L. MITCHELL JONES (U.S.B. 5979)
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MARK L. SHURTLEFF (U.S.B. 4666)
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DIVISION OF OCCUPATIONAL
& PROFESSIONAL LICENSING

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSE OF **MITCHELL EXCAVATION, INC** TO OPERATE AS A CONTRACTOR IN THE STATE OF UTAH	)))))	**STIPULATION AND ORDER** CASE NO. DOPL 2010- 110

MITCHELL EXCAVATION, INC ("Respondent") and the Construction Services Commission ("Commission") of the Department of Commerce of the State of Utah stipulate and agree as follows:

1. Respondent admits the jurisdiction of the Commission and the Division of Occupational and Professional Licensing ("Division") over Respondent and over the subject matter of this action. Scott Mitchell is the owner of Respondent company and Donald L. Lyster is the E-100 classification qualifier of Respondent company. Both individuals are authorized to act as agents for and enter into binding agreements on behalf of Respondent company. In this Stipulation and Order, the term "Respondent" shall mean Mitchell Excavation, Inc, Scott Mitchell, and Donald L Lyster, collectively and individually.

2. Respondent acknowledges that Respondent enters into this Stipulation knowingly and voluntarily.

3. Respondent understands that Respondent has the right to be represented by counsel in this matter and Respondent's signature below signifies that Respondent has either consulted with an attorney or Respondent waives Respondent's right to counsel in this matter.

4. Respondent understands that Respondent is entitled to a hearing before the Commission, or other Presiding Officer, at which time Respondent may present evidence on Respondent's own behalf, call witnesses, and confront adverse witnesses. Respondent acknowledges that by executing this document Respondent hereby waives the right to a hearing and any other rights to which Respondent may be entitled in connection with said hearing. Respondent understands that by signing this document Respondent waives all rights to any administrative and judicial review as set forth in Utah Code Ann. §§ 63G-4-301 through 63G-4-405 and Utah Administrative Code R151-46b-12 through R151-46b-15. Respondent and the Division hereby express their intent that this matter be resolved expeditiously through stipulation as contemplated in Utah Code Ann. § 63G-4-102(4).

5. Respondent waives the right to the issuance of a Petition and a Notice of Agency Action in this matter.

6. Respondent acknowledges that this Stipulation and Order, if adopted by the Commission and Division, will be classified as a public document. The Commission and Division may release this Stipulation and Order, and will release other information about this disciplinary action against Respondent's license to other persons and entities.

7. Respondent admits the following facts are true:

a. Respondent company was first licensed as a contractor in the State of Utah on or about October 2, 1997.

b. Donald L. Lyster was named as E-100 classification qualifier for Respondent company on an additional classification application that was granted on or about February 14, 2006. Donald L. Lyster has been the qualifier of record for the E-100 classification for Respondent company since that date.

c. Respondent company never paid Donald L. Lyster as an owner of Respondent company and has never paid Donald L. Lyster as an officer or manager in the form of W-2 wages.

d. Donald L. Lyster failed to exercise materials authority in the conduct of Respondent company's business as required in Utah Code Ann. §58-55-304(4).

8. Respondent admits that Respondent's conduct described above is unprofessional conduct as defined in Utah Code Ann. § 58-1-501(2)(a) and § 58-55-304(4); and that said conduct justifies disciplinary action against Respondent's license pursuant to Utah Code Ann. § 58-1-401(2)(a). Respondent understands that the issuance of the Order in this matter is disciplinary action by the Division against Respondent's license pursuant to Utah Administrative Code R156-1-102(7) and Utah Code Ann. § 58-1-401(2). Respondent agrees that an Order shall be entered in this matter as follows:

(1) Respondent's license shall be subject to a term of probation for a period of two years. The period of probation shall commence on the effective date of this Stipulation and Order, which is the date the Division Director signs the Order. During the period of probation, Respondent shall be subject to all of the following terms and conditions. If the Commission or Division later deems any of the conditions unnecessary such deletions may be made by an amended order issued unilaterally by the Commission or Division.

a. Respondent shall meet with the Commission or a Division compliance specialist on a quarterly basis or at such other greater or lesser frequency as determined by the Division for the duration of the Stipulation and Order.

b. Donald L. Lyster will act as qualifier, including exercising material authority in the conduct of the Respondent's business, as required by. in Utah Code Ann. §58-55-304(4).

c. Respondent shall provide the Division with the following on a quarterly basis:

(i) evidence that the qualifier of records is exercising material authority in the conduct of the business including furnishing documentation of remuneration for such services in form of:

(A) a current copy of W-2 wages statements provided to the Division of Workforce Services; and

(B) a list of ownership distributions made to the qualifier of record.

(ii) if requested by the Division, a listing of the jobs completed by the Respondent and the qualifier's involvement in the performance of each job.

d. Respondent shall provide the Division with the following on an annual basis or at such other greater or lesser frequency as determined by the Commission and Division, for the duration of the Stipulation and Order:

(i) a business income tax return for Mitchell Excavation, Inc; and

(ii) copies of W-2 forms or owner distribution tax forms for Donald L. Lyster.

e. Respondent shall notify the Division within 10 days if the qualifier of record fails to fulfill the duties of a qualifier as required in Utah Code Ann. §58-55-304(6).

f. Respondent shall maintain a current license at all times during the period of this agreement.

g. Respondent shall immediately notify the Division in writing of any change in Respondent's business address.

h. Respondent shall be responsible for payment of all costs associated with

this Stipulation and Order. Failure of Respondent to pay the costs associated with this Stipulation and Order constitutes a violation of this Stipulation and Order.

9. This Stipulation and Order, upon approval by the Commission and Division Director, shall be the final compromise and settlement of this non-criminal administrative matter. Respondent acknowledges that the Commission and Director are not required to accept the terms of this Stipulation and Order and that if the Commission does not do so, this Stipulation and the representations contained therein shall be null and void, except that the Commission, Director, and the Respondent waive any claim of bias or prejudgment Respondent might have with regard to the Commission and Director by virtue of his having reviewed this Stipulation, and this waiver shall survive such nullification.

10. Respondent agrees to abide by and comply with all applicable federal and state laws, regulations, rules and orders related to the Respondent's licensed practice.

11. This document constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, understandings or agreements between the parties regarding the subject of this Stipulation and Order. There are no verbal agreements that modify, interpret, construe or affect this Stipulation. Respondent agrees not to take any action or make any public statement, that creates, or tends to create, the impression that any of the matters set forth in this Stipulation and Order are without factual basis. A public statement includes statements to one or more Commission or Board members during a meeting of the Commission or Board. Any such action or statement shall be considered a violation of this Stipulation and Order.

12. The terms and conditions of this Stipulation and Order become effective

immediately upon the approval of this Stipulation and signing of the Order by the Commission and Division Director. Respondent must comply with all the terms and conditions of this Stipulation immediately following the Commission and Division Director's signing of the Order page of this Stipulation and Order. Respondent shall complete all the terms and conditions contained in the Stipulation and Order in a timely manner. If a time period for completion of a term or condition is not specifically set forth in the Stipulation and Order, Respondent agrees that the time period for completion of that term or condition shall be set by the Commission. Failure to complete a term or condition in a timely manner shall constitute a violation of the Stipulation and Order and may subject Respondent to revocation or other sanctions.

13. If Respondent violates any term or condition of this Stipulation and Order, the Commission may take action against Respondent, including imposing appropriate sanction, in the manner provided by law. Such sanction may include revocation or suspension of Respondent's license, or other appropriate sanction.

14. Respondent has read each and every paragraph contained in this Stipulation and Order. Respondent understands each and every paragraph contained in this Stipulation and Order. Respondent has no questions about any paragraph or provision contained in this Stipulation and Order.

DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENSING

BY: _____
DAN S. JONES
Bureau Manager

DATE: 4-1-10

RESPONDENT

BY: _____
SCOTT MITCHELL
Owner
Mitchell Excavation, Inc

DATE: 3/30/10

MARK L. SHURTLEFF
ATTORNEY GENERAL

BY: _____
L. MITCHELL JONES
Counsel for the Division

DATE: 04/01/10

RESPONDENT

BY: _____
DONALD L. LYSTER
Qualifier
Mitchell Excavation, Inc

DATE: 3/31/10

ORDER

THE ABOVE STIPULATION, in the matter of **MITCHELL EXCAVATION, INC**, is hereby approved by the Construction Services Commission, and constitutes its Findings of Fact and Conclusions of Law in this matter. The issuance of this Order is disciplinary action pursuant to Utah Administrative Code R156-1-102(7) and Utah Code Ann. § 58-1-401(2). The terms and conditions of the Stipulation are incorporated herein and constitute the Commission's final Order in this case.

DATED this 28 day of April, 2010.

CONSTRUCTION SERVICES COMMISSION
Representative

I concur with the above Stipulation and Order, which the Construction Services Commission has approved.

DATED this 29 day of April, 2010.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING

MARK B. STEINAGEL
Director