# New Legislation Amends Your MIPA Unit

By Glenn E. Johnson and Martin Gibson

HB3226 by Geren and Darby was passed by the Texas Legislature on May 6 and signed by the Governor on May 17, to be effective September 1, 2019. It amends §102.082 of the Texas Natural Resources Code (TNRC) and (i) changes a requirement for automatic dissolution of the MIPA unit from one year to two years if no production or drilling operations have occurred on the unit, and (ii) allows operations on an off unit surface location to be included for the "no operations" test.

Some background: In 1977 the Texas Legislature added Chapter 102 to the TNRC. Known as the Mineral Interest Pooling Act (MIPA), it allows the forced pooling of interests when there are separately owned interests in oil and gas within an existing or proposed proration unit in a common reservoir. One must apply to the Railroad Commission to do so and the Order forcing pooling cannot, absent consent of all parties to an escrow account, be effective until the final order is issued. Because of the usual rapid decline of production in horizontal shale wells, the delay in participation until the Order is issued diminishes the utility of MIPA from the perspective of the force pooled party.

There are nuances of MIPA units of which you should be aware:

1. The unit created by a MIPA unit is in addition to and not necessarily the same as any voluntary pooled unit created by the initial parties to the drilling. All of the acreage in the MIPA unit must reasonably appear to be productive. §102.018 TNRC. In addition, the reservoir must be subject to temporary or permanent field rules and the MIPA unit cannot exceed the size of the proration unit specified by the rules but, in any event, cannot exceed 160 acres for oil or 640 acres for gas plus 10% tolerance. §102.011 TNRC. A forced pooled unit cannot drill a discovery well.

2. If there is a unit agreement in effect before the MIPA order, the portion of production paid to the MIPA owner is like a separate, government mandated cost imposed on the unit agreement so that payments to the original unit owners are net of the payments to the MIPA unit participant. The Railroad Commission does not have the power to affect private contract provisions. The voluntary pooling agreement remains in effect to the extent it does not contravene the Railroad Commission order force pooling tracts. The voluntarily pooled tracts participate in the distributions received as a participant in the voluntary unit.

3. Production within the MIPA unit is generally allocated based on a surface acreage basis, but if a surface acreage allocation does not allocate a "fair share" to the forced pooled party the RRC can allocate on a different basis but the forced pooled party can receive no less that it would receive based on a surface acreage allocation. §102.051 TNRC. The production so allocated is based on production from the MIPA unit and does not include production from outside the MIPA unit but inside the original voluntary unit.

4. The financial terms of a MIPA pooling are set in the Order. Generally the RRC treats the force pooled party like it had granted a lease in which it reserved a 25% royalty and, at the same

time, as if it were a working interest owner subject to a non-consent penalty of not more than 100% with no personal liability for costs, i.e. costs are reimbursed solely out of production. §102.052 TNRC. Recent decisions have fixed the non-consent penalty at 50%. There is no statutory requirement for a 25% royalty, but that is the current practice based on the requirement that force pooling must be preceded by a "fair and reasonable" offer to voluntarily pool. §102.013 TNRC.

5. The terms of the MIPA unit cannot include a preferential purchase right, a call on production, district or central office expenses (other than reasonable overhead), or a prohibition against questioning the operation of the unit. §102.015 TNRC. The MIPA does not provide for a unit operating agreement. Thus, for example, the risk penalty for a non-consenting owner is only 100%.

6. If the interest that was force pooled was a leasehold interest and if that lease expires, the interests covered by the lease are considered pooled as unleased interests. §102.083 TNRC. Presumably this means that the mineral owner continues to own both a mineral interest and a royalty payment interest but has no obligation to pay costs of operation as opposed to the personal liability found by *Wagner & Brown, Ltd. v Sheppard*, 282 S.W.3d 419 (Tex. 2008).

7. The MIPA unit terminates two years after its effective date if there are no operations on the unit or drill pad, six months after the completion of a dry hole, or six months after cessation of production from the MIPA unit. §102.082 TNRC. Thus, it is entirely possible that the MIPA unit could expire before or after the original voluntary unit. Since the MIPA unit can be smaller than the original voluntary unit, it is also possible that the MIPA unit could expire while the voluntary unit continues if production ceases on the MIPA unit but continues from wells that are outside the MIPA unit but inside the voluntary unit.

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