

1990

Zions First National Bank and 4447 Associates, a  
Utah General Partnership, by and through its  
General Partner, Robert D. Kent v. Overthrust Oil  
and Gas Corporation; Bertagnole Investment  
Company Limited Partnership, a Utah Limited  
Partnership; Faust Land, Inc., a Utah Corporation;  
Joseph L. Pentz; Capitol Thrift and Loan; Richard  
A. Christenson: Brief of Appellee

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BRIEF

90391

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK and 4447  
ASSOCIATES, a Utah General  
Partnership, by and through its  
General Partner, ROBERT D. KENT,

Plaintiffs/Appellees,

vs.

OVERTHRUST OIL & GAS CORPORATION, a  
Utah Corporation; BERTAGNOLE  
INVESTMENT COMPANY LIMITED  
PARTNERSHIP, a Utah Limited  
Partnership; FAUST LAND, INC., a  
Utah Corporation; JOSEPH L. PENTZ;  
CAPITOL THRIFT & LOAN; RICHARD A.  
CHRISTENSON,

Defendants.

Case No. 90391

(Subject to Assignments to  
the Court of Appeals)

(Priority No. 16)

BRIEF OF APPELLEE RICHARD A. CHRISTENSON

On appeal from a Judgment of the Third  
Judicial District Court of Tooele County,  
State of Utah, Honorable Homer Wilkinson,  
District Judge, Presiding

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OVERTHRUST OIL & GAS CORP.,  
Defendants/Appellants

**FILED**

JAN 11 1991

Clerk, Supreme Court Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK and 4447	)	
ASSOCIATES, a Utah General	)	
Partnership, by and through its	)	
General Partner, ROBERT D. KENT,	)	
	)	
Plaintiffs/Appellees,	)	
	)	
vs.	)	Case No. 90391
	)	
OVERTHRUST OIL & GAS CORPORATION, a	)	(Subject to Assignments to
Utah Corporation; BERTAGNOLE	)	the Court of Appeals)
INVESTMENT COMPANY LIMITED	)	
PARTNERSHIP, a Utah Limited	)	(Priority No. 16)
Partnership; FAUST LAND, INC., a	)	
Utah Corporation; JOSEPH L. PENTZ;	)	
CAPITOL THRIFT & LOAN; RICHARD A.	)	
CHRISTENSON,	)	
	)	
Defendants.	)	

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BRIEF OF APPELLEE RICHARD A. CHRISTENSON

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On appeal from a Judgment of the Third  
Judicial District Court of Tooele County,  
State of Utah, Honorable Homer Wilkinson,  
District Judge, Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK and 4447  
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CAPITOL THRIFT & LOAN; RICHARD A.  
CHRISTENSON,

Defendants.

Case No. 90391

---

BRIEF OF APPELLEE RICHARD A. CHRISTENSON

---

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under Utah  
Constitution Art. VIII, § 3; Utah Code Ann. 78-2-2(3)(j) (Repl.  
Vol. 1987); and Rule 3, Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

I.

Did the lower court properly hold that Overthrust Oil &  
Gas Corporation was not an accommodation party to the \$1 million  
note executed by Capitol Thrift & Loan Company? This issue is a  
mixed question of fact and law. The question whether Overthrust  
was an accommodation party is an issue of fact (since it depends  
on the intent of the parties) and this Court should defer to the  
finding of the trial court unless the finding was clearly

erroneous as against the clear weight of the evidence. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989). The issue whether, as a matter of law, a trustor of a trust deed can be an accommodation party to the maker of the underlying instrument is an issue of law and this Court need accord no deference to the ruling of the lower court, but should review it for correctness. Doelle v. Bradley, 784 P.2d 1176, 1178-79 (Utah 1989).

## II.

Did the lower court properly dismiss appellants' cross-claim against Richard A. Christenson? This is an issue is a mixed question of law and fact, governed by the standard set forth in the previous paragraph.

### STATEMENT OF THE CASE

#### A. Nature of the Case.

This is an appeal by Overthrust Oil & Gas Corporation and Faust Land, Inc., from a judgment of the lower court entered on March 30, 1990, dismissing their cross-claims against Richard A. Christenson with prejudice and on the merits. (R. 441.)

#### B. Disposition of the Case Below.

The action was tried before the Honorable Homer F. Wilkinson, of the Third Judicial District Court for Tooele County, on August 31, 1989. Following the trial, the Court made its findings of fact and conclusions of law orally on the record. (Transcript of Memorandum Decision, September 7, 1989.) The

court entered written Findings of Fact and Conclusions of Law on October 23, 1989. (R. 339-48.) Following objections from appellants, the court entered Supplemental Findings of Fact and Conclusions of Law on December 29, 1989. (R. 401-06). After hearing further objections from appellants, the court entered Superseding Findings of Fact and Conclusions of Law (R. 423-37) together with a Judgment and Decree of Foreclosure (R. 438-44) on March 30, 1989. Appellants have appealed from the Judgment and Decree of Foreclosure entered March 30, 1989. (R. 473-74.)

#### STATEMENT OF FACTS

Zions First National Bank made a loan to Capitol Thrift & Loan Company ("Capitol Thrift") on September 28, 1984, for \$1,000,000.00 (the "\$1 million note"). The loan was guaranteed by defendant Richard A. Christenson ("Christenson"). In connection with the restructuring of all of the indebtedness owed by Capitol Thrift and others to plaintiffs, on May 26, 1986, Overthrust Oil & Gas Corporation ("Overthrust") executed a Trust Deed as additional security for the loan on approximately 3,500 acres of property located in Tooele County. (Finding of Fact No. 4, R. 434.)

On September 30, 1987, plaintiffs Zions First National Bank and 4447 Associates entered into an Agreement with defendant Richard A. Christenson ("Christenson") and other parties by which certain obligations owed to plaintiffs were settled and released.



The obligations that were released included the \$1 million note executed by Capitol Thrift & Loan Company. (Finding of Fact No. 12, R. 433; Exhibit D-4.)

Plaintiffs subsequently commenced this action to foreclose the Trust Deed. Overthrust and Faust Land, Inc. ("Faust Land") in turn filed a cross-claim against Christenson seeking a judgment against him for the value of the property that was the subject of the Trust Deed. (R. 204.)

#### SUMMARY OF ARGUMENT

1. Appellants' brief fails to contain any argument that the lower court committed error in dismissing the cross-claim against Richard A. Christenson. Although they conclude their brief with a request that this Court order that Christenson is liable, appellants have not articulated their legal argument and have not cited this Court to those portions of the record that support their position. Appellants' brief violates Rule 24(a)(9), Utah Rules of Appellate Procedure.

2. The lower court properly found that Overthrust was not an accommodation party. That issue is an issue of fact and depends on the intent of the parties. Appellants failed to marshal the evidence against the court's finding and failed to show that that finding was against the clear weight of the evidence. In addition, the lower court's ruling was correct as a matter of law. A trustor of a trust deed is not an accommodation

party within the meaning of Utah Code Ann. § 70A-3-415(1) (Repl. Vol. 1990). Overthrust, as a trustor, did not sign an "instrument" as that term is defined in the Uniform Commercial Code, nor did it lend its name to the maker of the note, Capitol Thrift & Loan Company. Finally, Overthrust has no standing to sue Christenson (or Zions and 4447 Associates for that matter) because it lack standing, having conveyed the Tooele property prior to the entry of the judgment of foreclosure. There was no evidence that Overthrust was damaged in any way by the foreclosure of the property.

#### ARGUMENT

##### I.

APPELLANTS' BRIEF DOES NOT ADEQUATELY DESCRIBE  
THE BASIS FOR THEIR ARGUMENT THAT THE COURT ERRED  
IN DISMISSING THE COUNTERCLAIM AGAINST CHRISTENSON.

In the conclusion to their brief on appeal, Overthrust and Faust Land ask this Court to reverse the trial court and to order that judgment should be entered against Christenson for the value of the mineral rights lost and for the value of the Tooele Property.<sup>1</sup> They do not, however, explain the basis for their position in any understandable fashion. Nowhere in their brief do they argue that Christenson should be liable to them, and Christenson is at a loss in knowing how to respond to their claims. Appellants had the same difficulty during the trial of

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<sup>1</sup> Appellants' brief, at 37.

this action in articulating the legal basis for their claim that they were somehow entitled to a judgment against Christenson.

In Point VIII of their brief, which appears to be the only point that might possibly relate to Christenson, they argue that they were accommodation parties, but fail to describe the legal significance of that assertion as it relates to their claims against Christenson. Their scattered and disorganized argument lends no support to their contention that the lower court committed error in dismissing the cross-claim against Christenson.<sup>2</sup>

If Overthrust and Faust Land believe that Christenson is liable on a theory of subrogation or for contribution, they have failed to make their argument in terms that can be understood and responded to. Not once in their brief do they direct this Court to legal authorities or to references in the record that support their untenable position, and Christenson is left to hazard guesses regarding the legal basis of their claims.

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<sup>2</sup> Point VIII of the brief filed by Overthrust and Faust Land was virtually unintelligible, containing sentences without verbs and paragraphs that seem entirely meaningless. In Point VIII they argue consecutively that they were accommodation parties; that plaintiffs "ought to be estopped" from foreclosing; that an accord and satisfaction was reached between plaintiffs, Capitol, and Christenson; and that the debt secured by the Trust Deed was extinguished. (Appellants' brief, at 32-35.) Appellants do not explain the relationship between these various issues, nor do they state whether these issues have any significance to the question of Christenson's alleged liability. Their argument contains practically no citations to legal authority or to the record and is impossible for Christenson to respond to adequately.

Their appeal as against Christenson should be dismissed for failure to comply with Rule 24(a)(9), Utah Rules of Appellate Procedure, which provides that the argument section of a brief "shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on."<sup>3</sup>

## II.

NEITHER OVERTHRUST NOR FAUST LAND WAS AN  
ACCOMMODATION PARTY WITHIN THE MEANING OF UTAH  
CODE ANN. § 70A-3-606.

A. Overthrust and Faust Land have not met their burden of showing that the lower court's finding of fact that they are not accommodation parties is clearly erroneous.

In Point VIII of their brief, Overthrust and Faust Land assert that they are accommodation parties "entitled to the benefits" of the Utah Uniform Commercial Code, Utah Code Ann. § 70A-3-606 (Repl. Vol. 1990).<sup>4</sup> Although they do not describe the "benefits" to which they claim entitlement, Overthrust and Faust Land apparently believe that their status as accommodation parties gives them rights against Christenson to the extent that they have suffered a loss of the Tooele property. The law does

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<sup>3</sup> Rule 24(k), Utah Rules of Appellate Procedure, provides further that briefs that do not comply with the rule "may be disregarded or stricken." The Court also has the discretion to award attorneys' fees under that rule. Christenson urges the Court to disregard or strike appellants' brief and to award him a reasonable attorneys' fee incurred in defending this appeal.

<sup>4</sup> Appellants' brief, at 32.

not support their position and this Court should affirm the trial court's dismissal of the cross-claim against Christenson.

The lower court held that "Overthrust was not an accommodation party in connection with the third loan of September 28, 1984, as the term accommodation party is used in the statutes of the State of Utah." (Conclusion of Law No. 8, R. 427.)<sup>5</sup> Whether Overthrust was an accommodation party is an issue of fact because it depends on the intent of the parties. According to this Court in Utah Farm Production Credit Association v. Watts, 737 P.2d 154 (Utah 1987),

[w]hether a person is an accommodation party is a question of intent. In other words, it is a question of the intention of the person claimed to be an accommodation party, the person who would be the accommodated party, and the person who was the holder of the paper when the alleged accommodation party signed.

Id. at 158 (emphasis in original; footnote omitted).<sup>6</sup> See Mooney v. GR and Associates, 746 P.2d 1174, 1177 (Utah App. 1987).

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<sup>5</sup> The lower court's holding is in reality a finding of fact and this Court should not accord it any less deference simply because it was denominated a conclusion of law. See e.g., State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990).

<sup>6</sup> In their brief, Overthrust and Faust Land cite the Utah Farm Production Credit case, noting that the Court held that "whether or not a signor does so as an accommodation is a question of intent." (Appellants' brief, at 33.) Although they acknowledge this rule, appellants failed at trial to introduce any evidence relating to the intent of the parties. Certainly, they have failed to marshal any evidence in their brief on appeal.

In Utah Farm Production Credit Association, this Court reversed a summary judgment in favor of the alleged accommodation parties on the grounds that issues of fact had been raised regarding the intent of the parties. Construing the provisions of Utah Code Ann. § 70A-3-415<sup>7</sup> this Court described the factors to be considered in determining whether a person is an accommodation party, including whether the party received any benefit from signing the instrument and "whether the signature of the person claiming to be an accommodation party was necessary for the other party to receive the consideration given in exchange for the note." Id. at 159 (footnote omitted).

There was no evidence in the present case that the parties intended that Overthrust would be an accommodation party when it executed the Trust Deed. There was no evidence, for example, that the delivery of the Trust Deed was essential in order for Capitol Thrift to receive the consideration given for the \$1 million note. Indeed, this could not have been the case since the note was made in 1984 and the Trust Deed in 1986. (Finding of Fact No. 4, R. 434.)

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<sup>7</sup> Section 3-415(1) of the UCC defines an accommodation party as follows:

An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

Because the finding that Overthrust was not an accommodation party is one of fact, appellants had the duty in their brief to marshal the evidence supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence insufficient to support the findings. Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989). Their brief does not contain any references to the record demonstrating that the lower court's finding was against the clear weight of the evidence. Overthrust had the burden at the trial of demonstrating that it was an accommodation party. Utah Farm Production Credit Association v. Watts, 737 P.2d at 158-59. Appellants failed in that burden. They failed to introduce the necessary evidence of the parties' intent at the trial and failed to marshal any evidence whatsoever in support of their position in their brief on appeal. This Court should affirm the trial court's holding that Overthrust was not an accommodation party.

B. As a matter of law, a party who signs a trust deed can not be an accommodation party to the maker of a promissory note.

Appellants' appeal should also fail on the additional ground that Overthrust, as the trustor of the Trust Deed, cannot be an accommodation maker as a matter of law. An accommodation party, according to Utah Code Ann. § 70A-3-415(1), "is one who signs the instrument in any capacity for the purpose of lending his name to another party to it." (Emphasis added.) Thus,

Overthrust could only be an accommodation party if it signed an "instrument" for the purpose of lending its name to another party to the instrument. The UCC defines "instrument" as meaning "a negotiable instrument." Utah Code Ann. 70A-3-102(1)(e). Utah Code Ann. § 70A-3-104 describes the requisites of negotiable instruments, which are limited to drafts, checks, certificates of deposit, and notes.

A trust deed is not an "instrument" within the meaning of Section 3-415(1). A trust deed is nothing more than a means of pledging real property to secure a debt. It does not, by itself, obligate the trustor to make payments and does not render the trustor liable in the event that the underlying obligation goes into default. By signing the Trust Deed in the present case, Overthrust did not become obligated to Zions First National Bank in any way. According to the Official Comment to Section 3-415(1),

Subsection (1) recognizes that an accommodation party is always a surety (which includes a guarantor), and it is his only distinguishing feature. He differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it. . . . An accommodation maker or acceptor is bound on the instrument without any resort to his principal . . . .

Official Comment 1 (Emphasis added.)<sup>8</sup>

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<sup>8</sup> In Official Comment 2, the drafters of the UCC stated further that "[t]he essential characteristic is that the (continued...)



Overthrust was not a surety of the debt that Capitol Thrift owed to Zions First National Bank. After it conveyed the property, Overthrust had no further connection with the transaction and owed no debt to the bank. If Overthrust was not a surety, it could not have been an accommodation party. Mere execution of the Trust Deed for the purpose of pledging property to secure the debt does not make Overthrust a surety of the debt. Because Overthrust did not sign or guarantee payment of the note, it is not an accommodation party.

This legal principal is supported by a careful reading of Section 3-415(1), which provides that the accommodation party must sign the same instrument as the person being accommodated. The statute states that an accommodation party "is one who signs the instrument in any capacity for the purpose of lending his name to another party to it." (Emphasis added.) In the present case, Overthrust did not sign the \$1 million note and did not, in any way, lend its name to Capitol Thrift's name. By signing the Trust Deed two years after the note was executed, Overthrust hardly became an accommodation party to the original note. If it was not an accommodation party, then it is not entitled to claim that it is somehow entitled to contribution from Christenson under Utah Code Ann. § 70A-3-606(1) or any other provision of

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<sup>8</sup>(...continued)  
accommodation party is a surety, and not that he has signed gratuitously."

law.<sup>9</sup> According to White & Summers, Uniform Commercial Code § 13-15, at 665 (1988 ed.), Section 3-606 applies only to "any party to an instrument." Overthrust was not a party to the note and was not obligated under the note in any way.

C. Overthrust has no standing to sue since it conveyed the property before the judgment of foreclosure was entered.

Overthrust has no standing to sue for the loss of the Tooele property, since it conveyed the property to Faust Land after executing the Trust Deed. (Finding of Fact No. 10, R. 433.) Faust Land was clearly not an accommodation party, since it did not sign anything and did not lend its name to Capitol Thrift. Overthrust appears to be claiming that it is entitled to a judgment against Christenson for the loss of the Tooele property even though it no longer owned the property at the time the judgment of foreclosure was entered. Overthrust could not have suffered the loss of the property.

Overthrust introduced no evidence regarding the terms of the conveyance to Faust Land and did not argue to the court below that it suffered a loss because of the encumbrance created

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<sup>9</sup> As argued in Point I of this brief above, appellants' brief contains no argument relating to their claims against Christenson. Christenson's argument herein represents his best effort to understand their claims against him and to respond in a way that will be helpful to the Court. Without a better understanding of the nature of appellants' claims, however, he is left in large part to speculate regarding the legal basis for their appeal.

by the recording of the Trust Deed. Faust Land took the property subject to the recorded trust deed lien and is in no position to claim that it suffered a loss because of the encumbrance on the property at the time of the conveyance. Overthrust has no standing to sue for value of the property if it no longer owns the property. Faust Land is similarly in an unavailing position, since it took the property subject to the recorded lien.

#### CONCLUSION

In their brief, appellants failed to set forth any understandable legal argument supporting their position against Christenson. The lower court's finding that Overthrust was not an accommodation party was justified by Overthrust's failure to introduce evidence relating to the intent of the parties at the time the note was executed. Moreover, as a matter of law Overthrust, as the trustor of the Trust Deed, could not have been an accommodation party within the meaning of Utah Code Ann. § 70A-3-415(1) since a trust deed is not an "instrument" as defined in the Uniform Commercial Code. Christenson urges this Court to affirm the lower court's dismissal of the cross-claim against him.

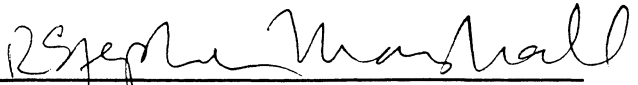
#### ADDENDUM

Attached hereto are the following documents:

1. Findings of Fact and Conclusions of Law.
2. Judgment and Decree of Foreclosure.

DATED this 11 day of January, 1991.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By 

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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the within and foregoing Brief of Richard A. Christenson to be mailed, postage prepaid, this 11 day of January, 1991, to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT  
TOOELE COUNTY, STATE OF UTAH

ZIONS FIRST NATIONAL BANK and  
4447 ASSOCIATES, a Utah General  
Partnership, by and through its  
General Partner, ROBERT D. KENT,

Plaintiffs,

vs.

OVERTHRUST OIL & GAS CORPORATION  
a Utah Corporation; BERTAGNOLE  
INVESTMENT COMPANY LIMITED  
PARTNERSHIP, a Utah Limited  
Partnership; FAUST LAND, INC., a  
Utah Corporation; JOSEPH L. PENTZ;  
CAPITOL THRIFT & LOAN; RICHARD A.  
CHRISTENSON, JOHN DOES 1 thru 100  
and any and all persons who may  
claim any right, title or interest  
in and to the property which is  
the subject of this action,

Defendants,

SUPERSEDING  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. 88-087

OVERTHRUST OIL & GAS CORPORATION  
a Utah Corporation, and FAUST  
LAND, a Utah Corporation,

Cross Claim Plaintiffs,

vs.

CAPITOL THRIFT & loan, a Utah  
Corporation, and RICHARD A.  
CHRISTENSON, an individual,

Cross Claim Defendants.

The above-referenced matter came on for trial before the  
Honorable Homer F. Wilkinson, Judge of the above-entitled Court,

on Thursday, August 31, 1989. Plaintiffs were represented by their counsel, Bruce J. Nelson, Esq., of the law firm of Allen Nelson Hardy & Evans. Defendants Overthrust Oil & Gas Company and Faust Land, Inc., were represented by their counsel, Lorin N. Pace, Esq. Defendants Capitol Thrift & Loan and Richard Christenson were represented by their counsel, R. Stephen Marshall, Esq., of the law firm of VanCott, Bagley, Cornwall & McCarthy. The Court considered the evidence submitted at trial, heard the testimony of witnesses, considered the exhibits offered into evidence, considered the various stipulations of counsel, the arguments presented at trial, and miscellaneous memoranda and briefs submitted concurrently therewith.

Subsequent to trial held on August 31, 1989, this Court made previous Findings of Fact and Conclusions of Law which were executed by the Court on October 23, 1989. Such Findings of Fact and Conclusions of Law delayed for future determination the issue of the amount of "boot" to be credited to the Promissory Note which is the subject of this action. Pursuant to hearing on Monday, November 13, 1989, the Court considered such issue. At such hearing, the Plaintiffs were represented by their counsel Bruce J. Nelson, Esq. Defendants Overthrust Oil and Gas Corporation and Faust Land, Inc., were represented by their counsel Lorin N. Pace, Esq. The Court made certain rulings following the conclusion of counsels' argument at such hearing. Subsequently, counsel for the Plaintiff submitted proposed Supplemental Findings of Fact and Conclusions of Law to which objections were made by counsel for

Defendants Overthrust and Faust Land, Inc. A hearing on such objections was held by the Court on February 8, 1990. Bruce J. Nelson, Esq., was present representing the Plaintiffs. Lorin N. Pace, Esq., was present representing Defendants Overthrust and Faust Land, Inc. R. Stephen Marshall, Esq., was present representing Crossclaim Defendants Capitol Thrift & Loan and Richard A. Christenson. At such hearing, the Court considered the written objections and arguments of counsel, and the Court, having reviewed the pleadings, documents, and exhibits on file herein, made certain rulings relating to amendment of the original Findings of Fact and Conclusions of Law, the proposed Supplemental Findings of Fact and Conclusions of Law, and the written objections thereto.

Pursuant to such ruling, the Court now makes and enters the following Findings of Fact and Conclusions of Law which are intended to supersede any previous Findings and Conclusions previously executed by the Court or submitted by the parties for consideration by the Court.

#### **FINDINGS OF FACT**

1. In early 1983, Zions First National Bank advanced the first of a series of large loans, principally arranged through Defendant Richard A. Christenson and affiliates of Bertagnole Properties, a Utah partnership.

2. The first loan advanced by Plaintiff Zions First National Bank was made on March 13, 1983, in the amount of \$3,015,000.00 to Defendant Bertagnole Investment Company Limited Partnership, Defendant Richard A. Christenson, an entity known as Franklin



Financial, and a Utah limited partnership known as Bertagnole Properties.

3. The second loan advanced by Plaintiff Zions First National Bank was made on June 8, 1984, in the amount of \$1,389,418.76 to Defendant Bertagnole Investment Company Limited Partnership, and a Utah limited partnership known as Bertagnole Properties.

4. A third loan, which is the subject of this action, was made by Plaintiff Zions First National Bank on September 28, 1984, to Defendant Capitol Thrift & Loan Company in the amount of \$1,000,000.00 (hereinafter "note"). Such loan was a renewal of prior loans to Defendant Capitol. Such loan was guaranteed by Defendant Richard A. Christenson. The loan was subsequently secured by a Trust Deed dated May 26, 1986, on approximately 3,500 acres of undeveloped real property located in Tooele County, State of Utah (hereinafter "Tooele Property"). The loan was further secured by an interest in property known as the Section 35 Property located in Summit County, and also by a pledge of receivables formerly owed to Richard A. Christenson, Bruce L. Moesser and Capitol Thrift & Loan Company (hereinafter "First Security Bank receivables").

5. Neither Overthrust nor Faust Land, Inc., were makers on any of the notes to Plaintiff Zions.

6. As the time of such pledge of property, principals of Defendant Bertagnole Investment Company Limited Partnership controlled approximately 80% of Defendant Overthrust Oil & Gas

Company Stock. Owners of Defendant Overthrust Oil & Gas Company were substantially similar to owners of Defendant Bertagnole Investment Company Limited Partnership and Bertagnole Properties.

7. The Bertagnole partnerships and members of the Bertagnole family also held substantial interests in Defendant Capitol Thrift & Loan Company.

8. Each of the three above-described loans subsequently became in default.

9. 4447 Associates, a Utah partnership, has acquired a participation interest in and to Plaintiff Zions First National Bank's interest to such three Promissory Notes.

10. Subsequent to the execution of the above-described Trust Deed, Defendant Overthrust conveyed title to the Tooele Property to Defendant Faust Land, Inc. Defendant Faust is a wholly-owned subsidiary of Defendant Overthrust.

11. Subsequent to the default on the Notes, Plaintiffs Zions First National Bank and 4447 Associates engaged in extended settlement negotiations with the obligors on such Notes.

12. On September 30, 1987, following the settlement negotiations, the Plaintiffs and the obligors under the three Promissory Notes executed a Settlement Agreement. Such Agreement was executed between the Plaintiffs, Bertagnole Investment Company Limited Partnership, Bertagnole Properties, several individuals from the Bertagnole family, Emanuel A. Floor, and Richard A. Christenson. The Settlement Agreement contemplated the foreclosure of various parcels of property securing the three Notes, as well

as the payment of certain "boot" by the obligors under such Notes, all in exchange for a contemplated release of liability to the obligors on such Notes.

13. Defendants Overthrust and Faust Land, Inc., were not parties to the September 30, 1987, Settlement Agreement.

14. The following "boot" was given to Plaintiffs by one or more of the note obligors or guarantors at or about the time of the September 30, 1987, Settlement Agreement:

a. 10,000,000 shares of restricted stock in Defendant Overthrust Oil & Gas Company. The stock was subject to an option to repurchase for ten cents (10¢) per share before September 30, 1993;

b. Release of a \$40,000 First Trust Deed having priority to the interest of the Plaintiffs in Section 35 in Summit County;

c. Certain property to be contributed by Richard A. Christenson, known as the Deer Hollow Property, consisting of approximately 160 acres of undeveloped real property located in Morgan County, State of Utah;

d. A two-thirds interest in 10 acres of real property located in Davis county, State of Utah, known as the Redwood Road Property; and

e. Certain mineral rights associated with other Summit County property known as the North Park Property.

No attempt was made in the September 30, 1987, Settlement Agreement to allocate the boot specifically to any of the three delinquent

notes, but was intermingled and credited to the total value of all three notes.

15. George Woodhead served as President of Defendant Overthrust during the periods of time relevant to negotiations and execution of the Settlement Agreement. Mr. Woodhead was involved in the negotiations of the Agreement and had full knowledge of the terms and contents thereof. Mr. Woodhead also had knowledge of the implications which would follow the execution of the Settlement Agreement.

16. Subsequent to the execution of the Settlement Agreement but prior to the scheduled foreclosure sales contemplated therein, it was determined by the parties to such Agreement that the Tooele County Property, which is the subject of this lawsuit, could not be foreclosed in the Bankruptcy Court as contemplated under the Settlement Agreement.

17. After a discussion of options available to effectuate the intent of the Settlement Agreement without the contemplated bankruptcy sale of the Tooele County Property, George Woodhead, as President of Defendant Overthrust Oil & Gas Company, agreed to convey the Tooele County Property to the Plaintiffs pursuant to the Agreement. He agreed to get permission from the Board of Directors of Overthrust to convey the property. No deed was ever given.

18. Mr. Woodhead subsequently suggested to counsel for the Plaintiffs that the Plaintiffs should file a friendly foreclosure suit with the intent being that Defendant Overthrust would not contest the suit.

19. George Woodhead's actions, in indicating a deed would be executed or in suggesting a friendly foreclosure which would not be contested, were outside the authority which he had as president of the corporation and were not binding upon Defendants Overthrust and Faust Land, Inc.

20. The amount owing on the third Note referenced in paragraph 4 above, as of August 31, 1989, was the sum of \$1,461,226.70, without deduction for boot settlement amounts and unearned interest on amounts ruled by the Court to have been paid on September 30, 1987.

21. The fair market value of the Tooele Property, pursuant to testimony of George Woodhead, is \$410,000.00.

22. Plaintiffs have filed a lawsuit against First Security Bank to seek collection of the First Security Bank receivables but have not collected any funds from such suit. First Security Bank is contesting any liability in such action.

23. The interest pledged to the Plaintiffs in the Section 35 property had a value of \$79,200.00 at the time of the September 30, 1987, Settlement Agreement.

24. The Shirley Thorpe Trust Deed on the Section 35 property, which Trust Deed was released at or about the time of the September 30, 1987, Agreement, had a value to Plaintiff's interest in the amount of \$21,200.00.

25. Based upon testimony received at trial, the Court finds the value of the mineral rights in Summit County to have been the

sum of \$450,000.00, as of the date of the September 1987 Settlement Agreement.

26. The Court finds the value of the Deer Hollow Property to have been the sum of \$200,000.00 at or about the time of the September 30, 1987, Settlement Agreement.

27. The Court finds the value of the Redwood Road Property to have been the sum of 155,000.00 at or about the time of the September 30, 1987, Settlement Agreement.

28. Pursuant to testimony given at trial, the Court concludes that the value of the 10,000,000 shares of Overthrust Oil & Gas Company stock, as of the date of September 1987, was the sum of \$250,000.00.

29. Plaintiffs have been required to retain the services of legal counsel to foreclose the property which is the subject of this action.

From the foregoing findings of fact, the Court now makes and enters the following:

#### **CONCLUSIONS OF LAW**

1. The September 30, 1987, Settlement Agreement was and is a valid and binding agreement.

2. Failure of the Plaintiffs to be allowed to foreclose against the Tooele Property presently owned by Defendant Faust Land, Inc., would have constituted a failure of consideration of the September 30, 1987, Settlement Agreement.

3. The Plaintiffs would be estopped from setting aside the September 30, 1987, Settlement Agreement based on the fact that

approximately two years have elapsed since its execution, and the Plaintiffs have elected to treat it as a valid agreement, have filed the instant action of foreclosure and undertaken other action to collect receivables against First Security Bank, and have not given any notice to set aside such Agreement.

4. Under the terms of the Settlement Agreement of September 30, 1987, Defendants Capitol Thrift & Loan and Richard A. Christenson have been released from liability on the three loans of Zions First National Bank described in the above Findings of Fact in paragraphs 2, 3 and 4 thereof.

5. George Woodhead, as President of Defendant Overthrust, did not have authority to bind the Defendant Overthrust in connection with his agreements to convey title to the Tooele County Property to the Plaintiffs or to suggest an uncontested friendly foreclosure of such property. George Woodhead's actions after the September 30, 1987, Settlement Agreement were outside his authority as president of Overthrust and are not binding on the corporation.

6. The Trust Deed on the Tooele County Property, dated May 20, 1986, and recorded in the office of the Tooele County Recorder on May 21, 1986, is a valid and binding Trust Deed supported by adequate consideration of the September 28, 1984, loan by Plaintiff Zions First National Bank.

7. Defendant Overthrust received a benefit from the granting of the Trust Deed by virtue of the fact that the Bertagnole Partnerships and family members owned a majority of the stock of Defendant Overthrust.

8. Defendant Overthrust was not an accommodation party in connection with the third loan of September 28, 1984, as the term accommodation party is used in the statutes of the State of Utah.

9. The Tooele property Trust Deed should be foreclosed in the same manner as a mortgage to satisfy the unpaid obligations of the September 28, 1984 loan. The interests in the Tooele Property of all Defendants are subordinate to the Trust Deed interest of the Plaintiffs. There should be no right to a deficiency judgment against the Defendants following foreclosure of the Trust Deed.

10. The unpaid amount of the loan should be reduced by the value of the Section 35 property as set forth herein, the value of the Shirley Thorpe First Trust Deed on such property as set forth herein, as well as the value of any other "boot" received at the time of the Settlement Agreement.

11. The combination of the value of the Section 35 property (\$79,200.00) and the value of the released Shirley Thorpe Trust Deed (\$21,200.00), being a total of \$100,400.00, should be credited directly to the amount owing on the Promissory Note.

12. Inasmuch as the Settlement Agreement treated all "boot" received towards the three outstanding loans owed by people affiliated with the Bertagnole Family, it is impossible to determine with exactness what boot should be applied to which of the three loans. The Court determines that the parties must have intended a pro rata application of the boot. The obligation owing on the loan which is the subject of this lawsuit constituted 19.79% of the total obligation of all three loans. As a result, 19.79%



of the value of the remaining "boot" should also be applied to the amount owing on the Note which is the subject of this lawsuit.

13. The value of the remaining "boot" is:

a.	Summit County water and mineral rights	\$ 450,000.00
b.	Deer Hollow Property	200,000.00
c.	Redwood Road Property	155,000.00
d.	Overthrust Stock	<u>250,000.00</u>
	TOTAL	\$1,055,000.00

As a result, the sum of \$208,784.50, constituting 19.79% of the above total, should be credited to the amount owing on the Promissory Note which is the subject of this action.

14. In summary, the following amounts should be credited to the Promissory Note which is the subject of this action.

a.	Amount owing as of date of trial	\$1,461,000.00
b.	Less Section 35 and Shirley Thorpe credits	<u>[100,100.00]</u>
	SUBTOTAL	\$1,360,900.00
c.	Less pro rata credit from remaining "boot"	<u>[208,784.50]</u>
	TOTAL AMOUNT OWING (as of date of trial)	\$1,152,115.50

15. Interest on the foregoing amount should accrue at the judgment rate of 12% per annum from and after August 31, 1989.

16. In addition to the foregoing, the Plaintiffs should be required to give credit on the Note which is the subject of this action, any amounts received from the pending First Security Bank lawsuit. Plaintiffs should be required to pursue such lawsuit in

good faith and are entitled to pursue the same either through trial or settlement as they deem appropriate.

17. Release of the obligors' liability on the note did not satisfy the unpaid note, nor release the Trust Deed on the Tooele Property, because the September 30, 1987, Settlement Agreement clearly contemplated such result.

18. The action of filing the lawsuit by Plaintiffs to liquidate the First Security receivables has not extinguished the amount owing on the note.

19. Defendants Overthrust and Faust Land, Inc., have a right of subrogation against Capitol Thrift & Loan to the extent Defendant Overthrust has shown it would be damaged by the expected foreclosure as may be subsequently determined by the Court. Defendant Overthrust has no right of subrogation against Defendant Christenson. Defendant Overthrust's Crossclaim against Defendant Christenson should be dismissed. After completion of the foreclosure, Defendants Overthrust and Faust may petition this Court for an additional hearing on damages. Such Defendants' claim for attorneys fees may be determined and considered at such later hearing.

20. Bertagnole, Capitol Thrift & Loan, and Overthrust were all separate entities and were not agents of each other.

21. The foreclosure of the Tooele Property should not be delayed pending a completion of the lawsuit against First Security Bank.

22. This Court should enter a Decree of Foreclosure authorizing the Sheriff of Tooele County to proceed with a

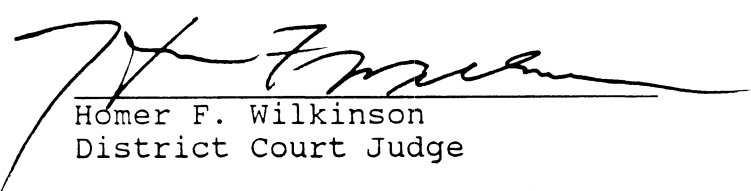
Sheriff's Sale, in accordance with the law and practice of this Court and the statutes of the State of Utah, of the real property located in Tooele County which is the subject of this action. Any amount received at the sale, or the amount of any final credit bid by the Plaintiffs, should reduce the amount owing on the Note as set forth in paragraph 4 above.

23. However, any monies received from the net receivables in the First Security Bank lawsuit (after crediting litigation costs, fees and expenses) should also be applied to any residual amount owing on the Note which is the subject of this action. In the event net receivables create a surplus over and above any remaining amount owing on the Note, the same shall be tendered into Court and any parties who may claim an interest in and to such surplus may seek appropriate legal relief to obtain any amounts to which they may be properly entitled.

24. In addition to the amounts owing on the note as set forth above, Plaintiffs are entitled to an attorneys fee in this matter in the amount of \$5,000.00.

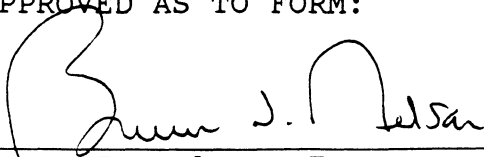
DATED this 30 day of March, 1990.

BY THE COURT:




Homer F. Wilkinson  
District Court Judge

APPROVED AS TO FORM:

A handwritten signature in cursive script, appearing to read "Bruce J. Nelson", written over a horizontal line.

Bruce J. Nelson, Esq.  
Attorney for Plaintiffs

A handwritten signature in cursive script, appearing to read "Lorin N. Pace", written over a horizontal line.

Lorin N. Pace, Esq.  
Attorney for Defendant Overthrust  
and Faust Land, Inc.

A handwritten signature in cursive script, appearing to read "R. Stephen Marshall", written over a horizontal line.

R. Stephen Marshall, Esq.  
Attorney for Defendants  
Capitol Thrift & Loan and  
Richard A. Christenson

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CLERK OF THE COURT  
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IN THE THIRD JUDICIAL DISTRICT COURT  
TOOELE COUNTY, STATE OF UTAH

9

ZIONS FIRST NATIONAL BANK and  
4447 ASSOCIATES, a Utah General  
Partnership, by and through its  
General Partner, ROBERT D. KENT,  
Plaintiffs,

vs.

OVERTHRUST OIL & GAS CORPORATION  
a Utah Corporation; BERTAGNOLE  
INVESTMENT COMPANY LIMITED  
PARTNERSHIP, a Utah Limited  
Partnership; FAUST LAND, INC., a  
Utah Corporation; JOSEPH L. PENTZ;  
CAPITOL THRIFT & LOAN; RICHARD A.  
CHRISTENSON, JOHN DOES 1 thru 100  
and any and all persons who may  
claim any right, title or interest  
in and to the property which is  
the subject of this action,  
Defendants,

JUDGMENT AND DECREE  
OF FORECLOSURE

H 3/4 24/1 7/6 13/2 19/6

Civil No. 88-087

OVERTHRUST OIL & GAS CORPORATION  
a Utah Corporation, and FAUST  
LAND, a Utah Corporation,  
Cross Claim Plaintiffs,

vs.

CAPITOL THRIFT & LOAN, a Utah  
Corporation, and RICHARD A.  
CHRISTENSON, an individual,  
Cross Claim Defendants.

The above-referenced matter came on for trial before the  
Honorable Homer F. Wilkinson, Judge of the above-entitled Court,

00044

on Thursday, August 31, 1989. Plaintiffs were represented by their counsel, Bruce J. Nelson, Esq., of the law firm of Allen Nelson Hardy & Evans. Defendants Overthrust Oil & Gas Company and Faust Land, Inc., were represented by their counsel, Lorin N. Pace, Esq. Defendants Capitol Thrift & Loan and Richard Christensen were represented by their counsel, R. Stephen Marshall, Esq., of the law firm of VanCott, Bagley, Cornwall & McCarthy. The Court, having listened to the evidence submitted at trial, having heard the testimony of witnesses and considered the exhibits offered into evidence, and the Court having considered the various stipulations of counsel, arguments presented at trial, and miscellaneous memoranda and briefs submitted concurrently therewith, and the Court having previously entered its Superseding Findings of Fact and Conclusions of Law and the Court being thereby fully advised in the premises, and good cause appearing:

IT IS HEREBY ORDERED, AJUDGED AND DECREED:

1. The real property located in Tooele County, Utah, more particularly described on the attached Exhibit "A", is security under a Trust Deed dated May 20, 1986, for an unpaid debt owed to the Plaintiffs in the amount of \$1,157,115.50 as of August 31, 1989, with interest accruing thereafter at the rate of 12% per annum, with a per diem of \$380.42. Such amount consists of unpaid principal, accrued interest, an attorneys fee of \$5,000.00, and a credit for payments applied to such loan in connection with a September 30, 1987, Settlement Agreement.

2. The foregoing described property, or such portion thereof as may be sufficient to pay the foregoing amounts and the accruing costs herein and expenses of sale, shall be sold at public auction by the Sheriff of Tooele County, State of Utah, in the manner prescribed by law for the foreclosure of mortgages. The Sheriff, out of the proceeds of such sale shall retain first his costs, disbursements, and commissions, and then pay to Plaintiffs, or to their attorneys, the accrued and accruing costs of this action, then the amount owing to Plaintiffs for principal, interest, and costs, or so much of such sums as such proceeds will pay, and the surplus, if any, shall be accounted for and paid over to the Clerk of this Court subject to this Court's further order.

3. The interest of all Defendants are subordinate to the interest of the Plaintiffs in the property subject to the Trust Deed.

4. All persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption. From and after the expiration of the period of redemption as provided by law, all Defendants and each of them, and all persons claiming by, through, or under them, and any other person or entity, shall be forever barred and foreclosed of all right, title, interest, and estate in and to the subject premises and from and after the delivery of the Sheriff's Deed to the subject premises, the grantee named therein shall be given possession thereof.

5. No deficiency judgment shall be hereafter awarded inasmuch as the obligors on the note have been released from liability or were otherwise discharged in bankruptcy.

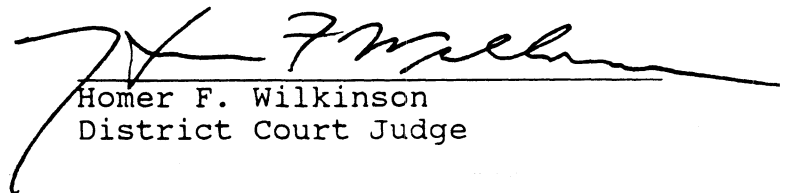
6. Defendant Faust Land, Inc., as current owner of the property in Tooele, is entitled to possession of the subject premises and all rights pertaining thereto during the period of redemption as provided by law.

7. The Crossclaims of Defendants Overthrust and Faust Land, Inc., are hereby dismissed with prejudice and on the merits as to Defendant Richard A. Christenson.

8. As between Defendants Overthrust and Christenson, each party shall bear their own costs and fees herein. The issue of fees of Defendants Overthrust and Faust against Capitol Thrift & Loan under any subrogation claim is reserved for future determination by the Court.

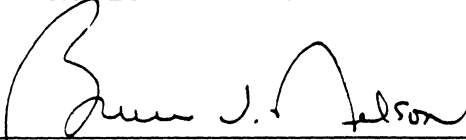
DATED this 30 day of March, 1990.

BY THE COURT:

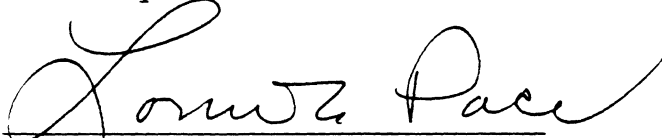
  
Homer F. Wilkinson  
District Court Judge



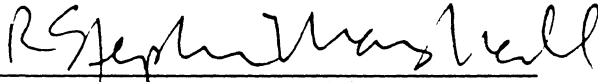
APPROVED AS TO FORM:



Bruce J. Nelson, Esq.  
Attorney for Plaintiffs



Lorin N. Pace, Esq.  
Attorney for Defendant Overthrust  
and Faust Land, Inc.



R. Stephen Marshall, Esq.  
Attorney for Defendants  
Capitol Thrift & Loan and  
Richard A. Christenson

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**EXHIBIT "A"**

**PARCEL NO. 1:**

Northwest 1/4 of the Northeast 1/4, Northwest 1/4, Lots 2 and 3, Section 27, Township 4 South, Range 5 West, Salt Lake Meridian, containing 249.86 acres;

The part of the Southeast 1/4 of Section 17, Township 4 South, Range 5 West, lying southerly of Division Line, containing 10 acres;

That part of Section 21, Township 4 South, Range 5 West, Salt Lake Meridian, lying southerly of Division Line, containing 480 acres;

North 1/2 of the Northeast 1/4, Southeast 1/4 of the Northeast 1/4, Section 29, Township 4 South, Range 5 West, Salt Lake Meridian, containing 120 acres;

That part of Section 22, Township 4 South, Range 5 West, lying southerly of Division Line, containing 619.16 acres.

North 1/2 of the Northwest 1/4, Northwest 1/4 of the Northeast 1/4, Section 23, Township 4 South, Range 5 West, Salt Lake Meridian, containing 120 acres;

That part of the South 1/2, Section 15, Township 4 South, Range 5 West, Salt Lake Meridian, lying south of Division Line, containing 58.80 acres;

North 1/2, Section 28, Township 4 South, Range 5 West, Salt Lake Meridian, containing 320 acres.

That part of the East 1/2, Section 20, Township 4 South, Range 5 West, Salt Lake Meridian, lying southerly of Division Line, containing 310 acres.

That part of the West 1/2 of the West 1/2, Section 14, Township 4 South, Range 5 West, Salt Lake Meridian, lying southerly from Division Line, less 15 acres to Ana Conda containing 45 acres.

Also that portion of the following described tracts lying Northerly from the Division Line particularly described as follows, and located in Township 4 South, Range 5 West, Salt Lake Meridian:

Beginning at the highest ridge line of the West Boundary of the Southwest 1/4 of the Southeast 1/4, Section 17 and running in a Southeasterly direction along said ridge line to a peak approximately in the center of Northeast 1/4 Section 21 which peak is shown on a map prepared by the U.S. Department of the Interior Geological Survey, covering Stockton, Utah, as being 6543 feet high

and running thence North 62°30' East 8976 feet, more or less, to a point on the East boundary of the West 1/2 of the West 1/2, Section 14 which final point is approximately on the East-West quarter section line.

**PARCEL NO. 2:**

North 1/2, Section 16, Township 4 South, Range 5 West, Salt Lake Meridian, containing 320 acres.

**PARCEL NO. 3:**

South 1/2, Section 35, Township 6 South, Range 5 West, Salt Lake Meridian, containing 320 acres.

**PARCEL NO. 4:**

East 1/2 of the West 1/2 of Section 15, Township 8 South, Range 6 West, Salt Lake Meridian, containing 160 acres.

**PARCEL NO. 5:**

East 1/2 of the Southwest 1/4, Northwest 1/4, Section 21, Township 8 South, Range 6 West, Salt Lake Meridian, containing 20 acres.

**PARCEL NO. 6:**

East 1/2 of the East 1/2, Section 9, Township 8 South, Range 6 West, Salt Lake Meridian, containing 160 acres.

**PARCEL NO. 7:**

East 1/2 of the West 1/2, Section 12, Township 8 South, Range 6 West, Salt Lake Meridian, containing 160 acres.

**PARCEL NO. 8:**

North 1/2 of the Northwest 1/4 of the Southwest 1/4 of Section 8, Township 6 South, Range 5 West, Salt Lake Meridian, containing 20 acres.

**PARCEL NO. 9:**

South 1/2, Section 36, Township 3 North, Range 11 West, Salt Lake Meridian, containing 320 acres.