“Informal Notice & Comment Rulemaking in Interstate Compacts”

[A Panel of the Administrative Law Section of the American Bar Association, for their Winter Meeting as held in Salt Lake City, Utah, on Feb. 13, 2005.]

Moderator: Kent W. Bishop:

Introductory Comments:

In November 2003, I invited three other panelists to join me in a discussion of rulemaking under Interstate Compacts, at the Administrative Law Section’s Fall meeting in Washington, DC. I observed then that drafter of four new Compacts had recently turned to Administrative Procedure Rulemaking and away from the more traditional compact law rulemaking system, --and by so doing, charted a new direction for making compact rules.

Interstate Compacts are multi-state agreements between two or more states. Each state agrees to work together in joint public functions, or to resolve shared problems. Once a state adopts a compact, it pledges to uphold its objectives. Management often occurs by a representative from each state, having a single vote on the compact’s commission. Rules that are made by most Interstate Compact -- make up a body of regulatory law that has been almost totally ignored, and is complete separate from administrative law.

States have crafted some 198 interstate Compacts since 1783. The drafters of the U.S. Constitution in 1789 authorized them under the following provision, which reads in part:

“No state shall, without the consent of congress, ... enter into any agreement or compact with another state, ... .”

That wording seems to imply that the only legal compact agreements are those which have obtained formal passage by congress. But the U.S. Supreme Court later rules that approval is only needed when a compact affects (a) the political balance within the federal system, or (b) a power delegated to the national government.

Many compacts have been adopted without obtaining specific congressional consent, though a federal court can review a compact. And the Supreme Court has the final power to pass upon the meaning or validity of interstate compacts.

Adoption of a compact requires each state’s legislature to vote on it, just as any statutes. States may withdraw from a compact only by complying with its withdrawal provisions, though some compacts do not allow withdrawal. Courts have held that a compact is a valid prospective delegation that carries future obligations.

Typically, a compact acts by a Commission; which sets up operating policies, by-laws, or rules to implement functions that are legally binding upon all member states. Until now, each
compact’s rules stand or fall based on the language of that Compact. Until 1999, there had been no attempt to utilize administrative procedure in compacts. In 1999, the Interstate Compact on Adult Offender Supervision was introduced in several state legislature. It provided in part:

“Article Eight: -- (b) Rulemaking shall occur pursuant to the criteria set forth in this article and the by-laws and rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C., Section 551 et seq.,”

Because this Adult Offender Supervision Compact requires rules to “substantially conform to the principles of the federal APA,” it signifies a new direction in Compact law rulemaking. The legal counsel with the Council of State Governments fully intended for administrative-procedure notice & comment rulemaking to:

(a) First, provide that a compact’s rules shall have more equal consideration by the courts by utilizing a notice & comment due-process method; and
(b) Second, that if a Compact’s rule “substantially conform” to the principles of an A.P.A., those rules will have more force of law.

Addressing the concept of how the Adult Offender Supervision Compact’s rules would function, C.S.G.’s Michael McCabe noted:

“The unusual part of the Compact’s language is ... (an) attempt to limit that (compact’s) authority and to require that it be exercised in a way that guarantees some minimum level of due process.”

At that November 2003 Administrative Law Section conference, I posed this question? “Is a reliance on the Federal APA a sufficient way to operate notice & comment rulemaking for state governments to use for their compact agreements? In reviewing this with Prof. David Rosenbloom of American University, he suggested that the federal APA was never intended and is ill suited to meet state-needs, including Interstate Compact rulemaking.

In his book on State Rulemaking, Dr. Arthur Bonfield urged that state’s rulemaking should not follow the federal APA, but employ a more “structured process.” For Interstate Compact Agreements, then, we need to ask what kind of Administrative Procedure Act, or rulemaking model would best meet these needs?

For some insight, I will now turn to the first of our panelists, Dr. Molly Klapper:

[In this space, include the full text of Dr. Klapper’s presentation: “Notice and Comment” or “Informal Rulemaking” under Interstate Compacts” as was printed in the hand-out for the ABA meeting held on Sunday, February 13, 2005, @ 10:45am - noon, in the Little America Hotel in Salt Lake City, Utah.]
"NOTICE AND COMMENT" OR "INFORMAL RULEMAKING"
UNDER INTERSTATE COMPACTS"

[Presented by Dr. Molly Klapper, of the Touro Law Center, Huntington, New York, to the Amer. Bar Assoc. Winter Meeting, Feb. 13, 2005 ]

Are the procedural requirements that must precede the legally effective promulgation, amendment, or repeal of a rule by a federal agency, as imposed by § 553 ("Notice and Comment" or "Informal Rulemaking") of the Federal Administrative Procedure Act (APA), other procedural statutes, and judicial decisions, equally applicable to "informal rulemaking" under Interstate Compacts? If not, how is it different?

If "yes," which APA applies to "Informal Rulemaking" under Interstate Compacts: Federal, State, or other administrative state statutes?

The presentation that follows attempts to answer these and other "informal rulemaking" questions, focusing exclusively on federal and state case law as it grappled with these issues.

I- APPLICABILITY

A. Definitions

1. Agency; Question 1: Is an Interstate Compact Commission an agency within the meaning of the Federal APA and hence required to follow the Federal APA? Answer: Interstate Compact Commissions are not considered agencies within the meaning of the Federal APA and hence not required to follow the Federal APA.

The U.S. District Court in The Organic Cow LLC v. Northeast Dairy Compact Com'n, 164 F. Supp.2d 412 (D. Vt. 2001) held the Northeast Dairy Compact (hereinafter "Compact") is not an agency within the meaning of the Federal APA and hence not required to follow the Federal APA. Even though the Court recognized the Compact's approval by Congress transformed the Compact into Federal Law, it nevertheless held the Federal APA is not applicable. It reasoned since the Compact is not an "authority of the Government of the United States", as "agency" is defined in the Federal APA (5 U.S.C.A., § 701(b)(1)), the Compact is not an agency within the meaning of the Federal APA, and accordingly not required to follow the federal APA. The Court's rationale herein follows:

a. "Congressional consent has transformed the Compact into a law of the United States." Organic Cow at 419.

b. "Although the Compact is the equivalent of a federal law, the Commission is not the equivalent of a federal agency governed by the Administrative Procedures
Act."

Organic Cow at 419-20.

c. "The Commission is an authority of the six New England states [signatories to
the Compact], not the United States government." Organic Cow at 420.

d. Hence, arguments that the hearing officer violated APA rules were unavailing:
"The argument that the procedure followed by the Hearing officer violated the
APA is easily resolved: the Commission is not an 'agency' within the meaning of the
APA, ... and is therefore not required to follow APA rules." Organic Cow at 421.
ftn.9.

e. Though not in a rulemaking context, it may be of interest to note that the D.C.
Circuit Court characterized the Washington Metropolitan Area Transit Authority
Interstate Compact (WMTA) "as a quasi-governmental entity created by its
signatory parties [Maryland, Virginia and the District of Columbia]." KiSKA
Const. Corp. v. Washington Metropolitan Area Transit Authority, 321 F. 3d 1151,
1158 (D.C. Cir. 2003).

Comment: When a Compact itself is silent as to any requirement for
§553" or informal rulemaking," the Commission is not required to
follow the Federal APA as a Commission is not considered a federal
agency within the meaning of the APA even if the compact has won
Congressional approval.

Question 2: Is the result different where a Compact provision requires the
Commission to follow the Federal APA's informal rulemaking provision?

Answer: Yes. Where the Compact itself specifically requires the Commission to follow the
Federal APA's § 553 for Informal Rulemaking procedures, the Commission must do so.

f. In another case concerning the Northeast Dairy Compact, the court held where a
Compact provision specifically sets forth that the Commission must follow the federal
APA's rulemaking provision, then the Commission must do so. While the Court
likewise recognized the Northeast Dairy Compact as only an "authority created by an
interstate compact among six states with congressional consent" and therefore not an
"agency subject to APA provisions, " it drew a distinction where provisions in the
Compact itself require following APA informal rulemaking provisions. New York
State Dairy Foods, Inc. v. Northeast Dairy Compact Com'n. 26 F. Supp.? 249, 255,

I. The Northeast Dairy Compact itself mandated that in informal rulemaking
proceedings the Commission "must comply with the requirements of § 553 of the
federal Administrative Procedure Act." New York State Dairy Foods at 255.

ii. "[Therefore], before the Northeast Dairy Compact Commission 'may invoke its
regulatory authority, it must conduct an informal rulemaking proceeding. ... The rulemaking proceeding must comply with the requirements of the federal Administrative Procedure Act, ...5 U.S.C., § 553." New York State Dairy Foods at 255.

iii. "[B]efore the [Northeast Dairy Compact] Commission can issue a price order, several procedural steps must be followed:


(Interestingly, as an aside, since the Compact itself did not specifically reference APA judicial review standards, the Court concluded, these standards were inapplicable.) New York State Dairy Foods at 255, 259, ftn. 9.

Comment: According to Organic Cow and New York State Dairy Foods, when the Compact is silent as to the Federal APA, an interstate compact, even if approved by Congress pursuant to the Constitution's Compact clause, is not considered an agency within the meaning of the Federal APA, and, therefore, such a Commission is not required to follow Federal APA rules. However, where the Compact itself specifically requires the Commission to follow the Federal APA's §553 for informal Rulemaking procedures, the Commission must do so.

The above cited cases refer to interstate compact commissions approved by Congress. "In creating the Union, the Framers acknowledged the inherent right of the states to make compacts and agreements with each other subject only to the limitation that Congress must consent to such compacts: ('No state shall, without the Consent of Congress ... enter into any Agreement or Compact with another State ....'"1 U.S. Const. Art. I, S10, cl. 3.) However, not all interstate compacts require Congressional approval. Congressional consent is required when such agreements "tend to alter the political power of the states affected, and thus encroach on, or interfere with, the supremacy of the United States." Corpus Juris Secundum. "States", § 31, Vol. 81A, p. 356. It has been held the constitutional provision refers only to "political compacts, alliances, and

treaties," but "agreements incapable of so operating may be made by the states without the consent of Congress." Id. at 356. However, there is "gen-eral agreement that compacts allocating interstate waters require congress-ional consent." David H. Getches, Water Law (West Publishing 1984) at 392.

Question 3: When a Compact is silent and fails to set forth any procedures for compact rulemaking, does the State's APA apply? Two cases held "no" and found other state statutes more applicable to the compact rulemaking power.

1. Referring to the Compact, the Colorado Supreme Court held the State's APA was not applicable as statute giving State Engineer "compact rule power" was enacted same day as "Water Right Determination and Administration Act" and therefore proceeding would be conducted in accordance with the latter. Matter of Rules and Regulations Governing the Use, Control, and Protection of Water Rights for both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and their Tributaries v. Gould (re: "Gould" (674 P.2d 914,917 (Colo. 1983).

2. An earlier case, had found fault with the Water Court's reasoning for disapproving of the State Engineer's rules for the three-state water compact on ground that state engineer had not followed procedure set forth in State APA was error. Kuiper v. Gould. 583 P.2d 910 (synopsis and headnote), (Colo.1978). (2)

   a. The Water Court Judge had erroneously held that "Rulemaking by a state agency must be in accordance with the State Administrative Procedure Act. ... The State Engineer has not followed the procedure set forth in the State Administrative Procedure Act. So far as exercise of the 'compact rule power is concerned, the state Engineer must follow the State Administrative Procedure Act." Id. t 913.

3. The most recent Supreme Court case on the Compact, notes "There are, however, no specific procedures set forth in the compact itself [nor in another section of the statute setting forth the 'compact power'] for compact rulemaking. (Simpson v. Bijou Irrigation Co. (hereinafter "Simpson"). 69 P. 3rd, 50, 70).

4. To the Court it was very clear though what procedural rules the State Engineer must follow, as follows: "It is crystal clear that, in order to promulgate and enforce rule for compliance with Compact

(2) The 'compact rule power' "gives the state engineer the authority to make and enforce regulations with respect to deliveries of water as will enable the State of Colorado to meet its compact commitments" C.R.S. § 37-80-104.
commitments, the State Engineer must promulgate and enforce appropriate rules for the administration of water rights. The latter rules must of necessity be under the authority of the 'water rule power'. Any achievement under the 'compact rule power' will be dependent upon and inextricably commingled with rules under the 'water rule power.'" Simpson at 70.

Comment: It is clear that the above cases rejected the applicability of the State's APA to the State Engineer's Compact rulemaking power. The Court explained that the passing of two statutes the same day ('water rule power' and 'compact rule power') could not but mean the two powers were meant to follow the same procedures—here, Water Court adjudication.

2. Rule: Question: What is an interstate compact rule?

a.) For the definition of a "rule" in interstate Compacts, the State Supreme Court in Budget Rent a Car Corporation v. State, Dept. of Licensing, 31 P. 3d 1174 Wash. 2001), referred to the State's APA (here, Washington State), as follows:

"For an agency policy to qualify as a 'rule' under the [State's] APA, two elements are required by statute: 'Rule' means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale." Budget Rent a Car Corp. v. State, Dept. of Licensing, 31 P. 3d 1174, 1177-78 (Wash. 2001).

Comment: The Washington State's APA definition of a rule is more detailed and perhaps clearer but less succinct than the Federal APA's. Compare "A rule is an agency statement designed to implement, interpret, or prescribe law or policy." Blackletter Statement of Federal Administrative Law. ABA Section of Administrative Law and Regulatory Practice, 2004, p. 21.

B. Exemptions

Interpretive Rules: Question 1: What is an interpretive rule?

One court defined an interpretive rule as follows:
1. When an agency simply states its interpretation of a statutory phrase, it is not creating a
rule. It is not creating any "new standard formula, or requirement." Budget Rent a Car Corp. v. State, Dept. of Licensing, 31 P. 3d 1174, 1178 (Wash. 2001).

2. The Department of Licensing (DOL) "was simply stating its interpretation of the statutory phrase 'total number of passenger cars in the fleet', not creating a rule." Budget Rent a Car Corp. at 1178.

3. "DOL, by giving its interpretation of the phrase 'total ... fleet,' cannot reasonably be said to have 'established, alter[ed], or revoke[d] any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.' The requirement arose from the terms of the IRP [International Registration Plan], not by action of DOL. Budget Rent a Car Corp. at 1178-79; emphasis supplied.

4. "[T]here were no additional requirements added to the IRP by the Department." Budget Rent a Car Corp. at 1178.

Question 2: Do interpretive rules in Interstate Compacts enjoy the same exemptions from "informal rulemaking" requirements as in the Federal APA? Under the Federal APA, interpretive rules, except for publication and petition requirements, are not required to follow informal rulemaking procedural requirements. Blackletter Statement of Federal Administrative Law, ABA Section of Administrative Law and Regulatory Practice, 2004, p. 22.

Comment: Based on the citations from Budget Rent a Car, supra, it is fair to conclude the Court found Interpretive rules in interstate compacts to be an exception to rulemaking procedural requirements as set forth in Washington State's APA.
Question 3: How does one determine under interstate compacts whether an exemption to informal rulemaking applies?

One court referred to the State's APA's definition of a rule to determine whether anything was added or revoked as a result of the Commission's action or inaction.

1. In *Budget Rent a Car Corp. v. State, Dept. of Licensing*, 31 P. 3d 1174 (Wash. 2000), the Court referred to the State's APA definition of a rule to determine whether an exemption applies to interstate compacts, as follows:

   a.) "It is axiomatic that '[f]or rule making procedures to apply, an agency action or inaction must fall into the APA Act's definition of a rule.' *Budget Rent a Car* at 1177, citations omitted. See "A. Definitions, 2. "Rule", supra, for Washington State APA's definition of a rule.

   b.) To construe it otherwise, the Court explained, would require the "[simplest and most rudimentary interpretation of a statute or regulation]" of an agency "to go through formal rule making procedures. While it is true that the APA is designed to provide 'greater public and legislative access to administrative decision making,' ... we believe it is equally true that the APA's provisions were not designed to serve as the straitjacket of administrative action." *Budget Rent a Car* at 1179 [citations omitted].

Comment 1: When compact commissions merely interpret a rule, they do not add, establish or take away any requirement, and hence are freed from the time-consuming element of § 553. The interpretive rule exemption, however, may create opportunities for inconsistent interpretations from similar agencies in different states. In fact, in *Budget Rent a Car*, the term in issue was interpreted differently in three different States. Id. at 1180-81.

Comment 2. Is such a situation desirable or fair, allowing each State to interpret the same provision according to its own understanding of what the term means? Thus, for example, the same company in different participating compact states would not get uniform treatment.

2.) While the Court in *Central Midwest Interstate Low-Level Radioactive Waste Commission*, 113 F. 3d 1468, 1473 (7th Cir. 1997), held the Secretary of Energy did not have the authority to engage in rulemaking, it did allow him to interpret the rule in issue without requiring him to follow APA's full-fledged informal rule provisions. The proposed rule concerned criteria for determining whether a compact had demonstrated compliance with a specific requirement to be eligible to receive incentive payments for disposing low-level wastes within its borders.
(Incidentally, the Secretary's interpretation was published in the Federal Register and written comments solicited before release of the final policy statement approximately eighteen months later in the Federal Register.)

Comment: Note here that the interpretive rule exemption allowed the Secretary to advance his interpretation of the Compact even though the Court held he was not permitted to engage in rulemaking for the Compact.

Thus, interpretive rules may provide a loophole for the States to maintain their sovereignty and for the federal government to interpose its interpretation of a compact provision.

II- INITIATING COMPACT RULEMAKING (to promulgate, amend or repeal a rule (also, if only partially))

A. Means to Initiate Rulemaking

Question 1: Who can initiate interstate compact rules? Is any interested individual, as in the Federal APA §553, able to petition the Commission to initiate rulemaking?

1. In Simpson v. Bijou Irrigation Co., 69 P. 3rd 50, 58 (Colo. 2003), it was the State Engineer, based on his statutory interstate compact authority, who proposed amended rules and regulations governing the diversion and use of tributary Ground Water, to ensure the State met its South Platte River interstate compact commitments.

1a. In Simpson at 54, "the State Engineer filed with the water court his proposed 'Amended rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the South Platte River Basin, Colorado.'"

2. An earlier case likewise refers to the "Compact rule power" as "giv[ing] the State engineer the authority to make and enforce regulations with respect to delivery of water as will enable the state of Colorado to meet its compact commitments."

   Gould, 674 P.2d at 917.

3. In Central Midwest Interstate Low-Level Radioactive Waste Commission at 1473, the Court ruled the Secretary of Energy did not have the authority to engage in rulemaking for the Commission, but could, as discussed earlier, interpret the rule in issue.

In Interstate Compacts, much like in the Federal APA, any interested person has a right to

1. In OrganicCow at 419, the Organic Cow Corporation sought a separate over-order price regulation for organic milk through a rule-making petition before the Commission.

2. Organic Cow initiated seeking an exemption from rulemaking by filing a petition with the Commission who had promulgated the rule it was seeking an exemption from. Id., at 418.

3. In New York State Dairy Foods at 257, the Northeast Dairy Compact Commission set forth the procedures available to handlers who object to the over-order price.
   a. Handlers may file a written petition with the Commission, which triggers the Commission's administrative process, and may request a hearing at that time.
   b. The Chair of the Commission appoints a "Hearing Panel" of one to three Commission members.
   c. The Hearing Panel considers the petition, issues a proposed decision, considers any handler objections thereto, and then renders a final proposed decision.
   d. The Hearing Panel's final proposed decision, together with any handler's objections, is then considered by the Commission, which issues a final ruling on the petition.

   New York State Dairy Foods at 257.

4. In Simpson v. Bijou at 71, "any person desiring to protest a proposed rule and regulation may do so in the same manner as provided in another section of the statute" and are heard by a Water Court Judge.

   Note: While the above provision (# 4) does not appear under the statute's Compact Rule Power, it was read by the Court as being applicable to the Compact Rule Power. These are special statutory proceedings that have nothing to do with either the Federal or State APA.

B. Developing a Proposed Rule:

   Question 1: What is the extent of a Commission's rulemaking power?

The extent of the Commission's rulemaking power is limited by the powers authorized in the Compact and the Compact Commission cannot act outside of the Compact as the power delegated to a Commission is not a power to legislate.
1. In District of Columbia v. Jones, 287 A. 2d 816, 820 (D.C. 1972), the Court cautioned the "rulemaking power is not a power to legislate. It is not a power to add to a statute. It would be contrary to the Constitution and contrary to the genius of our institutions to permit executive or administrative officials to legislate. The rule-making power is merely power to fill in details within the limitations of the statute." (3)

a. "It is well established that the rulemaking power of administrative officers and agencies is not the power to make law ... but the power to adopt regulations to carry out the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." District of Columbia v. Jones at 818.

b. It therefore ruled that while the WMATC had "broad powers3 to set rates," (included in rulemaking under the Federal APA), "that power did not extend to make rules regulating the conduct of passengers." This power was found elsewhere in the criminal code in all three participating States. District of Columbia v. Jones at 819.

(3) "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." District of Columbia v. Jones at 819.
2. David H. Getches in Water Law at 392, notes that while "[r]ecent compacts uniformly call for creation of an administrative agency, typically a 'compact commission,' to make rules to carry out the compact, ... "[g]enerally states hesitate to vest substantial powers or prerogatives in a compact agency."

3. So, too, Jerome C. Muys notes, as follows: "Although the states generally possess ample authority to confer adequate powers on compact commissions, the historic pattern, unfortunately, seems to reflect a lack of commitment on the part of the states to any cooperative regional effort that requires a significant delegation of power to an interstate entity that they may not be able to control." "Approaches and Considerations of Allocation of Interstate Waters," Water Law: Trends, Policies and Practice. ABA, SONRELL, 1993, 314-315.

4. See, however, the Northeast Dairy Compact Commission's Rules of Construction, which state that "it is the intent of this compact ... to afford the commission broad flexibility to devise regulatory mechanisms to achieve the purposes of this compact. " Organic Cow at 416.

Question 2: Is it constitutional to delegate rulemaking powers to an interstate compact?

Comment: Delegation of rulemaking powers to Interstate Commissions has withstood delegation challenges just as federal and state agencies have. However, a compact commission is limited by the rulemaking powers granted to it by the Compact.

1. In People v. Kantrowitz, 10 Misc. 2d 677, 680, 681 (N.Y. Co. 1958), the Court held the Palisades Interstate Park Commission was authorized to make rules and regulations to fix the maximum speed limit of 40 miles per hour on any park road or parkway within the limitations prescribed. It further held "[t]his does not constitute an invalid delegation of legislative power within the meaning of section 1 of article III of the New York State Constitution. The power to make rules for the use and government of the park and parkways was ... given to an "interstate agency duly created by the Legislature under a compact with the State of New Jersey and with the approval of Congress, as a body corporate and politic, with authority to act as a board. This delegation of power to an administrative body to make rules has been recognized by the courts. See Dyer v. Sims (341 U.S. 22, 30) in which there was a compact involving delegation to an interstate agency of the power to make rules and in which the delegation was upheld as 'one of the axioms of modem government’". However, the Court noted the "Legislature could not delegate to the commission, irrespective of the residence of its members, a legislative function such as the definition of a criminal offense," but State law could prescribe a violation of the Commission's rule as a misdemeanor or traffic infraction, but expressly declared that a violation of the Commission's rules would not be considered a crime.

3. The U.S. Supreme Court had earlier ruled that the W. Va. Legislature had authority, under the Constitution, to enter into a compact which involves delegation of power to an interstate agency and an agreement to appropriate funds for the administrative expenses of the agency, as follows: "That a legislature may delegate to an administrative body the power to make rules and decide cases is one of the axioms of modern government." State ex rel. Dyer v. Sims. 71 S. Ct. 557, 561-62, 341 U.S. 22, 30 (1951).

Question 3: In a Proposed Rulemaking, are there any procedural constraints placed on the Rulemaking Power granted to State Actor?

Where the compact was silent as to what standards are to be employed in informal rulemaking, two court decisions earlier discussed, required the State Engineer to follow the same State procedural rules in use for his intrastate water power rather than require him to follow the State's or federal APA.

1. Since "no specific procedures for compact rulemaking are set forth in the compact itself nor in the compact statute, the Court held the State Engineer must use his "Compact Rule Power" pursuant to his Water Rule Power which does set forth such procedures. ... Any achievement under the 'compact rule power' will be dependent upon and inextricably commingled with rules under the 'water rule power.'" Simpson at 70.

a. Where neither the Compact itself nor State law sets forth specific procedures for compact rulemaking, State Engineer must
necessarily do it pursuant to other powers granted to him where rulemaking procedures were set forth. *Simpson* at 69.

2. The Court further construed the State Engineer's rulemaking power to be operative only where the Compact itself is deficient in establishing standards for compliance within the State to meet its interstate compact obligations. (If the compact is "deficient in establishing standards for administration within Colorado ..., the state engineer shall make such regulations as will be legal and equitable to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact commitments." *Simpson* at 55, 68, 70.

3. The Court found as the equivalent of deficient standards the changed conditions that have occurred since the signing of the compact so many years ago. The Court, therefore, held the State Engineer is authorized to promulgate rules to ensure the State's compliance with its interstate compact obligations without the necessity of enactment of special statutes for such purposes by the Colorado General Assembly (*Simpson* at 68, 69, 70).

   a. Although State Engineer can make rules to enforce compact compliance in those instances where the compact itself is deficient in establishing standards, the means by which he does so are both dictated and constrained by other statutory requirements. *Simpson* at 70.

   b. "[Although the compact rule power is broad in its scope, it still must be exercised to the extent possible within the existing framework of Colorado's statutory priority law. *Simpson* at 69.

   c. "While State Engineer had authority to promulgate rules to enforce the terms of the South Platte River Compact pursuant to statutory rulemaking power granted to him, the State Engineer's power was constrained by statutory restrictions imposed on his water rule power. *Simpson* at 72.

   d. State Engineer's compact rule power can be exercised only in compliance with all other provisions of the statutory scheme. *Simpson* at 59.

4. While the Court recognized that a "separate basis of authority" exists for the Rulemaking power granted to State Engineer to promulgate rules and regulations to enforce the terms of the Interstate Compact to help the state meet its compact commitments, it nevertheless held that power is constrained by statutory restrictions imposed on him by other provisions of the State's statutory scheme. State Engineer's Compact Rule Power can be exercised only in compliance with all other provisions of State's statutory scheme which included Colorado's statutory adjudication procedure." *Simpson* at 55.

   a. State actor can make and enforce regulations that will enable State to meet its
Compact Commitments and make regulations that are legal and equitable to regulate distribution to replicate conditions as they were before the effective date of the compact. Simpson at 68.

b. State Engineer, while enforcing compact delivery requirements, must simultaneously adhere, "insofar as possible, to Colorado's constitutional and statutory provisions of priority administration." Simpson at 69.

Comment: The State Engineer's compact rulemaking power was considerably curtailed. First, to allow the State Engineer to engage in rulemaking, the Court had to ascertain that the Compact contained deficient standards and that rulemaking was therefore required to ensure compliance. Second, the Court held the State Engineer was required to follow procedural rules of his State Water Power, which meant the Water Court would adjudicate and make final decisions, and lastly, before the rules could take effect, in spite of the statute's 60-day allowance requirement, the Court held he had to await until all comments were heard and decided by the Water Court.

Comment: Should compact rulemaking be considered an adjudicatory function of water courts as opposed to an administrative task of the State Engineer?

Justice Rice seesawed between two poles; on the one hand, lauding the State Engineer and on the other hand, effectively curtailing his rulemaking powers.

1. "It is the State Engineer, as the chief state water administrative official, who must make the necessary administrative decisions regarding the necessity, timing, amount, and location of intrastate water restrictions in order to ensure that Colorado's critical interstate delivery obligations are fulfilled." Simpson at 69.

Question 4: Can a conflict exist between Compact and the State Law of a participating state?

Comment: In Simpson v. Bijou Irrigation Co., 69 P. 3rd 50, 58 (Colo. 2003), the Court walked a tightrope in addressing the above question. While affirming that the State Engineer had the authority to make rules to ensure that State met its interstate compact commitments, it nevertheless held that power can be exercised only when the State Engineer adheres to the entire statutory administrative framework concerning the entire river basin. Here, the Court found a strong interrelationship between the State Engineer 's water power and his compact power. While the Court repeated that compact law has ascendancy, it did not address the issue of what procedure the State Engineer would be required to follow in the event these procedural rules and his compact rule power conflict.
1. "Given an irreconcilable conflict between intrastate priority administration and compliance with an interstate compact, it is compact compliance that must take precedence. Simpson at 69. "If interstate allocation is subordinate to individual rights, interstate compacts would be valueless." Ibid at 69. Nevertheless, State Actor "must simultaneously adhere, insofar as possible, to the [State's] constitutional and statutory provisions for priority administration." Simpson at 69.

2. "Individual state water users are bound by compact requirements even where their water rights precede execution of the compact." Simpson at 69

3. "The issue of what procedure the State Engineer must follow if faced with an irreconcilable conflict between enforcing the South Platte River Compact and adhering to these procedural requirements is not before us and we decline to address it further." Simpson at 72.

Note: Was the court chipping away at the Supremacy doctrine if only on the procedural level?

On the substantive level, the Court in Budget Rent-A- Car held Compact substantive law supersedes State law even if the Compact uses standards different from State law.

1. In Budget Rent a Car. 31 P. 3d 1174, 1177 (Washington, 2001, the Court held the International Registration Compact (IRP) would be enforced even though the Compact used a different standard for taxing a rented vehicle than the State of Washington itself, as follows:

a. "[T]he IRP did signify a departure from the traditional '[t]ransactional focus' of Washington vehicle tax law." Budget Rent a Car at 1180.

b. Even though Washington law had required a separate registration for each newly acquired vehicle, even if the new vehicle replaces a previously licensed vehicle that was less than one year old, the IRP rule trumped Washington law. Budget Rent a Car at 1177.

c. The IRP focused on revenues in its determination of apportionment, and thereby created a system whereby nonrevenue producing vehicles are not factored into apportionment and thereby moved rental vehicles under the IRP away from traditional Washington vehicle tax law. Budget Rent a Car at 1180.

Comment: The above cases illustrate compact rulemaking has been attacked for acting ultra vires (beyond the authority granted) or for interfering with State law.
4. Note that in Milk Industry Foundation v. Glickman, 949 F. Supp. 882, 886 (D.D.C. 1996), one of the Compact's provisions specifically provides, as follows:

The Commission had the authority "to review and propose changes in State laws and regulations pertaining to milk and dairy products."

a. Nevertheless, New York State Dairy Foods, Inc. challenged the Commission's power to establish the "over-order" price, which is above the price established in federal marketing orders or by State farm price regulations in the regulated area. New York State Dairy Foods at 253.

5. In New York State Dairy Foods at 260, the Court explained that "once a compact between States has been approved, ...it is the law of the case binding on the states and its citizens .... Indeed, congressional consent transforms an interstate compact ... into a law of the United States." Citing to New Jersey v. New York, 523 U.S. 767 (1998).

Comment: It is now axiomatic that "Compacts have the force and effect of statutory law and they take precedence over conflicting state laws, regardless of when those laws are enacted." The Council of State Governments, "Interstate Compacts," p. 1.

III- NOTICE OF PROPOSED RULEMAKING AND OPPORTUNITY TO COMMENT

A. Notice of Proposed Rulemaking

Question 1: Is there a publication requirement under Interstate Compact, as in the Federal APA, for a Notice of Proposed Rulemaking, and if so, where should the Notice be published?

The court in Organic Cow and New York State Dairy Foods answered the question in the affirmative: A Notice of Proposed Rulemaking must be published in the Federal Register. The Organic Court relied on the basic elements of the due process doctrine for the publication requirement of the Notice.

1. "The basic elements of due process, notice and an opportunity to be heard are applicable to Interstate Compact Commissions. Organic Cow at 423.

2. The Notice of Proposed Rulemaking Proceedings in Organic Cow was published in the Federal Register. Id at 424.

3. Like federal agencies, when an Interstate Compact Commission intends to exercise its Rulemaking power to prescribe regulations, it must give notice. See, for example, New York State Dairy Foods, Inc. v. Northeast Dairy Compact Com'n, 26 F. Supp.2nd 249, 255 (D. Mass. 1999), which held that before the Northeast Dairy Compact
Commission "may invoke its regulatory authority, it must conduct an informal rulemaking proceeding."

4. The Northeast Dairy Compact itself required that the in rulemaking proceedings the Compact "must comply with the requirements of §553 of the federal Administrative Procedure Act." New York State Dairy Foods at 255.

5. In accordance with the Compact's provisions, the Northeast Compact Dairy Commission published a Federal Register notice and conducted public hearings on the proposed regulation. New York State Dairy Foods at 255.

**Question 2: Since Compacts involve more than one state, is publication in the Federal Register sufficient? As can be seen below, some states publish the notice in local agency newsletters, some in the State's register for each participating State, and some, in both the State and Federal Register.**

1. According to New York State Dairy Foods, Inc. v. Northeast Dairy Compact Com'n. 26 F. Supp. 249 (D. Mass. 1998), the Compact Commission is required to publish notice of the proceeding in the official register of each participating State (here 6 States) and additionally in the Federal Register in compliance with § 553 of the Federal APA.

2. a. In Simpson. 69 P. 3rd at 56, the Proposed Amended Notice of Proposed Rulemaking was included in the May 2002 resume for Water Division I and published in June.

   b. "[R]ules and regulations and changes thereof proposed for an aquifer shall be published once in the county or counties where such aquifer[s] exists not less than sixty days prior to the proposed adoption of such rules and regulations." Simpson at 57, ftn. 4.

   c. Copies are also required to be mailed by the water clerk of the division to all persons who are on the mailing list of such division. Simpson at 57, ftn. 4.

   d. "Copies of such proposed regulations shall be available without charge to any owner of a water right at the office of the water clerk." Simpson at 57, ftn. 4.

3. In Gould at 919, the state engineer promulgated the proposed rules and published it in all counties of Water Division No. 3, where the rules were going to take effect.

**Comment:** Generalizing from the above publications potpourri, the following appear to be true:
i. Where the proposed rule affects a matter specific to a local district, publication is effected through local publications and disseminations even if the Compact has been approved by Congress. Note that Congressional approval does not automatically imply that the Notice of Proposed Rulemaking will be published in the Federal Register.

ii. However, where the Compact itself requires the Commission to follow APA's § 553, publication in the Federal Register is required.

iii. If the proposed rule concerns state-wide matters, it requires publication in the State's Register of each participating state.

B. Requirements for a Notice of Proposed Rulemaking

Question 1: Does the Commission's Notice of Proposed Rulemaking require as does the Federal APA, inclusion of a detailed explanatory statement of what the proposed rules would accomplish? Based on the case law, publication of the Notice requires inclusion of a detailed explanatory statement.

1. The Notice of Proposed Rulemaking for International Registration Plan's Compact for rented vehicles had to give notice of a public hearing, provide a precise explanatory statement, and maintain a rule making file. Budget Rent-A Car at 1177.

2. The proposed amended Rules in Simpson consisted of sixteen separate regulations, setting out assumptions, methods, and criteria for determining out-of-priority groundwater depletions; authority for the water courts or the State Engineer to approve "replacement plans" whereby well users may replace their out-of-water priority groundwater depletions with water from other sources; notice and comment procedure regarding the State Engineer-approved "replacement plans"; well user responsibilities and reporting requirements; and State and Division Engineer responsibilities. Simpson at 56.

3. In New York State Dairy Foods, Inc. v. Northeast Dairy Compact Com'n, 26 F. Supp. 249 (D. Mass. 1998), the Notice requirements were to consider specific criteria detailed in the Compact and to hold a public hearing thereon.

4. In Gould at 916-917, 919, the proposed rules consisted of specific ways Colorado State Engineer intended to limit or curtail the use of surface and underground water in the San Luis Valley to meet the State's compact commitments. These were as follows: a.) Separate delivery rules for the Conejos River and the Rio Grande mainstream to deliver water according to schedules; b.)
tributary rules requiring curtailment of all tributaries of the Rio Grande; c.) underground water rules provide for phasing out of underground water diversions with certain exceptions.

C. **Public Comment on a Proposed Rule**

Under the Federal APA, after publication of a Notice of Proposed Rulemaking, a "reasonable time" must be allowed for written comments from the public. Black Letter Law at 24.

**Question I. Is public comment on a proposed rule, as under APA's § 553, a requirement under Compacts?**

Where the compact itself was silent as to public participation on the State Engineer's proposed rules, one court, as earlier discussed, required public participation, grounding the requirement on the Constitution's due process clause, the State's APA, and other administrative statutes that mandate such public participation.

1. The Simpson Court, referred to a "well-settled principle of administrative law that a legislative delegation of power to an administrative agency is valid only if the legislative body has provided both sufficient standards to guide the agency's exercise of that power, and adequate procedural safeguards to protect against the unreasonable abuse of that power." "The legislature often provides by statute for notice, comment, and hearing procedures as a means by which to safeguard individual rights." Simpson at 71, citations omitted.

2. While the Court also referred to the State's Administrative Procedure Act as additional justification for the above well-settled principle, it nevertheless held that the State Engineer must follow other State procedural directives set forth in State statutes concerning the State Engineer's water power, outside of the compact's. Simpson at 71.

3. Where compact itself as well as statute granting State Engineer compact rulemaking power fail to provide or allow for comments by affected users, State Engineer must allow such comments based on other powers granted to State Engineer that provides procedures for comments and hearings and decisions by a judge either confirming, modifying, reversing and remanding contested rules even though it is a lengthy process. Simpson at 72.

4. Before the Northeast Dairy Compact can issue a price order, several procedural steps must be followed, including among them holding a public hearing. New York State Dairy Foods at 255.

   a. The Commission "solicited comments on whether to exempt organic milk handlers from the over-order obligation and to exclude organic milk

**Question 2. Is the reasonable time limit for public comments, in effect under the federal APA, also applicable under interstate compacts?** To the Simpson Court, what is "reasonable" is that all protests must be heard before the rule takes effect.

1. The Colorado Supreme Court held that under the South Platte River Interstate Compact, rule can take effect only after all protests have been filed and resolved by the agency court even though the statute refers to proposed rules being published in the county where aquifer exists 60 days prior to the proposed adoption of such rules and regulations. Simpson, 69 P. 3rd at 71.

2. In the Proposed Rules at issue in Gould, the State Engineer had set a limit to the time when protests can be heard, as follows:

"Any protests to said proposed rules and regulations must be filed with the Water Clerk in and for the District Court of Water Division III, Alamosa, Colorado, by the end of the month following the month in which said proposed rules and regulations are published." Gould at 942, Appendix C.

**Comment:** Interestingly, that same Simpson Court, earlier held where the Compact is silent as to rulemaking, other State statutes in the administrative framework concerning the State Engineer's water power must be adhered to, but not the State's APA. However, here, to justify the hearing requirement that all comments must be heard and ruled upon prior to the rule's taking effect even if this exceeds the sixty-days delay time, the Court not only referred to the due process clause, but also to the State's APA.

**Question 2: Is an oral hearing required under Compacts?**

Under the federal APA, while oral argument is not required, an opportunity for oral argument may be granted. The same appears to be true under some Compacts, while others employ even more elaborate procedures.

1. Where the Compact itself requires that a handler be afforded "an opportunity for a hearing ...in accordance with regulations made by the Commission," the conduct of proceedings before the Commission's hearing panel gives the hearing panel... the discretion to limit the taking of evidence to affidavits and to proceed without conducting an oral hearing, but it must notify
the petitioner of its decision and the basis for it.  
Organic Cow at 421.


a. During the initial rulemaking proceeding to adopt an over-price regulation, there was a discussion of the exemption sought by Organic Cow.  
Organic Cow at 419.

b. There was also a fact-finding inquiry into organic milk production, processing and distribution in response to Organic Cow's petition to initiate rulemaking.  
Organic Cow at 419.

c. An agency "need not conduct an evidentiary hearing when there are no disputed issues of material fact, and ... even where there are such disputed issues, [it] need not conduct such a hearing if they may be adequately resolved on the written record."

Organic Cow at 422; citations omitted.

3. In Gould, 674P.2dat919.920, numerous protests were filed, requiring a hearing before the water judge under the relevant statute. At trial, the proposed rule proponents and the protestants submitted documents detailing the legislative history of the compact and testimony from administrators about operative interpretations of the compact.

IV The rulemaking Record and Decisionmaking Process

A. Record Requirements

In Budget Rent a Car, the Commission had to maintain a rule making file.  
Budget Rent a Car at 1177.

B. Decisional Process

Question I: Does the compact provide for disqualification of any commission members from the decision-making process if his impartiality is reasonably questioned?

Grounding itself on the basic due process requirement, the Northeast Dairy Compact had such a provision, as noted in New York State Dairy Foods, and also had special requirements for Hearing Panel members who decided petitions and exemption requests. However, the court denied a disqualification request based on what it saw were "slight pecuniary interests" and justified its inclusion of
industry members based on what agencies generally do.

1. "[I]t is well-settled that a fair proceeding before an impartial decisionmaker is a basic requirement of due process, applicable to administrative agencies as well as the courts.

   New York State Dairy Foods at 264.

2. The Northeast Dairy Compact provided for disqualification of a Commissioner if his impartiality might be reasonably questioned, as follows: "Any Commissioner shall (on either the Commissioner's own motion or on motion of the petitioner) disqualify himself or herself from consideration of the Commission's final ruling on the panel's decision if that commissioner's impartiality might reasonably be questioned."

   New York State Dairy Foods at 257.

3. The court beat back a challenge to the composition of the panel members, as follows: "Although there is a constitutional right to a fair and impartial hearing in an adjudicatory matter (i.e. a disciplinary hearing), there is no commensurate due process right to be regulated by an agency composed of members sympathetic to a particular economic interest."

   New York State Dairy Foods at 264.

4. "Individuals from a particular industry typically serve on administrative bodies with regulatory authority over that industry."

   New York State Dairy Foods at 264.

5. "However, due process is not violated by the participation of adjudicators who 'might conceivably have had a slight pecuniary interest' in the outcome of the case before them."

   New York State Dairy Foods at 264; citations omitted.

V. The Final Rule

A. Publication of Final Rule and Basis and Purpose of the Rule

Question: Under compacts, Is the federal APA's "concise general statement" required to be included in the Final Rule?

By requiring the Commission to demonstrate that it fully considered important comments and to explain why it rejected such comments, it is apparent that the Organic Cow Court required the Commission to include in its final decision
more than the APA's "concise general statement of ... basis and purpose."

1. In Organic Cow, the operative text of the final rule was published in the Federal Register, pursuant to § 553.

2. In Organic Cow, the District Court found deficient the Panel's first denial of Organic Cow's petition for exemption because the Court was "unable to discern the basis for the Commission's refusal to differentiate between organic and nonorganic milk handlers." Organic Cow at 422.

3. In its final order, the Commission gave a detailed statement of why it did not treat Organic Cow differently from other producers and also explained that production costs is only one factor of the equation. The Commission found "the record did not support Organic Cow's claim that the costs of organic milk production are so much greater than the cost of nonorganic milk production as to require separate regulatory treatment of organic milk." Organic Cow at 424.

4. The Commission further determined that "uniform application of the over-order regulation to organic as well as nonorganic milk would better serve the purposes of the Compact." Organic Cow at 424.

Comment: As an interesting aside, outside the purview of this presentation, the Court did not agree with the Commission's decision, but gave it deference because it was reasonable.

B. Effective Date

Question: Under compacts, is there, as in the Federal APA, a 30-day delay time from publication to the time the final rule takes effect?

While the Compact in Simpson, discussed above, required a 60-day delay period, the Court on due process grounds held it could not be adhered to and for future rulemaking cases would take effect only after all protests were heard. Under the Northeast Dairy Compact, there are elaborate voting and referendum procedures before the rule can take effect. Nevertheless, it appears that the 30-day delay period as set forth in the APA was adhered to under the latter compact.

1. Though statute has a sixty-day publication requirement before a rule can take effect, due process nevertheless requires that all protests be heard and resolved on the merits by the Water Court prior to the rules taking effect. Simpson at 72.

2. The effective date of State Engineer's proposed rules and regulations must be stayed until all such protests are judicially resolved pursuant to statutory directives in a statute other than compact rulemaking power which is silent on this issue.
3. After Notice and public comment of a Northeast Dairy Compact Commission rule establishing or terminating a price order over the federal price, such rule can take effect only if a) it meets the concurrence of two-thirds vote of the States, with each of the six member States given one vote; and b) the Commission must conduct a formal referendum of producers within the regulated area, in which the terms of the price order must be approved by a two-thirds vote before any order goes into effect; and 3) and adoption by a two-thirds majority of the delegation ...of a written price regulation. Milk Industry Foundation, V. Glickman, 949 F. Supp. 882, 898 (D.D.C. 1996); New York State Dairy Foods at 255.


5. Moreover, once the Commission adopts a regulation, that regulation will only apply to those States that vote affirmatively for it. New York State Dairy Foods at 255.

Comment: From the Simpson Court decision, it would appear that even if the Compact specifically sets forth a delay time, this is a minimum only and can be extended if all protests had not been heard by the effective date set forth in the compact.
Moderator - Kent Bishop: We now turn to our first respondent, John L. Marshall.

John L. Marshall [Respondent]:

I think one of the core questions that I try to avoid answering, that might be interesting to talk about is: “What is a Compact Agency?” I’ve seen some of the case law on the question of whether it is a state, federal or local agency, because I think it then reflects the merits of how administrative law applies. In all of our cases, we try to avoid answering that question at all costs because it maximizes our flexibility to pick and choose what kind of entity we want to be at the appropriate time.

First, a little background about who we are. The Tahoe Regional Commission is a bi-state compact–between California and Nevada. We have five local jurisdictions within our boundaries, a city, and five-counties. We regulate land use in the Tahoe Basin, which, of course, crosses over all these jurisdictions. We came into being about 35 years ago because the two states and their local jurisdictions were unable to agree on a common set of rules for development in the Lake Tahoe Basin that would protect the environmental interests at stake, -- which is essentially to focused on the quality and clarity of the waters at Lake Tahoe.

Our Commission issues rules, and it adjudicates matters. We issue a thousand plus permits a year. The number of rules in our binders probably take up 13-16 inches. We have been able to devise them without any sort of affiliation or use of a state, local, or federal administrative procedures act. We have, within our own Compact, rules that address how we should go about devising and issuing our regional plan, and broad rules, or types of ordinances or regulations. And we also, not too surprising, have a whole set of rules and procedures that dictate how we go about issuing permits and the taking of enforcement actions, which of course, are another kind of communication.

But what I would kind of like to focus on for this discussion, is two things:

First: The experience we’ve had with how we are defined as an entity.
Second: Some of the political realities I am told we get into.

The Supreme Court has held that the Tahoe Regional Commission is not a city. Because we regulate some valuable pieces of property, we get sued a lot. So we have some paramount case laws on who we are and what rules apply to us.

The Supreme Court has also ruled that since we are not a city, we do not share in the states 11th Amendment considerations. The Court basically premised that decision on an examination of the nature of our Compact, which they found equated us to more of a local agency. In addition, our Commission is not a federal agency under various district court opinions because the federal NEPA law does not apply to us. And, NEPA doesn’t apply to us because we are not a federal agency.

Because of a recent unpublished decision that held our Commission to not be a state agency, it follows that the State APA and the state requirements to issue economic reports on
the impacts of those regulations, are not binding on us. We are not a local entity because of how our regulations apply. Local ordinances and state laws may or may not be binding on us, because the compact is regarded as Federal law. Perhaps there is a need to try making a case for some sort of overarching administrative procedure for compact agencies --because we don’t fit in any particular category.

I’ll give you a kind of good example of where the rubber meets the road. The state of Nevada has a part time legislature, and one of the more powerful state senators has a thriving law practice. He recently represented a land-owner in the Tahoe Basin, in a case that came before the Tahoe Regional Planning Agency. He also sits on the sub-committee of the Nevada Legislature that oversees TRPA’s actions. In these kind of dual roles, some might feel this person has conflicting roles. He suggested that the Commission should create a policy on ex-parte contacts for legislative actions. At the present time, we don’t have a particular rule on ex-parte contacts. Then he also suggested to his fellow state legislators that they should link our budget allocations to what, in his mind, would be a successful completion of an ex-partie policy, along with rules that would result in staff being punished if they engage in ex-parte contacts.

The behavior that he was so annoyed at, --was the fact that the neighbor of his client came in to our Commission offices, and reported some problems to our staff concerning what his client’s true intentions were. Then, during the public hearing process, some of that information came to light --and he felt that was an inappropriate ex-party contact.

The TRPA Commission’s governing board is made up of 14 members: seven from each state of California and Nevada. Each state’s delegation is composed of 4 members reflecting state wide orientation, and 3 members reflect a more local orientation. The 3 local members are generally elected officials. We found that there is a fairly sharp distinction between (a) when state agencies need to take action at the state-level, verses (b) when local agencies have a responsibility, or even quasi-duty to take action. The result from either one of those actions may be a policy that generally prohibits ex-parte contacts with local governments. Because they tend to be more responsive to their constituents, they don’t want to prohibit ex-parte contacts in circumstances where there is a quasi-duty to take some kind of permanent action.

As a result, we are now bringing to our governing board a list of options. We can either model our policy on (1) a federal model, or (2) a state model. A more local practice is to disclose ex-parte contacts and to make sure that any comment is hopefully on the records.
Moderator -Kent Bishop: We now turn to our second respondent, Michael Buenger:

Mike Buenger [Respondent]:

I did want to make one point of clarification, I’m listed in the program as the President of the Conference of State Court Administrators, and actually I am it’s “Past” president. The only reason I say that is the current president is Dan Becker of Utah, and I have a flight to catch at 2:28 this afternoon and I don’t want him issuing an arrest warrant for me for impersonating the President of the Stat Court Administrators.

The Chair mentioned that I participated in writing three [3] interstate compacts: (1) the Compact on Adult Offenders, (2) the new Juvenile Compact, and (3) recently for those of you who practice in the area of child welfare, a new draft of the interstate compact on the placement of children is under review and currently being circulated. Each of those compacts tries to address the issue of rule making by modeling their process after the federal APA or similar act.

The question that comes up is why do you want to do that? Why is it important to set up some type of standard for the propagation of rules? It became clear to us in writing both the Adult Compact and the Juvenile Compact that rule making in Interstate Compacts and some other regulatory compacts, was being undertaken in a very ad hoc way.

During the writing of the Juvenile Compact, we began to question the administrators of the association that actually oversees the Juvenile Compact, about some of their rules—rules that quite flagrantly violated the terms of the compact, and rules that even exceeded the authority of the compact. We noted that the State of Arkansas, in administering the current compact on the placement of children, found that some rules may have been unconstitutional respecting the statutory authority that the Interstate Compact and the Legislature had delegated.

So in writing the three compacts, one of the things we were concerned about was establishing some standard; -not so much, quite frankly, for the public but equally importantly, if not more importantly, for the people who are actually writing the rules.

Absent those standards, at least in reference to what I would call these social oriented compacts, the folks who oversee them were really operating in various dimensions, in various avenues. That’s what prompted the actual selection of a standard for rule making.

I think it’s important to note, and also to frame this with a little bit of history, that Interstate Compacts are really pretty nebulous. There are about 200 of them that exist. Up until about 1920, most of them were border compacts which were not regulatory in nature. The regulatory compact types of functions did not start until about the late 1920’s with the New York New Jersey Port Authority agreement. That is the first border compact that I would call a regulatory compact; but then the use of compacts as regulatory mechanisms began to accelerate. For example, you have in the 1930’s, the First Compact on Probation and Parole; we have in the 1960’s the creation of environmental compacts, such as the Tahoe Regional Compact. We have in the 1980’s, the Columbia River Gorge Compact.

In all this the use of a compact instrument as a regulatory instrument --is really a function
of about the last 80 years. And it has grown up in a very ad-hoc fashion with compacts frequently making reference to the authority of some Commission, some Authority-entity, some policy-making body that is to promulgate rules, without setting the standards for doing so.

It was our feeling, while writing the interstate compacts, the Adult Offender Supervision Compact in particular, because it affects about 300,000 people a year who are moving between states and having their supervision, parole, probation, deferred sentencing supervision transferred -- that they needed more certainty in their affairs. And just as clearly, that the states needed more certainty in their state affairs, and the Commission which actually promulgates the rules, needs more certainty in their Commission affairs.

As we look forward, I think that the use of Interstate Compacts by states to regulate multilateral issues will probably continue to grow. The Great-Lakes Commission is now reviewing its interstate compact with an eye toward tightening it, and to provide some mechanisms for rule making that are more definitive. I think that we’ll continue to march forward as states try to establish boundaries within our federal system of what they can regulate and what the federal government can regulate.

In the absence of some standard, be it the federal APA, be it the model APA, be it something that the American Bar Association promulgates as a model for interstate compact rule making; this approach of ad hoc rule making will continue to move forward with the compacts. And, as one of the judges in our Supreme Court who is frequently fond of saying, recently stated: “people need certainty in their affairs.” I think, too, their needs to be more certainty in the future as to what standards are going to be used. Thank You!

Moderator & Presenter: Kent Bishop:

[Given the lateness of the hour, it was suggested that panelists and the audience merely refer to Mr. Bishop’s printed materials as contained in the hand-out, as distributed for this session, rather than to have Mr. Bishop make a full verbal presentation that merely repeated those materials. The panel was then opened up to the audience for questions. Dr. Michael Asimow then addressed the group, expressed much interest in the presentations, and asked the panelists and the ABA project efforts, to coordinate their activities with those at the National Coordinating Commission on Uniform State Laws. Mr. Bishop assured Dr. Asimow and others that it was their full intent to work with Dr. John Gedid in doing so.]

[End of Panel Discussion]