



Primer on Interstate Compact Law

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A brief introduction to the law of interstate compacts may be helpful in understanding the challenges of this project. We start at the beginning:

No state shall, without the consent of Congress . . . enter into agreement or compact with another state . . .

U.S. Const. art. 1, § 10, cl. 3.

A. Congressional Consent Required

The precise language of the Constitution implies that consent is required for all agreements between the states. However, the Supreme Court has long held that “consent is necessary only in the case of a compact that enhances the political power of the member States in relation to the Federal Government.”² The timing of consent is unimportant. “Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.”³

A corollary to the requirement for consent is that if the states wish to amend a compact, they must either do so in a way that is not inconsistent with the Congressional consent, or seek Congressional consent to the amendment.

Once Congress gives its consent to a compact, the compact becomes federal law.⁴ Construction of a compact presents a federal question.⁵ However, the Ninth Circuit noted that in approving the Tahoe Regional Planning Compact, “Congress did no more than incorporate the agreement of the two parties into body of federal law; it did not make applicable the entire panoply of federal administrative and substantive standards.”⁶

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The analysis and opinions in these materials are solely those of the author, and do not represent policy of or other stated direction by the Columbia River Gorge Commission.

² *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459 (1978). The Court discussed the history of granting consent, including a similar requirement under the Articles of Confederation.

³ *Cuyler v. Adams*, 449 U.S. 433, 441 (1981).

⁴ *Id.* at 438.

⁵ *Id.*

⁶ *Lakeview Development Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1295 (1990).

B. A Compact is a Contract

A compact is a contract.⁷ As such, several principles follow. First, one state may not amend the Compact without the other state joining in that amendment. Most compacts are silent regarding amendment. Second, one state may not unilaterally alter the duties and responsibilities specified in a compact.⁸ Finally, a court may not order relief inconsistent with a compact's express terms.⁹

C. Application of State Law

One of the most frequent issues in interstate compact litigation is when may a state impose its own laws on a compact. The Supreme Court has not addressed this issue. The Ninth Circuit determined that a state may impose its own laws on a compact only if the compact itself specifically preserves the law it wishes to impose.¹⁰ The default then is that state law does not apply. The Washington State Supreme Court followed suit.¹¹ However, this is a rule that not all courts follow. Many of the cases involving this question have arisen in the states courts of New York and New Jersey, and in the Second and Third Circuits. In those cases, the issue is framed as whether states that pass substantially similar legislation have amended a compact to impose new law. As expected, the courts are not in agreement.¹²

D. What Type of Entity is a Compact Entity?

Another question that often arises is whether an interstate compact entity should be treated as a state agency for specific purposes. The language of a compact is often silent and thus unhelpful.¹³ Some compacts are more specific, but not necessarily more helpful.¹⁴ Scholars have posed the question, but have not satisfactorily answered it:

⁷ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823) (“If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous.”).

⁸ *Bi-State Dev. Agency of the Missouri-Illinois Metro. Dist. v. Director of Revenue*, 781 S.W. 2d 80, 82 (Mo. 1989) (states may not enact legislation that would impose burdens upon the compact absent the concurrence of the other signatories).

⁹ *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The court actually discussed this restriction on courts as a consequence of a compact's transformation into federal law.

¹⁰ *Seattle Master Builders v. Pacific NW Elec. Power and Cons. Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986).

¹¹ *Salmon for All v. Department of Fisheries*, 118, Wash. 2d 270, 278, 811 P.2d 1211, 1215–16 (1992). *But see Skamania County v. Woodall*, 104 Wash. App. 525, 535, 16 P.3d 701, 706 (2001) (holding that the Columbia River Gorge Commission must apply Washington state law because the Columbia River Gorge Compact did not specifically reject such state law).

¹² For a very good summary, see *International Union of Operating Engineers, Local 542 v. Delaware River Joint Toll Bridge Commission*, 311 F.3d 273 (3d Cir. 2002).

¹³ See e.g. Potomac River Compact of 1958, Art. I, § 1, “The Potomac River Fisheries Commission, hereinafter designated as “commission”, is hereby created.” Approximately 1/3 of the compact entities have similar creation language. The Council of State

If interstate compact agencies cannot be defined as either state or federal entities, how are they to fit into a doctrinal reality based on a federalist conception of dual—but no more than dual—sovereignty?¹⁵

Courts too have had a difficult time describing just what a compact entity is. In the 11th Amendment immunity context, courts will find that a compact entity is entitled to the same immunity as a state if the states are liable for the debts and losses of the compact.¹⁶ The issue also recently arose in a case that the author argued to the Oregon Court of Appeals in which the question presented was whether the Columbia River Gorge Commission (an interstate compact entity) is an Oregon state agency for the purpose of holding the State of Oregon liable in inverse condemnation for an action of the Commission.¹⁷

More information about interstate compacts can be found through the Council of State Governments' website, *see* Note 13 above.

Governments maintains information on interstate compacts. *See* <http://www.csg.org/CSG/Programs/National+Center+for+Interstate+Compacts/default.htm>.

¹⁴ *See e.g.* Palisades Interstate Park Compact, Art. II, § 1, “There is hereby created a body corporate and politic with the name and style of “Palisades Interstate Park Commission” (for brevity hereinafter referred to as “the commission”) which shall be a joint corporate municipal instrumentality of both the state of New York and the state of New Jersey for the purpose of effecting the objects of this compact and which shall be deemed to be performing governmental functions of the two states in the performance of its duties hereunder.” Approximately 1/3 of the compact entities have similar creation language that gives at least this level of definition to the entity.

¹⁵ Note, *Charting No Man’s Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 Harv. L.R. 1991, 1996 (1998). The article never answered the question.

¹⁶ *See e.g. Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39–52 (1994).

¹⁷ *Murray v. Oregon*, No. 9700012CC (Wasco County Cir. Ct., Mar. 4, 2002), appeal filed No. A117707 (Or. App. Mar 28, 2002).