrangements for the suspension or discharge of such liens.

**10.2 Non-subordination.** Any security interest granted in any Improvement, including a Collateral Assignment will be subordinate to the Lien created by this Paragraph and the Statutory Lien created by NMSA 1978, §19-7-34.

**10.3 Survival.** This Paragraph 10 shall survive termination of this Lease.

## 11. SALE OR EXCHANGE.

**11.1** At any time, Lessor in his sole discretion, may offer to sell or exchange the Leased Premises, or any part thereof, to the highest and best bidder in accordance with law and subject to this Lease. If Lessor offers the Land for sale or exchange, Lessee may bid at the auction for such sale or exchange, provided Lessee is not in default and Lessee complies with the bid requirements established by Lessor, with all pertinent statutes and regulations, and with the governing terms of this Lease. If Lessee elects to bid at such auction and Lessee is selected by Lessor as the highest and best bidder and a purchase and sale transaction (or exchange) is entered into between Lessor and Lessee, Lessee shall not be required to pay as consideration due from the purchaser or exchange party the amount (if any) of Improvement Value Credit accrued by Lessee under the terms of this Lease, specifically Paragraph 14 below. Nothing in this Lease shall be interpreted to grant Lessee a right or an option to purchase the Residual Estate if Lessor decides to sell or exchange the Land.

## 12. PERMITTED USE.

**12.1** Lessee shall use, enter upon, occupy and perform activities with respect to the Land solely to complete the Project, consisting of planning and development of the Land as described below.

**12.2 Planning.** Future uses of the Land shall be planned with due diligence to accomplish the Project in accordance with this Lease, and all other requirements reasonably imposed by the Local Government or reasonably required by Lessor to protect the Trust.

**12.3 Annexation.** The terms of any proposed annexation of trust lands must be approved by lessor.

**12.4 Project Plans.** Project Plans consisting of master plan, subdivision plat (if Lessee desires to do so), or related planning or subdivision documents required by local authorities shall be prepared for the Land and Lessee shall use reasonable efforts to have such Project Plans approved by the Local Government. Lessee shall be required to develop Project Plans in accordance with the terms of this Lease, the requirements of the Local Government, and SLO Rules.

**12.5 Planned Roads and Utility Corridors.** Lessor and Lessee agree that ROWs for roads should be offered to the Local Government for dedication as may be required by it on terms acceptable to Lessor; provided, however, that such ROWs shall not create or convey a fee simple interest in the Land but will be limited to a specified use and include a possibility of reversion to Lessor. All such ROWs shall be obtained in accordance with Section 19-7-57, NMSA 1978.

**12.6 Lessor and Local Government Approval Required.** Prior consultation with and written approval by Lessor is required before Lessee finalizes any Project Plan or submits any Project Plan to the Local Government for approval. Unless otherwise approved by Lessor, Lessee shall obtain all appropriate Local Government approvals of all Project Plans and activities on the Land that would be required if Lessee were accomplishing the Project on private land. While Lessor, as a State of New Mexico government entity is not subject to Local Government ordinances, zoning or land use plans, Lessee nevertheless agrees to abide by all such decrees or actions of the Local Government with respect to the Project.

**12.7 Water Wells; Disposal of Waste.** Absent Lessor's prior approval no water wells shall be completed on the Land. There shall be no disposal of hazardous waste on the Land during the term of this Lease. It is anticipated that the Project Plans will require disposal of liquid and solid waste on the Land. All plans for disposal of liquid or solid waste will comply with all applicable laws and regulations and will be approved by Lessor prior to any filing with any local governmental authority.

**12.8 No Encumbrance of Land.** Lessee shall not permit any lien or other encumbrance to be placed upon or asserted against the Land, including Permanent Improvements on, in or under the Land. In the event of such lien or other encumbrance, Lessee shall take whatever actions may reasonably be

necessary to remove the lien.

### 13. IMPROVEMENTS.

**13.1 Authorized Improvements.** In accordance with Paragraph 12, "PERMITTED USE," above, the following improvements are authorized:

(a) Preparation, obtaining approval from Local Government, and recording of Project Plans; and

(b) Providing infrastructure to or for the Land such as roadways, utilities and other necessary physical amenities needed to develop the Land in accordance with project plans.

**13.2** Except for those improvements approved in Paragraph 13.1 above, no other improvements shall be placed on, or made for the benefit of, the Leased Premises without Lessor's prior written approval.

**13.3** If any improvements are placed on, or made for the benefit of, the Leased Premises without Lessor's approval, Lessor may elect to: (a) deem such improvements abandoned and forfeited to Lessor at the termination, cancellation, or expiration of this lease; or (b) require Lessee to obtain approval and pay all such reasonable fines and costs as Lessor deems appropriate; or (c) Lessor may, by written notice, order the removal of such improvements and the restoration of the Leased Premises to their condition existing prior to the placement of said improvements, all at Lessee's sole expense and at such time as Lessor may direct. The foregoing rights of Lessor shall be cumulative to Lessor's right to cancel this Lease and other legal or equitable remedies.

**13.4** In case of Lessee's default of this Lease, as defined in Paragraph 23.1 below, or its relinquishment of this Lease as set forth in Paragraph 19 below, any or all improvements of the type described in Paragraph 1.e(3), DEFINITIONS, above, shall, unless otherwise specified in this lease, remain the sole property and liability of lessee, shall be deemed in trespass, and lessee shall remain liable beyond the term of the lease for any costs, fines or other expenses incurred by lessor in mitigating such trespass and in seeking any other remedies available at law or in equity.

**13.5** All documents, whether on paper, magnetic, electronic, or other format, relating to the development of improvements by Lessee on the Land including, but not limited to, all analyses, appraisals, approvals, contracts, drawings, lists, manuals, permits, plans, plats, reports, schematics, and studies, must be given to Lessor at the termination of this Lease unless sooner requested, in writing by Lessor, in which case Lessee shall promptly deliver same to Lessor. All such documents shall be considered "works for hire" owned

by Lessor, except to the extent that Lessor and Lessee agree otherwise in writing.

**13.6 Compensation for Improvements.** Lessee shall not be entitled to compensation for any improvement from any person, except as set forth in Paragraph 14 below. Lessee hereby waives and shall waive any and all rights to any other compensation for improvements, including any rights under NMSA 1978, 19-7-14. Under no circumstances shall Lessee be entitled to any compensation from Lessor or the State of New Mexico for any improvement.

**13.7 Survival.** All of this Paragraph 13 shall survive termination of this Lease.

#### **14. IMPROVEMENT VALUE and IMPROVEMENT VALUE CREDIT.**

**14.1 Intangible Improvements.** The value of any improvements related to the Land developed or obtained by Lessee and falling within Paragraph 1.e(3) DEFINITIONS, above (intangible improvements) shall be computed as follows:

(a) **First Appraisal Round.** Within 120 days after the Effective Date, Lessee, at Lessee's expense, shall cause an appraisal of the Land to be performed by a New Mexico appraiser holding a General State Certification who is approved by Lessor. The appraisal shall be conducted in accordance with the Uniform Standards of Professional Appraisal Practice and shall value the land as of the effective date of this lease. In the event that Lessee or Lessor disputes the resulting appraised value of the Land, the disputing party, at its expense, may have a second appraisal performed by a second New Mexico appraiser with the aforementioned credentials, acceptable to the other party, in accordance with the aforementioned professional standards. If the second appraisal reflects an appraised value within ten percent (10%) of the first appraisal, the Appraised Value shall be determined by the Commissioner of Public Lands. However, the value shall not exceed the value of the highest appraisal. If the second appraisal does not reflect such a value, the appraisers who performed the first and second appraisals shall select a third appraiser to perform a third appraisal. The third appraiser shall possess the credentials set forth above and shall perform an appraisal in accordance with the standards set forth above. The third appraisal shall be made at Lessee's expense. The Appraised Value shall then be determined by the Commissioner of Public Lands and shall be a value within the range of the values reflected in the three appraisals. Each appraisal prepared in accordance with this paragraph shall have an effective date that is the same as the Effective Date of this Lease. The appraised value established by this first appraisal round shall be referred to as the "Base Appraised Value" of the Land.

(b) **Second Appraisal Round.** On or before the expiration of this Lease or, at Lessor's discretion, Lessee shall cause an appraisal of the Land to be performed in accordance with the standards set forth above by a New

Mexico appraiser holding a General State Certification who is approved by Lessor. In the event that Lessee or Lessor disputes the appraised value of the Land resulting from this appraisal, it may cause a second and/or a third appraisal in the Second Appraisal Round to be performed in accordance with the procedure set forth in Paragraph 14.1(a) above. The purpose of the Second Appraisal Round is to determine any change in the value of the Land attributable to Lessee's intangible improvements. The value of the Land as determined by the Second Appraisal Round shall be referred to as the "Final Appraised Value" of the Land. The difference between the Base Appraised Value of the Land, as established by the First Appraisal Round, and the Final Appraised Value of the Land, as established by the Second Appraisal Round, shall be referred to as the "Change in Value."

**14.2 No Court Challenge of Appraisals.** Lessee expressly waives any right it may have to institute a court proceeding to challenge or appeal the appraisals described above.

**14.3 Lessee's Reasonable Project Costs.** Reasonable costs incurred by Lessee in carrying out the project and approved by the Commissioner of Public Lands, including costs of engineering and planning expenses and local governmental fees related to or arising from preparation of the Project Plans, costs of any improvements related to the Land developed or obtained by Lessee, other than those described in Paragraph 1.e(3) DEFINITIONS, above (intangible improvements), shall be referred to herein as "Lessee's Reasonable Project Costs."

**14.4 Improvement Value Credit.** Subject to the conditions and restrictions set forth in this provision, Lessee shall be entitled to Improvement Value Credit equal to the sum of (a) Lessee's Reasonable Project Costs approved by the Commissioner of Public Lands, plus (b) forty percent (40%) of the Change in Value if the Change in Value is a positive figure of the total consideration received by Lessor from a lease, sale or exchange of the Land pursuant to Paragraph 14.5 over the Final Appraised Value. *Provided that*, if the Change in Value is zero or is a negative number, Lessee shall be entitled to no Improvement Value Credit. *Provided further that*, if the Final Appraised Value is equal to or less than the sum of the Base Appraised Value plus Lessee's Reasonable Project Costs (as capped herein), then the Improvement Value Credit will be limited to the agreed upon percentage of the Change in Value, regardless of the amount of the Reasonable Project Costs.

**14.5 Payment of Improvement Value Credit.** Within a reasonable time following expiration of this Lease or Lessee's request therefor, with such time not to exceed one hundred eighty (180) days, Lessor shall publicly offer the Land either for lease or for sale or exchange, in either case to the highest and best qualified bidder, subject to terms and conditions of the bid lease, sale or exchange, and in conformity with the applicable State Land Office Rules and

statutory requirements. If Lessor enters into a subsequent lease, sale or exchange transaction within two years following the expiration of this Lease, the subsequent lessee or purchaser of the Land will be obliged, as a fundamental term of its purchase or lease, to pay Lessor the amount of the Improvement Value Credit, as calculated above. Lessor shall promptly pay that sum, less any amount due lessor from lessee, over to Lessee. In the event of a subsequent lease or sale of a portion of the Land but not all of it within two years following the expiration of this Lease, the subsequent lessee or purchaser shall be obliged to pay, as a fundamental term of its purchase or lease the portion of the Improvement Value Credit proportional to the acreage it is leasing or purchasing. In the event that Lessee is the subsequent lessee or purchaser of the Land, it will neither receive nor be required to make any payment of Improvement Value Credit. If Lessor, following reasonable efforts, has not leased, sold or exchanged the Land within two years after expiration of this Lease, the Improvement Value Credit will be depreciated (reduced) 33.3%. If Lessor has not leased, sold or exchanged the Land within four years after expiration of this Lease, the Improvement Value Credit will be depreciated (reduced) an additional 33.3%. If Lessor has not leased, sold or exchanged the Land within six years after expiration of this Lease, the Improvement Value Credit will be depreciated (reduced) to zero. In the event that Lessor, following reasonable efforts to sell, lease or exchange the Land, has leased, sold or exchanged a portion but not all of the Land within two years after expiration of this Lease, then the portion of the Improvement Value Credit attributable to the portion of the Land that Lessor has not leased, sold or exchanged will be depreciated (reduced) 33.3%. In the event that Lessor, following reasonable efforts to sell, lease or exchange the Land, has leased, sold or exchanged a portion but not all of the Land within four years after expiration of this Lease, then the portion of the Improvement Value Credit attributable to the portion of the Land that Lessor has not leased, sold or exchanged will be depreciated (reduced) an additional 33.3%. In the event that Lessor, following reasonable efforts to sell, lease or exchange the Land, has leased, sold or exchanged a portion but not all of the Land within six years after expiration of this Lease, then the portion of the Improvement Value Credit attributable to the portion of the Land that Lessor has not leased, sold or exchanged will be depreciated (reduced) to zero. For purposes of this provision, Lessor will be deemed to have leased, sold or exchanged the Land (or a portion of it) following expiration of this Lease on the effective date of a new lease or the closing date of a sale or exchange, whichever applies. With any successful bid consummated in the form of a new lease, sale or exchange, all depreciation stops with respect to the land encompassed in that transaction. In the event that this Lease is cancelled for Lessee's default pursuant to Paragraph 23 below, or Lessee relinquishes this Lease pursuant to Paragraph 19 below, Lessee shall not be entitled to any Improvement Value Credit unless the parties otherwise agree in writing.

**14.6 Lessor's Right to Retain a Portion of Increased Value.** Lessor, as owner of the Land, retains any increase in the value of the Land that does not

constitute Improvement Value Credit to be paid to or retained by Lessee, as calculated and defined above.

## **15. COMPLIANCE WITH LAWS; PROTECTION FROM WASTE AND TRESPASS; RELEVANT SLO RULES INCORPORATED BY REFERENCE**

**15.1 Compliance with Laws.** Lessee shall fully comply with all applicable laws, whether statutory or court-made, regulations, rules, ordinances, and requirements, including, but not limited to, those addressed to environmental protection and all SLO Rules applicable to the Land or to Lessee's operations relative to the Land. Lessee's compliance shall be at its own expense and shall not be an offset to Rent. Lessee shall comply with the Cultural Properties Act, NMSA 1978, §§ 18-6-1 *et seq.* and Lessor's policies on the protection of cultural properties. Lessee will not discriminate against any independent contractor, agent, employee, sublessee or applicant because of race, color, religion, national origin, sex, sexual preference, age or handicap. Lessee shall comply with all applicable environmental protection and occupational health and safety statutes and regulations. Lessee shall not permit any nuisance to be maintained on the Land.

**15.2 Protection from Waste and Trespass.** Lessee's compliance obligations include, but are not limited to the following: Pursuant to NMSA 1978, §19-6-5, Lessee shall diligently maintain and protect the Land from waste and trespass.

**15.3 Applicable SLO Rules Incorporated by Reference.** All applicable SLO Rules are incorporated into this Lease and made additional terms hereof by this reference.

**16. HAZARDOUS MATERIALS.** Lessee shall not cause or permit any Hazardous Material to be generated, stored, transported, handled, or disposed of in, on, or under the Land accept as permitted by law and with Lessor's prior approval. Lessee shall be solely liable for all liability, damages, costs or claims (including reasonable attorneys' fees) arising from or in connection with such Hazardous Materials and hereby indemnifies and agrees to defend Lessor against the same.

## **17. INSURANCE.**

**17.1 Liability Insurance.** During the Term of this Lease, Lessee shall obtain and maintain at all times, at Lessee's cost and expense, broad form comprehensive general public liability insurance that names Lessor as an additional insured, protecting Lessor and Lessee against claims for personal injury, death and property damage. Such an insurance policy must specifically provide coverage for Lessor and its employees and agents in minimum amounts of \$100,000 for damage to or destruction of property arising out of a single

occurrence; \$300,000 for all past and future medical and medically-related expenses arising out of a single occurrence; \$400,000 to any person for any number of claims arising out of a single occurrence for all damages other than property damage and medical and medically-related expenses; and \$750,000 for all claims other than medical or medically-related expenses arising out of a single occurrence. The insurance policy must provide the foregoing minimum coverage amounts for Lessor, its employees and agents, and must provide separate coverage, in reasonable amounts agreeable to Lessor, for Lessee, its employees and agents. Higher coverage for either Lessor or Lessee or both may be reasonably required by Lessor from time to time. Lessee shall provide copies of the policies and all amendments and renewals to Lessor upon issuance, amendment, and renewal.

## 18. CONDEMNATION.

**18.1 Complete Taking.** If title to the whole or substantially all of the Land is taken or condemned by any competent authority for any public or quasi-public use, this Lease shall cease and terminate, all Rent and other obligations payable or to be performed by Lessee as provided in this Lease will be prorated as of the date of vesting title in the condemning authority. As damages, Lessor shall be entitled to claim the full market value of the Land, the value of Lessor's rights under this Lease, and any rights reserved to Lessor under this Lease that are taken or condemned; and Lessee shall be entitled to claim the value of the Leasehold Estate. Lessor and Lessee shall pursue and protect their various claims separately and solely against the condemning authority. Lessee shall use the amount of the damages that it receives, if any, to first pay and discharge in full any collateral assignment of its interest in all or part of this Lease.

**18.2 Partial Taking.** If title to less than the whole or substantially all of the Land is taken or condemned by any competent authority for any public or quasi-public use, this Lease will not terminate, and the Rent and the other obligations payable and performable by Lessee as provided in this Lease for the remainder of the Term will be reasonably and proportionately reduced by Lessor as of the next lease anniversary. Notwithstanding the foregoing, if the Partial Taking has the direct effect of causing the prevention of the continued business of Lessee in the remainder of the Land in such a manner that Lessee cannot earn a fair and reasonable proportionate net return from the continued business, Lessee will have the option to surrender and terminate this Lease by giving written notice of the election to Lessor within fifteen (15) days after the date of vesting of title in the condemnation action. If Lessee exercises the option of Lessee to surrender and terminate this Lease in accordance with this Paragraph, all of the Rent and other obligations payable or to be performed by Lessee will be prorated as of the date of vesting of title in the condemnation action. As damages for a partial taking, Lessor shall be entitled to claim the full market value of the taken portion of the Land, the value of Lessor's rights under this Lease, and any rights reserved to Lessor under this Lease that are taken or

condemned; and Lessee shall be entitled to claim damages equal to the injury caused to the Leasehold Estate by the partial taking. Lessor and Lessee shall pursue their various claims separately and solely against the condemning authority. Lessee shall use the amount of the damages that it receives, if any, to first pay and discharge in full any collateral assignment.

**19. RELINQUISHMENT.** Lessee may not relinquish this Lease without the prior written approval of Lessor, which approval may be withheld in the sole discretion of Lessor. Lessee may request relinquishment of this Lease on forms prescribed by Lessor and shall pay the relinquishment fee required in the sole discretion of Lessor if Lessor approves relinquishment. Lessee shall not, by relinquishment, avoid or be released from: (i) any liability for known or unknown waste or damage to the leasehold, including environmental damage which arose from, or in connection with, Lessee's use or occupancy of the Land, or from any other requirement of this Lease that survives the Termination of this Lease; (ii) from any liability to Lessor, including all Rent owed under this Lease, which accrued prior to the date of such relinquishment; or (iii) from the obligation to maintain infrastructure that is not included within any ROW. Upon relinquishment, Lessee shall not be entitled to the refund of any Rent previously paid.

## **20. ASSIGNMENT, COLLATERAL ASSIGNMENT.**

**20.1 Limitations on Assignments.** Lessee shall not have the right to make any Assignment of this Lease without the prior written consent of Lessor. Lessor's approval of an Assignment shall not relieve Lessee from any liability that may have arisen prior to the Assignment. The occupation or use of the Land or developing improvements for the benefit of the Land pursuant to any Assignment made without Lessor's approval shall constitute a default of this Lease.

**20.2 Limitations on Collateral Assignments.** No collateral assignment of this Lease, or under the terms of this Lease, shall be allowed except for a collateral assignment, approved in advance by Lessor, whereby Lessee may borrow money from a bank or other financial or lending institution for the purpose of completing work under this Lease and except for a collateral assignment of Lessee's right to receive the Improvement Value Credit. Lessor shall provide a Collateral Assignee with a copy of any notice of default given to Lessee under this Lease and permit the Collateral Assignee to cure or attempt to cure the default within the time periods and subject to the conditions provided to Lessee under this Lease. Collateral assignments are not to be used as security for the services of any Project contractor or subcontractor. Filing of a collateral assignment does not guarantee future payment.

**20.3 Other Conditions.** No consent to an Assignment or Collateral Assignment shall release Lessee/assignor except as agreed to in writing by Lessor. Lessor may condition approval of any proposed Assignment or Collateral Assignment upon an increase in the Rent, the modification or addition of other provisions to this Lease, proof of the third-party's creditworthiness, financial soundness, and skill and experience in effecting the uses and improvements contemplated by this Lease, and such other conditions as Lessor may impose to protect Lessor's interest.

**20.4 Approval Procedure.** Applications to assign or collaterally assign shall be made by Lessee under oath, on forms prescribed by Lessor, and shall be accompanied by such fees as are designated by Lessor in the SLO Rules.

**21. SUBLEASING.** Lessee shall not have any right to sublease all or any portion of the Leased Premises or this Lease.

**22. REPORTING COVENANTS.** In addition to the quarterly reports referred to in Paragraph 9.2 above, Lessee shall provide to Lessor such periodic financial reporting and development and marketing progress reporting, including updating of Lessee's projections on the Project, as Lessor may reasonably request from time to time.

### **23. DEFAULT; REMEDIES.**

**23.1 Default.** Any violation by Lessee of any of the terms of this Lease, or threat to violate any of the terms of this Lease, including but not limited to any failure to pay rent when due or any violation of law, constitutes a default. In addition, Lessee will be in default if it becomes insolvent, or makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors or if a receiver or trustee shall be appointed for the Leasehold Estate or all or substantially all of the assets of Lessee, or if Lessee abandons the Project.

**23.2 Cancellation in the Event of Lessee's Default; Notice.** Lessor may cancel this Lease after providing Lessee thirty (30) days notice of the default by registered or certified mail. The mailing of such notice as herein provided shall constitute notice of Lessor's intention to cancel the Lease and no proof of receipt of such notice shall be necessary. Lessor may cancel this Lease thirty days after mailing the notice if Lessee has not cured the default to Lessor's satisfaction within said thirty-day period.

**23.3 Further Remedies.** Lessor shall be entitled to recover from Lessee compensation for all damages and costs caused by Lessee's breach and all reasonable costs and expenses Lessor incurs in securing its remedies. If a court of competent jurisdiction determines that Lessee or Lessor has breached any of the terms of this Lease, then such party shall pay the costs incurred by the other party in litigating the default, including reasonable attorney fees. Lessor

also shall have all other remedies available at law or equity in the event of any default by Lessee.

**24. HOLD HARMLESS; INDEMNITY.** Lessee shall save, hold harmless, indemnify, and defend the State of New Mexico, Lessor and Lessor's employees, agents, contractors, and beneficiaries in both their official and individual capacities, from any and all liabilities, claims, demands, losses, damages, or expenses, including, but not limited to, reasonable attorneys' fees, loss of land value, third-party claims, penalties for removal, remedial or restoration costs arising out of or in connection with: (1) the actions, use and occupancy under this Lease at the Land and in connection with the Project of Lessee and Lessee's employees, agents, contractors or invitees, including but not limited to, any Default of this Lease by Lessee; (2) any Hazardous Materials located in, under, or upon or otherwise affecting the Land or adjacent property, whether caused before or after the Effective Date; (3) the activities of third parties on the Land, whether with or without Lessee's knowledge or consent, and whether before or after the Effective Date. This Paragraph shall survive the Termination of this Lease, and any cause of action Lessor may have to enforce this Paragraph shall not be deemed to accrue until Lessor's actual discovery of said liability, claim, demand, loss, damage, or expense. To the extent that Section 56-7-1 NMSA 1978, as amended, applies, any agreement to indemnify, hold harmless, insure or defend another party contained herein will not extend to liability, claims, damages, losses or expenses, including attorneys' fees, arising out of bodily injury to persons or damage to property caused by or resulting from the negligent act or omission of any indemnitee, its officers, employees or agents.

**25. NO WAIVER BY LESSOR.** No employee or agent of Lessor has the power, right, or authority to orally waive any of the conditions, covenants, or agreements of this Lease; and no waiver by Lessor of any of the conditions, covenants, or agreements of this Lease shall be effective unless in writing and executed by Lessor. Lessor's waiver of Lessee's breach or default of any of the conditions, covenants, or agreements hereof shall not constitute or be construed as a waiver of any other or subsequent breach or default by Lessee. The failure of Lessor to enforce at any time any of the conditions, covenants, or agreements of this Lease, or to exercise any option herein provided, or to require at any time performance by Lessee of any of the conditions, covenants, or agreements of this Lease shall not constitute or be construed to be a waiver of such conditions, covenants, or agreements, nor shall it affect the validity of this Lease or any part thereof, or Lessor's right to thereafter enforce each and every such condition, covenant, or agreement. Lessor's consent to any assignment, collateral assignment or sublease shall not be construed as a waiver of his right, in his sole discretion, to refuse to consent to any other assignment, collateral assignment or sublease.

**26. HOLDING OVER.** At the Termination of this Lease, Lessee immediately shall deliver possession to Lessor with all Repairs and maintenance required herein to be performed by Lessee completed. If, for any reason, Lessee retains

possession of the Land or any portion thereof after the Termination of this Lease, unless the parties hereto otherwise agree in writing, such possession shall be subject to termination by either Lessor or Lessee at any time upon not less than ten (10) days' advance written notice, and all of the other terms and provisions of this Lease shall be applicable during such period, except that Lessee shall pay Lessor from time to time, upon demand, as rental for the period of any holding over, to be due for each day of such holding over, an amount equal to two hundred percent (200%) of the average annual Rent paid over the three years immediately preceding the date of Termination. This amount shall be liquidated damages to Lessor for Lessee's use of the Land only, and shall not bar Lessor's claims or remedies for any other damages suffered by Lessor as a result of Lessee's holding over or related acts or omissions. Nothing contained herein shall be construed as a grant to Lessee of the right to hold over or otherwise enter the Land for any purpose after the Termination of this Lease without the prior written approval of Lessor. This Paragraph shall survive the Termination of this Lease.

**27. GENERAL PROVISIONS.** When applicable, the following provisions shall survive the termination of this Lease.

**27.1 Scope of Agreement.** This Lease incorporates all the agreements, covenants, and understandings between Lessor and Lessee concerning the subject matter hereof and all such agreements, covenants, and understandings are merged into this Lease. No prior agreement or understanding between Lessor and Lessee shall be valid or enforceable unless expressly embodied in this Lease.

**27.2 Amendment.** This Lease shall not be altered, changed, or amended except by a written instrument executed by both Lessor and Lessee.

**27.3 Applicable Law and Venue.** The laws of the State of New Mexico shall govern this Lease, without giving effect to the conflict of law provisions of the State of New Mexico. Lessee consents to venue and jurisdiction in the First Judicial District Court of the State of New Mexico, and to service of process under the laws of the State of New Mexico in any action relating to this Lease or its subject matter.

**27.4 Successors In Interest.** All terms, conditions, and covenants of this Lease and all amendments thereto shall extend to and bind the permitted heirs, successors, and assigns of Lessee and Lessor.

**27.5 Time.** Time is of the essence. Lessee's failure to perform any of its obligations under this Lease in a timely manner shall be a breach of this Lease.

**27.6 Recording; Documents Affecting Title And Interest.** Lessor and Lessee have signed, acknowledged and delivered contemporaneously with the

signing of this Lease, a Memorandum of this Lease in the form of attached Exhibit "C" which either Lessor or Lessee may record in the records of the Local Government or the records of the New Mexico State Land Office. Lessee will not do any act that may encumber the interest or title of Lessor in and to the Land.

**27.7 Severability.** In the event that any provision of this Lease is held invalid or unenforceable under applicable law, this Lease shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

**27.8 No Joint Venture.** Lessor is not and will not be construed or held to be a partner, joint venturer or associate of Lessee in the conduct of the business of Lessee. Lessor will not be liable for any debts incurred by Lessee in the conduct of the business of Lessee. The relationship between Lessor and Lessee is, and will remain, solely that of lessor and lessee.

**27.9 Counterparts.** This Lease may be executed by the parties in multiple counterparts, each of which shall constitute an original, but all of which together shall constitute a single binding agreement between the parties.

**27.10 No Lessor Personal Liability.** In the event of a court action, Lessee shall not seek damages from Lessor or any employee of SLO or the State of New Mexico in their individual capacity.

**28. EXHAUSTION OF ADMINISTRATIVE REMEDIES.** In the event that Lessee is aggrieved by a decision of Lessor to cancel this Lease, Lessee shall within thirty (30) days after the date of such decision file an administrative contest pursuant to NMSA 1978, §19-7-64 and State Land Office Rule 15 (19.2.15 NMAC). Lessee shall initiate no court action regarding this Lease except to appeal a final decision of the Commissioner of Public Lands rendered pursuant to such a contest proceeding, and as provided by NMSA 1978, §19-7-64.

**29. NOTICES.** Written notice by registered or certified U.S. Postal Service, return receipt requested, or delivered by reputable overnight courier, return receipt or tracking system, to the address of the party hereunder shall constitute sufficient notice to comply with the terms of this Lease. Notice will be deemed effective upon delivery. Either Lessor or Lessee may change its respective address as provided in this Paragraph effective three (3) business days after giving written notice of the change to the other as provided in this Lease. The addresses for notice are:



**Exhibit A**

S $\frac{1}{2}$  of Section 25, S $\frac{1}{2}$  of Section 26 and E $\frac{1}{2}$  of Section 36 in T22S, R2E,  
N.M.P.M.

S $\frac{1}{2}$  of Section 30 and W $\frac{1}{2}$  of Section 31 in T22S, R3E, N.M.P.M.

N $\frac{1}{2}$  and SE $\frac{1}{4}$  of Section 2 in T23S, R2E, N.M.P.M.

W $\frac{1}{2}$  of Section 6 in T23S, R3E, N.M.P.M.

A. B. C. D.

Exhibit B

**Bearden, Dell**

**To:** Laura Riley  
**Subject:** Land With Leases

**Attachments:** Copy of Relinquishment.doc; Commercial-REQUEST TO LEASE LAND CURRENTLY LEASED.doc

1). Sec. 32, 33, 34, T21S, R2E (north of Hwy 70):

GS-1875 Jeff Isaacks leases a total of 8253 acres under this lease and it expires 9/30/07.

2). Sec. 26, T22S, R2E (East Las Cruces south of Hwy 70):

BL-1378 City of Las Cruces has 1 acre on Sec. 26 and 1 acre on Sec. 35 for a well and water tank. Per terms of the lease, the City of Las Cruces pays \$25 per annum additional rent to withhold the rights of drilling for O&G, Minerals and the right to grant rights of way and easements over, upon or across the leased premises for public highway, telephone, power lines, etc. I recently brought this to JK's attention as it looks like this could be in the path of a much needed road. You need to get you a copy of this when you are in. Someone is going to have to work with the City on this.

3). Sec. 30, T22S, R3E (East Las Cruces south of Hwy 70):

GT-2637 Dale Hopkins has a total of 2854 acres under this lease which expires 9/30/08.

4). Sec. 31, T22S, R3E (East Las Cruces south of Hwy 70):

N2W2NW4 - GT-2637 Dale Hopkins has 80 acres.

S2W2SW4 - GM-3024 A.B. Cox has 80 acres. His total lease includes 2473 total acres expires 9/30/09.

Other sections in the P&D Leases are not encumbered with a grazing lease or a business lease (I think, if I find out different, I will let you know).



Copy of  
 Relinquishment.doc (6: ST TO LEASE LA...

Commercial-REQUE  
 Attaching these in case you need them.

Dell