Holliday Energy Law Group, PC is a San Antonio-based transactional energy law firm focused on rendering title opinions and providing operational/regulatory advising to oil and gas operators active across the continental United States. We represent clients throughout all stages of a drilling program – from acquisition through divestiture – in Texas, Oklahoma, North Dakota, Ohio, Nebraska, and Illinois.
Presentation Overview

• Pre-MIPA – Why do we have it?
• Review Statute
• When is MIPA Applicable?
• What does MIPA Applicant have to prove?
• What if pooling order is granted?
• Practice Tips
MIPA Overview

- Texas’ Compulsory or Forced Pooling Statute
- More accurate is “Forced Voluntary Pooling Act”
  - Parties must demonstrate that they have exhausted efforts to negotiate pooling
  - Efforts generally result in voluntary pooling
MIPA is Legislative Response to Normanna Decision

- Enacted in response to the Normanna case (Atlantic Refining Co. v. Railroad Commission, 346 SW2d 801 (Tex. 1961))
  - RRC Order set allowables for newly discovered Normanna field at 1/3 per well, 2/3 per acre formula, with 320-acre spacing.
  - Bright, owner of 0.30 acre lot, received a Rule 37 spacing exception and allowed to drill gas well on their tract.
  - Under RRC Production Proration Rule, Bright would be able to produce 200X more gas per-acre than a 320-acre spaced well.
  - Atlantic contested grant of RRC order, citing irreparable damages and inability to remedy under the Rule of Capture
Normanna Decision

• Texas Supreme Court holding in Normanna case
  • Invalidated RRC’s order
  • 1/3-2/3 Proration Formula is unreasonable basis for allocating production from reservoir in question
    • Does not compel ratable production
    • Does not afford each producer opportunity to produce his/her fair share
  • Court did not establish a guiding rule for allocating production
  • Mandated that RRC has the responsibility to devise a rule of proration that will…
    • Conserve gas (in this case)
    • Be ‘fair and just to all parties’ without depriving them of property
• Normanna became basis for challenging RRC orders
  • Shifted balance from small to larger operators
RRC’s Response to Normanna (1961-1965)

• Severely restricting small tract owners’ ability to produce was a problem – politically and operationally
• RRC reaction was Special Allowables for small tracts – De-facto Compulsory Pooling
• RRC’s Intent was to incentivize voluntary pooling on fair terms
  • Encourage small tract to negotiate with neighbors for ‘fair and just’ treatment, BUT…
  • Provide allowable large enough (i.e. enough leverage) to encourage neighbors to have a ‘reasonable’ attitude
• Default Allocation Formula now purely acreage-based, BUT…
• Special Allowable exception available for Gas Wells <100 acres, IF…
  1. Operator could not operate on his tract due to per-acre allowable, AND
  2. Adjacent owners had refused to pool
Texas Legislature Passes MIPA (1965)

- Texas Natural Resources Code Section 102
- Purpose is to encourage voluntary pooling
- RRC now has authority to compel pooling for...
  - Separately owned tracts
  - In same field/reservoir
  - Upon application of a qualified owner
- For purposes of
  1. Preventing drilling of un-necessary wells
  2. Preventing waste
  3. Protecting correlative rights
     - Correlative Rights = Rights of all owners in a common source/supply.
When is MIPA Available?

Three Initial Hurdles: Applies ONLY to...

1. Oil and Gas
2. Fields DISCOVERED & PRODUCED after March 8, 1961
   1. MIPA is prospective ONLY from date of the Normanna Decision
   2. Old legal framework remains for pre-Normanna orders
   3. MIPA is NOT AVAILABLE for many of Texas’ major producing fields
3. Privately owned minerals (subject to exceptions)
When is MIPA Available?

Restated: If the answer to any of the following is NO, then MIPA does not apply…

1. Are we dealing with Oil and Gas?
2. Was the field first DISCOVERED & PRODUCED after March 8, 1961?
3. Are the minerals to be pooled privately owned (subject to exceptions)?
MIPA and State-owned Lands

• **General Rule:** For MIPA to apply, minerals must be privately owned
  - Cannot compel the State of Texas to pool
• **MIPA DOES NOT APPLY** to lands…
  - Owned by State of Texas outright
  - In which State of Texas owns an interest, directly or indirectly (e.g. NPRIs)
• **EXCEPTIONS:**
  - GLO can use MIPA offensively to force pool itself
  - MIPA is available for state lands IF GLO’s consent is obtained before applying
• Includes UT Lands, Relinquishment Act Lands, Riverbeds, Unsold School Lands, Tidelands, etc.
  - What about VLB lands not yet paid off (i.e. State liens)? No judicial interpretation of State Interest
Requirements for Seeking a MIPA Action

These Requirements are JURISDICTIONAL – RRC lacks authority to hear MIPA action if any of the following elements are not present (MIPA application will be denied)

1. Separate Tracts
2. Overlying a Common Reservoir
3. Existing Field Rules - RRC has established the size and shape of proration units through temporary or permanent field rules
4. Rightful owner has drilled or is proposing to drill
5. No voluntary agreement to pool despite fair and reasonable offer (MAJOR HURDLE)
6. Pooling is for the right reasons
7. Units will comply with 160 Oil / 640 Gas (+10%)
Separate Tract Requirement

Must be Two or More (2+) Separately Owned Tracts of Land

• IF no separate tracts, THEN RRC lacks jurisdiction to grant pooling
• MIPA not available to pool a fellow co-tenant in same tract.
  • Co-Tenancy would need to be partitioned in kind before seeking MIPA

Example 1: Co-tenancy in a Single Tract

A owns undivided 3/4, B owns undivided 1/4 in Tract 1. A seeks MIPA action to force B into his unit.

OUTCOME = MIPA not available. MIPA does not apply to co-tenants in same tract. Must have 2+ separately owned tracts.
Separate Tract Requirement

Example 2: Force Pooling Co-Tenants in Distinct Tract

A owns 8/8 in Tract 1; B and C each own und. 1/2 in Tract 2. B and C refuse to pool. A seeks MIPA action to force Tract 2 owned by B and C into his unit.

OUTCOME = MIPA is available. A can use MIPA to force pool B and C’s interest in Tract 2 with A’s interest in Tract 1.

• There are 2 or more separately owned tracts, even if one has multiple owners
Separate Tract Requirement

Example 3: Forcing Pooling Some Co-Tenants in Distinct Tract

A owns 8/8 in Tract 1; B and C each own und. 1/2 in Tract 2. B agrees to pool his 50% in Tract 2 with A’s Tract 1, but C refuse to pool. A seeks MIPA action to force C’s undivided 1/2 in Tract 2 into his unit.

OUTCOME = MIPA is available. A can use MIPA to force pool C’s undivided 50% interest in Tract 2 with A’s interest in Tract 1 and B’s undivided 1/2 in Tract 2.

• A can seek compulsory pooling here because there are 2+ separately owned tracts.
Separate Tract Requirement

Example 4: MIPA for Subdivided Tract

A owns 8/8 in Tract 1, consisting of 40 acres. B leases W/2, and C leases E/2. B seeks to pool C’s WI, who refuses to pool.

OUTCOME = MIPA is available. Either B or C could seek MIPA to force pool the other because separate tracts have been created.

Note *Windsor* case – Separate tracts cannot be created for the purpose of making MIPA available.
Common Reservoir Requirement

MIPA is available only where the separate tracts share a COMMON RESERVOIR

• IF no common reservoir, THEN RRC lacks jurisdiction to grant pooling
• General Rule: Pooling authority is limited to a single reservoir
  • ISSUE FOR STACKED PAY/HORIZONTAL DEVELOPMENT: MIPA will generally apply only to the targeted reservoir, not all horizons from surface to targeted reservoir depth
  • Can be a major issue for development plan when seeking to maintain shallower depths via production from a single or limited number of wells
  • IF compelling pooling into different wells or wells completed in multiple horizons, THEN best practice is to file separate MIPA actions for each horizon
Common Reservoir Requirement

MIPA is available only where the separate tracts share a COMMON RESERVOIR

- General Rule: Pooling authority is limited to a single reservoir
- Exception: *Railroad Commission v. Pend Oreille Oil & Gas Co.*, 817 SW2d 36 (Tex. 1991)
  - Texas Supreme Courts takes expansive view of Pooling Authority
  - Upheld RRC grant of MIPA pooling of two different sands connected by a common wellbore where gas was commingled pursuant to Rule 10
Existing Field Rule Requirement

MIPA is available only in fields where FIELD RULES HAVE ESTABLISHED SHAPE & SIZE OF PRORATION UNITS

• IF no existing field rules, THEN RRC lacks jurisdiction to grant pooling
• Field rules can be temporary or permanent
• Field rules must exist at the time MIPA is sought
• RRC lacks pooling authority (i.e. MIPA jurisdiction) for...
  • Wildcat exploration
  • Undesignated horizons (i.e. horizons not subject to existing field rules)
• Defensive protection for operators – prevents others from force pooling into discovery wells
Existing or Pending Operations Requirement
(a/k/a Timing Req.)

MIPA is available only when:
1. 1 or more owners with the right to drill
2. Either has…
   1. drilled, or
   2. proposed a well
3. On an existing or proposed proration unit

IF no existing or pending operations, THEN RRC lacks jurisdiction to grant pooling
Fair & Reasonable Offer Requirement

The major hurdle facing MIPA applicants...

MIPA is available only when RRC determines that there is no voluntary pooling despite fair and reasonable offers to all owners sought to be pooled

- IF RRC determines that a fair and reasonable offer to voluntarily pool was not made, THEN RRC lacks jurisdiction to grant pooling
  - MUST DISMISS the application if no finding of prior F&R voluntary pooling offer
Fair & Reasonable Offer Requirement

- MIPA Application must detail applicant’s voluntary pooling offers
  - If RRC doesn’t find F&R offer, must dismiss
  - RRC cannot retain jurisdiction and pool on terms it deems not F&R
- Requirement responsible for nickname Mineral Interest Voluntary Pooling Act
  - Generally so onerous that voluntary pooling results
    - F&R Offers are generally accepted
    - Opponent knows (or should know) that rejected F&R offers could result in compulsory pooling
- Legislative intent is that pooling should be result of private negotiations
**Fair & Reasonable Offer Requirement**

What is "Fair & Reasonable?"

- MIPA does not define
  - Limited Statutory Guidance – Offer to share in existing unit on same ‘yardstick’ basis as existing owners shall be considered F&R
- 102.015 defines Four Per-Se Unreasonable Terms
  - Operator’s preferential right to purchase minerals in unit
  - Operator’s call or option to purchase production from the unit
  - Operator charges that include non-standard / unreasonable overhead
  - Prohibitions against non-ops questioning operations in the unit
What is "Fair & Reasonable?"

- Texas Supreme Court has declined to issue bright-line rule
- In *Carson v. Railroad Commission*, 669 SW2d 315 (Tex. 1984), TXSCT offers guidelines:
  - Offer must be one that
    - Takes into consideration those relevant facts
    - Existing at the time of the offer
    - Which would be considered relevant by a reasonable person
    - When entering into a voluntary agreement
Fair & Reasonable Offer Requirement

What is "Fair & Reasonable?" What we know from the Case Law…

• Both Applicant & Opponent must negotiate seriously.
  • This is NOT Oklahoma - Cannot simply send offer and file MIPA when it is rejected.
  • Applicant must engage counter-offers and be specific as to why voluntary offers are refused.
  • Opponent cannot simply reject offer and refuse to negotiate.
• In all F&R offer cases, the party perceived by the court as refusing to negotiate lost
Fair & Reasonable Offer Requirement

What is ”Fair & Reasonable?” What we know from the Case Law…

• Fairness is determined from viewpoint of person being pooled at the time of the offer.

• MIPA will be construed in favor of the little guy.
  • MIPA will be construed in favor of either small-tract owners OR lessees who are:
    • Being pooled against their will, or
    • Attempting to ‘muscle-in’ to a larger unit
  • Stance is mandated by Legislative History (which courts will look to in interpreting the Act)
Fair & Reasonable Offer Requirement

Ensuring the Fair & Reasonable Offer

- Best practice = Make offers that allow various ways for parties to participate
- Offer with single participation method increases risk that RRC will reject application
  - RRC may view that one method as unreasonable from standpoint of party being pooled, and without alternatives will lack MIPA jurisdiction
Fair & Reasonable Offer Requirement

Example 1: MIPA Among Operators

• Following operators own 8/8 WI in following tracts…
  • A in Tract 1 (160 acres)
  • B in Tract 2 (100 acres)
  • C in Tract 3 (60 acres)

• A wants to form 320 acre unit, offers B&C the following:
  1. Standard pooling on surface acreage basis
  2. Purchase of B & C’s WI for agreed $/acre or ORRI=FMV
  3. A will pool and drill alone, carrying B & C until payout + agreed risk premium
Fair & Reasonable Offer Requirement

Example 1: MIPA Among Operators

- Multiple options necessary b/c…
  - Option 1 could be unreasonable to C if small operator with limited capital
  - Option 2 could be unreasonable to B&C if they argue that it deprives them of opportunity to participate in exploration
Fair & Reasonable Offer Requirement

Example 2: MIPA to pool unleased mineral owner

- Big Oil wants to pool unleased mineral owner A into a unit. Big Oil could offer… *(Finley case)*
  1. Share drilling costs and production pro-rata
  2. Lease @ FMV
  3. 1/5 royalty and 4/5 carried working interest (at risk factor)

- Option 1 not likely reasonable alone b/c unleased owner not likely to have capital
- Option 2 not likely reasonable alone b/c owner may have purposefully declined to lease in order to self-develop or participate
Fair & Reasonable Offer Requirement

Who has to receive a Fair & Reasonable Offer? Not Everyone

- *Butte Resources Co. v. Railroad Commission,* 732 SW2d 675 (Tex.App. – Houston [14th Dist.] 1987, writ ref’d n.r.e.)
  1. No requirement that applicant seek to negotiate with all parties prior to pursuing MIPA
     1. HOWEVER – Required notice must provided to all owners
  2. Generally will be sufficient for applicant to seek negotiation with operator, who has authority from other owners
  3. You have to notice everyone, but you don’t have to negotiate with everyone.
Muscle-In Clause

Section 102.014 authorizes small tract owners to force-pool their tracts into adjoining tracts of equal or greater size than standard proration units in the field.

- Required Elements: RRC must determine that the small tract...
  - Is of equal or smaller size than the proration unit to be pooled into
  - Has not been provided a reasonable opportunity to voluntarily pool

- Small tract owner who rejects a F&R offer will likely be precluded from seeking MIPA

- In order to succeed, likely that offer should be to participate on the same basis as other owners in the unit

- Acreage muscling-in be adjacent

- Must meet all other MIPA requirements as well
Who Can Apply for MIPA?

Three Types of Owners Who May Seek MIPA Action (Three Amigos)

1. Owner of any interest in oil or gas in an existing/proposed proration unit;
2. Owner of any working interest; or
3. Any owner of an unleased tract other than a royalty owner
MIPA Must Be for Right Reasons

MIPA must be demonstrated to be for purpose of…
1. Avoiding drilling of unnecessary wells; or
2. Protecting correlative rights; or
3. Preventing waste.
Maximum Size of MIPA Unit

MIPA Unit must be the approximate size of the proration unit

STATUTORY MAXIMUM MIPA UNIT SIZES
1. OIL = 160 acres + 10% Tolerance = 176 acres
2. GAS = 640 acres + 10% Tolerance = 702 acres
Quick Recap

IF…

1. 2+ separately owned tracts embraced in a common reservoir;
2. For which RRC has established size & shape of proration units via field rules (T or P);
3. Separately owned interests in the existing/proposed proration unit overlying the common reservoir;
4. Owners have not agreed to pool;
5. @ Least one owner of right to drill has either drilled or proposed a well on an existing/proposed proration unit to the common reservoir…
Quick Recap

THEN…

1. Upon application of property party (one of the Three Amigos);
2. For the proper purpose(s);
3. RRC SHALL establish a unit and pool all interests in the unit within an area containing the approximate acreage of a proration unit
   1. MAXIMUM MIPA UNIT SIZES
      1. OIL = 160 acres + 10% Tolerance = 176 acres
      2. GAS = 640 acres + 10% Tolerance = 702 acres
4. Pooling Order shall be on F&R terms and afford each owner opportunity to produce receive fair share
5. Order shall designate the operator and well location
**Procedural Requirements**

1. **30 Days Notice Required Prior to Hearing**
   1. Notice of MIPA application must be given to “all interested parties”
   2. May serve notice upon missing or unknown owners by publication

2. **No standard form. Application must...**
   1. Request hearing for a compulsory pooling order
   2. Include detailed record of voluntary pooling offers made and rejected
   3. Identify the tracts
   4. Identify all interest owners
Procedural Requirements

1. Applicant must provide RRC with list of all interested parties to whom notice has been sent.
   1. This should be all interest owners of all types in the tract
   2. Best to include offset operators and adjacent mineral owners
2. RRC will mail notice to all listed parties
3. Notice by publication is applicant’s responsibility

MIPA Actions generally take 6 months to 1 year – timeline must factor into operations realities (lease terminations, etc.)
MIPA Application Checklist

- Oil or Gas well
- Field was NOT discovered and produced prior to March 8, 1961
- Private Minerals (i.e. Non State of Texas, but see exceptions)
- 2+ Separately Owned Tracts
- Common Reservoir
- RRC has already established Field Rules (Temporary or Permanent) that set the Size & Shape of proration units
- 1+ owner with right to drill has drilled is proposing a well
- No voluntary agreement to pool despite “Fair & Reasonable” offers
- Pooling is for right reasons
  - Prevent drilling unnecessary wells
  - Prevent Waste
  - Protect Correlative Rights
MIPA Practice Tips Recap

• RRC typically only authorized to pool the targeted reservoir
  • IF seeking to compel pooling into (a) different wells in different horizons, or (b) wells completed in multiple horizons…
  • THEN best practice is to file separate MIPA actions for each horizon
• Providing multiple pooling options/alternatives will enhance likelihood that offers will be deemed “Fair & Reasonable”
• Make voluntary pooling offers time-bound in order that they may be deemed rejected before seeking MIPA action
  • RRC will lack jurisdiction if there is no demonstrated failure to agree
• Personal notice for hearing should be given to all interest owners other than missing/unlocatable owners
MIPA Practice Tips Recap

- Notice should be provided to offset operators and adjacent unleashed mineral owners if application involves a proposed well
  - Notice to these parties typically required for Rule 37 spacing exceptions
- To pre-empt incomplete interest notice, best practice is to file notice by publication for all MIPA actions
- Keep detailed records of all pre-MIPA voluntary offers, as well as written & oral communications (documentation is essential in a contested case)
- Make all offers so exact the terms can be proven
QUESTIONS?

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