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Course (Summer Conference, June 7-10)

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### El Paso/New Mexico Controversy [outline]

John P. Frank

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EL PASO/NEW MEXICO CONTROVERSY

John P. Frank  
Lewis & Roca, Phoenix

New Sources of Water for Energy  
Development and Growth: Interbasin Transfers

a short course sponsored by the  
Natural Resources Law Center  
University of Colorado School of Law  
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## EL PASO/NEW MEXICO CONTROVERSY

### I. Facts.

- A. Geology.
- B. El Paso Activity.
- C. New Mexico Statute. *prohibits transfer water*
- D. Litigation Posture.

### II. Critical Questions Presented

- A. Does the Commerce Clause bar New Mexico from limiting the exportation of groundwater?

(1) Is groundwater in a special category for Commerce Clause purposes by virtue of the police power or because long tradition has established that groundwater in a state like New Mexico is not an "article of commerce"?

(2) Has Congress by an elaborate network of statutes recognized in the states plenary control over their groundwater except as to possible federal regulation?

(3) Did Altus overrule McCarter or do these represent separate lines of recognition of state law?  
*(Tx case - limitation export water not permissible)*

- B. Does the Rio Grande Compact and related reclamation project represent a congressional determination of New Mexico's right to control the water not governed by the Compact?

- C. Does the Eleventh Amendment bar this action?
- III. The Sporhase Correlation.
- IV. Does the Dormant Commerce Clause Invalidate New Mexico's Statute?
- A. H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949) vs. Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908); Herein of the Bearing of West v. Kansas Natural Gas Co., 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911).
- B. Did City of Altus, Oklahoma v. Carr, 255 F. Supp. 828 (W.D. Tex.), aff'd per curiam, 385 U.S. 35 (1966) Overrule McCarter, supra? Herein of the Nature of Water Rights in the West and of the Public Ownership or Article of Commerce Concept.
- C. Under Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), Is the New Mexico Statute Invalid?
- D. What Difference, if any, Does the Police Power Make?
- V. Has Congress Delegated Plenary Control Over Groundwater to the States?
- VI. What Bearing, if any, Does the Rio Grande Compact Have on the Subject at Hand?
- VII. Conclusion.