

"The focus of the webinar will be providing *perspectives on water courts and experiences related to them*, with the goal of helping to understand how these practices can be useful for other states contemplating water courts or other specialized courts in the context of climate change. The audience will be not only judges and court administrators, but any other interested folks in the environmental law community.

The next step will be to schedule a planning call with you and the other panelists to discuss the format and logistics of the webinar."

FIRST: IN WHAT FORM ARE WE GOING TO RECEIVE CLIMATE CHANGE CASES?

A. Administrative Claims vs Common Law claims; challenges

(1) *Administrative Claims*. May arise from OSE, Environmental Dept, Muni Waterworks, Water Conservation & Mgmt, Department of Health, state Environmental Protection agencies, Departments of Emergency Mgmt, etc

- through admin appeals or Rule of Civ. Procedure 74 (NM admin. appeals)

- constitutional right to appeal administrative decisions not addressed in sttes or codes

> Challenges: Admin regulations and statutes establishing administrative remedies will likely not include CC as a consideration in its decision; will have to look at discretion granted, whether waste, conservation, or avoidance of harm or damage an element to consider.

> Admin. principals apply uniformly: Within the scope of authority granted? Police power v. rights and liberties? Admin process uniquely suited for the relief?

(2) *Common Law*. Most claims will arise from Negligence (foreseeability, failure to anticipate or act, exercise of reas care), Nuisance, Constit'l and Public Tort (regulatory or stty duty, consumer protection claims), Public Trust Doctrine, Equitable Actions, Insurance related, Water Law, Social Justice, etc)

- through creation of jurisdiction based on statute or order/rule of Sup Ct.

(Superintending control)

> 2/3's of my water law docket arise from common law claims

> need to view common law claims in light of climate change issues

- by judicial notice of climatic events or conditions, filings, etc;

-evidentiary challenges

(3) *Note*: For effective and comprehensive coverage, need to have concurrent jurisdiction for CC courts.

SECOND: SEPARATION OF POWERS; WHO ESTABLISHES CS/WATER COURTS - JUDICIARY OR LEGISLATURE?

Legislature:

- Mendelson v. Miller, 21 Ohio Dec. 377 (Ohio Com. Pl. 1911) ("the general assembly may *** establish other courts, whenever two-thirds of the members elected to each house shall concur therein." Art. 4, Secs. 1, 15"). To constitute *a court, there must be a judge or judges, and he or they must have a defined and delegated jurisdiction*. But before we can have judges and jurisdiction, these must be provided for, by the constitution or by law.

Pers. v. Bd. of Comm'rs of Shelby Cnty., No. W200701346COAR3CV, 2009 WL 3074616 (Tenn. Ct. App. Sept. 28, 2009) (Legislature is the sole judge of the necessity or expediency of establishing [inferior] courts.) "Consequently, in order to "ordain and establish" a court under Art. VI, § 1, the legislation creating or establishing the court must make provision for a judge. The legislature cannot establish a court without also establishing a judgeship." Mengel Box, 135 Tenn. 202, 186 S.W. 91, 91–92 (1916) (whether a private act provided for a new court or was simply an enlargement of the jurisdiction of an existing court.)

Superintending Control/Rule-making Authority:

State v. Figaro, 462 N.J. Super. 564, 228 A.3d 466 (App. Div.), appeal denied, 244 N.J. 248, 238 A.3d 289 (2020) ("*Drug Courts are a creature of the judiciary*[,] and, as such, are "subject to the constitutional purview of [the Supreme] Court, which executes its policies through the Administrative Office of the Courts [(AOC)]). In re Application of Carlstrom, 240 N.J. 563, 572, 223 A.3d 1223 (2020) (Directive is an expression of [the] Court's constitutionally granted rule-making authority over all state courts."). Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 313, 551 P.2d 1354, 1360 (1976) (This court has a superintending control over all inferior courts as well as jurisdiction and power to issue writs of certiorari. New Mexico Constitution Art. VI, § 3. ***This constitutional power and jurisdiction carries with it the power to regulate pleading, practice and procedure in inferior courts*** and the circumstances under which such writs, including writs of certiorari, may issue.) Hudson v. State, 89 N.M. 759, 760, 557 P.2d 1108, 1109 (1976) (stating that our superintending control includes "the power to regulate and to promulgate rules regarding pleadings, practice, and procedure affecting the judicial branch of government"), cert. denied, 431 U.S. 924, 97 S.Ct. 2198, 53 L.Ed.2d 238 (1977). McBee v. Shanahan Home Design, LLC, 2021 OK 60, 499 P.3d 1 (These references to administration of courts make it clear the judiciary has exclusive authority to manage its own affairs. The purpose of a unitary system of judicial management is to centralize the administrative power of the entire judicial system in the Supreme Court, and make the Chief Justice the administrative head of all courts. (Authority to issue orders for the safe operation of the Court under Covid.)) Com. v. Nicely, 326 S.W.3d 441 (Ky. 2010) (While no new statutes were enacted to establish the [*drug court*] program, it is statutorily based in that the statutes which already gave the court system authority to act in regard to probation and diversion govern the program without need for further enactments.)

Contra: State ex rel. Moore v. Sharp, 151 S.W.3d 104 (Mo. Ct. App. 2004) When a court of general jurisdiction establishes and uses a drug court, it is *exercising a special statutory power*; in doing so, it is confined strictly to the authority given by the statute. VAMS sec 478.001

THIRD: ESTABLISHING CS/WATER COURTS

1) Provide Information on Climate Science to Judges and Policymaking Leaders;

- exercise caution when presenting science, to avoid presenting one side of scientific perspectives, or unwittingly endorsing one position over others in an ongoing dispute or giving advisory opinions;
- avoid the political football: not Climate Change, but climate change or climate science;
- clarify to your audience, you are not a climate scientist;
- localize climate change issues: where possible, use public records from local agencies (OSE, Envir Dept of S, etc)

2) Advocate on the Need for the Judiciary to Establish Climate Science Courts and/or Incorporate with Water Courts; (In the Western states Climate Change is Water)

- administrative claims vs common law claims; difficulties
- incorporate common law claims in addition to administrative matters; concurrent jurisdiction

3) Educate Judges on the Challenges with Integrating Climate Science into Existing Laws; Water law (administrative law):

- in Western states, potential conflict or tension exists between right of appropriation on which water law is predicated, with extreme climate events (climate change);
- portions of Western Water Codes based on past periodic and predictable periods of drought may not be adaptable to prolonged and extreme droughts resulting from climate change for purposes of water administration and allocation; (conservation efforts, calls by sr. rightsholders, consumptive use rights, etc);
- explore the discretion found within administrative processes such as OSE water administration; (Bounds, Aquifer Science permit under Sec. 72-5-7, groundwater application and objections include conservation and public welfare).

Common law:

- use tools for legal adaptations within our jurisdiction:
 - climate change is a climatic condition or event, not a cause of action
 - incorporate common law claims into climate change issues (negligence - foreseeability, failure to act; equitable actions, nuisance, etc)
 - by judicial notice of climatic events or conditions; evidentiary challenges
- develop legal adaptations to climate change which will lead to the development of legislative policymaking in climate change.