



# RAILROAD COMMISSION OF TEXAS

## HEARINGS DIVISION

**OIL & GAS DOCKET NO. 8A-0299910**

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**COMPLAINT OF MARISUE POTTS THAT ESCO OIL OPERATING COMPANY LLC (OPERATOR NO. 254263) DOES NOT HAVE A GOOD FAITH CLAIM TO OPERATE THE BURLESON "60" LEASE, WELL NO. 1, WILDCAT FIELD, MOTLEY COUNTY, TEXAS**

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### PROPOSAL FOR DECISION

**HEARD BY:**

Jennifer Cook – Administrative Law Judge  
Brian Fancher, P. G. – Technical Examiner

**PROCEDURAL HISTORY:**

Complaint Filed:	March 10, 2016
Hearing Request Form Filed:	April 19, 2016
Notice of Hearing:	May 20, 2016
Hearing Date:	July 8, 2016
Transcript Received:	July 26, 2016
Record Closed:	July 26, 2016
Proposal for Decision Issued:	September 14, 2016

**APPEARANCES:**

**For Complainant –**  
Marisue Potts, Pro Se  
Christopher Goodfried

**For Esco Oil Operating Company LLC –**  
Jay B. Stewart  
Wesley McGuffey  
*Hance Scarborough, LLP*

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## **I. Statement of the Case**

Marisue Potts (“Complainant”) filed a complaint claiming that Esco Oil Operating Company LLC (“Esco”) does not have a good faith claim to operate the Burleson “60” Lease, Well No. 1 (the “Well”), Wildcat Field, Motley County, Texas. Complainant asserts the contractual Oil and Gas Lease (“Lease”) relied upon by Esco has terminated for lack of production and Complainant requests that the Well be ordered plugged.

The Administrative Law Judge and Technical Examiner (collectively “Examiners”) respectfully submit this Proposal for Decision (“PFD”) and recommend the Railroad Commission (“Commission”) deny Complainant’s request to have the Well ordered plugged. The Examiners have determined that there is sufficient evidence that Esco has a good faith claim to operate the Well.

## **II. Jurisdiction and Notice<sup>1</sup>**

Sections 81.051 and 81.052 of the Texas Natural Resources Code provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

On May 8, 2016, the Hearings Division of the Commission sent a Notice of Hearing via first class mail to both Complainant and Esco setting a hearing date of July 8, 2016. Consequently, both parties received more than 10 days’ notice. The Notice of Hearing contained (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short and plain statement of the matters asserted.<sup>2</sup> The hearing was called to order on July 8, 2016, as noticed. Both parties appeared at the hearing.

## **III. Applicable Legal Authority**

Complainant alleges that Esco does not have a good faith claim as that term is defined by Commission rule and that the Well should therefore be plugged. A “good faith claim” is defined in Commission Statewide Rule 15(a)(5) as:

A factually supported claim based on a recognized legal theory to a continuing possessory right in the mineral estate, such as evidence of a currently valid oil and gas lease or a recorded deed conveying a fee interest in the mineral estate.<sup>3</sup>

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<sup>1</sup> The hearing transcript in this case is referred to as “Tr. at [pages:lines]”. The Complainant’s exhibits are referred to as “Complainant Ex. [exhibit no.]”. Esco’s exhibits are referred to as “Esco Ex. [exhibit no]”.

<sup>2</sup> See TEX. GOV’T CODE §§ 2001.051 and 052; 16 TEX. ADMIN. CODE §§ 1.45 and 1.48.

<sup>3</sup> 16 TEX. ADMIN. CODE § 3.15(a)(5).

#### IV. Discussion of Evidence

Complainant provided the testimony of two witnesses and four exhibits. Esco provided the testimony of two witnesses and twelve exhibits.

The following is a summary of the evidence substantially in the order that it was presented.

##### A. Summary of Complainant's Evidence and Argument

Complainant was the first witness. She is an owner of the property where the Well is located. Since 1952, she, and her parents before her, have owned this property and maintained it as a ranch.<sup>4</sup> Complainant testified that the property is a historic ranch and there are currently agritourism tours that feature its historic quality. She expressed an interest in preserving and protecting the ranch.<sup>5</sup> Complainant also owns 25 percent of the mineral interests where the Well is located.<sup>6</sup> The Well is produced from the Atoka formation.<sup>7</sup>

The Lease at issue was effective February 4, 2004. It is between Complainant, as lessor, and MTT, LP., as lessee. There have been approximately six assignments of MTT, LP.'s interest in the Lease, which was ultimately assigned to Escopeta Oil & Gas Corporation ("Escopeta") effective August 5, 2014. Escopeta designated Esco as the operator for the Well. The original primary term of the lease is five years. There was an additional five-year option for renewal, which was exercised making the primary term end on February 4, 2014. Complainant contends Escopeta began operations right before the end of the 10-year primary term. After the primary term is over, the second paragraph ("Paragraph 2") in the Lease becomes applicable and is at the crux of Complainant's complaint. Complainant claims Esco has no good faith claim because of a violation of Paragraph 2, causing termination of the Lease.<sup>8</sup> Paragraph 2 reads:

2. It is agreed that this lease shall remain in force for a primary term of (5) years from this date, and as long thereafter as operations are conducted upon said land with no cessation for more than (180) one hundred eighty consecutive days, provided, however, that in no event shall this lease terminate if production of oil and/or gas from a well located on said land, or on lands pooled therewith, has not permanently ceased. Whenever used in this lease the word "operations" shall refer to any of the following activities: preparing location for drilling, drilling, testing, completing, reworking, recompleting, deepening, plugging back or repairing of a well in search for or in an endeavor to obtain production of oil and/or gas, and production of oil and/or gas whether or not in paying quantities.<sup>9</sup>

Complainant maintains the Lease for the Well is invalid for lack of production. She asserts that Paragraph 2 is a "continuous production" clause in the Lease that has been violated

<sup>4</sup> Tr. at 11:18 to 11:25.

<sup>5</sup> Tr. at 12:1 to 12:5 and 20:20 to 21:4.

<sup>6</sup> Tr. at 45:16 to 45:22.

<sup>7</sup> Tr. at 28:3 to 28:19.

<sup>8</sup> Tr. at 40:10 to 41:23; Esco Ex. 2; Complainant Ex. 1; Tr. at 65:15 to 67:9.

<sup>9</sup> Complainant Ex. 1 at 1 ¶ 2.

causing termination of the Lease. She testified that six days before the primary term expired, Esco and Escopeta installed a recompletion well and then more or less abandoned it.<sup>10</sup>

Complainant testified that since Escopeta and Esco began their operation on the ranch, they have been a detriment to it and an intrusion into the ranch's privacy. Some examples mentioned were that roads are not maintained, there have been some spills of saltwater, and cattle guards are not respected. She asserts that since there has been no production, she is receiving no benefit from the lease—only harm.<sup>11</sup>

Complainant asserts that according to Railroad Commission records, there is no production from the Well.<sup>12</sup> Official notice was also taken of a report from the Commission website showing no production since at least October 2005.<sup>13</sup> Complainant has no knowledge of production despite monitoring the Well periodically.<sup>14</sup> She did acknowledge that after she complained, representatives from Esco told her that there was some production and she did receive a few checks for small amounts of money. Complainant testified that she received two checks of approximately \$150 to \$250. She did not cash them because there was no report of any oil production to the Commission so she was skeptical as to whether production had actually occurred.<sup>15</sup>

Complainant has monitored and documented activities she observed around the site of the Well. According to her:

But what I have seen and what I have -- you know, I have documented as a journal and have documented in photographs is that, randomly, activity starts. And they may leave tools all around as if something was going on. But it doesn't go anywhere.<sup>16</sup>

Complainant asserts that there has been more than 180 days with no production, in violation of Paragraph 2. She contends that periodically the operator appears and moves equipment as if some operations are occurring but very rarely is anything accomplished.<sup>17</sup> Complainant provided pictures she took, in chronological order, in order to demonstrate lack of activity as well as some spilling and leaking of pollution occurring in the area around the Well.<sup>18</sup> Complainant acknowledged that the area has since been cleaned and currently has better kept equipment.<sup>19</sup>

Complainant also provided some correspondence that Escopeta sent her.<sup>20</sup> She testified as to pertinent portions of the correspondence. In a letter dated January 13, 2015, she was notified Escopeta had been assigned the Lease. This letter claims that 360 barrels of oil has been

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<sup>10</sup> Tr. at 13:9 to 14:7.

<sup>11</sup> Tr. at 21:5 to 21:25 and 22:1 to 22:10.

<sup>12</sup> Tr. at 22:1 to 22:10.

<sup>13</sup> Complainant Ex. 3.

<sup>14</sup> See Tr. at 25:15 to 25:23.

<sup>15</sup> Tr. at 27:14 to 27:24, 45:4 to 45:7, and 46:20 to 46:24.

<sup>16</sup> Tr. at 29:4 to 29:21.

<sup>17</sup> Tr. at 29:22 to 31:17.

<sup>18</sup> Tr. at 35:11 to 36:25; Tr. at 133:21 to 134:10; Complainant Ex. 4.

<sup>19</sup> See Tr. at 122:9 to 123:7; Esco Ex. 9.

<sup>20</sup> Complainant Ex. 2; see also Esco Ex. 1 (Esco also provided some correspondence between the parties).

produced from the Well. However, the Complainant noticed that the production did not appear to be reported to the Commission. The letter states Escopeta intends to drill horizontally in the Atoka Formation in 90 to 120 days. Complainant contends this never happened. In a letter dated May 6, 2015, Escopeta provides \$2,500 for damages to the ranch, including spills and damage to cattle guards. Escopeta cleaned the spills and repaired the cattle guards. In this letter, Escopeta claims 283 barrels of oil has been sold and states that Complainant will be receiving a check soon. Escopeta also claims that it plans to run a downhole electrical submersible pump (“ESP pump”) to clean out the water from a prior fracturing of the Well. Complainant expresses concern that this was never accomplished due to the expense of an ESP pump. In a third letter dated May 7, 2015, Escopeta provides a royalty payment from the sale of 133.89 barrels of oil first produced and sold. Escopeta claims there will be another royalty payment in the following month due to the sale of an additional 150 barrels of oil. This letter also claims that Escopeta will utilize an ESP pump, which should increase oil production significantly. Complainant doubted the accounts of production since none had been reported to the Commission.<sup>21</sup>

Complainant’s second witness was Christopher Goodfried. Mr. Goodfried is a friend of Complainant and is a landman.<sup>22</sup> He mainly testified to his interpretation of Paragraph Two. He mentions several legal theories, such as a “savings clause” and a “statute of perpetuities” but did not provide any authority for the theories. The main thrust of his argument is that, according to Paragraph Two, the Lease has been terminated due to insufficient production.<sup>23</sup>

Mr. Goodfried also testified about his personal observations of the Well operations. Generally, he has not observed active operations, consistent with Complainant’s observations. He testified that he has gone by the Well every month for about four years now. He testified that he has not observed any signs of an ESP pump, despite Escopeta’s letters stating one was planned to be utilized.<sup>24</sup>

## **B. Summary of Esco’s Evidence and Argument**

Mr. Danny Davis was Esco’s first witness. He is the principal for Escopeta, the present lessee with Complainant. He is also very familiar with Esco, Escopeta’s designated operator of the Well, and Esco’s operations; his brother is a principal of Esco and it appears that Esco and Escopeta are closely associated entities.<sup>25</sup>

Mr. Davis testified that there has never been 180 consecutive days without operations since February 2014, when the 10 year extended primary term ended.<sup>26</sup> He testified that there is current production of three to five barrels a day and about 50 barrels of water a day. He stated that currently Esco is trying to determine how to get the utmost oil from the Well while minimizing excessive water. He testified that in May 2016 the Well produced 70 barrels and 120 barrels in June and that Esco has approximately 200 barrels of oil in the storage tank.<sup>27</sup>

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<sup>21</sup> Tr. at 42:12 to 45:7.

<sup>22</sup> See Tr. at 57:14 to 57:25.

<sup>23</sup> Tr. at 15:22 to 16:9, 50:21 to 51:15, 52:16 to 52:24, and 137:15 to 138:12.

<sup>24</sup> Tr. at 54:15 to 54:17.

<sup>25</sup> Tr. at 60:24 to 61:24, 62:1 to 62:6, and 105:21 to 107:3.

<sup>26</sup> Tr. at 68:12 to 69:17.

<sup>27</sup> Tr. at 69:18 to 70:10.

Mr. Davis acknowledged there have been gaps in production but stated that Esco and Escopeta have continued to operate the Well during the pendency of the Lease.<sup>28</sup>

Esco provided a report of Commission records demonstrating that Esco's status is active and it has a current Commission Form P-5 (Organization Report) on file, indicating Esco is an operator in good standing with the Commission.<sup>29</sup> It also provided an approved Commission Form P-4 (Certificate of Compliance and Transportation Authority) demonstrating Esco is the Commission operator of record for the Lease.<sup>30</sup>

Esco provided a calendar of operations and supporting documentation, such as invoices for 2014,<sup>31</sup> 2015,<sup>32</sup> and 2016<sup>33,34</sup>. These documents indicate that the longest consecutive period that Esco has ceased operations on the Lease is 171 days.<sup>35</sup>

Mr. Davis provided a chronological history of Esco's operation of the Well. The Well is considered a wildcat well and that Esco has been working and reworking trying to establish it as productive and believes ultimately that it will be very productive as a horizontal well. Esco obtained this Well and other wells in the Palo Duro Basin. The Well was originally drilled as a vertical well and fractured in the Atoka Formation. Esco began with swabbing the Well. Originally, the swabbing resulted in the production of oil, but ultimately resulted in the production of only water. Esco then spent a few months evaluating how to get the Well productive. Mr. Davis testified that there has been limited production in the area and no horizontal wells in the Palo Duro Basin. He believes he is going to be the first one to build a horizontal well there. Mr. Davis testified that he has had experience with successfully producing wildcat wells and producing in new areas. His opinion is that the Atoka is going to be very productive and that the Mississippian and the Wolfcamp formations are also going to be productive in the area. He testified that all those zones have produced oil in this area but none have been drilled horizontally. He considers horizontal drilling of the Palo Duro Basin as a "frontier area". Ultimately, Esco had to make adjustments to the Well over time, including reworking the Well four times. Mr. Davis testified that currently everything is online and working smoothly. He anticipates that within a few months, Esco expects to get 10-14 barrels of oil a day from the Well. Additionally, Esco is actively trying to get the Well drilled horizontally.<sup>36</sup>

Mr. Davis testified that there has been cumulative production since Escopeta became the lessee and started operations—in January 2014—of approximately 500 barrels of oil.<sup>37</sup> Mr. Davis clarified that while the assignment of the Lease to Escopeta states that is effective in August 2014, Escopeta did not actually take over operation of the Lease from the prior assigned lessee

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<sup>28</sup> Tr. at 70:19 to 70:23.

<sup>29</sup> Esco Ex. 3; Tr. at 71:15 to 72:5.

<sup>30</sup> Esco Ex. 4; Tr. at 72:6 to 72:22.

<sup>31</sup> Esco Exs. 5 and 6; Tr. at 89:14 to 90:18.

<sup>32</sup> Esco Ex. 7; Tr. at 91:4 to 91:15.

<sup>33</sup> Esco Ex. 8; Tr. at 91:24 to 92:25.

<sup>34</sup> Tr. at 75:9 to 76:11.

<sup>35</sup> Tr. at 85:20 to 88:9 Esco Exs. 5-8.

<sup>36</sup> Tr. at 79:3 to 84:17, 85:7 to 86:5, 93:18 to 93:24, and 109:18 to 110:12.

<sup>37</sup> Tr. at 105:4 to 105:14 and 107:11 to 107:19.

until January 2014.<sup>38</sup> However, Escopeta did work closely with the prior assigned lessee before January 2014.<sup>39</sup>

Esco's second witness was Mr. Roland Baker. Mr. Baker regularly files regulatory documents with the Commission on behalf of various regulated entities. His background is as a professional geologist. He began performing regulatory work with the Commission in 1984. He has filed documents for Esco and testified at the hearing on Esco's behalf.<sup>40</sup>

Mr. Baker testified that he has filed production reports to the Commission for the Well. He stated that since the Well is a wildcat well, he filed it as pending using the Commission Well identifying number (referred to as the "API" number); because the production was not associated to a lease number, it did not appear in Commission records of production for the Burleson "60" Lease. On April 4, 2016—using the wildcat identifier—Mr. Baker reported production for the Well for the following months in 2014: September, October, and November.<sup>41</sup> There was no production in 2015. On the morning of the hearing, July 8, 2016, Mr. Baker submitted production for the months of May and June 2016.<sup>42</sup> In total, Mr. Baker submitted production for the following amounts and months.<sup>43</sup>

Month	Oil Production (whole barrels)
9/2014	120
10/14	180
11/14	25
05/16	70
06/16	120
<b>Total:</b>	<b>515</b>

Mr. Baker also filed a request to have a new field designation for the Well, which was approved. The new field name for this well is the Floydada (Atoka) Field so it no longer has a wildcat well designation. The correlative interval is 9268-9282 feet. Mr. Baker stated that he had to demonstrate the new field is productive and file a completion report to get the field designation approved.<sup>44</sup>

After hearing Esco's evidence, Complainant acknowledged that there was much information presented of which she was not previously aware. She still maintained the lease should be terminated, but conceded that Esco had proved that the longest consecutive period with no operations was 171 days, less than the 180 days specified in the lease.<sup>45</sup>

<sup>38</sup> Tr. at 97:13 to 98:5 and 99:3 to 99:9.

<sup>39</sup> Tr. at 88:19 to 89:13.

<sup>40</sup> Tr. at 120:8 to 122:6.

<sup>41</sup> Tr. at 123:16 to 124:16; Esco Ex. 10.

<sup>42</sup> Tr. at 124:20 to 126:17; Esco Ex. 11.

<sup>43</sup> Esco Ex. 10 and 11.

<sup>44</sup> Tr. at 127:6 to 127:19 and 127:25 to 129:10; Esco Ex. 12.

<sup>45</sup> Tr. at 134:13 to 135:15.

## V. Examiners' Analysis

The Examiners recommend that Complainant's request to have the Well plugged be denied and that the Commission find that Esco provided sufficient evidence at the hearing of a good faith claim to operate the Well.

Complainant alleges that Esco does not have a good faith claim to operate the Well and the Commission should order that the Well be plugged. A good faith claim is defined in Commission rule as:

A factually supported claim based on a recognized legal theory to a continuing possessory right in the mineral estate, such as evidence of a currently valid oil and gas lease or a recorded deed conveying a fee interest in the mineral estate.<sup>46</sup>

The Commission does not adjudicate questions of title or right to possession, which are questions for the court system.<sup>47</sup> A showing of a good faith claim does not require an applicant to prove title or a right of possession. It is sufficient for an applicant to make "a reasonably satisfactory showing of a good-faith claim," and another's good faith dispute of title or possessory interest will not alone defeat an applicant.<sup>48</sup> Esco provided sufficient evidence of a reasonably satisfactory showing of a good-faith claim to operate the Well.

Esco and Complainant have differing interpretations of Paragraph 2 of the Lease. Complainant's interpretation is that Paragraph 2 provides for termination of the Lease if there is a lack of commercial production. Esco's interpretation is that Paragraph 2 only provides for termination if there is more than 180 consecutive days of operations and in no event if there is current production. The Examiners determine that Esco's interpretation of Paragraph 2 is reasonable. Under the good faith claim standard above, the Examiners need not determine whether Complainant's interpretation is valid or reasonable. The Examiners do note that Esco's interpretation appears more similar to the actual language in Paragraph 2. The Examiners also find that Complainant's witness's general and unsupported potential legal theories such as the applicability of the Rule Against Perpetuities and that Paragraph 2 should be treated as a "savings clause" do not defeat Esco's showing of a good faith claim.

Esco also provided sufficient evidence that it has not violated Paragraph 2. It provided calendars—with underlying supporting evidence—identifying all days Esco was conducting operations. These calendars show that there was no more than 171 consecutive days without operations, which is less than the 180 days required for termination in Paragraph 2. Additionally, Esco provided records of recent production from the Well. While Complainant had testimony and pictures demonstrating general lack of activity near the Well, Complainant's evidence did not prove at least 180 consecutive days of no production, which would be needed to trigger

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<sup>46</sup> 16 TEX. ADMIN. CODE 3.15(a)(5).

<sup>47</sup> *Magnolia Petroleum Co. v. R.R. Comm'n*, 170 S.W.2d 189, 191 (Tex. 1943); see also *Trapp v. Shell Oil Co.*, 198 S.W.2d 424, 437-38 (Tex. 1946); *Rosenthal v. R.R. Comm'n of Tex.*, 2009 WL 2567941, \*3 (Tex. App.—Austin 2009, pet. denied) (mem. op.); 56 Tex. Jur. 3d *Oil and Gas* § 737, *Adjudication of title to property and contract rights* (June 2016 Update).

<sup>48</sup> *Id.*

Paragraph 2. Moreover, Complainant did not present evidence contradicting Esco's production records.

For these reasons, the Examiners conclude that based on the evidence provided, Esco has made a reasonably satisfactory showing of a good-faith claim and there was insufficient evidence that the Well should be ordered plugged. Complainant's request to have the Well plugged should be denied.

## **VI. Recommendation, Proposed Findings of Fact and Proposed Conclusions of Law**

Based on the record in this case and evidence presented, the Examiners recommend that Complainant's request that the Well be plugged be denied, that the Commission find that Esco provided sufficient evidence of a good faith claim to operate the Well, and that the Commission adopt the following findings of fact and conclusions of law.

### **Findings of Fact**

1. On March 10, 2016, Marisue Potts ("Complainant") filed a complaint that Esco Oil Operating Company LLC ("Esco") does not have a good faith claim to operate the Burluson "60" Lease, Well No. 1 (the "Well"), Wildcat Field, Motley County, Texas.
2. On April 15, 2016, Esco filed a request for hearing.
3. On May 8, 2016, the Hearings Division of the Commission sent a Notice of Hearing via first class mail to both Complainant and Esco setting a hearing date of July 8, 2016. Consequently, both parties received more than 10 days' notice. The Notice of Hearing contained (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short and plain statement of the matters asserted.<sup>49</sup>
4. Complainant asserts that Esco's rights under the subject Oil and Gas Lease ("Lease") have terminated due to lack of production under paragraph two ("Paragraph 2") of the Lease.
5. Esco's interpretation of Paragraph 2 is reasonable. Under Esco's interpretation, termination of the Lease is not triggered unless there is at least 180 consecutive days of production and in no case does it terminate if there is current production.
6. Esco provided sufficient evidence that there has not been at least 180 consecutive days of the cessation of operations.
7. Esco provided evidence that there has been recent production from the Well and cumulative production of over 500 barrels of oil.

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<sup>49</sup> See TEX. GOV'T CODE § 2001.051 and 052; 16 TEX. ADMIN. CODE §§ 1.45 and 1.48.

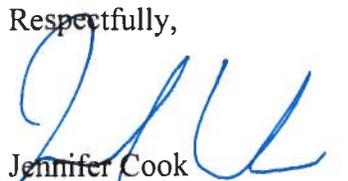
### Conclusions of Law

1. Proper notice of hearing was timely issued to appropriate persons entitled to notice. *See, e.g.,* TEX. GOV'T CODE §§ 2001.051 and 052; 16 TEX. ADMIN. CODE §§ 1.45 and 1.48.
2. The Commission has jurisdiction in this case. *See, e.g.,* TEX. NAT. RES. CODE § 81.051.
3. At the hearing in this matter, Esco provided a reasonably satisfactory showing of a good-faith claim to continue operating the Well. 16 TEX. ADMIN. CODE § 3.15(a)(5).
4. Complainant's good faith dispute with Esco does not defeat Esco's satisfactory showing of a good faith claim.
5. There is insufficient evidence that the Well should be plugged.

### Recommendations

The Examiners recommend the Commission enter an order finding Esco demonstrated a good faith claim to operate the Well and denying Complainant's request that the Well be plugged.

Respectfully,

  
Jennifer Cook  
Administrative Law Judge

  
Brian Fancher, P.G.  
Technical Examiner