



SOUTH FEATHER WATER & POWER AGENCY

TO: Board of Directors

FROM: Michael Glaze, General Manager

DATE: March 14, 2007

**RE: SPG Solar Software Agreement
Agenda Item for 3/27/07 Board of Directors Meeting**

SPG Solar (previously known as Sun Power and Geothermal Energy) installed new internet-based monitoring software for the Miners Ranch solar system in early 2006. The Agency was then asked by SPG Solar to execute a software license agreement for the new system to ensure that its proprietary interests in the software were protected.

The software license agreement originally proposed by SPG shortly after the software was installed was a modified version of one it was using with private commercial and residential customers and, therefore, totally inappropriate for a public agency. My objections to it led to a lengthy and sluggish revision process.

Finally, after over a year of negotiations, I can recommend the attached agreement for the Board's approval. The software covered by the agreement was installed at no additional expense by SPG, and the agreement does not impose any new fees on the Agency (the \$15,000 specified in Section 4 was "included in the PV Systems contract" and paid at the time the solar project was built).

Please consider the following action:

"I move approval of the SunSpot Software and Hardware License Agreement with SPG Solar, Inc., and authorize its execution by the General Manager."



SPG SOLAR, INC. SunSpot® Software and Hardware License Agreement

This Software and Hardware License Agreement (“Agreement”) is entered into as of _____, 200_ by and between **SPG Solar, Inc.** (hereinafter “SPG”), a California corporation, with offices located at 863 East Francisco Boulevard, Suite A, San Rafael, California, 94901, and _____ (“Client”), a _____ (Corporation, LLC, Sole Proprietorship), with offices located at: _____.

Purpose: This Agreement covers the use by Client of SPG’s SunSpot® Monitoring System. The SunSpot Monitoring System allows Client to obtain certain information about the performance of the photovoltaic power system installed by SPG for Client (the “PV System”).

In consideration of the promises and covenants contained herein, SPG and Client agree as follows:

1. DEFINITIONS. The following defined terms are used in this Agreement:

“Associated Hardware” means the electric meters, temperature sensors, microprocessor, Sunpak interface, and associated equipment installed by SPG or with the written approval of SPG as listed in the specifications for the SunSpot Monitoring System.

“Documentation” means the manuals and documentation for use by Client in connection with the operation of the SunSpot Monitoring System.

“eSunSpot Website” means the web site hosted by SPG that allows Client to access information about the PV System.

“Kiosk” means the desktop computer and integrated enclosure that allows users to access the SunSpot Data.

“Kiosk Software” means the software provided by SPG for installation on the Kiosk if Client purchases the Kiosk.

“Monitoring Software” means the software loaded by SPG on the microprocessor that is part of the Associated Equipment.

“Site” means Client’s facility located at: _____.

“SunSpot Data” means information about the performance of the PV System that is monitored and made available on the SunSpot Monitoring System.

“SunSpot Monitoring System” means the Associated Hardware, Monitoring Software, eSunSpot Website, Documentation and, if Client purchases the Kiosk, the Kiosk and the Kiosk Software.

2. LICENSE.

2.1 License Grant. Subject to the terms and conditions of this Agreement, SPG grants a limited, nonexclusive, nontransferable license to Client to (i) use the Associated Hardware and the Monitoring Software to monitor and obtain SunSpot Data; (ii) use the eSunSpot Website to access and

download SunSpot Data; and (iii) if Client purchases the Kiosk, install the Kiosk Software on the Kiosk at the Site and use it to access SunSpot Data. The Associated Hardware and the Monitoring Software may only be used together and only as part of the SunSpot Monitoring System. The Kiosk Software may only be used with the Kiosk and only as part of the SunSpot Monitoring System. All rights not expressly granted to Client are reserved by SPG.

2.2 Restrictions on Use. Client shall use the Monitoring Software only at the Site where the PV System and Associated Hardware have been installed by or under the authorization of SPG and shall use the SunSpot Monitoring System only for Client's internal business purposes. The right to use the Software granted herein permits Client to use the application links only within Client's own organization. Client shall not (i) permit any parent, subsidiaries, affiliated entities or third parties to use the SunSpot Monitoring System, (ii) process or permit to be processed the data of any third party, (iii) use the Sunspot Monitoring System to monitor any electrical generation system other than the PV System, (iv) allow access to the SunSpot Data through any terminals or computers, other than those authorized by SPG, located outside of the Site, (v) provide any third party with access to the eSunSpot Website, Monitoring Software, Kiosk Software, or Associated Hardware; (vi) frame any page or portion of the eSunSpot Website or create or facilitate the creation of hyperlinks and/or frames to the eSunSpot Website; (vii) use the eSunSpot Website in any manner which violates any applicable laws; or (viii) knowingly introduce viruses or otherwise cause harm to any part of the SunSpot Monitoring System.

2.3 Security. Client's access to the eSunSpot Website to monitor the PV System and obtain SunSpot Data shall be password and user-ID protected and limited to key employees subject to the confidentiality provisions of this Agreement. Client shall not share with any third parties the passwords and/or User-ID's used by Client to obtain the SunSpot Data. Client shall not permit any links to be displayed or take any other action that will circumvent the password protection. Client shall be responsible for any actions taken under its passwords and/or User-ID's.

2.4 Copies. Client may make one archival copy of the Kiosk Software solely to enable Client to use the Kiosk Software, provided that the copy shall include SPG's copyright and any other proprietary notices. The Kiosk Software delivered by SPG to Client and the archival copy shall be stored at the Site. Client shall have no other right to copy the Kiosk Software in whole or in part and shall have no right to copy the Monitoring Software. Any copy of the Kiosk Software made by Client shall be the exclusive property of SPG.

2.5 Material Terms & Conditions. Each of the terms and conditions of this Section 2 are material terms of this Agreement. The failure of Client to comply with these terms and conditions shall constitute sufficient cause for SPG to terminate this Agreement. The presence of this Section 2.5 shall not be relevant in determining the materiality of any other provision or breach of this Agreement by either party.

3. DELIVERY & ACCEPTANCE. SPG shall deliver the Monitoring Software, the Associated Hardware and, if the Kiosk is purchased, the Kiosk and Kiosk Software, to the Site within 10 days after the utility interconnection, as confirmed by a "Permission to Operate" letter generated by the utility. Acceptance shall occur upon completion of installation of the Software and Associated Hardware by SPG or as authorized by SPG in writing.

4. CONSIDERATION. This license for use of the SunSpot Monitoring System under the terms and conditions of this Agreement is granted in consideration for Client's payment of the fee of \$ \$15,000.00 , which is included in the PV Systems contract. Client shall pay all sales, use, value added or other taxes, federal, state, local or otherwise, however designated, that are levied or imposed by reason of the transactions contemplated by this Agreement.

5. OWNERSHIP. Client acknowledges and agrees that SPG owns and retains exclusive ownership of and title to the SunSpot® Monitoring Software, eSunSpot.com and Kiosk software, including all patent, copyright, trade secret, trademark and other proprietary rights, and any enhancements, updates, corrections, bug fixes or other modifications to the Software, whether made by SPG or any third party. **SPG acknowledges that the client owns the Associated Hardware.** The Client acknowledges that SPG can

replace the Associated Hardware as long as SPG provide equivalent or enhanced functionality of the existing Associated Hardware. The Client further acknowledges that SPG owns the Intellectual Property rights to the Associated Hardware.

6. ASSOCIATED HARDWARE INSTALLATION, MODIFICATION AND UPGRADES. SPG shall maintain the Associated Hardware for the duration of the warranty, which is five years from the date of acceptance under Section 4 above (the "Warranty Term"). The installation or replacement of the Associated Hardware or any upgrades shall be performed only by SPG or only after written consent from SPG. SPG may replace the Associated Hardware, as long as the replacement is an SPG-provided equivalent or results in enhanced functionality. Client shall provide reasonable physical access to the Associated Equipment at the Site so that SPG can fulfill its obligations under this Section 6. If Client fails to provide such access or if Client upgrades or tampers with the Associated Hardware without SPG's authorization, SPG's obligation to maintain and/or replace the Associated Hardware shall be void. Client shall not modify, alter, tamper with, or disassemble the Associated Hardware.

7. SOFTWARE MAINTENANCE & UPGRADES. SPG shall maintain the Monitoring Software and, if purchased, the Kiosk Software for the Warranty Term. SPG may replace or upgrade the Monitoring Software or the Kiosk Software, as long as the replacement is an SPG-provided equivalent or results in enhanced functionality. Client shall provide electronic access to the Monitoring Software and shall install any update to the Kiosk Software on the Kiosk so that SPG can fulfill its obligation under this Section 7. If Client breaches this provision, SPG's obligation to maintain and/or replace the Monitoring Software and the Kiosk Software shall be void. Client shall not modify, decompile, reverse engineer, copy (except as provided in Section 2.4, distribute, or create any derivative work of, the Monitoring Software, the Kiosk Software or the eSunSpot Website.

8. RIGHTS TO SYSTEM DATA. Customer acknowledges that SPG will compile certain information related to the performance of the PV System array and the Associated Hardware under this License relating to the SunSpot Monitoring System ("Data"). Client agrees that SPG may use such Data for at its discretion; provided that SPG may only disclose the Data: (a) if requested to do so by a utility company or government agency; (b) as required by law; (c) if SPG does not identify the Client, its street address or its business; or (d) if the Data is disclosed collectively with other performance data such that the Data cannot be independently identified with Client or the PV System. SPG shall arrange for the Data to be backed-up from time to time according to reasonable procedures approved by SPG

9. INTELLECTUAL PROPERTY INDEMNIFICATION BY SPG. In the event that any claim is made against Client that the Sunspot Monitoring System (other than the Kiosk) or Client's use thereof infringes or otherwise violates the patent, copyright, trade secret right or other intellectual property rights of any third party (a "Third Party Claim"), SPG shall indemnify, defend and hold Client harmless from and against all losses, claims, obligations, demands, assessments, penalties, liabilities, costs, damages, reasonable attorneys' fees and expenses (including, without limitation, all costs of experts and all costs incidental to or in connection with any appellate process) (collectively, "Damages") asserted against or incurred by Client arising out of or resulting from such Third Party Claim. SPG shall have full control of the action it takes to discharge its obligation under this Section 9. Client may participate in, but not control, any such action and shall bear its own costs and expenses with respect to such participation. If Client becomes aware of a Third Party Claim, Client shall promptly provide written notice thereof to SPG (the "Notice") describing in reasonable detail the nature of the use, action or event giving rise to the Notice and include a copy of all papers (if any) served with respect to any Third Party Claim. In the case of any claim that the SunSpot Monitoring Services infringe the rights of a third party, SPG shall either, at its option, (a) procure for Client the right to continue using the SunSpot Monitoring System; (b) replace or modify the SunSpot Monitoring System so that that its becomes non-infringing, but equivalent in functionality and performance; or (c) refund a pro rata portion of the fee (Section 4) based on the remaining term of the Agreement and remove the SunSpot Monitoring System.

10. INTERNET DELAYS. The SunSpot Monitoring System may be subject to limitations, delays, and other problems inherent in the use of the internet and electronic communications. SPG is not responsible for any delays, data problems, or other damage resulting from such internet problems.

11. DISCLAIMER OF WARRANTIES; LIMITATION OF DAMAGES.

11.1 EXCEPT AS PROVIDED IN SECTIONS 6 AND 7 ABOVE, THE SUNSPOT MONITORING SYSTEM IS PROVIDED "AS IS" AND SPG MAKES NO WARRANTIES OR REPRESENTATIONS CONCERNING THE SUNSPOT MONITORING SYSTEM OR ANY RESULTS TO BE ACHIEVED THROUGH USE OF THE SAME. SPG ADDITIONALLY MAKES NO WARRANTIES OR REPRESENTATIONS THAT THE SUNSPOT MONITORING SYSTEM SHALL BE UNINTERRUPTED OR ERROR FREE. SPG ALSO DISCLAIMS ALL OTHER WARRANTIES, INCLUDING THE WARRANTIES OF MERCHANTABILITY, QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND ALL WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE.

11.2 SPG SHALL NOT BE LIABLE TO CLIENT FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND OR NATURE, REGARDLESS OF WHETHER SPG HAS BEEN WARNED OF THE POSSIBILITY OF ANY SUCH LOSS OR DAMAGE. ADDITIONALLY, SPG SHALL NOT BE LIABLE FOR THE COST OF PROCUREMENT OF SUBSTITUTE ELECTRIC POWER RESULTING FROM INTERRUPTION IN THE SUNSPOT MONITORING SYSTEM OR RESULTING FROM UNAUTHORIZED ACCESS TO OR ALTERATION OF SUNSPOT DATA OR ARISING FROM ANY OTHER MATTER RELATING TO THE SUNSPOT MONITORING SYSTEM. THIS INCLUDES, BUT IS NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS, USE, DATA OR OTHER INTANGIBLES. IN NO EVENT SHALL SPG'S LIABILITY EXCEED THE LICENSE FEE PAID BY CLIENT TO SPG UNDER SECTION 4 OF THIS AGREEMENT PRIOR TO THE EVENT RESULTING IN THE CLAIM.

12. INDEMNIFICATION. Contractor will indemnify and hold Client harmless from all liabilities to the extent caused by the negligent acts of Contractor, its agents, or employees.

13. CONFIDENTIALITY. During the term of this Agreement, SPG and Client acknowledge that neither party may provide confidential and proprietary information to the other parties, including without limitation, information about the SunSpot® Monitoring System, information concerning proprietary technology and products, technical data, system programming, software processes, ideas, concepts, formulas, designs, engineering, trade secrets, know-how, and Client information.

14. ARBITRATION OF DISPUTES; MEDIATION. Any dispute, controversy or claim with respect to the terms or performance of this Contract will be first submitted to mediation. If the matter is not resolved by mediation, or a party refuses to participate after receiving notice, then either party may submit the matter to binding arbitration. Mediation and/or arbitration will be conducted before a neutral retired judge or attorney appointed by the initiating party's selection of one of the following organizations to administer the mediation/arbitration process: the American Arbitration Association; JAMS; or Resolution Remedies. Any mediation/arbitration fees will be divided equally between the parties involved. The prevailing party at arbitration will be awarded its costs, including attorneys' fees, and the arbitration award may be entered in any court having jurisdiction.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISIONS DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE “ARBITRATION OF DISPUTES” PROVISION TO NEUTRAL ARBITRATION.

I agree to arbitrate _____
Initials of Owner

I agree to arbitrate _____
Initials of SPG

15. GOVERNING LAW.

This Agreement shall be governed by and construed in accordance with the laws of the State of California without reference to its principles of conflicts of laws.

16. ENTIRE AGREEMENT. This Agreement constitutes the complete and exclusive statement of the agreement between the parties and supercedes all proposals, oral or written, and all communications between the parties relating to the subject matter of this Agreement. If any provision or portions of any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the remaining provisions shall be valid and enforceable to the extent possible.

17. TERM & TERMINATION. This Agreement and the license granted herein shall take effect upon the Effective Date set forth below and shall remain in effect for five (5) years and shall renew automatically thereafter until terminated as set forth herein.

17.1 Termination. Either party shall have the right to terminate this Agreement and the license granted herein upon the occurrence of the following: (a) in the event either party gives 30 days prior written notice of termination after the initial five (5) year term, (b) in the event that Client or SPG violates any provision of this Agreement at any time, or (c) in the event SPG or Client terminates or suspends its business, becomes subject to any bankruptcy or insolvency proceeding, becomes insolvent or subject to control by a trustee or receiver, or has wound up or liquidated its business at any time. Section 5 and Sections 8 to 16 shall remain binding and in full force and effect, notwithstanding any expiration or termination of this Agreement.

17.2 Action Upon Termination. Upon termination of this Agreement, Client shall immediately cease to use the SunSpot Monitoring System (other than the Kiosk for purposes unrelated to the PV System) and shall terminate all associated links to the eSunSpot Website from each Client computer using the system pursuant to this Agreement. Within 10 days after any termination of this Agreement, Client shall return to SPG at Client’s expense the Kiosk Software, Monitoring Software, and all software copies and deliver to SPG a certification in writing signed by an officer of Client that the foregoing and all copies have been returned and the use of the SunSpot Monitoring System has been discontinued.

18. ASSIGNMENT. Client shall not assign this Agreement or otherwise transfer the Software to any third party, including any person, parent, subsidiary, affiliated entity or other party, or as part of the sale of any portion of its business, or pursuant to any merger, consolidation or reorganization, without SPG’s prior written consent.

19. GENERAL. All notices required under this Agreement shall be in writing and shall be delivered by overnight delivery service or by hand delivery to the addresses below and shall be deemed delivered on the date of delivery. The failure of either party to exercise any right provided under this Agreement shall not be deemed a waiver of any further right under this Agreement. This Agreement may only be modified or amended by a written document executed by an officer of SPG and Client.

The parties hereby acknowledge that they have read this Agreement, understand and agree to all terms and conditions stated herein and agree to be bound by its terms and warrant that they are duly authorized to execute this Agreement.

AGREED TO AND ACKNOWLEDGED:

SPG Solar, Inc.

By: _____

Name: _____

Title: _____

863 East Francisco Boulevard, Suite A

San Rafael, California 94901

Effective Date: _____
(Building Final Date)

Client: _____

By: _____

Name: _____

Title: _____

Address: _____

City, State, Zip: _____

Date: _____