

1 BY AUTHORITY

2 ORDINANCE NO. _____
3 SERIES OF 2010

COUNCIL BILL NO. _____
COMMITTEE OF REFERENCE:
ECONOMIC DEVELOPMENT

5 A BILL

6 For an ordinance approving a proposed Loan Agreement between the City and
7 County of Denver and Constellation Solar V, LLC related to a new solar plant at
8 Denver International Airport.

10 **BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

11 **Section 1.** The proposed Loan Agreement, Contract Control Numbers CE 0A040; AR
12 1A001, in the words and figures contained and set forth in that form of Loan Agreement filed in the
13 office of the Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver, on the 29th
14 day of July, 2010, City Clerk's Filing No. 10-794 is hereby approved.

16 COMMITTEE APPROVAL DATE: July 23, 2010.

17 MAYOR-COUNCIL DATE: July 27, 2010.

18 PASSED BY THE COUNCIL _____ 2010

19 _____ - PRESIDENT

20 APPROVED: _____ - MAYOR _____ 2010

21 ATTEST: _____ - CLERK AND RECORDER,
22 EX-OFFICIO CLERK OF THE
23 CITY AND COUNTY OF DENVER

24 NOTICE PUBLISHED IN THE DAILY JOURNAL _____ 2010; _____ 2010

25
26 PREPARED BY: Norman Higley; NH DATE: July 29, 2010

27 Pursuant to Section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the
28 City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
29 ordinance. The proposed ordinance is submitted to the City Council for approval pursuant to § 3.2.6
30 of the Charter.

31 David R. Fine, City Attorney

32 BY: _____, _____ City Attorney

33 DATE: July 29, 2010

LOAN AGREEMENT

THIS LOAN AGREEMENT (this "Loan Agreement" or "Agreement"), is made and entered into as of the date set forth on the signature page below, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, ("Lender" or "City"), and Constellation Solar V, LLC, a Delaware limited liability company ("Borrower").

WITNESSETH:

WHEREAS, pursuant to Section 516 of the 1984 Airport System General Bond Ordinance, Ordinance No. 626, Series of 1984, as supplemented and amended to the date hereof (the "General Bond Ordinance"), Net Revenues remaining in the Capital Fund established under the General Bond Ordinance after all deposits and credits required under the General Bond Ordinance have been made are permitted to be used for any lawful purposes relating to the Airport System (as defined in the General Bond Ordinance) as the Manager of the City's Department of Aviation (the "Manager") may from time to time determine; and

WHEREAS, the Manager has determined that it is necessary and in the best financial interests of the Airport System that such Net Revenues remaining in the Capital Fund in the amount of \$7,500,000 be loaned to the Borrower for the purposes and on the terms provided in this Loan Agreement; and

WHEREAS, the Borrower is ready, willing, and able to meet the conditions of this Loan Agreement.

NOW, THEREFORE, in consideration of the premises and mutual agreements herein contained, the parties agree as follows:

1. **CONTINGENCIES:** The City's loan is contingent upon the following:

A. **Conditions Precedent to Closing:**

City's obligation to make any advance to the Borrower under this Agreement is subject to the following conditions precedent, with all documents, instruments, opinions, reports, and other items required under this Agreement to be in form and in substance satisfactory to City.

10-794

- City shall have received evidence that this Agreement and all related documents have been duly authorized, executed, and delivered by Borrower to City.
- City shall have received such opinions of counsel, supplemental opinions, and documents as City may request.
- The security interest in the Collateral shall have been duly authorized, created and perfected with first lien priority and shall be in full force and effect.
 - Security Agreement required by City for the credit shall have been executed by Borrower, delivered to City and be in full force and effect.
- City, at its own option and for its sole benefit, shall have conducted an audit of Borrower's accounts, inventory, equipment, books, records and operations, and City shall be satisfied as to their conditions.
- Borrower represents and warrants to City that it is a limited liability company for profit which is, and at all times shall be duly organized, validly existing, and in good standing under and by virtue of the laws of the State of Delaware.
- Unless otherwise previously disclosed to City in writing, Borrower has not entered into or granted any security agreements, or permitted the filing or attachments of any security interest on or affecting any of the Collateral directly or indirectly securing repayment of Borrower's Loan and Note, that would be prior or that may in any way be superior to City's security interests and rights in and to such Collateral.

B. Perfection of Security Interest: Borrower agrees to execute a Security Agreement perfecting City's security interest and to take whatever actions are reasonably requested by City to perfect and continue City's security interest in the collateral. Upon request of City, Borrower will deliver to Lender any and all of the documents evidencing or constituting the Collateral (i.e., lien releases from Borrower's subcontractors), and Borrower will note City's interest upon any and all chattel paper and instruments if not delivered to City for possession of City.

Contemporaneous with the execution of this Agreement, Borrower will execute one or more UCC financing statements and any similar statements as may be required or permitted by applicable law, and City will file such financing statement and all such similar statements in the appropriate location or locations.

C. Representations and Warranties Concerning Equipment: With respect to the equipment, Borrower represents and warrants to City: (1) All equipment represented by Borrower to be equipment for purposes of this Agreement and attached to Exhibit A of the Solar Power Purchase Agreement conforms to the requirements of the definition of equipment; (2) All equipment values listed on schedules delivered to City will be true and correct, subject to immaterial variance; (3) The value of the equipment will be determined on a consistent accounting basis; (4) Except as agreed to the contrary by City in writing, all equipment is now and at all times hereafter will be in Borrower's physical possession; (5) Except as reflected in the equipment schedules delivered to City, all eligible equipment is now and at all times hereafter will be of good quality, and free from defects, subject to normal wear and tear; (6) Eligible equipment is not now and will not at any time hereafter be stored with a bailee, warehouseman, or similar party without City's prior written consent, and, in such event, Borrower will concurrently at the time of bailment cause any such bailee, warehouseman, or similar party to issue and deliver to City, in form acceptable to City, warehouse receipts in City's name evidencing the storage of equipment; and (7) City, its assigns, or agents shall have the right at any time during Borrower's normal business hours and at City's expense to inspect and examine the equipment and to check and test the same as to quality, quantity, value and condition.

2. LOAN TO BORROWER: Subject to the terms of this Loan Agreement, on the Commercial Operation Date set forth in the Solar Power Purchase Agreement between City and Borrower, the City agrees to lend Borrower the sum of Seven and a half Million Dollars (\$7,500,000.00), to be repaid, together with interest at the rate of five and one-half percent (5.5%) per annum ("Base Rate"), over a term of twenty (20) years. Such principal and interest shall be due and payable in annual installments of Six Hundred Twenty Seven Thousand Five

Hundred Ninety Four Dollars (\$627,594) commencing 12 months after the date of disbursement of the funds to the Borrower and following execution of a promissory note in form attached hereto which is satisfactory to the City evidencing this loan (the "Promissory Note"), and should continue thereafter on the 12 month anniversary each succeeding year. The entire unpaid balance shall be due and payable on or before the first day of the twentieth (20th) year following the date of disbursement of the funds to the Borrower the Lender. Interest shall commence accruing upon the date of disbursement of the funds to the Borrower following the execution of the Promissory Note.

3. SECURITY FOR REPAYMENT: As security for this loan, the Borrower agrees execute a Security Agreement to grant and properly perfect a security interest in all of its assets, including accounts, goods, inventory, machinery, equipment, furniture, fixtures, contract rights, and general intangibles, now owned or hereafter acquired, and wherever located, but including those located at Denver International Airport, Denver, Colorado (the "Collateral"), and the proceeds thereof. The City's security interest shall be documented in the Security Agreement, referred to herein as the "UCC Security Documents."

4. SUBORDINATION: (INTENTIONALLY DELETED).

5. USE AND DISBURSEMENT OF FUNDS: Loan proceeds will be used for the acquisition of the completed commissioned 4.3MWDC photovoltaic solar electrical generation plant, as more fully described on Exhibit A to the Solar Power Purchase Agreement. The 4.3MWDC photovoltaic solar electrical generation plant will be located on the property, as more fully described in the Ground Lease Agreement (the "Property").

Acquisition funds will be disbursed at a scheduled closing, payable to Borrower.

6. DEADLINE FOR DISBURSEMENT OF FUNDS: Borrower agrees that all conditions required for a closing hereunder shall have been met within three hundred and sixty five (365) days following the date of this Loan Agreement, or the City may terminate this Loan Agreement. All documentation will be submitted on or before loan closing. These deadlines may be extended with the written approval of the City.

7. DESIGN STANDARDS: Borrower agrees to complete the construction or installation on the Property in accordance with plans approved by the City.

8. ENVIRONMENTAL: No loan proceeds may be obligated or spent until Borrower has received written environmental clearance from the City, which shall not be

unreasonably withheld, conditioned or delayed. Any special environmental conditions reasonably imposed by the City must be incorporated into the design and construction of the project. The Borrower covenants that it shall not allow any hazardous substances to be above, in, on, or under the Property, and that it shall not generate, use, have, manage or release or allow (to the extent subject to Borrower's control) the generation, use, presence, management or release of any hazardous substance above, in, on, under or from the Property. Borrower shall be solely responsible for, and shall indemnify and hold harmless the City, its officers, agents, and employees, from and against any loss, damage, cost, expense or liability directly or indirectly arising out of or attributable to the use, generation, storage, release, threatened release, discharge, disposal or presence of hazardous substances on, under or about the Property to the extent caused by the operations, acts or omissions of Borrower.

9. DEFAULT AND ACCELERATION: (A) Borrower Default. Borrower expressly agrees that the refusal or inability of the Borrower to make the payments called for to the City, any other default or breach of this Loan Agreement, the Promissory Note, or UCC Security Documents, shall constitute a default. The City also may declare a default if any material warranty, representation or statement made or furnished to the City by or on behalf of Borrower in connection with this Loan proves to have been false in any material respect when made or furnished. Upon the existence of a default which remains uncured thirty (30) days after Borrower's receipt of written notice thereof, , or in the event the City exercises its option to purchase the System pursuant to paragraph 4.05, OPTION FOR PURCHASE OF SYSTEM, of the Ground Lease Agreement, the City shall have the right to accelerate any outstanding obligations of the Borrower, which shall be immediately due and payable, including payments under the Promissory Note. Borrower agrees to pay a late charge of the Base Rate plus 2% (i.e., 7.5%) per annum of any annual installment not received on or before the fifteenth (15th) day after the installment is due. (B) City Default. City shall be in default under this Loan Agreement if City breaches any material term and fails to cure such breach within sixty (60) days from receipt of written notice, becomes insolvent, or makes a bankruptcy filing that is not dismissed within sixty (60) days.

10. EXPENSES: Each Party agrees to pay all direct costs, expenses, and attorney fees reasonably incurred by the other Party in connection with the other Party's breach or default of this Loan Agreement, the Promissory Note, or UCC Security Documents. The Borrower

agrees to pay reasonable costs associated with the loan closing, but in no event greater than \$1,000.00.

11. INSECURITY: The Borrower agrees that should the City reasonably deem this loan to be insecure, in accordance with this Loan Agreement or with Borrower's Promissory Note if due solely to the voluntary or involuntary dissolution or cessation of business by the Borrower, the filing of a petition in bankruptcy or an assignment for the benefit of creditors, the breach of any loan agreement or security agreement to any other lenders on the project, such insecurity shall be deemed a default under the Article herein entitled "DEFAULT AND ACCELERATION" and the entire amount of the loan shall be immediately due and payable, notwithstanding the Borrower's full compliance with any payment obligations under this Loan Agreement or the Promissory Note.

12. EXAMINATION OF RECORDS: The Borrower agrees that the City or any of its duly authorized representatives shall, until the expiration of three (3) years after the final payment under this Loan Agreement, have access to and the right to examine any directly pertinent books, documents, papers and records of the Borrower involving transactions related to this Loan Agreement, subject to the Colorado Open Records Act and any other similar laws.

13. CONDITIONS: This Loan Agreement is subject to the City's Charter and Revised Municipal Code, as the same may be amended from time to time. The obligation of the City to lend the above sums shall only extend to payment of monies.

14. ASSIGNMENT: The City is not liable under this Loan Agreement to any party other than the Borrower. The Borrower shall not assign its interest in this Loan Agreement except upon prior written consent of the City which shall not be unreasonably withheld, conditioned or delayed.

15. INSURANCE: Borrower or its contractor shall procure and maintain insurance in the following types and amounts:

A. Builders' Risk or Installation Floater – Completed Value Basis: Unless otherwise provided, the Borrower shall purchase and maintain, in a company or companies lawfully authorized to do business in Colorado, Builders' Risk or Installation Floater Insurance in the amount of the initial Contract Sum, plus value of subsequent modifications, change orders, and cost of material supplied or installed by others, comprising total value of the entire Project at the site on a replacement cost basis. Policy must provide coverage from the time any covered property becomes the responsibility of the Borrower, and continue without interruption during construction, renovation, or installation, including any time

Personal/Advertising Injury	\$	1,000,000
Fire Damage (Any One Fire)	\$	50,000
Medical Payments (Any One Person)	\$	5,000

Coverage may be written utilizing an occurrence or claims-made format.

C. Automobile Liability: Bodily injury and property damage for any owned, hired, and non-owned vehicles used in the performance of this Contract.

Minimum Limits:

Bodily Injury/Property Damage (Each Accident)	\$	1,000,000
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D. Umbrella Liability/Excess Liability: Borrower, its Contractor or subcontractors may elect to utilize any combination of Primary Liability, Umbrella Liability or Excess Liability coverage that applies in excess of the Commercial General Liability, Automobile Liability, and Employers' Liability to satisfy such insurance requirements herein. Coverage shall be as broad as the primary coverages and shall include the City and County of Denver, its subsidiary, parent, associated and/or affiliated entities, successors, or assigns, its elected officials, trustees, and employees are included as an additional insured with respect to liability and defense of suits arising out of the activities performed by, or on behalf of the Borrower, including completed operations."

The Borrower's Contractor shall include all Subcontractors as insureds under its policy or shall furnish separate certificates of insurance for each subcontractor.

E. Worker's Compensation and Employers' Liability: Policy shall contain a waiver of subrogation against the City and County of Denver. This requirement shall not apply when a contractor or subcontractor is exempt under Colorado Workers' Compensation Act, **AND** when such contractor or subcontractor executes the appropriate sole proprietor waiver form.

The Borrower's Contractor and Subcontractors shall also carry Workers' Compensation and Employers' Liability coverages in compliance with Colorado State Law and shall contain a waiver of subrogation against the City and County of Denver.

Minimum Limits:

Coverage A (Worker's Compensation)		Statutory
Coverage B (Employers' Liability)	\$	500,000
	\$	500,000
	\$	500,000

F. Contractors' Pollution Liability: City and County of Denver requires this

coverage whenever work at issue under this Contract involves potential pollution risk to the environment or losses caused by pollution conditions that may arise from the operations of the Borrower or its Contractor or subcontractors. The Policy shall cover the Borrower's, Contractor's and subcontractor's completed operations.

Coverage shall apply to sudden and accidental pollution conditions resulting from the escape or release of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids, or gases, natural gas, waste materials, or other irritants, contaminants, or pollutants. If the coverage is written on a claims-made basis, the Borrower, its Contractor and subcontractors warrants that any retroactive date applicable to coverage under the policy precedes the effective date of this Loan Agreement; and that continuous coverage will be maintained or an extended discovery period will be exercised for a period of three (3) years beginning from the time that work under this Loan Agreement is completed.

Coverage shall be limited to third party personal injury or damage to personal property not incurred on the Property.

The policy from the Borrower shall include the following as Additional Insureds: "City and County of Denver, its subsidiary, parent, associated and/or affiliated entities, successors, or assigns, its elected officials, trustees, and employees included as an additional insured with respect to liability and defense of suits arising out of the activities performed by, or on behalf of the Contractor, including completed operations."

Minimum Limits:

Per Loss	\$	1,000,000
Aggregate	\$	1,000,000

G. Property Insurance: Borrower shall provide permanent property coverage after installation, in amounts specified below subject to the UCC Security Documents. The Property insurance shall be written on a Covered Cause of Loss-Special Form or its equivalent, replacement cost coverage, including coverage for flood and earth movement.

The City and County of Denver shall be named as mortgagee/loss payee and a waiver of subrogation shall apply the City and County of Denver as Mortgagee/Loss Payee.

Property Coverage	100% of the replacement cost of the Property
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16. INDEMNIFICATION: The Borrower shall defend, release, indemnify and save and hold harmless the City against any and all damages to property or injuries to or death of any

person or persons, including property and employees or agents of the City, and shall defend, release, indemnify, and save and hold harmless the City from any and all claims, demands, suits, actions, liabilities, causes of action or legal or equitable proceedings of any kind or nature, including workers' compensation claims, of or by anyone whomsoever, in any way to the extent resulting from or arising out of the Borrower's negligent activities or performance in connection herewith, including acts or omissions of the Borrower or its officers, employees, representatives, suppliers, invitees, licensees, subconsultants, subcontractors, and agents. This indemnity clause shall also cover the City's defense costs, in the event that the City, in its sole discretion, elects to provide its own defense. This indemnification obligation shall survive termination of this Loan Agreement.

Insurance coverage specified constitutes the minimum requirements, and these requirements do not lessen or limit the liability of the Borrower under this Loan Agreement. The Borrower shall maintain, at its own expense, any additional kinds and amounts of insurance that it may deem necessary.

17. WAIVER: No waiver of any breach or default under this Loan Agreement shall be held to be a waiver of any other or subsequent breach or default. All remedies afforded in this Loan Agreement shall be construed as cumulative, in addition to every other remedy provided herein or by law.

18. NO DISCRIMINATION IN EMPLOYMENT: In connection with the performance of work under this contract, the Borrower agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability; and the Borrower further agrees to insert the foregoing provision in all subcontracts hereunder.

19. BINDING EFFECT: This Loan Agreement shall be binding upon the parties and shall inure to the benefit of their respective successors, assigns, representatives, and heirs.

20. COMMERCIAL TRANSACTION: Borrower agrees and warrants that this Loan Agreement and the obligations created herein constitute a commercial transaction and is not a consumer obligation or consumer related loan or obligation.

21. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION:

A. The Contractor represents and warrants that it and its principals are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency.

B. The Contractor will not enter into any lower tier transaction with a person who is debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in a covered transaction unless authorized by the federal agency from which the transaction originated.

C. The Contractor shall include the certification contained in subparagraph A of this section in any and all subcontracts hereunder and shall require any subcontractors or subconsultants to comply with any and all applicable federal laws, rules and regulations, policies and procedures or guidance concerning the federal debarment, suspension, and exclusion program.

D. The Contractor will immediately notify the City in writing if at any time it learns that it failed to disclose that it or any of its principals were excluded at the time the parties executed this contract if due to changed circumstances the Contractor or any of its principals have subsequently been excluded by a federal agency.

E. The representation made in subparagraph A of this section is a material representation of fact upon which reliance was placed when this transaction was entered into.

22. FEDERAL LABOR STANDARDS: Borrower must assure that its contractors and subcontractors comply with applicable federal labor standards, including payment of wages in accordance with the City's Prevailing Wage Ordinance. Borrower must obtain current wage rates from the City, and include current wage rates in all bid specifications and construction contracts. The City shall have no responsibility for any failure by Borrower or its contractors to pay current wage rates.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties have executed through their respective authorized representatives, this Loan Agreement as of _____, 2010.

ATTEST:

STEPHANIE Y. O'MALLEY,
Clerk and Recorder, Ex-Officio Clerk
of the City and County of Denver

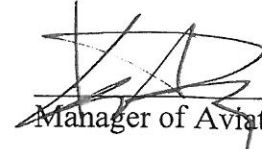
APPROVED AS TO FORM:
DAVID R. FINE
for the City and County of Denver

By: _____
Assistant City Attorney

CITY AND COUNTY OF DENVER

By: _____
Mayor

RECOMMENDED AND APPROVED:

By:  _____
Manager of Aviation

REGISTERED AND COUNTERSIGNED:


By: _____
Manager of Finance
Contract Control No. CE 0A040;
AR 1A001

By: _____
Auditor

"CITY"

Constellation Solar V, LLC
a Delaware limited liability company

I.R.S. No. 27-2841359

By:  _____
Title: Gregory S. Jarosinski, President

"BORROWER"

FORM OF
PROMISSORY NOTE

Form of Promissory Note

Borrower: Constellation Solar V, LLC
a Delaware limited liability company

Note Date: _____, 2010

Principal Amount: **\$7,500,000**

FOR VALUE RECEIVED, Borrower promises to pay to the order of the City and County of Denver, a municipal corporation of the State of Colorado, ("Lender"), 8500 Pena Boulevard Denver, Colorado 80249-6340 (the "City"), the principal sum of Seven Million Five Hundred Thousand Dollars (\$7,500,000), advanced by the City pursuant to the Loan Agreement (the "Loan Agreement") between Borrower and the City together with interest on the outstanding unpaid balance of such principal amount at the rate of Five and One Half percent (5.5%) per annum.

Principal and interest shall be due and payable over a term of twenty (20) years after disbursement of the funds to Borrower. In annual installments of Six Hundred Twenty Seven Thousand Five Hundred Ninety Four Dollars (\$627,594), commencing twelve (12) months after disbursement of the funds to Borrower, and continuing thereafter on the first day of each succeeding year during the indebtedness. The balance remaining unpaid plus accrued interest shall be due and payable on or before the first day of the Twentieth (20th) year. All payments of principal and interest shall be made at the City's offices at the address shown above, or at such other place as the City shall have designated to Borrower in writing. Interest shall commence accruing upon disbursement of the funds to the Borrower following execution of this Promissory Note.

In the event that Borrower shall fail to make any annual payment due to the City within fifteen (15) days after the due date thereof, the City may at its option impose a late charge upon Borrower in an amount not to exceed seven and one half percent (7.5%) per annum of said unpaid annual payment. Borrower agrees that such charge reasonably approximates the damage to the City that will result from a late payment. Lender's imposition of late payment charges shall not limit in any manner Lender's other rights and remedies provided herein or in the Loan Agreement or the Security Document (as defined below).

This Promissory Note may be prepaid in whole or in part, at any time, without notice or penalty. Partial prepayments will not, unless agreed to by City in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule.

This Promissory Note is secured by, and the holder of this Promissory Note is entitled to the benefits of, a Security Agreement of even date herewith (the Security Agreement being referred to herein as the "Security Document"). Reference is made to the Security Document for a description of the property covered thereby and the rights, remedies and obligations of the holder hereof in respect thereto.

In the event of (i) any default in any payment of the principal or interest on this Promissory Note when due and payable, or (ii) any default or event of default under the provisions of the Loan Agreement then the unpaid principal balance of this Promissory Note, plus accrued interest and all other obligations of Borrower to City, direct or indirect, absolute or contingent, now existing or hereafter arising, shall, at the option of the City, become immediately due and payable upon notice or demand, and the City shall have and may exercise any and all of the rights and remedies provided herein or in the Loan Agreement or the Security Document.

In the event of any such default, Borrower agrees to pay on demand all of the City's reasonable

Form of Promissory Note

costs and expenses incurred for the recovery of all or any part of or for the protection of the indebtedness, or to enforce the City's rights under the Loan Agreement or Security Document, including, without limitation, reasonable attorneys' fees.

Borrower waives presentment, notice of dishonor, notice of acceleration and protest, and assents to any extensions of time with respect to any payment due under this Promissory Note, to any substitution or release of collateral and to the addition or release of any party. No waiver of any payment or other right under this Promissory Note shall operate as a waiver of any other payment or right.

This Promissory Note is made and dated as of the date above written, and is to be governed by and construed according to the laws of the State of Colorado.

Constellation Solar V, LLC
a Delaware limited liability company

I.R.S. No. 27-2841359

By: _____

Title: Gregory S. Jarosinski, President

"BORROWER"