

Marshall and the Four Corners Doctrine: 10 Years After
By Martin C. Rochelle and Nathan E. Vassar

This year marks the 10th anniversary of the Texas Supreme Court’s decision in *Marshall v. Uncertain*, 206 S.W.3d 97 (Tex. 2006), where the court squarely identified the factors to be considered by the Texas Commission on Environmental Quality (“TCEQ”) in its assessment and approval of certain water right amendments, and thus by applicants in their preparation of amendment applications. Following that decision, TCEQ implemented a stakeholder process to define a procedural protocol for implementing the court’s direction. Thereafter, TCEQ Commissioners took quick action to approve several applications involving the most prevalent types of amendments, and without notice or the opportunity for expensive, time-consuming hearings. Since then, many dozens of amendments to water rights have been issued by TCEQ following the agency’s review, and without the requirement of notice or the opportunity for contested case hearing.

To date, our water supply planning series has focused on the value of water supply audits to identify supply shortfalls and prioritize needs, and the availability of exempt interbasin transfers (“IBTs”) to enable the provision of water supplies across river basin boundaries. Like the exempt IBT approach, the “Four Corners” or “Full Use” doctrine assessed by the Texas Supreme Court in *Marshall* can, if implemented appropriately, afford water suppliers an avenue to maximize their use of existing water supplies without the risks of protests or hearings. The doctrine is a product of statutes, case law, and agency action, and as such, its benefits become available by framing water right amendment applications in a manner that honors the doctrine’s historical and legal foundations.

The requirement that water right holders secure amendments has evolved, beginning with case law dating to the 1940s. In *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 684 (Tex. Civ. App.—Austin, 1947, no writ), the court determined that one of the TCEQ’s predecessors, the Texas Board of Water Engineers, maintained jurisdiction over changes of purpose and place of use by water right holders. The current statute addressing amendments to water rights (Texas Water Code § 11.122(b)) incorporates the “Four Corners” doctrine. It provides that certain amendments “shall be authorized” if specific requirements are met. These provisions reflect policy enacted in 1997 via Senate Bill 1, where the Legislature directed TCEQ to authorize certain water right amendments – those that did not propose to enlarge the diversion right or increase the rate of diversion, and did not cause adverse impacts to other right holders or the environment of “greater magnitude” than if the base water right (without the amendment) were “fully exercised.” In short, the Legislature directed, and the Supreme Court subsequently confirmed in *Marshall*, that certain water right amendments are not subject to notice and hearing requirements if the amendment would not pose any greater impact to other water rights or the environment than if the pre-amendment right were fully used.

The statutory and judicial history of “Four Corners” has certainly informed TCEQ practice in the decade since the *Marshall* decision. If applicants for amendments are to avail themselves of the opportunity that Four Corners affords, they must frame their applications to address statutory requirements related to a host of “limited public interest” factors, including conservation, beneficial use, and consistency with state and regional water plans, and they must also address possible impacts of the proposed amendment “irrespective of the full use assumption.” Needless to say, the construction of amendment applications since *Marshall* has demanded a thoughtful approach.

The scope of water right amendments that are candidates for the “Four Corners” treatment continues to evolve, as new amendment applications are presented to and considered by TCEQ.

Among the amendments that are currently available for streamlined actions by TCEQ are applications to: (1) cure ambiguities in a water right; (2) change the place or purpose of use of a water right; (3) move a diversion point when there are no interjacent water users between the existing and proposed diversion locations; and (4) increasing rates and/or periods of diversion from storage reservoirs. Depending on a variety of factors, including location, other non-noticed amendments may also be secured.

An appropriately crafted amendment application may invoke the “Four Corners” doctrine and take advantage of the benefits afforded through it, if the applicant can demonstrate that it meets the doctrine’s statutory requirements, as detailed by the court in *Marshall*. By framing amendment applications in a manner that avoids the hurdles, costs, and delays that accompany notice and hearing, water suppliers may implement the very purpose of Senate Bill 1 – as quoted in *Marshall*, to “make better use of existing supplies, . . . encourage conservation, . . . and to encourage systematic water-resource planning.” As such, adjusting water rights in order to address current and future service needs through water right amendments that use the “Four Corners” doctrine can be among the most effective water planning tools available to water suppliers.

Martin C. Rochelle is the Chair of the Water Practice Group at Lloyd Gosselink Rochelle & Townsend, P.C. in Austin. Martin’s practice is focused on representing clients in complex water rights, water quality and water reuse matters before state and federal administrative agencies, and in the development and implementation of sound water policy. He represents a wide array of water interests across Texas, including cities, river authorities, regional water districts, and other political subdivisions of the state, as well as industrial and commercial interests. Nathan Vassar is an Attorney in the firm’s Water Practice Group. Nathan’s practice focuses on representing clients in regulatory compliance, water resources development, and water quality matters. Nathan regularly appears before state and federal administrative agencies with respect to such matters. For questions related to the use of water supply planning tools, including amendment applications pursuant to the Four Corners doctrine, please contact Martin Rochelle at (512) 322-5810, mrochelle@lglawfirm.com or Nathan Vassar at (512) 322-5867, nvassar@lglawfirm.com.