



The Impact of Climate Change:

What It Means to the Judiciary.

Choices to Make.

Our Choices Will
Impact Others.

There Will be
Winners and
Losers.

YouTube. Capital One Bank –
No Overdraft fees.

[Capital One \(Banking\) TV Spot,
'Barkley' - iSpot.tv](#)



What Climate Change?

Lateral, Mesilla Valley June 2022



Southern Mesilla Valley March 2022



For the Western States, climate change is water.

The Western U.S. experienced a severe mega drought from 2000 through the early 2020's.

National Oceanic and Atmospheric Administration
(NOAA)

Lake Mead 7/1/2022



LET'S GO BACK TO NEW MEXICO.



Who Uses Water in New Mexico?

Irrigated agriculture uses
about 80% of the water
in the state. (2018)

2018 Water Plan Office of the State Engineer, page 24,
Part II.



Irrigated agriculture
contributes 20% to
the State's economy.

Flood irrigation applied to a pecan orchard,
Mesilla Valley (July 2022)



The rest of the water use:

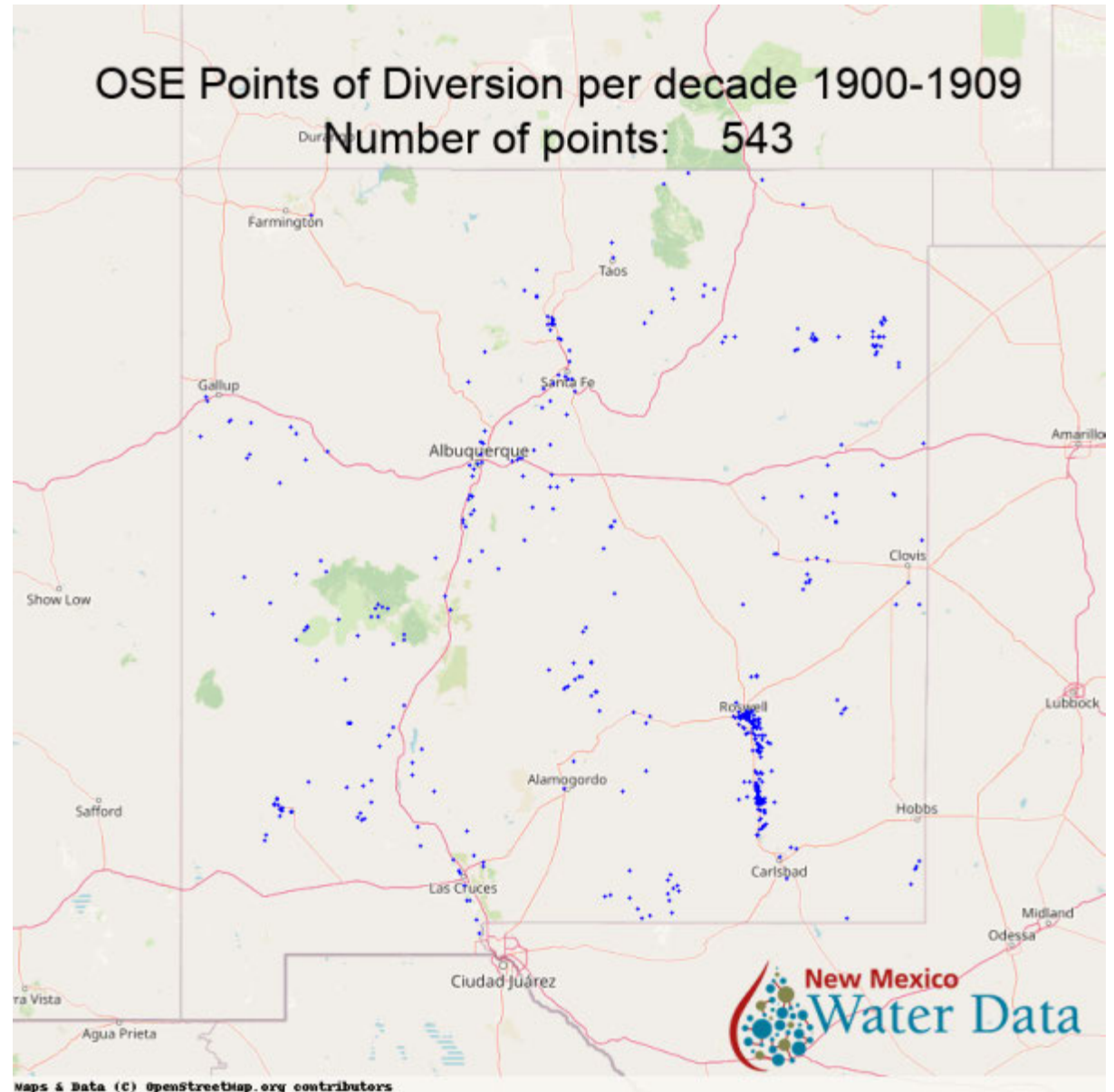
8.7 percent of total water use is for municipal and related purposes.

12.3 percent is other uses: manufacturing, mining, commercial purposes.

Deep Well Extractions

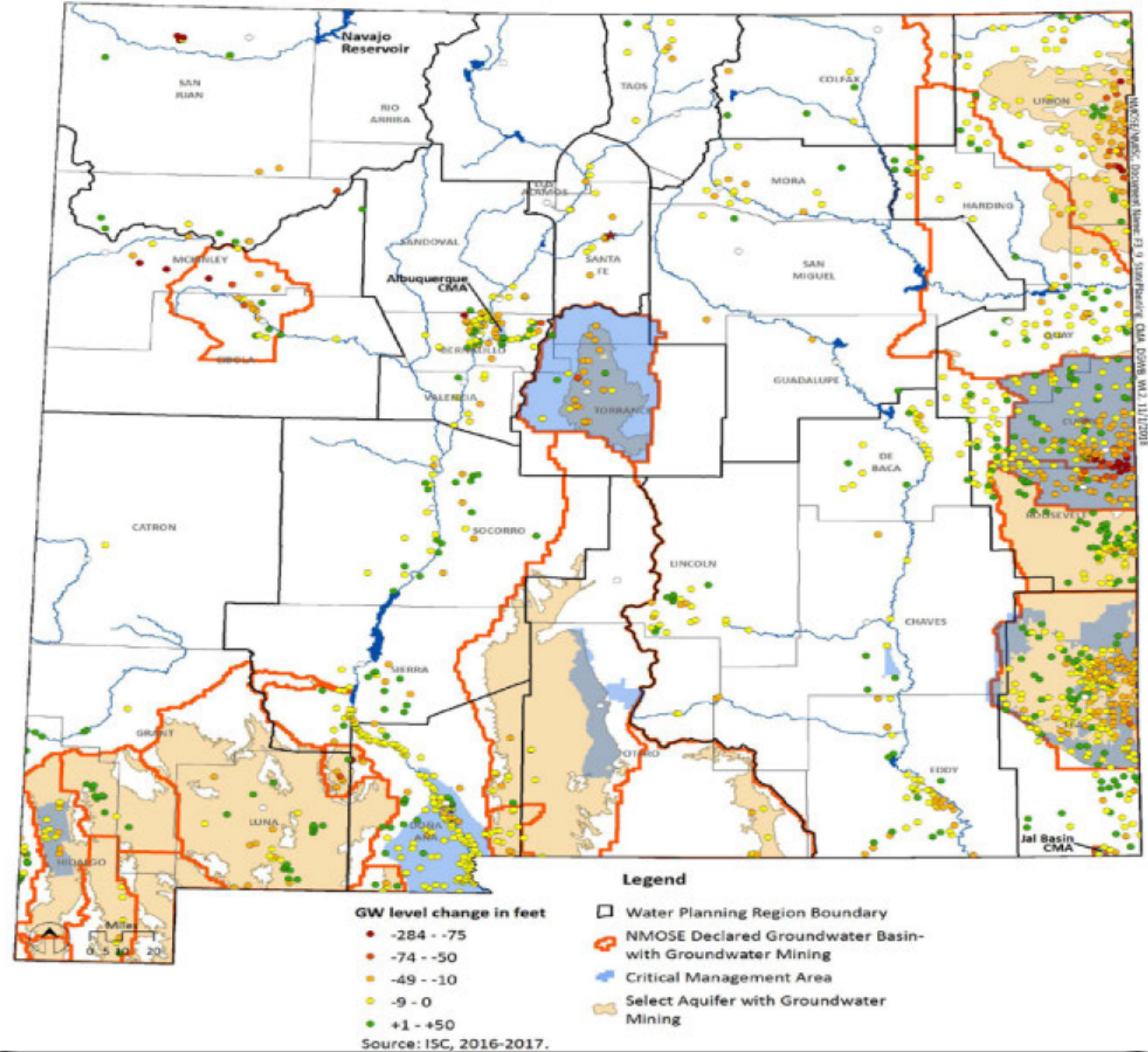
1909 - 543 deep wells

2022 - 174,758 deep wells

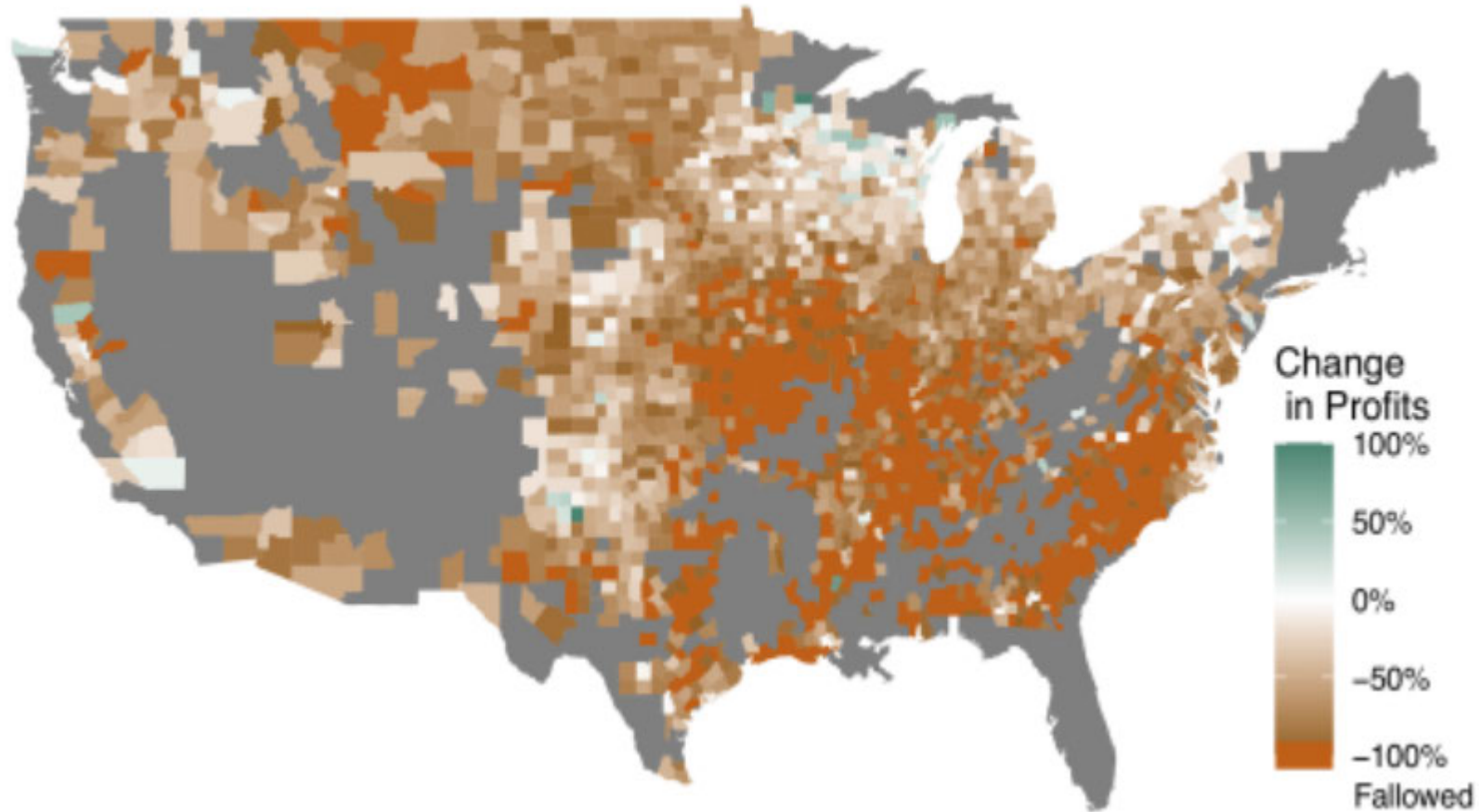


2018 Water Plan
Office of the
State Engineer,
page 33, Part I

“The most glaring water supply shortfall is occurring in eastern New Mexico where some communities have less than five years of water supply remaining.”



By 2060, America's breadbasket will shift to Canada.



So What is New Mexico's Approach to Water?

(Under the Law)

N.M. Const., Art. XVI, Sec. 3:

“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”

The New Mexico Water Code (Sec. 72-1-1, et seq.)

“All natural waters flowing in streams and watercourses, ... belong to the public and are subject to appropriation for beneficial use.” (72-1-1)

“The state engineer shall, upon ... application of a majority of the water rights owners of any district in this state, appoint a water master ... who ... shall be removed upon a petition of a majority of the water rights owners ... ” (72-3-2)

“Improved irrigation methods or changes in agriculture practices resulting in conservation of water shall not diminish beneficial use or otherwise affect an owner's water rights or quantity of appurtenant acreage.” (72-5-18)

Common Law and Statutory Interpretation:

Bounds v. State ex rel. D'Antonio, 2013-NMSC-037, aff'g 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708.

"Section 72-12-1.1 NMSA 1978 does not violate the doctrine of prior appropriation set forth in the New Mexico constitution and is facially constitutional."

State ex rel. State Eng'r v. Lewis, 2007-NMCA-008, 141 N.M. 1, 150 P.3d 375.

"The doctrine of prior appropriation does not require that resolution of existing and projected future water shortage issues be attempted exclusively through the procedure of a priority call when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods."

SO ... WHAT TYPES OF CLIMATE SCIENCE CASES ARE BEING FILED?

A. Negligence-duty of care.

- Exercise of reasonable care (not industry standards.)
- Foreseeability of risk, failure to assess
- Mitigation issues
- Adaptation issues

B. Nuisance

- Private or Public
 - failure to abate a foreseeable risk

C. Constitutional and Public Tort Claims

- a. Statutory obligation to regulate
- b. Policy or administrative decision to act, or not act
- c. Failure to disclose or assess
- d. Consumer protection claims

D. Public Trust Doctrine

- a. Usually relates to bodies of water

E. Insurance and Insurance Claims

- a. Coverage issues (flood exemption, Act of God, etc)
- b. First Party Claims
 - inadequate coverage provided
 - underwriting omissions
- c. Reduced coverage limits or market withdrawal

F. Water law claims

- Appropriation rights (NM Water Code Sec. 72-1-1, et seq.)
- Conservation and PW issues (Common law and Stty)

G. Social Justice

- a. Claims seeking equitable relief for the poor/unrepresented.
- b. Justice for the undeveloped.

H. Federal Jurisdiction – Interstate Commerce Clause

- a. Equitable apportionment of water.
- b. Regulatory deference to states.
- c. Preemption issues.
- d. Sporhase v. Nebraska, 458 U.S. 941 (1982)

Climate Change Litigation In New Mexico – IT’S HERE.

1. Texas v. New Mexico, 602 U.S. 943, 144 S. Ct. 1756, 219 L. Ed. 2d 539 (2024) (*Pending*) – suit between Texas, NM and US to apportion water between the states to include the Lower Rio Grande and the underground waters in that district.
2. Augustin Plains Ranch, LLC v. D’Antonio, No. –A-1-CA-3 (2014) – application made to transfer well water from the Augustin aquifer near Magdalena to a populated area south of Albuquerque.
3. City of El Paso v. Reynolds, 563 F.Supp. 379 (D.N.M.1983) (El Paso I) and City of El Paso v. Reynolds, 597 F.Supp. 694 (D.N.M.1984) (El Paso II) initially an out-of-state embargo by NM, then a failed effort based on public interest and conservation.

... IT'S HERE.

4. Quay County et al., v. Eastern New Mexico Water Utility Authority; D-1010-CV 2024-00122 (Pending) - petition for injunctive relief; objection to water to construction of 110 mile pipeline from Clovis to Ute Lake.
5. Mora County fire – Hermit's Peak/Calf Canyon. Gallegos, et al. v. FEMA; No. CIV 24-0170 JB/JFR consolidated with 10 other cases; 13+ cases filed. (*Pending*) - April 2022 wildfire scorched over 340,000 acres, destroying over 900 structures, and evacuation of over 15,000 households throughout Mora, San Miguel and Taos counties. Largest wildfire in NM.

IT'S HERE ...

6. Pueblo of Sandia v. Rio Rancho, et al.; D-1329-CV-2023-821 consolidated with D-1329-CV-2023-820 (*Pending*) – city applications to transfer water rights from MRGD without depleting stream system flows, non-pueblo water rights protections, and conservation and not detrimental to public welfare in the State, at issue.
7. Aquifer Science, LLC v. Verhines, 2023-NMCA-020, 527 P.3d 667, cert. denied (Jan. 30, 2023), appellate courts addressed conservation and climate change in Sec. 72-12-(E) in Water Code. Deferred to the legislature “to provide guidance regarding climate change and conservation before it is judicially imposed.”
8. Pyle, et. al v. PNM Resources Inc., et. al, D-202-CV-2022-04363, (2nd Judicial) (*Pending*) – suit by multiple homeowners who lost homes and property in the McBride Fire (Ruidoso) in April of '22.

Camino a Santiago de Compostela



WE HAVE HOPE.



Judge Manuel (Mannie) Arrieta

Third Judicial District Court

