

The Gorge Commission and Public Law: Why is it so Complex, Why Does It Matter, and What does it Mean in the Life and Work of the Commission?

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October 14, 2014

* This report is prepared by the author in conjunction with a Center for Public Service project with the Columbia River Gorge Commission. It is not intended to represent the views of Portland State University or the State of Oregon

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Executive Summary

The Columbia River Gorge Commission is a regional governance body operating in the complex arena of interstate compact law and the particularly difficult and challenging requirements of National Scenic Area Act and the Columbia River Gorge Compact. Interstate compact law is a developing area of the law with some well-established principles but many ambiguities as well. And, within that larger body of national compact law, each compact has, in a very real sense, its own unique body of law. Because of its particular obligations and constraints, the legal demands and challenges that the Columbia River Gorge Commission faces are daunting indeed.

The Study

This report provides a public law analysis of the work of the Gorge Commission. It is based on an analysis of the commission's statute, the compact, its regulations, and bylaws as well as the case law that has emerged over the years of the commission's operation. It is also based on an analysis of the body of interstate compact law within which the Gorge Commission operates. It involved interviews with Jeffrey Litwak, Gorge Commission Counsel as well as a review of commission counsel's case files and work products assessing legal issues that the commission has, is, or will be facing over time. Since he is also a leading author and teacher on interstate compact law, the study also benefits from his scholarly and instructional materials.

Findings

This analysis indicates that there are four critical themes that are central to the success of the Gorge Commission. They include complexity, education, communication, and continuing law and policy development. Of these, complexity is dominant and shapes the need for attention to the other three. Another critically important finding, and one that pervades all of the other elements, is the importance of attending to legal practice as a central part of the line operation of the Gorge Commission. It is not just a staff function that is supportive of the agency, but an effort that is central to the core functions of the Commission and accomplishment of its mission under the Scenic Act and the Gorge Compact. Indeed, that reality goes to the first of the recommendations that the report offers to the commission.

Recommendations

The recommendations are strengths-based, since the study found clear competence and skill on the part of commission counsel; well-developed materials, including Commission litigation history, well-organized, complete, and efficient case files; and continuing efforts to ensure knowledge of relevant state and national law not only as to compact law but also such critical areas as administrative law. The recommendations are directed to the commission and not addressed specifically to the counsel, though each of these clearly involves, affects, and will be central to counsel's efforts.

1. Ensure that legal practice is understood as a critical core function of the Commission and its staff.
2. Ensure staff legal capacity adequate to address the full range of legal practice obligations of the Commission and avoid reliance on state attorneys general for legal work.

3. Maintain sufficient staff capacity to ensure continuous learning on and influence in the shaping of interstate compact law.
4. Have staff brief the Commission annually on both the tactical and strategic legal issues that counsel considers important for the Commission to influence through litigation priorities or amicus participation.
5. Develop further the discussion of the special legal issues associated with the tribal governments in the Gorge as part of the ongoing considerations of interstate compact law and Gorge Compact law in a manner that both assists commissioners and the tribal governments.
6. Develop an ongoing channel of communication on legal issues associated with the federal participant in the Gorge and other federal entities operating in an around the Scenic Area as part of ongoing considerations of interstate compact law and Gorge Compact law to assist the Commission and also to enhance the effectiveness of the federal agencies in legal decision making and the management of important policies.
7. Ensure active participation in professional associations that have a focus on interstate compact law such the ABA and National Center for Interstate Compacts of the Council of State Governments.
8. Build effective intern/extern relationships with regional law programs to ensure training of a next generation of public sector attorneys able to practice and who can be resources to the Commission either as employees or outside counsel where needed.
9. Recognize education as a central element of commission legal staff roles.
10. Consider ways that legal capabilities can enhance collaborative relationships with communities in the Gorge and in the two states.

The Commission is a public law body with public law authority and public law responsibility, and it faces a two-level problem. At a day-to-day level, public law authorizes, drives, constrains, and holds the Commission accountable. It also supports the legitimacy of the Commission and its work. Attention to its legal complexities and what they require of the Commission and education of key participants and stakeholders about those factors are essential to the effectiveness of the agency, the compact, and the National Scenic Area Act.

Introduction: Public Law and the Columbia River Gorge Commission

Two states shared a great river basin. Their dramatically different political cultures, policies, and expectations, taken together, led to numerous clashes over time about a wide range of concerns. Those conflicts affected most important aspects of life in the basin, from trade and economic development, the health of the river and surrounding environment, and the ways of life experienced by the residents of the area. These tensions ultimately came to a head and engendered action to ensure effective regional governance.

The states were Virginia and Maryland. The river was the Potomac. The year was 1785 and the occasion that brought a resolution to the situation came at the Mt. Vernon Conference, a meeting of representatives from the two states held at George Washington's home. Following that agreement, five states met the next year for a follow-on conference in Maryland, known as the Annapolis Convention. Four states named commissioners, but they did not get to the meeting. Four other states, including Maryland, did not name representatives. After the Annapolis meeting, George Washington wrote to James Madison pleading for action to bring the states together. "The consequences of a lax, or inefficient government, are too obvious to be dwelt on.-Thirteen Sovereignties pulling against each other and all tugging the federal head, will soon bring ruin on the whole."¹ In the end, the report of the Annapolis convention called for what is now known as the Philadelphia Convention of 1787. "Your Commissioners . . . beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the union, if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavors to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States. . . ."² The Continental Congress responded by issuing the formal call for what became known as the constitutional convention in terms that made clear both the problem and the essential goal of the work. "Resolved -- That in the opinion of Congress it is expedient, that . . . a convention of delegates . . . be held at Philadelphia, for . . . revising the Articles of Confederation, and reporting to Congress . . . such alterations and provisions therein, as shall . . . *render the federal Constitution adequate to the exigencies of government and the preservation of the Union.*"³ (Emphasis added)

Two hundred years later President Reagan signed the Columbia River Gorge Scenic Area Act that approved creation of a Gorge Compact and launched the Columbia River Gorge Commission.⁴ As the Commission has worked to meet its mandate, it has continued to

¹George Washington to James Madison, November 5, 1786, Maryland State Archives, "The Mt. Vernon Compact & the Annapolis Convention," <http://msa.maryland.gov/msa/mdstatehouse/html/compact_convention.html> Accessed May 31, 2014.

²"Proceedings of Commissioners to Remedy Defects of the Federal Government: 1786," <http://avalon.law.yale.edu/18th_century/annapoli.asp> Accessed May 31, 2014.

³Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor Books, 1961), pp. 247-248.

⁴Columbia River Gorge National Scenic Area Act, P.L. 99-663, 100 Stat. 4274 (1986), 16 U.S.C. 544 et seq.

struggle with many of the same kinds of intergovernmental tensions that led to the writing of the Constitution and that had given rise to the compact between Maryland and Virginia before that. The Gorge Commission faces a now well-known, but nevertheless challenging mandate set by the federal legislation:

(1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).⁵

The legislation also called for a new public law entity in the Pacific Northwest, a compact agency, separate from the states but created by an interstate compact between the states with the consent of Congress.⁶ Both the substantive mission of the Gorge Commission under the Act and the fact that it is an interstate compact agency make the tasks of the Commission both challenging and exceedingly complex. That complexity relates in significant part to the fact that interstate compact law is still a developing area of public law. That complexity and the particular characteristics of the Gorge Compact and the Scenic Area Act make attention to law and the particular legal practice central to the work of the Gorge Commission essential to the successful accomplishment of its mission.

This report provides a public law analysis of the work of the Gorge Commission. It is based on an analysis of the Commission's federal statute, the Gorge Compact, Commission administrative rules, and bylaws as well as the case law that has emerged over the years of the Commission's operation. It is also based on an analysis of the body of interstate compact law within which the Gorge Commission operates, including case law and other materials. Finally, and of particular importance in several respects, it involved interviews with Jeffrey Litwak, Gorge Commission Counsel, as well as a review of his case files and his work products assessing legal issues that the commission has addressed, is dealing with currently, or is likely to face over time. Since he is also a leading author and teacher on interstate compact law, the study also benefits from his scholarly and instructional materials.⁷

The study finds that four critical themes are central to the success of the Gorge Commission over time. They include complexity, education, communication, and continuing law and policy development. Of these, complexity is dominant and shapes the need for attention to the other three, though each is important in its own right. Another critically important finding, and one that pervades all of the other elements, is the importance of attending to legal practice as a central part of the line operation of the Gorge Commission. It is not just a staff function that is supportive of the agency, but work that is central to the core functions of the Commission and accomplishment of its mission under the Act and the Compact.

The analysis to follow addresses the reasons why compact law is so complex and what that entails; the particular challenges that arise from the complexities of the Gorge Compact and Scenic Act; why that complexity matters to the commission, the residents of the Gorge, the

⁵*Id.* at Sec. 544a.

⁶Oregon, ORS 196.105 -125 and ORS 196.115 -165. Washington, RCW 43.97.025, 43.97.035, 35.63.150, 36.32.550, 36.70.980, and 90.58.600.

⁷Jeffrey B. Litwak, *Interstate Compact Law: Cases & Materials* (Lake Oswego, OR: Semaphore Press, 2012). (Hereafter Compact Law.)

two states, and the nation; the critical role of legal practice in the Gorge Commission; and recommendations. There is one other important starting point for the analysis to follow. Although it necessarily deals with the substance of a complex body of law, the presentation that follows is not written in the manner of a law review or an analysis prepared for presentation to judges and lawyers, but for the members of the Commission, Commission staff who are not law-trained, and others outside the Commission whether they are policymakers in the member states or at the federal level. Additionally, the focus was limited to the particular organization and task at hand and the report does not purport to be a broad analysis of the full body of literature on interstate compact law. Nonetheless, an effort has been made to ensure the citation to authority and other materials necessary to an understanding of the material.

Why Is Compact Law So Complex and Why Does it Matter?

Commissioners and staff of a compact agency cannot be successful if they do not have a basic understanding of interstate compacts, the law that governs their operation, and the ambiguities and unresolved challenges in that body of law. The complexity of compact law is not just a set of esoteric legal arguments, but a variety of facts on the ground that shape what compact agencies do and how they operate. In short, the complexity of compact law matters on a day-to-day basis.

Each Compact Has Its Own Body of Law within the Context of a Larger National Body of Interstate Compact Law

The starting place for understanding interstate compact law is that it is a developing area of the law with some well-established principles but many ambiguities as well. And, within that larger body of national compact law, each compact has, in a very real sense, its own unique set of laws. Each major interstate compact has its own statutory foundation. Although many significant compacts have received congressional consent, others have not.⁸ Each has its own compact language. Each has its own organizational and jurisdictional design. And there are, as of the time of this writing, some 209 such interstate compacts (See Appendix 1). Some 22 of these are national with a number of states, some with 35 or more member states, and another 30 that are regional in character with at least 8 states.⁹ The Interstate Compact for Adult Offender Supervision includes all of the states, 2 territories, and the District of Columbia.¹⁰ The Multistate Tax Compact has 17 members, 6 so-called sovereignty members, and 25 "Associate or Project Members."¹¹

⁸There are compacts that have not received congressional consent. See *United States Steel v. Multistate Tax Commission*, 434 U.S. 452 (1978). More will be said about these later. See Michael Buenger and Richard Masters, "The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems," *Roger Williams U.L. Rev.* 9 (2003): 79-83.

⁹Council of State Governments, National Center for Interstate Compacts, "Fact Sheet" <<http://www.csg.org/knowledgecenter/docs/ncic/FactSheet.pdf>> Accessed June 9, 2014. <http://apps.csg.org/ncic/>

¹⁰Interstate Commission for Adult Offender Supervision, "States/Regions," <<http://www.interstatecompact.org/Directory/RegionsStates.aspx>> Accessed August 2, 2014.

¹¹See Multistate Tax Commission, "Member States," <<http://www.mtc.gov/AboutStateMap.aspx>> Accessed August 2, 2014. Associate members participate, but do not have formal or voting membership. "Compact members are states (represented by the heads of the tax agencies administering corporate income and sales and use taxes) that have enacted the Multistate Tax Compact into their state law. Sovereignty members are states that support the purposes of the Multistate Tax Compact through regular participation in, and financial support for, the general activities of the Commission. These states join in shaping and supporting the Commission's efforts to preserve state taxing authority and improve state tax policy and administration. Associate members are states that participate in Commission and otherwise consult and cooperate with the Commission and its other member states or, as project members, participate in Commission programs or projects." *Id.*

Since each of these compacts generates a unique body of law as well as operating within the larger body of national compact law, it is important to see how compacts have grown in number, diversity, and scope in modern history. The Council of Governments notes that from 1783 to 1920 there were 36 such agreements, but that since then, and particularly since World War II, that number has grown dramatically to the present 209, with others in various stages of development at the time of this writing.¹² Those early compacts focused heavily on settling boundary issues among the states, but the more modern compacts cover a much wider range of activities. In addition to boundary matters and creation of advisory bodies, the CSG adds a third category of compacts intended “to create administrative agencies to regulate and manage a variety of interstate policy concerns,” but that third category is large, broad, and important. It ranges “from conservation and resource management to civil defense, education, emergency management, energy, law enforcement, probation and parole, transportation and taxes.”¹³ In fact, the purposes, character, scope, and nature of administrative bodies is so great that there really is not an adequate classification scheme that explains their work. Again, given that each compact is *sui generis*, there is perhaps no reason to expect an easy framework for understanding them, though the National Center for Interstate Compacts continues efforts to develop best practices for the development of new compacts given the experience of various compacts and their administrative agencies to date.¹⁴

Many states are involved in significant compacts that span a range of policy domains. For example, Oregon is a party to 29 compacts (see Table 1). Washington is currently a member of 32 compacts (see Table 2).

As that number suggests, while these neighboring states both belong to a number of the same compacts, they also hold memberships that are different from the other state. These compacts operate independently and often without any regular communications among their governing bodies.

¹²Council of State Governments, “Fact Sheet,” at 2.

¹³*Id.* See also Caroline N. Broun, Michael L. Buenger, Michael H. McCabe, and Richard L. Masters, *The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide* (Chicago: A.B.A. Publishing, 2006),

¹⁴See e.g., Council of State Governments, “Best Practices for Compact Development,” *Council of State Governments*, May 2011 http://knowledgecenter.csg.org/kc/system/files/Compact_Development.pdf, Accessed July 31, 2014. See also, Crady DeGolian, “Background, History, and Modern Use,” *Council of State Governments*, February 2014 <http://knowledgecenter.csg.org/kc/system/files/Compacts%20Background.pdf> Accessed July 31, 2014; “Developing Interstate Compacts,” *Council of State Governments*, June 2014 http://knowledgecenter.csg.org/kc/system/files/CR_DevIntCompacts.pdf Accessed July 31, 2014; “Evolution of Interstate Compacts,” *Council of State Governments*, May 2012 <http://knowledgecenter.csg.org/kc/system/files/theevolutionofinterstatecompacts.pdf> Accessed July 31, 2014; “Interstate Compacts and the Federal Government,” *Council of State Governments*, March 2014 http://knowledgecenter.csg.org/kc/system/files/CR_Interstate%20Compacts%20and%20the%20Federal%20Government.pdf Accessed July 31, 2014; “Interstate Compacts: Governance and Structure,” *Council of State Governments*, April 2014 http://knowledgecenter.csg.org/kc/system/files/CR_Interstate%20Compacts%20Governance%20and%20Structure.pdf Accessed July 31, 2014.

Table 1. Oregon – Interstate Compacts

Source: Council of State Governments, National Center for Interstate Compacts
<<http://apps.csg.org/ncic/State.aspx?search=1&id=37>> July 26, 2014

No.	Compact Title	Citation
1	Agreement on Detainers	ORS 135.775 to 135.79
2	Boating Offense Compact	ORS 830.080
3	Columbia River Compact	ORS 507.010, 507.040
4	Columbia River Gorge Compact	ORS 196.150 to 196.165 ORS 428.310, 428.320, 428.330
5	Compact on Mental Health	
6	Compact on Placement of Children	ORS 417.200 to 417.260
7	Driver License Compact	ORS 802.540, 802.550
8	Emergency Management Assistance Compact	ORS 401.045
9	Interstate Compact for Adult Offender Supervision	ORS 144.600
10	Interstate Compact for Juveniles	ORS 417.030 to 417.080
11	Interstate Compact on Educational Opportunity for Military Children	
12	Interstate Corrections Compact	ORS 421.245 to 421.254
13	Interstate Forest Fire Suppression Compact	ORS 421.296
14	Interstate Library Compact	ORS 357.330 to 357.370
15	Interstate Pest Control Compact	ORS 570.650
16	Klamath River Compact	ORS 542.610 to 542.630
17	Multistate Highway Transportation Agreement	ORS 802.560
18	Multistate Tax Compact	ORS 305.655 to 305.685
19	National Crime Prevention and Privacy Compact	ORS 181.036
20	Northwest Compact on Low-Level Radioactive Waste Management	ORS 469.930
21	Northwest Wildland Fire Protection Agreement	ORS 477.175 to 200
22	Oregon-Washington Columbia River Boundary Compact	ORS 186.510, 186.520
23	Pacific Marine Fisheries Compact	ORS 507.040, 507.050
24	Pacific Ocean Resources Compact	ORS 196.175
25	Pacific States Agreement on Radioactive Materials Transportation	ORS 469.930
26	Western Corrections Compact	ORS 421.282 to 421.294
27	Western Interstate Energy Compact	(no citation)
28	Western Regional Education Compact	ORS 351.770 to 351.840
29	Wildlife Violator Compact	ORS 496.750

Table 2. Washington – Interstate Compacts

Source: Council of State Governments, National Center for Interstate Compacts
 <<http://apps.csg.org/ncic/State.aspx?search=1&id=47>> July 26, 2014

No.	Compact Title	Citation
1	Agreement on Detainers	RCW 9.100.000
2	Agreement on Qualifications of Educational Personnel	RCW 28A.690.010 et seq.
3	Boating Offense Compact	RCW 88.01.010
4	Columbia River Compact	RCW 77.75
5	Columbia River Gorge Compact	RCW 43.97.015
6	Compact on Mental Health	RCW 72.27.010
7	Compact on Placement of Children	RCW 26.34.010 et seq.
8	Driver License Compact	RCW 46.21.010 et seq.
9	Emergency Management Assistance Compact	RCW 38.10.010
10	Interstate Compact for Adult Offender Supervision	RCW 9.94A.745-9.94A.74503
11	Interstate Compact for Juveniles	RCW 13.24.010 et seq.
12	Interstate Compact on Educational Opportunity for Military Children	West's RCWA 28A.705.010 to 28A.705.020.
13	Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutual Wagering	RCW 67.17.005 et seq.
14	Interstate Corrections Compact	RCW 72.74.010 et seq.
15	Interstate Forest Fire Suppression Compact	RCW 72.64.150, 72.64.160
16	Interstate Insurance Product Regulation Compact	West's RCWA Secs. 48.130.005 et seq.
17	Interstate Library Compact	RCW 27.18.010
18	Interstate Pest Control Compact	RCW 17.34.010 et seq.
19	Multistate Highway Transportation Agreement	RCW 47.74.010, 47.74.020
20	Multistate Tax Compact	RCW 82.56.010
21	National Guard Mutual Assistance Counter-Drug Activities Compact	RCW 38.08.500
22	National Popular Vote Interstate Compact	West's RCWA 29A.56.300 et seq.
23	Nonresident Violator Compact	RCW 46.23.010 et seq.
24	Northwest Compact on Low-Level Radioactive Waste Management	RCW 43.145.010 et seq.
25	Pacific Marine Fisheries Compact	RCW 77.75.030, 77.75.040
26	Uniform Unclaimed Property Act	RCW 63.29.330
27	Vehicle Equipment Safety Compact	RCW 46.38.010 et seq.
28	Washington-Oregon Boundary Compact	RCW 43.58.050 et seq.

29	Western Corrections Compact	RCW 72.70.010 et seq.
30	Western Interstate Energy Compact	RCW 43.21F.400 et seq.
31	Western Regional Education Compact	RCW 28B.70.010 et seq. RCW 77.75.070-
32	Wildlife Violator Compact	77.75.090

National Compact Law: Still a Work in Progress

Despite the fact that interstate compacts reach back to before the creation of the U.S. Constitution, compact law is still surprisingly undeveloped as compared with other areas of public law, and particularly other areas of law that present significant constitutional dimensions. There are fewer than 40 United States Supreme Court rulings that are most often cited as the foundation for much of the discussion of compact law (see Table 3). Although there is a secondary literature on the subject, it is again not nearly as extensive as exist in many other fields with far less significance and complexity.¹⁵ Even the Supreme Court rulings are not well known in intergovernmental relations. There are well-established principles in the existing law, but there are also many questions that have not yet been clearly resolved.¹⁶

Table 3. Leading U.S. Supreme Court Interstate Compact Cases

2013	<i>Tarrant Regional Water District v. Herrmann</i> , 133 S. Ct. 2120
2010	<i>South Carolina v. North Carolina</i> , 558 U.S. 256
2010	<i>Alabama v. North Carolina</i> , 560 U.S. 330
2008	<i>New Jersey v. Delaware</i> , 552 U.S. 597
2004	<i>Kansas v. Colorado</i> , 543 U.S. 86
2003	<i>Virginia v. Maryland</i> , 540 U.S. 56
2002	<i>Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency</i> , 535 U.S. 302
2001	<i>Kansas v. Colorado</i> , 533 U.S. 1
2001	<i>Alabama v. Bozeman</i> , 533 U.S. 146
2000	<i>New York v. Hill</i> , 528 U.S. 110
1997	<i>Suitum v. Tahoe Regional Planning Agency</i> , 520 U.S. 725
1995	<i>Kansas v. Colorado</i> , 514 U.S. 673
1994	<i>Hess v. Port Authority Trans-Hudson Corp.</i> , 513 U.S. 30
1992	<i>New York v. United States</i> , 505 U.S. 144
1991	<i>Oklahoma v. New Mexico</i> , 501 U.S. 221
1990	<i>Port Authority Trans-Hudson v. Feeney</i> , 495 U.S. 299
1987	<i>Texas v. New Mexico</i> , 482 U.S. 124
1985	<i>Carchman v. Nash</i> , 473 U.S. 716
1984	<i>Washington Metropolitan Transit Authority v. Johnson</i> , 467 U.S. 925
1984	<i>Brown v. Hotel & Restaurant Employees & Bartenders Local 54</i> , 468 U.S. 491
1983	<i>Texas v. New Mexico</i> , 462 U.S. 554
1981	<i>Cuyler v. Adams</i> , 449 U.S. 433
1979	<i>Lake Country Estates v. Tahoe Regional Planning Agency</i> , 440 U.S. 391
1979	<i>California v. Arizona</i> , 440 U.S. 59
1978	<i>United States v. Multistate Tax Commission</i> , 434 U.S. 452

¹⁵See the selected bibliography at the end of the report.

¹⁶See generally Litwak, Compact Law.

1968	<i>Universal Interpretive Shuttle Corp. v. Wash. Metro. Trans. Com.</i> , 393 U.S.	186
1960	<i>De Veau v. Braisted</i> , 363 U.S.	144
1959	<i>Petty v. Tennessee-Missouri Bridge Commission</i> , 359 U.S.	275
1951	<i>West Virginia ex rel. Dyer v. Sims</i> , 341 U.S.	22
1938	<i>Hinderlider v. La Plata River & Cherry Creek Ditch Co.</i> , 304 U.S.	92
1930	<i>Kentucky v. Indiana</i> , 281 U.S.	163
1894	<i>Wharton v. Wise</i> , 153 U.S.	155
1893	<i>Virginia v. Tennessee</i> , 148 U.S.	503
1855	<i>Pennsylvania v. Wheeling and Belmont Bridge Co.</i> , 59 U.S.	421
1840	<i>Holmes v. Jennison</i> , 39 U.S.	540
1838	<i>Rhode Island v. Massachusetts</i> , 37 U.S.	657
1837	<i>Poole v. Lessee of John Fleeger</i> , 36 U.S.	185
1823	<i>Green v. Biddle</i> , 21 U.S.	1

1. Not every state-to-state relationship is an interstate compact.

The effort to understand what is firmly established and what remains on the table is most often traced back to a seminal article published in 1925 by Felix Frankfurter and Jerome Landis. The article started from a recognition that there had been at least half a dozen forms of intergovernmental devices used to that point in U.S. history to address problems among the states that did not rely on specific constitutional provisions related to federalism.¹⁷ There were two, however, that plainly were grounded in constitutional language. One concerned the use of cases brought on original jurisdiction in the U.S. Supreme Court by one state against the other. The other provision is the interstate compacts clause of Article I, §10, cl. 3 which states in pertinent part: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."¹⁸

Litwak, too, starts from the same point about the fact that interstate compacts are by no means the only way that states deal with one another to address contemporary issues. In addition to those devices noted by Frankfurter and Landis, he points to more modern tools, like the use of common litigation launched by many or all states that can lead to resolutions like the multistate tobacco settlement.¹⁹ He also refers to "agreements entered into by administrative officials [and] enactment of uniform and model laws."²⁰ In addition to all of these, there are also suits brought in federal courts besides the Supreme Court that attempt

¹⁷Felix Frankfurter and James M. Landis, "The Compact Clause of the Constitution. A Study in Interstate Adjustments," *Yale L. J.*, Vol. 34 (No. 7 May 1925): 685-758

¹⁸*Id.* at 691.

¹⁹Litwak, *Compact Law*, at 5. The tobacco settlement involved 46 states and is administered through National Association of Attorneys General Tobacco Staff, <<http://www.naag.org/tobacco.php>>Accessed August 5, 2014.

²⁰*Id.* Frankfurter and Landis point to the uniform and model laws and indeed note that a major study had been done on interstate compacts in 1921. That study was done under the auspices of the National Conference of Commissioners on Uniform State Laws, an organization that came into being in 1892. In 1916 the conference established a Committee on Compacts and Agreements between States which produced that 1921 report. See Peter Winship, "The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law," *U. Pa. J. Int'l Bus. L.*, Vol. 13 (No. 2 1992): 246-247.

to resolve complex intergovernmental issues, with or without negotiations attached.²¹ Litwak's definition of an interstate compact is as clear as any available. "An interstate compact is a binding, enforceable agreement between two or more states."²²

It is also established, though often confusing to those not experts in compact law, that not every agreement that is termed an interstate compact requires congressional consent under Article I, §10 of the Constitution. As Litwak explains, the Supreme Court has provided strong statements on this point in the *Northeast Bancorp* and *Multistate Tax Commission* cases. In the *Multistate Tax Commission* decision, the Court wrote:

But the multilateral nature of the agreement and its establishment of an ongoing administrative body do not, standing alone, present significant potential for conflict with the principles underlying the Compact Clause. The number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy. As to the powers delegated to the administrative body, we think these also must be judged in terms of enhancement of state power in relation to the Federal Government. . . . [T]he test is whether the Compact enhances state power quoad the National Government. This pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence. Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission. Moreover, each State is free to withdraw at any time. . . ."²³

In *Northeast Bancorp*, the Court ruled:

But even if we were to assume that these state actions constitute an agreement or compact, not every such agreement violates the Compact Clause. *Virginia v. Tennessee*, 148 U.S. 503 (1893). "The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976), quoting *Virginia v. Tennessee*, *supra*, at 519. See *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978).²⁴

The idea that there can be compacts of such importance that nonetheless need not meet the requirements of the compacts clause of Article I is confusing and has been a matter of considerable concern, including to members of the Supreme Court. Justice White, citing

²¹ For example, suits can be brought over resource issues as in the Chinese catfish case brought against Illinois and the U.S. Army Corps of Engineers involving a number of neighboring states and tribal governments. *Michigan v. U.S. Army Corps of Engineers*, 2014 U.S. App. LEXIS 13349 (7th Cir. 2014).

²²Litwak, Compact Law, at 12.

²³*United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472-473 (1978).

²⁴*Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 175-176 (1985).

James Madison's preface to the records of the Philadelphia convention, reminded the majority in the *Multistate Tax Commission* case that problems with interstate compacts had been an important concern that added impetus to the need for an effective Constitution for the United States.²⁵ He warned that the decision by the Court not to ensure that the Congress had an opportunity to consider a compact of such importance as the Multistate Tax Compact meant losing that critical concern with broad national interests that the framers of the Constitution clearly understood.

2. Where there is congressional consent, it can come in different forms.

The case law makes clear that consent can be given by Congress in express terms or it may be implied. As Justice Washington wrote in *Green v. Biddle*, "[T]he constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified. . . . The only question in cases which involve that point is, has Congress, by some positive act, in relation to such agreement, signified the consent of that body to its validity?"²⁶

Consent can be provided in response to a compact agreed to by the states and presented to the Congress or it can be provided by Congress in advance of an agreement by the states. Litwak notes that some very broad and extremely important statutes give advance consent.

²⁵434 U.S., at 496, White, J., dissenting. Madison's full statement in the Preface is interesting. "The want of authy. in Congs. to regulate Commerce . . . led to an exercise of this power separately, by the States, wch not only proved abortive, but engendered rival, conflicting and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighbouring ports, and to co-erce a relaxation of the British monopoly of the W. Indn. P. 548 navigation, which was attempted by Virga. (see the Journal of) the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them, as N. Y. Pena. Virga. & S-Carolina. Some of the States, as Connecticut, taxed imports as from Massts higher than imports even from G. B. of wch Massts. complained to Virga. and doubtless to other States (see letter of J. M.) In sundry instances of as N. Y. N. J. Pa. & Maryd. (see) the navigation laws treated the Citizens of other States as aliens.

In certain cases the authy. of the Confederacy was . . . violated by Treaties & wars with Indians, as by Geo: by troops, raised & kept up. withr. the consent of Congs. as by Massts by compacts witht. the consent of Congs. as between Pena. and N. Jersey. and between Virga. & Maryd. From the Legisl: Journals of Virga. it appears, that a vote to apply for a sanction of Congs. was followed by a vote agst. a communication of the Compact to Congs.

In the internal administration of the States a violations of Contracts had become familiar in the form of depreciated paper made a legal tender, of property substituted for money, of Instalment laws, and of the occlusions of the Courts of Justice; although evident that all such interferences affected the rights of other States, relatively Creditor, as well as Citizens Creditors within the State. . . .

As a natural consequence of this distracted and disheartening condition of the Union, the Fedl. authy had ceased to be respected abroad, and dispositions shewn there, particularly in G. B. to take advantage of its imbecility, and to speculate on its approaching downfall; at home it had lost all confidence & credit. The unstable and unjust career of the States had also forfeited the respect & confidence essential to order and good Govt., involving a general decay of confidence & credit between man & man. It was found moreover, that those least partial to popular Govt. or most distrustful of its efficacy were yielding to anticipations that from an increase of the confusion a Govt. might result more congenial with their taste or their opinions; whilst those most devoted to the principles and forms of Republics. were alarmed for the cause of liberty itself, at stake in the American Experiment, and anxious for a System that wd avoid the inefficacy of a mere Confederacy without passing into the opposite extreme of a Consolidated gov't." in Max Farrand, *The Records of the Federal Convention of 1787*, Vol. 3, pp. 547-549, <http://memory.loc.gov/cgi-bin/query/D?hlaw:6:./temp/~ammem_p5mT::> Accessed July 30, 2014. The Base Page for Farrand's *Records* is <http://memory.loc.gov/ammem/amlaw/lwfr.html>

²⁶21 U.S. (8 Wheat.) 1, 85-86 (1823).

The Clean Air Act²⁷ and the Patient Protection and Affordable Care Act²⁸ include advance consent for states to enter into compacts.²⁹ He cites the *Virginia v. Tennessee* case for the proposition that consent can even be implied. In this case, the Court explained: “The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. . . . The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings.³⁰ The Court repeated the point in *Cuyler v. Adams*: “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.³¹

Congress can give consent to specific states and their particular compacts or it can provide consent in blanket form to cover such states as choose to enter into compacts that fit the criteria in the legislation. However, Congress sometimes encourages compacts, but requires that particular compacts receive individual approval. Indeed, in the case of the Affordable Care Act, Congress delegated to the Secretary of Health and Human Services the authority to approve compacts.

a) Health care choice compacts

(1) In general

Not later than July 1, 2013, the Secretary shall, in consultation with the National Association of Insurance Commissioners, issue regulations for the creation of health care choice compacts under which 2 or more States may enter into an agreement under which—

(A) 1 or more qualified health plans could be offered in the individual markets in all such States but, except as provided in subparagraph

(B), only be subject to the laws and regulations of the State in which the plan was written or issued;

(B) the issuer of any qualified health plan to which the compact applies—

(i) would continue to be subject to market conduct, unfair trade practices, network adequacy, and consumer protection standards (including standards relating to rating), including addressing disputes as to the performance of the contract, of the State in which the purchaser resides;

(ii) would be required to be licensed in each State in which it offers the plan under the compact or to submit to the jurisdiction of each such State with regard to the standards described in clause (I) (including allowing access to records as if the insurer were licensed in the State); and

²⁷42 U.S.C. 7402(c).

²⁸P. L. 111-148, 124 Stat. 119, (2010), 42 U.S.C. 18053.

²⁹Litwak, *Compact Law*, at 22.

³⁰*Virginia v. Tennessee*, 148 U.S. 503, 521-522 (1893). And see Litwak, *Compact Law*, at 23.

³¹*Cuyler v. Adams*, 449 U.S. 433, 441 (1981).

(iii) must clearly notify consumers that the policy may not be subject to all the laws and regulations of the State in which the purchaser resides.

(2) State authority

A State may not enter into an agreement under this subsection unless the State enacts a law after March 23, 2010, that specifically authorizes the State to enter into such agreements.

(3) Approval of compacts

The Secretary may approve interstate health care choice compacts under paragraph (1) only if the Secretary determines that such health care choice compact—

(A) will provide coverage that is at least as comprehensive as the coverage defined in section 18022 (b) of this title and offered through Exchanges established under this title;

(B) will provide coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable as the provisions of this title would provide;

(C) will provide coverage to at least a comparable number of its residents as the provisions of this title would provide;

(D) will not increase the Federal deficit; and

(E) will not weaken enforcement of laws and regulations described in paragraph (1)(B)(I) in any State that is included in such compact.³²

3. Congress can provide its consent with conditions and set limits on the duration of a compact.

Litwak points to one of the better known examples of a time-limited compact, the Northeast Dairy Interstate Compact, which the Congress allowed to expire.³³ When it enacted the Low-Level Radioactive Waste Policy Act in 1980,³⁴ Congress provided for the creation of interstate compacts, but explained:

A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent.³⁵

And when Congress adds such conditions, the Supreme Court has said, "The States who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached."³⁶ Obviously, Congress cannot require a condition that would violate the Constitution.³⁷

³²42 U.S.C. 18053.

³³Litwak, *Compact Law*, at 23.

³⁴P. L. 96-573, 94 Stat. 3347 (1980).

³⁵Sec. 4(a)(2)(B). On this compact and later legislation on them, see *New York v. United States*, 505 U.S. 144 (1992).

³⁶*Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 281-282 (1959).

³⁷Litwak discusses at some length the D.C. Circuit's opinion in *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962) on this point. The opinion states in pertinent part: "In granting its consent Congress can attach certain binding

However, Litwak indicates that there is still not a clear answer to the question whether the Congress has the authority under the Constitution to reserve to itself in compact legislation the ability to “alter, amend, or repeal” the terms of a compact. While the D.C. Circuit walked up to the issue in *Tobin v. United States*, and even though Congress frequently includes that reservation language in compact legislation, existing case law does not clearly and directly address that question.³⁸ Beyond that broad point, he raises two concerns. What is not clear about congressional authority is the effect of the consent in one piece of compact legislation on other legislation or the effect of later legislation on compacts. Litwak notes:

After Congress gives its consent to a compact, two questions arise relating to the relationship between the compact and the federal government. First, does that consent limit the ability of the federal government to enact subsequent law that might affect the implementation of the compact? . . . Second, does consent alter the responsibilities of the federal government under existing federal law that relates to the subject matter of the compact?³⁹

Obviously, he says, “a federal law of nationwide applicability will therefore be enforceable even if it affects a prior compact.”⁴⁰ He is basing this on Supreme Court case law reaching back to 1856.⁴¹ However, he explains, that does not really make clear what happens if later legislation is aimed specifically at existing compacts or compact parties.⁴²

The one thing that is clear is that efforts to claim that Congress has repealed by inference existing compact provisions will not likely be considered by any court. He refers particularly to the Supreme Court’s ruling in *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*⁴³ which repeated the general rule against finding

conditions, not only to its consent to the admission of a new state into the Union, but also to its consent to the formation of an interstate compact. However, the vital condition precedent to the validity of any such attached condition is that it be constitutional. If Congress does not have the power under the Constitution, then it cannot confer such power upon itself by way of a legislative fiat imposed as a condition to the granting of its consent.” *Id.* at 272-273. However, Litwak then adds, While the D.C. Circuit walked up to the issue in *Tobin*, no circuit ruling or Supreme Court decision makes clear whether Congress can under its constitutional authority retain the authority “to alter, amend or repeal’ its resolutions of approval.”

³⁸Litwak, *Compact Law*, at 33, 241.

³⁹*Id.* at 47.

⁴⁰*Id.*

⁴¹*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How (59 U.S.) 421 (1856) in which the Court wrote: “The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among the several States? Clearly not. Otherwise congress and two States would possess the power to modify and alter the constitution itself.” *Id.* at 433.

⁴²Litwak, *Compact Law*, at 48.

⁴³393 U.S. 186 (1968).

repeal by inference.⁴⁴ “There is thus no reason to ignore the principle that repeals by implication are not favored.”⁴⁵

4. When Congress gives consent, it establishes a national interest in the compact beyond the particular concerns of the states involved.

Consent matters not only because it satisfies the constitutional requirement but also because it makes clear the fact that, in addition to whatever specific interests two or more states might have in a given situation, there is a national interest in the matter that is critical. The states are not free to assert that only their particular concerns count, either at the time of the agreement or later when disputes may arise over its terms. As the Supreme Court made clear in *Dyer v. Sims*: “A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review.”⁴⁶ And in *Hess v. Port Authority Trans-Hudson Corp.*,⁴⁷ Justice Ginsburg echoed the *Dyer* language.⁴⁸

Litwak explains at length, and with excerpts from a variety of key cases, this national interest and the constitutional consent requirement that protects it. This doctrine allows Congress to ensure that agreements among states do not injure either other states or the nation as a whole and is key to understanding why states cannot act unilaterally with respect to existing compacts. He stresses that: “*Dyer v. Sims* is the Supreme Court’s clearest statement on holding states to their obligations under a compact, even if a state believes its constitution restricts the state’s ability to fulfill the compact.”⁴⁹

The *Dyer* Court held that it would not be states that would decide, but the federal courts.

But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own

⁴⁴Litwak, *Compact Law*, at 50.

⁴⁵393 U.S., at 193. The Court in *Universal Shuttle* in turn traced the presumption against repeal by inference back to *Wood v. United States*, 16 Pet. 342, 363 (1842); *FTC v. A. P. W. Paper Co.*, 328 U.S. 193, 202 (1946).

⁴⁶*West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951).

⁴⁷513 U.S. 30 (1994).

⁴⁸*Id.* at 40.

⁴⁹Litwak, *Compact Law*, at 61-62. He then cited and explained such examples as *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 706 F.2d 1312 (4th Cir. 1983); *Stephans v. Tahoe Reg’l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988); *Alcorn v. Wolfe*, 827 F. Supp. 47 (D.D.C. 1993); and *Parkridge 6, LLC v. U.S. Dep’t of Transp.*, No. 1:09CV1312(LMB/IDD) (E.D. Va. Apr. 6, 2010).

ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the "federal common law" governing interstate controversies (*Hinderlider v. La Plata Co.*, 304 U.S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

The *Dyer* Court went on to quote Chief Justice Hughes' opinion for a unanimous Court in *Kentucky v. Indiana*.⁵⁰ "Where the States themselves are before this Court for the determination of a controversy between them, neither can determine their rights *inter sese* [among themselves], and this Court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved."⁵¹

Moreover, compact issues under agreements to which the Congress has consented are matters of federal, not state law, known generally as the "law of the union" doctrine.⁵² This critically important doctrine is one that many state officials and some state judges appear not to understand, but the Supreme Court has made the point clearly in *Cuyler v. Adams*.⁵³ "Because congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question."⁵⁴ The Court added "[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."⁵⁵

In addition to the obvious points, Litwak stresses that because compact law is federal law, the usual considerations of federal preemption are not present and the compact law "supersedes the party states' statutes and constitutions."⁵⁶ This is again something that many state officials and some state judges have difficulty accepting.

⁵⁰281 U.S. 163 (1930).

⁵¹*Id.* at 176-177.

⁵²See Litwak, *Compact Law*, at 95.

⁵³449 U.S. 433 (1981).

⁵⁴*Id.* at 438. In support of that holding, the Court cites *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940).

⁵⁵*Id.* at 440.

⁵⁶Litwak, *Compact Law*, 103.

5. Interpretations in matters of interstate compact law are matters of both statutory law and contract law, but these are very different bodies of law, each with its own complexities.⁵⁷

Statutes are exercises of the legislative power to prescribe or prohibit public or private conduct, establish policy, or mandate processes by which public agencies operate and are part of the body of positive law. Compacts are agreements that represent a meeting of the minds among different parties and are interpreted today against a longstanding common law tradition.⁵⁸ An interstate compact is clearly an agreement among states, but it is also statutory, both in terms of the legislation adopted by the participating states to sanction the agreement but also because of the critically important fact that Congress adopts legislation consenting to the agreement. As noted above, it can even do so in advance of the actual agreement to the provisions of the compact by the participating states. The congressional action is not only an exercise of its authority under the interstate compact clause of the Constitution, but also transforms issues that arise under the compact into federal questions under the law of the union doctrine.

Litwak states the well-established point that courts interpreting compacts do start from the plain language involved, but also with a concern for uniformity in interpretation.⁵⁹ However, in any given situation, that may be more complex than it appears. Although there are similarities in statutory construction and the interpretations of contracts, such as beginning from plain language, the situation is far more complex in application in particular circumstances. As the earlier discussion indicated, the Supreme Court has clearly established that compacts are matters of national interest and not just agreements among the parties to the compact. On the other hand, there are compacts that have not received

⁵⁷Litwak adds that treaty law principles are sometimes applied as well with reference to the Vienna Convention on treaties. *Id.* at 195-198, but while there is some case law that suggests the treaty analogy might be useful, it presents a variety of difficulties as well. It is interesting to note that the U.S. Department of State explains, “Is the United States a party to the Vienna Convention on the Law of Treaties? No. The United States signed the treaty on April 24, 1970. The U.S. Senate has not given its advice and consent to the treaty. The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.” <<http://www.state.gov/s/l/treaty/faqs/70139.htm>> Accessed July 25, 2014.

⁵⁸It is interesting to note that although Article I plainly provides that all legislative power is vested in a Congress, the Constitution does not specifically speak to the authority of the government to enter into contracts. That authority was not firmly established until 1831 when the Supreme Court recognized that authority in both the federal government and the states. “Upon full consideration of this subject, we are of opinion that the United States have such a capacity to enter into contracts. It is in our opinion an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those power are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. . . . To adopt a different principle, would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation.” *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831). See also *United States v. Bradley*, 35 U.S. (10 Pet.) 343 (1836).

⁵⁹Litwak, *Compact Law*, at 198. The plain language requirement reaches back in compact law all the way to *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823) and continues with repeated emphasis by the Supreme Court. See *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

congressional consent, but do have state legislation approving and directing their implementation.⁶⁰

It can be confusing to read the case law that moves quickly back and forth between the two different types of law and interpretation within the same opinion.

There are important implications for whether courts, compact agencies, and state governments see the situation as statutory or contractual. If the focus is on statutory interpretation and if the issues are matters of federal law, compact agencies may be entitled to deference by courts in their interpretation of the legislation they implement and administer under the Supreme Court's *Chevron* doctrine.⁶¹ Indeed, the Oregon Supreme Court recognized that *Chevron* deference is due to the Gorge Commission.⁶² Litwak even notes that a number of compacts empower the compact agency "to provide guidance on compact responsibilities and interpretation of compact provisions."⁶³ If so, then the agency may be entitled to deference from courts in a review of its interpretations.

If the primary focus is on contract law, the situation shifts to an emphasis on the substance of what the contracting parties have agreed upon, which begins with the plain language of the compact, but courts often necessarily reach beyond that to consider other factors. The

⁶⁰Litwak excerpts *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991) which is a case involving the Interstate Compact for Placement of Children which did not require the consent of Congress. "Because congressional consent was neither given nor required, the Compact does not express federal law. Consequently, this Compact must be construed as state law. . . . Nevertheless, uniformity of interpretation is important in the construction of a Compact because in some contexts it is a contract between the participating states. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states." Litwak, *Compact Law*, at 203.

⁶¹"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determined Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency. *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842-844 (1984).

⁶²*Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 346 Or. 366, 384 (2009). The Court wrote, "[W]e conclude that . . . Congress delegated authority to the commission that, under the federal methodology that we are bound to apply, implies a congressional expectation that the commission will 'speak with the force of law' when it addresses ambiguities and gaps in the statutory scheme. The commission's interpretations of the Act therefore are entitled to the level of deference that the *Chevron* doctrine prescribes." *Id.*

⁶³Litwak, *Compact Law*, at 205.

Supreme Court's *Tarrant Regional Water District v. Herrmann*, regarding the Red River Compact explains the contract interpretation approach.⁶⁴ Justice Sotomayor began her opinion for the Court by establishing the starting point for interpretation. "Interstate compacts are construed as contracts under the principles of contract law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). So, as with any contract, we begin by examining the express terms of the Compact as the best indication of the intent of the parties."⁶⁵ In this case, a Texas water district claimed that the compact was silent and ambiguous with respect to the question of cross-border water rights. The Court explained that in such circumstances: "We . . . turn to other interpretive tools to shed light on the intent of the Compact's drafters. Three things persuade us that cross-border rights were not granted by the Compact: the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties' course of dealing."⁶⁶ She notes, as to the second part of this standard, that the Court can also look "to the customary practices employed in other interstate compacts also helps us to ascertain the intent of the parties to this Compact."⁶⁷ On the last point, she adds, "A 'part[y's] course of performance under the Compact is highly significant' evidence of its understanding of the compact's terms."⁶⁸ Thus, an interstate compact is a contract, but of a particular kind that requires, where plain language is not a solution, special kinds of consideration for its interpretation.

Litwak adds that the Court also considers the negotiating history of compacts.⁶⁹ He adds that in some cases uniformity of interpretation and comity are important enough to cause some state courts to consider the decisions of other courts in their interpretations of compacts, but others do not do so.⁷⁰ Thus, the unique characteristics of interstate compacts mean that their interpretation is often an extremely complex enterprise.

6. Compact agencies are difficult to define as organizations. They are usually not federal agencies, but neither are they state agencies. They are more often designated as regional or multistate bodies, but just what kind of organization a particular commission is depends upon the language of the compact that created and empowered it.

As Litwak points out, about two-thirds of the compacts have some kind of administrative agency, but the design and character of those agencies vary dramatically.⁷¹ He quotes one of the more interesting descriptions of the species from a district court ruling concerning the

⁶⁴133 S. Ct. 2120 (2013).

⁶⁵*Id.* at 2130.

⁶⁶In setting the principles for interpretation, she cites *Oklahoma v. New Mexico*, 501 U.S. 221, 235 (1991).

⁶⁷133 S. Ct., at 2133.

⁶⁸*Id.* at 2135. On this point, she cites *Alabama v. North Carolina*, 130 S. Ct. 2295, 2317 (2010).

⁶⁹Litwak, *Compact Law*, at 201. He cites *Oklahoma v. New Mexico*, 501 U.S. 221, 234 (1991); *Texas v. New Mexico*, 462 U.S. 554, 568 n.14 (1983), and *Arizona v. California*, 292 U.S. 341, 359-360 (1934) on that point.

⁷⁰*Id.* at 204.

⁷¹*Id.* at 71.

Port Authority of New York and New Jersey. "Compact Clause entities are hybrids, occupying a special position in the federal system. As the Supreme Court has observed, a Compact Clause entity is really the creation of multiple sovereigns: the compacting states whose actions are its genesis, and the federal government, whose approval is constitutionally required when the agency will operate in an area affecting the national interest."⁷² The district court goes on to say "While Congressional approval of a bistate compact makes it appropriate to treat the document's interpretation as a federal question . . . this 'law of the Union' doctrine does not mean that Congress intends to subsume the Compact Clause agency within the federal government or to subject its operations to general federal regulatory schemes."⁷³

The Columbia River Gorge National Scenic Area Act refers to the Gorge Commission as a "regional agency" and adds that it "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law."⁷⁴ Because there are so many statutes and compacts with such variation in the nature and design of their agencies, as well as in their legal character and authority, questions of their operations, substantive authority, jurisdiction, and procedures are likely to be continuing subjects of debate, as is the question of just who can conduct oversight and through what means.

7. Compact agencies are not state agencies, but are the administrative rules they issue federal rules or some unique classification?

Since the processes and activities of the compact bodies are often presented in the form of administrative rules, and given the complexity of the systems by which rules are made in their member states, it is an interesting problem to determine just how the agency's rules are to be defined. Litwak notes that although some courts have stated that compact agency rules are indeed federal rules,⁷⁵ others have simply determined that they are federally authorized, and yet others have treated them as if they were federal rules, but without specific holdings on the point.⁷⁶

It matters how the rules are understood for a variety of reasons. For example, there are doctrines in federal administrative law that provide more judicial deference to an agency's interpretation of its own rules than is the case in the administrative law of some states. This doctrine is termed *Auer* deference from the U.S. Supreme Court's *Auer v. Robbins*

⁷²*Brooklyn Bridge Park Coalition v. Port Auth. of New York and New Jersey*, 951 F. Supp. 383, 393 (EDNY 1997). The Supreme Court rulings cited in support of this assertion are *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979). See Litwak, *Compact Law*, at 87.

⁷³*Id.*

⁷⁴16 U.S.C. § 544c.

⁷⁵Litwak, *Compact Law*, at 107. He cites *Stephans v. Tahoe Reg'l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988); *Rhode Island Fishermen's Alliance v. Rhode Island Dep't of Env'tl. Mgmt.*, 585 F.3d 42 (1st Cir. 2009), and *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 1062 (E.D. Cal. 1998).

⁷⁶He cites *City of South Lake Tahoe v. Tahoe Reg'l Planning Agency*, 664 F. Supp. 1375 (E.D. Cal. 1987), *Klickitat County v. State*, 71 Wn. App. 760 (1993); and *Columbia River Gorge Comm'n v. Hood River County*, 210 Or. App. 689 (2007).

decision.⁷⁷ As Litwak observes, the Oregon state courts have applied Auer deference to the interpretation of its rules issued by the Columbia River Gorge Commission.⁷⁸ It is also a question because compact agencies are often required to report their rules and rulemaking actions to state officials, but each of the states has its own rulemaking and public information statutes. Indeed, Litwak poses the question whether there needs to be a unique category for administrative rules issued by compact agencies.⁷⁹

It is clear that although there are some principles that undergird the body of Interstate Compact law, there are many complexities, a great many unresolved questions or at least unambiguous situations, relatively limited Supreme Court rulings that explain that law, and many people involved in interstate compacts or who deal with compact agencies who do not understand the existing national body of interstate compact law.

⁷⁷See *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013); *Chase Bank USA v. McCoy*, 131 S. Ct. 871 (2011); and *Auer v. Robbins*, 519 U.S. 452 (1997).

⁷⁸*Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 215 Or. App. 557, 603 (2007), *aff'd* in relevant part, 346 Or. 366, 410 (2009).

⁷⁹Litwak, *Compact Law*, at 106.

Why is the Law of The Gorge Compact Particularly Complex?

The Columbia River Gorge Commission must carry out its responsibilities within the set of principles and challenges presented by interstate compact law, but it also faces additional complexities that are presented by its context, its congressional consent statute, and its compact language. Consider each of these in turn.

The Columbia River Gorge: The Setting and Its Challenges

It was in significant part because of the diverse environmental, economic, cultural, social, and community context, and the competing demands that these factors engender in a unique place that the National Scenic Area Act was passed and the Gorge Compact created. It was also because the Gorge is important to the people who live in the Gorge, but also to the states, the region, and the nation. However, those same features make it an extremely challenging context for governance and one that is virtually guaranteed to ensure a range of legal issues, practice demands, and litigation.

As the Gorge Commission reminds visitors to its website or offices, the area covered by the Scenic Act and for which the commission has responsibilities is 85 miles long and covers some 292,500 acres. The range of topography, climate, flora, and fauna of the Gorge is one of the features that makes it such a special place. At its heart is the Columbia River which is and has been the lifeblood of so many communities not only in the Gorge but for the people up and down river, the states that rely on it for so many purposes, the nation, and – increasingly in recent decades – even international commerce. It has long been not only a much-loved set of fascinating and diverse ecosystems and an artery of trade but a spiritual place -- home to ancient Native American communities who have sought to preserve it not only because of its importance to subsistence, but also as the home and centerpiece of spirituality and culture. It has been home as well to a range of economic activities, dating back to those native communities for whom it was a center of trade and forward to the era when the sale of agricultural commodities came to dominate economic activity, to the more recent era in which efforts have been made to diversify the economic base and to move beyond just the sale of crops to the preparation of value-added agricultural products. In the Internet age, it has also become an attractive place to live and work using the Internet as a foundation. It has been discovered by many who live far away from the Gorge and the states and communities around it and who sought to be part of the lifestyle and the place.

In addition to the two states, the Gorge Scenic Area includes 6 counties and 13 cities and communities.⁸⁰ But even beyond the specific jurisdiction and authority of the commission, the area and the interests of the commission include federal agencies, tribal governments, and a wide range of other entities. In fact, Senator Hatfield explained during consideration of the legislation that: "The Act establishes a 'partnership between the Federal Government, the States of Oregon and Washington, and the nearly 50 units of local government within

⁸⁰These include Cascade Locks, Hood River, Mosier and The Dalles in Oregon, and North Bonneville, Stevenson, Carson, Home Valley, White Salmon, Bingen, Lyle, Dallesport and Wishram in Washington. Section 544b(e)(1).

the Columbia River Gorge for the purpose of protecting and enhancing' property and resources within the Gorge."⁸¹

As these factors suggest, the Gorge is a place where different – and often competing – political cultures come together. Some years ago, the *Oregonian* ran a series entitled "The Nine States of Oregon," that described nine different cultural regions in the state, with different political cultures to match.⁸² Three of those different political cultures are part of the Gorge, including, moving from east to west, the "Columbia Corridor," the northeast corner of "Timber Country," and "Portlandia" (years before the television program used the term). Although the comparisons are certainly in a number of respects different on the Washington side of the river, it is also the case that there are differences in political culture across the three Washington counties in the Gorge. But in addition to the communities that are part of the National Scenic Area, the "Nine States" series includes in the Columbia Corridor communities to the south as well, in part because they depend heavily on the river and have many important connections to the communities in the Gorge for economic and other reasons.

In addition to the differences among the communities in the Gorge and surrounding jurisdictions, Washington and Oregon have long had very different political cultures – even as they share the tensions of east versus west and rural versus urban divides. Those differences have produced government structures and processes with many differences in all aspects of state and local government. That includes their law and their judicial systems.

These features of the Gorge suggest a number of requirements for legal practice, both pro-active and reactive. The pro-active dimension requires a continuous effort to anticipate the types of needs and demands that are likely to come to the Commission in order to ensure that the commission's rules, processes, instruments, and practices are updated or modified, or new ones developed in order to be ready to address those demands when they come to the Commission. That set of tasks also requires regular and ongoing reviews of the products of the two states' legislative sessions and a regular review of the Commission's rules to ensure compliance with changes in those areas affected by state legislation. Additionally, it means monitoring particular situations, issues, or controversies to help the commissioners be ready to address new developments.

An example of this situation came with the passage of Washington's Initiative 502 concerning marijuana production, processing, and retail sales.⁸³ In a memorandum to the Commission, Litwak explained that the Washington Liquor Control Board, charged with licensing and regulation under the initiative, had not given any consideration to how it applied to the Scenic Area and the Washington Attorney General had concluded that I 502

⁸¹132 *Cong. Rec.* 29496 (Oct. 8, 1986), quoted in *Columbia River Gorge United v. Yeutter*, 960 F.2d 110, 112 (9th Cir. 1992).

⁸²The series was authored by Jeff Mapes, Alex Pulaski, and Gail Kinsey Hill, and has been republished on the Internet by the *Oregonian*, see <http://topics.oregonlive.com/tag/9%20states%20of%20oregon/index.html> and <http://members.peak.org/~gourleyr/Docs/9States.pdf> Accessed August 7, 2014.

⁸³See Jeffrey B. Litwak, Memorandum to the Columbia River Gorge Commission, "Application of Washington Initiative 502 in the Columbia River Gorge National Scenic Area," April 8, 2014. As Litwak explains, I 502 has been codified at RCW Ch. 69.50 (primarily at RCW 69.50.101, and RCW 69.50.325 through .369).

did not preempt local government decisions on the subject.⁸⁴ Although the Litwak memorandum indicates that action was not specifically required at the time, it recommends the issuance of guidance by the Commission that I 502 “does not apply in the National Scenic area” and offers legal explanations as to why that is the case.⁸⁵ Of course, if the Commission were to take specific action, that might in turn prompt litigation that would offer the Commission the opportunity to obtain a judicial opinion addressing issues the Commission considers important.

Apart from specific issues, a proactive approach includes strategic reconnaissance to anticipate demands and possible legal issues. For example, in the period following the economic downturn that began in 2008, most local governments saw a dramatic drop in permit requests for new construction of various types. However, that situation began to change in 2013-14. Though there have continued to be permit requests, both commercial and residential, in the Gorge there was by early to mid-2014 every reason to anticipate a significant upsurge in permit requests going forward. Indeed, staff indicate that there has been a dramatic increase in the past year. Although 5 of the 6 counties in the Scenic Area have their own permitting operations, the Commission administers permitting for one county. In addition, there is every reason to expect that as more requests are considered, there will be more appeals and litigation not only as a result of the Commission’s actions, but those of the other jurisdictions involved. The Commission may not be a party to some of those disputes directly, but these cases will certainly be matters of interest as they affect land use, economic activity, and residential development in the area. It requires time and energy to monitor these dynamics, communicate with relevant parties where necessary, and ensure that the commissioners are equipped with the necessary information and legal supports they are likely to need.

The reactive element, of course, involves responding to legal challenges to the Commission, but it has both a tactical and strategic element. At the tactical level, commission staff must be ready to respond in a timely manner to legal actions launched within its jurisdiction and to attempt to avert situations in which it should not be a party. In that respect, it becomes necessary to educate parties and their counsel (if they are not regularly and actively engaged in litigation involving the Commission) about the boundaries of action. While doing so takes time, it can save significant amounts of money.⁸⁶

At the strategic level, it is important for Commission Counsel to anticipate key legal issues that require clarification, explanation, or even correction from previous rulings in order to be ready to argue those issues in cases that are filed or to take legal action where appropriate to protect the Commission and its work, not only in the present but for the future. This kind of strategic reconnaissance requires continuing efforts to monitor recent developments and pending cases on interstate compact law nationally and careful study of the existing case law that addresses the Gorge Commission in particular. It requires analysis of contemporary developments in the various fields the Commission addresses, such as land use planning and environmental law, but it also requires attention to developments in administrative law, government contract law, and constitutional law.

⁸⁴*Id.* at 2.

⁸⁵*Id.* at 6.

⁸⁶One such case came up in the course of interviews with Commission staff in which an attorney did modify litigation to remove the Commission as a party which in turn saved considerable time and money.

The National Scenic Area Act and the Creation of the Gorge Compact

As the earlier discussion stressed, one of the key reasons why each compact has its own body of law within the larger corpus of national interstate compact law is that, at least where congressional consent was required, the federal legislation makes the law of the compact federal law and prescribes the conditions and terms under which the states can enter into the compact and then administer their agreement. The context and politics differ each time Congress considers legislation consenting to a compact, with different interests and different levels of conflict at play in each situation. Bowen Blair has explained the process and the politics that produced the National Scenic Area Act legislation in his classic article on the subject.⁸⁷ That story and the legislation it produced provided, in addition to its particular provisions, some key themes that continue to be important for the law and legal practice of the Gorge Commission. They include the lack of a regular process and legislative history, the fact that it was an advance consent statute, and what it said and did not say about the states.

Blair explained that the need for the article providing the legislative history of the Scenic Act was that “[s]uch a history, because of the abbreviated and extremely controversial process taken by the bill . . . , does not otherwise exist.” Given the importance for any compact of the legislation providing congressional consent, that lack of a standard process and normal legislative history was a challenge for the Commission and for the Gorge Compact from the beginning. That was partly because the Act set requirements for a variety of ambitious obligations within time limits to be conducted by a completely new agency in a difficult context without providing any assurance that resources would be forthcoming to support those obligations. Indeed, as other parts of the report show, the commission was never adequately funded to meet those responsibilities and the ongoing requirements of the Act.

Again, the challenges Congress announced as the purposes of the Act were daunting. (1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and (2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

The fact is not mentioned in materials about the Gorge Compact, but these purposes could very well have been taken from the World Commission on Environment and Development (Brundtland Commission) report entitled *Our Common Future* issued shortly after the Scenic Area Act was passed. It was that document that presented and explained the concept of sustainable development as an essential balance of environmental protection, social development, and economic development.⁸⁸

The Scenic Area Act made it clear that the Gorge Commission was to have several different roles, ranging from regulatory responsibilities to planning obligations. It was to be an adjudicative body with respect to some matters and an appeals tribunal for others. It was to

⁸⁷Bowen Blair, Jr., “The Columbia River Gorge National Science Area: The Act, Its Genesis and Legislative History,” *Envtl. L.*, 17 (Summer 1987): 863-969.

⁸⁸World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987).

“adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State.”⁸⁹ It was to “monitor activities of counties pursuant to sections 544 to 544p of this title” and to take such enforcement actions “as it determines are necessary to ensure compliance.”⁹⁰ However, it also contained a citizen suit provision that provided that: “Any person or entity adversely affected may commence a civil action to compel compliance with sections 544 to 544p of this title.”⁹¹

Of particular importance to the unique challenges of the Gorge Commission was the fact that the act provided that: The State courts of the States of Oregon and Washington shall have jurisdiction –

- (A) to review any appeals taken to the Commission pursuant to subsection (a)(2) of this section;
- (B) over any civil action brought by the Commission pursuant to subsection (b)(1) of this section or against the Commission, a State, or a county pursuant to subsection (b)(2) of this section;
- (C) over any appeal of any order, regulation, or other action of the Commission or a county taken pursuant to paragraph 4 of this subsection; or
- (D) any civil penalties assessed by the Commission pursuant to subsection (a)(3) of this section.⁹²

Although two other compacts nationally provide for jurisdiction in state courts, that is a rare situation and one that creates significant complexities, particularly where, as in the Gorge Compact, the two states and their judicial systems are so different.⁹³ Since the law of the compact is federal law, the state courts are asked to address issues with an agency that is not a state agency but a regional body under very different law than they customarily address. It also means that Gorge Commission Counsel must continuously work to ensure that all parties understand clearly the law that applies and the ways in which it differs from what arises in other kinds of cases. Additionally, recalling the earlier comment about issues of comity and uniformity of interpretation, it also means that counsel must consider whether and how to raise decisions rendered in the courts of one member state in litigation in the other state with a sensitivity for the relationships among the two states and their differences.⁹⁴

⁸⁹Section 544c(b).

⁹⁰Section 544m(a)(1).

⁹¹Section 544m(b)(2).

⁹²Section 544m(b)(6).

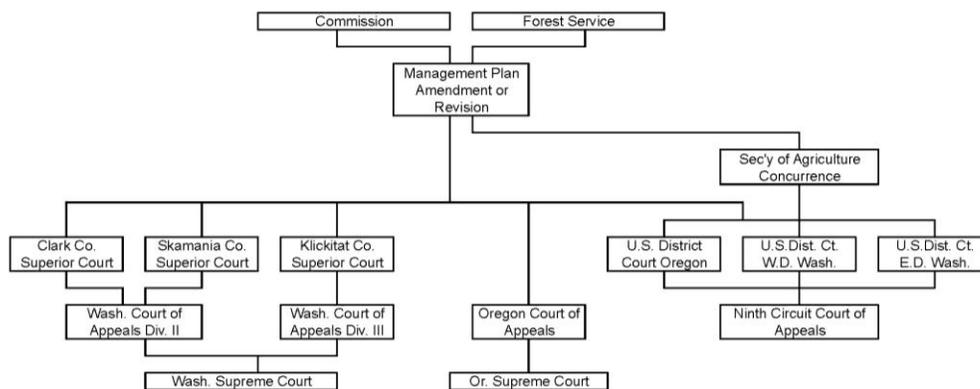
⁹³Litwak points to the Metropolitan Washington Airports Authority, created by statutes of the Commonwealth of Virginia and the District of Columbia and The Delaware-New Jersey Compact (creating the Delaware River and Bay Authority as examples of other compacts that have jurisdiction in the state courts. Litwak, *Compact Law*, at 129-130. The author is not aware of any other examples beyond these cases.

⁹⁴Mr. Litwak explained the ways in which the Commission tries to carry out these tasks as it goes about its practice across the range of legal assignments it faces.

Litwak notes that, while the Act places jurisdiction in the state courts, it does not specify the venue. The fact that the Commission operates under these conditions means that it finds itself before 6 different courts in Washington, 2 two different courts in Oregon, and as many as 4 different federal courts (see Figure 1). These are different courts that have different procedures, different local rules, different staffs, and, not least, different judges. The number of moving parts that are or may be in operation at any given time would be a challenge for any law firm, let alone a Commission with only one full-time counsel.⁹⁵ It also requires continuous monitoring of the rulings of those courts to maintain currency.

Apart from its internal counsel and litigation responsibilities, the legal staff of the Commission has a part to play in the general consultative obligations of the Commission. The Scenic Act provides that: "The Secretary and the Commission shall exercise their responsibilities pursuant to sections 544 to 544p of this title in consultation with Federal,

Figure 1. Appeal Route for Challenge to a Legislative Action by the Gorge Commission
Source: Jeffrey Litwak



State, and local governments having jurisdiction within the scenic area or expertise pertaining to its administration and with Indian tribes.”⁹⁶ That is in addition to the general public participation obligations related to policymaking which require that: “The Secretary and the Commission shall conduct public hearings and solicit public comment prior to final adoption of the management plan and the Commission shall conduct public hearings and solicit public comment prior to final adoption of land use ordinances.”⁹⁷ Further, it requires that “The Commission and the appropriate county shall promptly notify the Secretary, the States, local governments and Indian tribes of all proposed major development actions and residential development in the scenic area.”⁹⁸ These provisions, as well as effective working relationships with the affected communities, tribal governments, and states, mean that legal staff for the Commission will necessarily be involved in ongoing consultative and information-sharing activities with many organizations and people.

⁹⁵Of course, it has only been in recent years that the Commission had a full time attorney on staff. Before that it operated with a part-time attorney.

⁹⁶Section 544d(e).

⁹⁷*Id.*

⁹⁸*Id.*

The Special Challenges of the Gorge Compact

The Columbia River Gorge Compact, then, came as a result of advance consent by Congress and specifically required that the elements of the Act “respecting the powers and responsibilities of the Commission shall be interpreted as conditions precedent to congressional consent to the interstate compact described in section 544c of this title.”⁹⁹ Oregon and Washington ratified the Compact in 1987.¹⁰⁰ The Compact was upheld against constitutional challenges by the Ninth Circuit in 1992.¹⁰¹ The Compact, of course, incorporated the provisions of the Scenic Act, but, in addition to its language, the agreement is the centerpiece of an ongoing working relationship that is to ensure governance of the National Scenic Area that serves all of the kinds of interests set forth in the Act and discussed earlier in this analysis. And like any complex ongoing relationship, it evolves in practice even if its language remains the same.

That ongoing work under the Compact requires the Commission’s legal staff to pay continuing attention to law and policy changes made by the member states, decisions of relevant courts and emerging or ongoing disputes; ensure effective intergovernmental communication and education with various jurisdictions, nonprofit organizations, and private firms insofar as their activities are governed by the Scenic Act (to avoid unnecessary conflicts); enhance compliance with the range of law that governs in the Gorge; and help build and maintain effective working relationships in order to assist the Commission in its efforts to lead the kind of partnership that Senator Hatfield described.

In addition to the broader obligations, there are some matters that arise specifically from the Compact and the provisions of the Scenic Act it incorporates. For example, the Scenic Area Act requires the Commission to “adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State.”¹⁰² The Compact follows with requirements that:

The commission shall adopt bylaws, rules, and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules and regulations. The commission shall publish its bylaws, rules and regulations in convenient form and shall file a copy thereof and of any amendment thereto, with the appropriate agency or officer in each of the party states.¹⁰³

⁹⁹Section 544o(d).

¹⁰⁰ORS 196.150 (1987); RCW 43.97.020 (1987).

¹⁰¹*Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992). The *Yeutter* decision rejected challenges brought on the basis of the commerce clause, the property clause, the Tenth Amendment, compact clause, and Fifth Amendment equal protection elements.

¹⁰²Section 554c(b).

¹⁰³Article Ig, ORS 196.150, RCW 43.97.015.

However, the rulemaking processes and publication requirements of the two states are not the same. Similarly, the financial disclosure and freedom of information requirements of the two states are different. Even such seemingly minor matters as the process for ensuring that the two states respond to a notification by the Commission of a change in its rules has turned out to create complexity, since, for example, one of the states concluded that because the Commission is not a state agency it is not appropriate to publish Commission rules in the same manner or with the other administrative rules.¹⁰⁴

Although the Commission has clearly established land use regulation authority in the Scenic Act, it must work with jurisdictions in each of the two states which operate under very different bodies of land use law. As a practical matter, it is important for those who must work with the Commission but also with the counties, other local governments, and state agencies in the member states to understand the common concerns, but also the particular differences among those different jurisdictions. Therefore there is a need to understand how to operate in a manner that is as positive and constructive as possible while simultaneously dealing with different law and policies among those agencies. Another example comes from staff consultations with local governments in the area about their desire for interlocal service consolidation that crosses the state line, but is within the Scenic Area.¹⁰⁵ The Commission counsel has attempted to be helpful in facilitating those innovative efforts.

As noted earlier, the need to operate with these different state laws and state courts as well as emerging problems and policy in the two states requires both strategic and tactical perspectives on legal practice in the Gorge Commission. The mention of the questions arising from Washington's I 502 is just one example.

To an outside observer accustomed to working in the field of intergovernmental relations, it is surprising to find that there is no provision in the Gorge Compact materials that addresses what are termed Intergovernmental Agreements in Oregon¹⁰⁶ or Interlocal Agreements in Washington.¹⁰⁷ Interviews with staff indicate that the Commission has not made regular use of IGAs. Such agreements are in practice the lifeblood of intergovernmental relations in most parts of the country, including Oregon and Washington. They offer a degree of stability and predictability among various units of government, often on matters that are technical or programmatic. Where there are many organizations that interact in a variety of ways, they can be helpful in creating working understandings unique to the situation.

As the earlier discussion indicated, the fact that the Commission's cases go before a number of different state courts and the complexities involved in the different systems, processes, and substantive state statutes means in practice that legal work often focuses on issues related to jurisdiction or procedure. In fact, a review of over a hundred opinions identified nationally that cite cases that involve the Gorge Commission found that there was relatively little emphasis on the substantive regulatory, planning, or land use decisions themselves, but instead discussion of issues of jurisdiction, procedure, and statutory interpretation. That speaks to some of the specific challenges the legal staff of the Gorge Commission addresses

¹⁰⁴Litwak interview.

¹⁰⁵*Id.*

¹⁰⁶See ORS Chapter 190.

¹⁰⁷See RCW Chapter 39.34

on a regular basis, but also to the fact that the decisions and arguments made on these issues are important beyond the Gorge.

The theme that recurs in reading cases is that judges must work through issues of interstate compact law, particular issues of the Scenic Area Act, and the peculiarities of the Gorge Compact in addressing the cases decided here. One of the most important challenges of the Gorge Commission's legal staff is to help them to do their work correctly and effectively. For example, in addressing the question whether deference is due to the Commission's interpretation of the legislation it administers under the Supreme Court's *Chevron* ruling, the Oregon Supreme Court wrote:

A long line of federal cases, beginning with *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984), holds that, when Congress has charged a federal agency with implementing a federal statute, courts should defer to that agency's interpretation of the statute, treating that interpretation as controlling as long as it is reasonable. *Although that sort of deference is foreign to the administrative law of this state, we are bound to apply it in our interpretation of federal statutes if the federal interpretive methodology so demands.*¹⁰⁸ (Emphasis added.)

Then the Court had to turn to whether *Chevron* applied in that case. The Commission argued that it was justified on several grounds, including the important point about the need for uniform interpretation. The Court's response is worthy of quotation at length because it captured the challenges presented by the complexity of the law of the Columbia River Gorge Compact.

We note . . . that the Act specifically places jurisdiction to review appeals taken from commission actions in the state courts of Washington and Oregon, but does not specify any standard of review. One Washington court has responded to that circumstance by applying the standards of review set out in its own administrative procedures act when it is called upon to review a commission action, while Oregon courts use a standard of review that the legislature specifically adopted for review of commission actions, now codified at ORS 196.115(3)(c) to (e). . . . [T]he fact that the Act by omission creates a situation in which Oregon and Washington are free to apply different standards of review to commission actions suggests that uniform treatment may not be the objective that Congress sought to achieve under the Act. . . .

In the end, we think that the applicability of *Chevron* turns on a single question – whether the federal interpretive methodology . . . would require it. And the answer to that question, as it turns out, is itself a function of congressional intent: The United States Supreme Court, which first announced the *Chevron* standard, has explained the standard in terms of a congressional intent or expectation – specifically, a congressional expectation, implied from the agency's "general conferred authority" and other circumstances, that the agency will "be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." . . .

¹⁰⁸*Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 346 Or. 366, 378 (2009)

According to the Court, when circumstances suggest that such an intent or expectation exists, “a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise, but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.”

It follows that, to resolve whether the commission’s interpretations of the Act are entitled to *Chevron* deference, we must determine whether the commission’s “generally conferred authority” or other aspects of the Act imply a congressional expectation that the commission will “speak with the force of law” when it addresses ambiguities and gaps in the statute. . . .

Applying the foregoing considerations to the present case, it appears that, to the extent that the management plan purports to carry out the purposes of the Act in a way that includes resolving ambiguities in or filling in gaps in the Act, the commission is entitled to *Chevron* deference. The Act clearly contains gaps that the commission is charged with filling. Indeed, Congress has directed the commission to “adopt a management plan for the scenic area,” which must be based on resource inventories and land use designations that the Act requires the commission to develop, which must be “consistent with” certain specified statutory standards, 16 USC § 544d(c)(1), (2) and (3), and which, once adopted, will effectively control land use actions within the scenic area, 16 USC § 544e. That would seem to be the precise sort of delegation of authority that . . . indicates a congressional expectation that the commission will “speak with the force of law” in filling the significant gaps left open by the statute. Moreover, to the extent that the Act authorizes the commission to develop and adopt a management plan (a documentary product that in every relevant sense is a rule or a compilation of rules), requires the commission to conduct public hearings and solicit public comment before adopting a final management plan, 16 USC § 544d(e), and requires the commission to adopt and follow other administrative procedures that would appear to be designed to foster fairness and deliberation, 16 USC § 544c(b), the commission stands well within the mainstream of agencies whose interpretations of their organic statutes have been deemed worthy of *Chevron* deference.

Petitioners argue that *Chevron* is a federal doctrine that applies only to agencies and instrumentalities of the United States, and that, whatever else it may be, the commission is not a federal agency. . . . However, none of the federal cases that discuss and apply *Chevron* to agency actions appears to focus on the agency’s status as a federal agency. . . . [T]heir focus is on the nature of Congress’s delegation of authority to the agency, rather than the agency’s federal status.

Petitioners also argue that the commission is not a recipient of a congressional delegation of authority but, instead, derives its authority from an interstate agreement and, thus, from the two member states. Petitioners acknowledge that Congress gave consent for Oregon and Washington to enter into an interstate compact, but it notes that

Congress did not require the states to do so. Petitioners contend that, under those circumstances, Oregon and Washington must be deemed to have created the commission and to be the source of its authority to develop and implement the management plan.

We disagree. The Act reveals a far greater Congressional role . . . [T]he Act provides for the formation of an interstate commission to administer that compact, describes in relatively fine detail the structure of that body and how its members will be appointed, requires the commission to adopt a management plan, describes the process that the commission must use for developing the management plan, and provides standards to which the resulting management plan must adhere. In short, even if Oregon and Washington are the parties who enter into the compact, it is a compact of Congress's design. Of particular relevance here, it is Congress – not the states – that determined what powers and responsibilities would be delegated to the commission and what procedures the commission must follow in carrying out its responsibilities.

In the end, we conclude that, in 16 USC §§ 544 -544p, Congress delegated authority to the commission that, under the federal methodology that we are bound to apply, implies a congressional expectation that the commission will “speak with the force of law” when it addresses ambiguities and gaps in the statutory scheme. The commission's interpretations of the Act therefore are entitled to the level of deference that the *Chevron* doctrine prescribes.¹⁰⁹ (Case citations omitted.)

One need not be an administrative law professor to see a group of jurists struggling with a level of complexity and ambiguity that tests the skills of judges who deal on a regular basis with the most sophisticated and difficult questions of law. This passage captures the mix of elements that make interstate compact law so complex and the law of the Gorge Compact even more so. In interviews with Commission staff, a review of the Commission's case files, a reading of the relevant legal documents of the Gorge Compact, and review of opinions citing Gorge Compact cases, what becomes clear is that the Commission's counsel is trying to deal with a weak fabric of law that has holes and thinly constructed aspects. He must continually assess the condition of the fabric and the stresses on it and also identify the often narrow and very technical – but important – pieces of the weave that require attention. He then needs to consider how to deal with those issues, whether by litigation (as a party or *amicus curiae*), consultation, education, or all of the above.

¹⁰⁹*Id.* at 380-384.

Why Does the Complexity Matter to the Commission, to the Residents of the Gorge, the Two States, and the Nation?

Although this report has necessarily addressed a variety of complex legal issues, doctrines, and case law, it has attempted throughout that there are clear answers to the so-what question. Even so, it is useful at this point to step back to a broader and perhaps more general level to be clear about why the legal complexity of the Gorge Commission's mandate, its administration, and the competing interests it must serve matter so much. These factors and the preceding analysis then suggest a number of recommendations for the Commission.

The most important reason is that, without a basic understanding of interstate compact law issues and challenges, attention to the particular aspects of the Gorge Compact, and an awareness of the legal practice challenges they present, the Commission will not succeed in accomplishing its mission. If one only sees the Commission as a planning agency or a development agency where the law is a technical staff function, the Commission will spend more time and resources defending problematic positions in court.

In particular, many of the important issues the Commission faces and the durability of Commission decisions turn on technical legal issues within an extraordinarily complex body of developing interstate compact law in general and Gorge Compact law in particular. If the Commission is attentive to the need and the staff is resourced adequately to stay on top of this set of issues, it will be possible to stop challenges before they become time and resource consuming litigation or persuade parties to narrow the issues if litigation is to move forward. That does not mean that all, or even most, cases will or should be resolved without litigation. However, it is likely that the demands on the Commission will intensify in the years to come and it will therefore continue to be important to save legal and financial resources for when and where they are needed.

As the previous analysis indicates, there are times when, for either tactical or strategic reasons, the Commission will want to obtain judicial rulings in order to reinforce and clarify for all relevant parties the basic authority and jurisdiction of the agency, its rules and procedures, and its place as a regional body. Such decisions can help to explain in formal terms the role and status of the Commission in particular aspects as well as its general character and roles relative to the relevant state and local governments and to private individuals with interests in the Scenic area, whether personal or commercial. In an area with as much ambiguity as the Gorge Compact, and interstate compact law in general, that clarity is as important as it is difficult to obtain.

One of the roles of Gorge Commission legal practice is not just to litigate or to negotiate in the shadow of litigation, but to educate. As the analysis to this point has demonstrated, interstate compact law is a developing field that is unfamiliar to many in the legal profession, let alone for many state and local officials. In addition, because each compact has its own unique compact law within the larger national body of compact law, there is an additional need to educate not only officials but also nongovernmental organizations, citizens, and businesses about the legal character of the Commission and the body of law that affects so many aspects of their lives – likely in more ways than they understand. That education can help to develop public support by building a foundation of aware citizens, but that is unlikely unless there is some way to translate the technically complex legal work that

is at the heart of the Gorge Commission's actions into language those citizens can understand and relate to matters that count in their quality of life in the Gorge.

The educational task also includes legal practitioners in both states; those on the government side and those on the private practice side. Although many of these attorneys, public or private, understand land use law in their respective states, many are not familiar with the peculiar characteristics of compact law or of the specific law of the Gorge Compact. That educational task also reaches to judges. As the previous discussion indicates, there are particular reasons why otherwise knowledgeable and experienced judges need help with interstate compact law and the law of this particular compact. That is particularly true for state judges.

The technical complexity and developing character of compact law and of Gorge Compact law matters as well because of the need for Gorge Commission staff and Commissioners to stay current. It is also important for the Gorge Commission to participate in the evolution of the law and policy of interstate compacts nationally. The educational task for staff includes the need to continue learning from what is happening around the country in other compact agencies, Congress, and the courts as well as contributing to and even providing leadership in educating others around the country.

The litigation process is not just about arguing positions in support of the Commission in appeals of its decisions. It can also mean participating as *amicus curiae* in cases elsewhere that promise to be important in shaping national interstate compact law and, in turn, influencing decisions in future Gorge Commission cases. Similarly, it means the ability to raise and argue issues in pending Gorge Commission cases that can address gaps or ambiguities in the existing law to address not only current cases but to clarify the law for the future.

Gorge Commission Legal Counsel has been active in this area, as indicated throughout this analysis, and in less formal ways such as ongoing communication with counterparts in other compact agencies and ABA activities related to compacts and administrative law. However, it is not at all clear how he can manage so much except by investing a great deal of his personal time and energy to the task. The legal practice of the Gorge Commission and its role in interstate compact law generally is too demanding to accomplish with only one person.

Recommendations

The analysis to this point of interstate compact law, the law of the Gorge Compact, and the challenges of legal practice at the Gorge Commission lead to a number of recommendations for the Commission. They emphasize four key concepts that flow from the analysis which include complexity, education, communication, and continuing law and policy development. The recommendations are strengths-based, since the study found clear competence and skill on the part of Commission Counsel; well-developed materials on Commission litigation history and current activity; well-organized, complete, and efficient case files; and continuing efforts to ensure knowledge of relevant state and national law not only as to compact law but also such critical areas as administrative law. Just how Mr. Litwak manages to accomplish all of that is not clear, though it appears likely on the face of it that it has to do with contributing far more hours and days to the work than are part of his formal contract with the Commission. That said, the current Commission Counsel has a rather unique set of training and experiences and the Commission obviously must consider not just this counsel, but the role of the counsel and those who may work with the counsel as legal staff in the future. Also, the recommendations are directed more to the Commission and not addressed specifically to the counsel, though each of these clearly involves, affects, and will be central to counsel's efforts.

1. Ensure that legal practice is understood as a critical line function of the Commission and its staff.

Early on in the study, it became clear that the legal practice requirements of the Commission represent far more than what is sometimes considered the limited staff role of counsel. It is not just a staff function supportive of Commission activities and advisory to the Commission and staff, but central to the effective accomplishment of the Commission's charge under the National Scenic Area Act and the Compact. For the reasons explained to this point, counsel deals with a complex body of law, both nationally and in terms of the Gorge Compact, that has unique requirements and special challenges. Even the publication of Commission administrative rules turns out to be a complex exercise in intergovernmental relations, dealing with two different sets of state processes for reporting and publishing rules and a Commission with a unique status that does not precisely fit either of them. Although the Commission can go outside to the state attorneys general for litigation work, a study of the challenges and history suggests that it is far better to have litigation capacity in-house for this particular agency and, indeed, for other compact agencies given the difficulties of this developing area of the law and the peculiarities of each compact.

2. Ensure staff legal capacity adequate to address the full range of legal practice obligations of the Commission and avoid reliance on state attorneys general for legal work.

As the previous discussion indicates, it is important to ensure staff legal capacity that is adequate to address the full range of legal practice obligations of the Gorge Commission. There may be times when it is necessary to retain some additional outside assistance in special cases, but effectiveness and accountability are greatest with staff who know both compact law and the law of the Gorge Compact and are not operating from one state's legal perspective or the other. Reliance on state attorney general staff often means both cost and additional work for commission staff. Over time that extra work has included education for state attorneys on the specifics of national interstate compact law and specifics of the law of the Gorge Compact. Consistent practice and argument positions over time are also important considerations.

In addition to the kinds of work agency counsel would do in a different type of organization, there is particular need to have capacity to assist in decision processes, to monitor emerging state legislation that might require new or changed administrative rules, continuously review commission rules and procedures to ensure that they are current and address needs as well as case law. In addition to the specific legal tasks, the report indicates that the demands on staff mean that adequate capacity includes the ability to carry out the educational and communications roles that the challenges of the Gorge Commission's legal practice require. As the preceding analysis indicates, meeting these obligations and particularly given the special challenges of the Gorge Compact requires more than a one person legal staff.

3. Maintain sufficient staff capacity to ensure continuous learning on and influence in the shaping of interstate compact law.

Legal staff capacity for the Gorge Commission will not be adequate to any of the essential functions unless staff members are able to have the time and resources needed to stay current on the developing body of interstate compact law. Because of the nature of the field and the state of the law, that requires not only the time to monitor and read the case law and legal literature, but also the ability to communicate with other professionals in the field at other compact agencies. That turns out to be somewhat more complex than it might at first appear because of the range of differences across and among compacts, their members states, and the agencies (where there are agencies) who are charged to administer them.

Because compact law is so diverse and complex and in light of the fact that it is very much a work in progress, it is important for legal staff to be able to monitor pending litigation in other compact settings as well as in other fields that affect the work of the Gorge Commission in order to identify cases in which the Commission should file an amicus curiae brief or join other such filings. That is particularly complex for the Commission staff because it is necessary not merely to monitor federal cases, as is true for the vast majority of compacts, but also developments in both states. It is a task made more important by the differences in the law of the two member states on everything from land use planning and regulation to administrative law to public records law.

4. Have staff brief the Commission annually on both the tactical and strategic issues that staff counsel considers important for the Commission to influence through litigation priorities or amicus participation.

Given the complexity of compact law and of the law of the Gorge Compact and the centrality of the legal practice to the Commission's work, it is important that commissioners be aware of the expectations and priorities of the legal staff for the year ahead or perhaps longer. Such a perspective would indicate what the key issues are and the plans counsel has for addressing them in support not only of the particular matters on the Commission's current agenda but also key tactical and strategic opportunities to address legal issues in pending cases or others that may present opportunities in the near term with long term consequences. As the analysis to this point indicates, opportunities are those situations in which it is possible or necessary to obtain judicial decisions that address gaps in the existing law or anticipate problems that are likely to arise in the foreseeable future.

Such a discussion need not be lengthy or burdensome and it can serve as an opportunity for commission members to develop their own knowledge about their own authority and limits outside the context of particular matters currently pending before the Commission. It can also help to familiarize commissioners with what is happening more broadly in interstate compact law that is likely to be of importance even if the issues are arising in other compact agencies at the present. Again, it is a context in which to explain why it would be useful to consider consultation with those agencies or even the filing of an amicus brief. The

Commission Counsel has a carefully detailed analysis of issues that require clarification or support at the national and local levels. Of course, this kind of discussion requires an understanding among all concerned of the importance of attorney-client communication so that the Commission and staff can talk candidly together in a way that considers options without causing unnecessary public controversy.

5. Develop further the discussion of the special legal issues associated with the tribal governments in the Gorge as part of the ongoing considerations of interstate compact law and Gorge Compact law in a manner that both assists commissioners and the tribal governments.

Two elements that did not emerge clearly in this study concerned the participating federal agency, and other area federal agencies operating in the area that not directly party to the Scenic Area Act work, and those elements of Commission practice related to tribal government activity. Each is the subject of a recommendation here. First, consideration of the challenges in the Scenic Area it would seem to be important to enhance as much as possible the relationships with tribal governments and, for purposes of this particular analysis, the communication between Gorge Commission legal staff and tribal legal representatives on matters of mutual interest.

Although the Act seeks to narrow the scope of the Commission's work with regard to some extremely complex areas such as fishing and timber, the environmental, cultural, economic, and community dimensions of what the Commission does clearly affect and are affected by legal positions that are being taken by tribal governments. Obviously, tribal legal relationships are fundamentally sovereign-to-sovereign with the federal government and litigation with respect to the issues that arise is resolved in federal courts. However, as the recent case of the Coyote Island coal terminal proposed for the Port of Morrow in Boardman shows, there are times when tribal governments have interests in matters pending in state agencies as well as with the federal government. Even where the Commission is not making decisions on specific issues with respect to tribal governments, cooperative working relationships, the consultations required by the Scenic Area Act, and practical political and administrative concerns dictate the need to work well and closely together. The Commission currently meets with the tribal governments at an annual Government to Government consultation, the most recent of which took place in August 2014 with participation by the Confederated Tribes of Warm Springs Indian Reservation of Oregon, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes and Bands of the Yakima Nation, the Nez Perce Tribe, and the Commission. That meeting featured discussions on a series of issues, including the urban area boundary, treating fishing access sites, tribal housing along the Columbia River, fossil fuel transportation, the Columbia River Treaty, fishers memorial, Millers Island, tribal position on the Columbia River Gorge Commission, tribal roles in CGRC process and protocols, treaty rights issues, and CGRC resources. Such opportunities for communication and cooperation are important for a variety of obvious reasons.

However, this recommendation focuses more specifically on the importance of ongoing communication and collaboration with respect to legal issues in the Gorge and around it. The Coyote Island terminal case involved filings by the tribal governments that objected to the permitting of the terminal. Given the importance of fossil fuel transportation through the Gorge and on the river with coal and oil trains and the transfer of their cargo to barges or ships for transport down river and then into international markets, it was clear that the Oregon Department of State Lands permit decision on Coyote Island would be the focus of significant litigation, whatever the initial ruling might be. Indeed, soon after DSL issued its

denial of the permit,¹¹⁰ the company, the Port of Morrow, and the State of Wyoming filed appeals.¹¹¹ The appeals attacked the sufficiency of the findings in support of the permit rejection, but they also raised a range of other issues, from procedural concerns to an interstate commerce clause question under the Constitution. There is every reason to assume that, whatever happens on administrative appeal, the case will move into the courts thereafter and the implications of rulings on the issues presented in the case will be important for the a variety of reasons to the Gorge Commission as well as for all other governmental agencies and jurisdictions in the area. It would be useful to have a regular pattern of discussions among Gorge Commission legal staff and tribal legal representatives in anticipation of cases of this sort and even to understand the legal issues that important to raise and resolve to address areas of mutual concerns and to share knowledge and experience where possible with respect to those legal questions.

6. Develop an ongoing channel of communication on legal issues associated with the federal participant in the Gorge and other federal entities operating in an around the Scenic Area as part of ongoing considerations of interstate compact law and Gorge Compact law to assist the Commission and also to enhance the effectiveness of the federal agencies in legal decisionmaking and the management of important policies.

Just as the National Scenic Act and constitutional and statutory law related to tribal governments make their position unique, the Forest Service and other federal agencies not part of the Act but operating in or around the Scenic Area also have a particular place and legal character that differs from that of the member states of the Compact. The Forest Service is of course included within the requirements of the Act and has a particularly set of roles and relationships to the other parties. It obtains legal advice and responds to litigation as an agency of the federal government represented by federal attorneys in federal courts. In addition to that one federal participant with the Commission under the Scenic Act, though, there are many other federal agencies operating in the region engaged in important areas of policy and administration that directly affect the National Scenic Area, the river, and the communities in the region. However, it was not clear from this study that there is a well-established and continuously operating channel of communications with respect to legal matters between the Gorge Commission and the federal government other than the participation of the Forest Service representative on the Commission.

In some respects, this recommendation is directed as much to the federal government agencies as to the Commission. Given the scope of the work of the U.S. Attorneys and the U.S. Department of Justice generally, it can be difficult to ensure a continuing focus either as to legal representatives designated to participate in such conversations or the focus on particular subject matter important to the region. Even so, the same factors that caution the

¹¹⁰Oregon Department of State Lands, Coyote Island Terminal, Findings and Order, August 18, 2014, http://www.oregon.gov/dsl/PERMITS/docs/cit_findings.pdf, Accessed October 4, 2014.

¹¹¹*In re Coyote Terminal*, Oregon Department of State Lands, Application No. 49123-RF, Request for Hearing, September 8, 2014, http://media.oregonlive.com/opinion_impact/other/2014/09/10/ambreappeal.pdf, Accessed October 4, 2014; Port of Morrow Request for Hearing, September 8, 2014, http://media.oregonlive.com/opinion_impact/other/2014/09/10/ambreappeal.pdf, Accessed October 4, 2014; State of Wyoming, Appeal from Denial of Coyote Terminal, LLC's removal-fill Permit Application, 49123-RF, September 8, 2014, http://media.oregonlive.com/opinion_impact/other/2014/09/10/1.%20Wyo%20Appeal%20of%20Oregon%20DSL%20Decision%20Appeal%289-8-14%29.pdf, Accessed October 4, 2014.

Commission and its staff to remain in consultation with organizations in the area, suggest the importance for the federal government to take similar steps. It is also important for the Commission, the federal government, and others in the Gorge Compact to maintain this kind of cooperation because only some of the legal actions go to federal courts while most others are in state courts. Even though the federal agencies are not answerable to the state courts, the decisions rendered by state agencies and courts have important implications for the accomplishment of federal policies and administrative goals in the region. The complexity of intergovernmental relations in the Columbia basin is too great and the cross jurisdictional impacts of decisions made or unmade too great to ignore these dynamics unless and until a particular case arises that forces the issue.

Whatever the views of federal legal policymakers may be on the matter, it is certainly worth the effort for the Gorge Commission to attempt to forge and maintain such an ongoing dialogue with federal legal representatives. The intergovernmental complexities of the area are only likely to grow over time and the federal agencies, including those not party to the National Scenic Act, are key participants in those dynamics.

7. Ensure active participation in professional associations that have a focus on interstate compact law such the ABA and National Center for Interstate Compacts of the Council of State Governments.

Given all that has been said about the developing character of compact law and the special features of Gorge Compact law, it is clear that it is important for Commission legal staff to be actively involved in professional associations that focus on the field. This is not just a comment about the counsel individually. That kind of involvement is not just a benefit to the individual staff members. It is valuable to the Commission as an organization. In important respects it is also of value to the participating states, since best practices in interstate compacts are part of the work that is continuing with respect to compact law and administration (as earlier references to the work of the National Center for Interstate Compacts of the Council of State Governments explained).

Indeed, given the experiences in compact law practice and knowledge of the current commission counsel, it would be useful for the Commission to consider hosting regional conferences on a regular basis with the support and participation of all states in the region in order to ensure that the conversation is ongoing and robust as well as to provide a context for collaborative problem-solving. There have been some conferences with various attorneys and law professors on the topic, but something regional and regular that involved a wider range of participants could serve a number of purposes in addition to the discussions among legal practitioners and faculty.

It is useful to remember that both Oregon and Washington are signatories to more than two dozen compacts, but there is no current process by which the agencies communicate, coordinate, or address problems of mutual concern. Compact agency members, state officials, and others could benefit from such opportunities.

8. Build effective intern/extern relationships with regional law programs to ensure training of a next generation of public sector attorneys able to practice and who can be resources to the Commission either as employees or outside counsel where needed.

Most law students will never encounter a course in interstate compact law. Most only vaguely know what a compact agency is. Many have relatively limited training in related areas such as administrative law. Fewer still have actual experience in compact law. Precisely because compact law is still a work in progress and because of the complexity of that body of law and each individual body of compact law associated with a particular

compact, experiences such as internships/externships can be invaluable as training tools. They help to educate not only those who will serve in compact agencies, but also those who will be in private practice dealing with one or more of the more than two hundred compacts (and counting) that exist presently. They can also provide an inexpensive way to augment staff capacity as the experience of the last year with an extern with the Commission demonstrated.

Internships may also include those who are not in law schools who may assist with related research or educational activities. Students from public administration or urban planning programs are obvious examples of the kinds of programs that could be the source of such interns.

9. Recognize education as a central element of Commission legal staff roles.

The educational challenge is an important one for the reasons discussed throughout this report, and it had several dimensions. There is the need to educate on an ongoing basis commission members and other staff internally. It is also necessary to educate other legal professionals with respect to compact law and the law of the Gorge Compact, both those in the governments of the member states and local jurisdictions and also private counsel who represent clients in Gorge Compact matters. That includes judges where the educational process can take place in continuing legal education sessions or in the process of litigation through the manner in which briefs are prepared and oral arguments are presented. That has been a task important to the current commission counsel.

It is also essential to help in a careful and respectful manner to educate public service professionals in the Gorge whether they are in local governments or nonprofit organizations in order to enhance their understanding of what the commission is and must do from a legal standpoint, but also how it can and cannot relate to other governmental or nongovernmental organizations. Leaving it to the attorneys is not sufficient. Another key element of education is for the business community. If business leaders understand the critical elements of the law of the Columbia River Gorge Compact and the Scenic Area Act, it may not end controversies, but it may help those involved understand the boundaries of problem solving and communicate more effectively, perhaps avoid unnecessary litigation and facilitate negotiated resolution of emerging controversies.

There is also a need for community education. The Commission and the compact it administers addresses some of the most critical problems that affect the lives of the people who live in the Gorge, in the areas surrounding the Scenic Area, in the two member states, and in the Pacific Northwest. This is not the kind of organization and or governance activity about which people learn in their K-12 or even their college or post-graduate education. And since the compact is a public law entity, created by legislation and compact, it is not something simple to comprehend for most people – even if they do not have suspicions or frustrations to direct at the Commission. A website is not enough. Some of this work might be done or supported by legal interns/externs and other public service interns.

10. Consider ways that legal capabilities can enhance collaborative relationships with communities in the Gorge and in the two states.

Communications and coordination with all of the relevant parties is clearly central to effective accomplishment of the Commission's mission under the Scenic Area Act and Compact, and the legal staff is key to that effort in a number of respects. On the point about education for the community, businesses, and other governmental organizations, an important aspect of that work may not only avoid unnecessary, expensive, and divisive litigation, but it may contribute to enhancing the legitimacy of the commission and its work in the area and in the member states.

If the organization is seen as simply a problem that gets in the way of doing things the residents, the businesses, or the communities seek to accomplish, most interactions are likely to begin from a negative starting point. The Commission can also be seen as a legal resource to accomplish area goals which can yield a variety of benefits in future matters. The Commission Counsel's communications with three Gorge cities on both sides of the state boundary about service consolidation is an example.¹¹² If the Commission is seen as body whose legal authority and knowledge can aid in facilitation of local initiatives, there can be great valued-added for all involved.

Additionally, the report discussed Litwak's question about whether commissions, and particularly the Gorge Commission, may elect to use guidance documents and advisories as tools to inform and clarify while leaving room for formal and specific decision-making in particular cases. That is an option worthy of consideration. One additional tool to consider is the systematic use of intergovernmental agreements discussed earlier in the report to facilitate relationships. For reasons explained earlier, these agreements are considered central to intergovernmental relations in both member states and across a range of problems and policies.

Perhaps even worse than seeing the Commission as a problem is the difficulties that arise if the Gorge Commission is not understood as a critically important governance institution or, worse, dismissed as largely irrelevant by those groups. The mission of the Commission under the Scenic Area Act and its Compact, as well as the decisions it makes, touch so many aspects of life that it is important to educate these target groups with the aim of enhancing collaboration, communication, and ultimately legitimacy.

¹¹²See Jeffrey B. Litwak, "State Border Towns and Resiliency: Barriers to Interstate Intergovernmental Cooperation," *Idaho L. Rev.* 50 (No. 2 2014): 194-216.

Conclusion: the Critical Role of Legal Practice in the Commission -- a Public Law Body with Public Law Authority and Public Law Responsibility

The Commission faces a two-level problem. At a day-to-day level, public law authorizes drives, constrains, and holds the Commission accountable. At a more fundamental, and in many respects, more important level it supports the legitimacy of the commission and its work.

The Commission is a planning body and a development agency, but it is also a regulatory body that makes rules, enforces law, and adjudicates important issues. It is a regional governance body, one that is created by statute and compact to fill a unique need through a complex arrangement. Awareness of its legal complexities and what they require of the Commission is essential to the effectiveness of the agency, the Compact, and the National Scenic Area Act.

This report addresses the various challenges of compact law and Gorge Compact law and the demands they place on the Commission and on its legal staff. The Commission has accomplished a great deal, certainly in legal terms. However, it is an agency and a staff under stress to meet many needs and to support the commissioners as they address their many obligations. The report seeks to explain these challenges and what they mean for the effective operation of the Commission going forward.

Although the public law of the interstate compacts and of the Gorge Compact is highly complex, technical, and set in a unique context, it reminds us of the problems central to our nation's governance and presents dynamics that were critical to the creation of the Constitution under which we live and work.

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Appendix 1. Existing Interstate Compacts

Source: Council of State Governments, National Center for Interstate Compacts,
<<http://apps.csg.org/ncic/SearchResults.aspx?>> accessed July 26, 2014

- 1 Agreement on Detainers
- 2 Agreement on Qualifications of Educational Personnel
- 3 Alabama-Coosa-Tallapoosa River Basin Compact
- 4 An Interstate Compact For Mutual Military Aid In An Emergency
- 5 Animas-La Plata Project Compact
- 6 Apalachicola-Chattahoochee-Flint River Basin Compact
- 7 Appalachian States Low-Level Radioactive Waste Compact
- 8 Arizona-California Boundary Compact
- 9 Arizona-Nevada Boundary Compact
- 10 Arkansas River Basin Compact
- 11 Arkansas River Compact of 1949
- 12 Arkansas River Compact of 1965
- 13 Arkansas-Mississippi Great River Bridge Construction Compact
- 14 Atlantic States Marine Fisheries Compact
- 15 Bay State-Ocean State Compact
- 16 Bear River Compact
- 17 Belle Fourche River Compact
- 18 Bi-State Criminal Justice Center Compact
- 19 Bi-State Development Agency Compact
- 20 Big Blue River Compact
- 21 Boating Offense Compact
- 22 Boundary Compact Between Minnesota, Wisconsin, and Michigan
- 23 Breaks Interstate Park Compact
- 24 Buffalo and Fort Erie Bridge Compact
- 25 Bus Taxation Proration and Reciprocity Agreement
- 26 California-Nevada Compact for Jurisdiction on Interstate Waters
- 27 Canadian River Compact
- 28 Central Interstate Low-Level Radioactive Waste Compact
- 29 Central Midwest Low-Level Radioactive Waste Compact
- 30 Chesapeake Bay Commission
- 31 Chickasaw Trail Economic Development Compact
- 32 Civil Defense and Disaster Compact
- 33 Colorado River Compact
- 34 Colorado River Crime Enforcement Compact
- 35 Columbia River Compact
- 36 Columbia River Gorge Compact
- 37 Compact for a Balanced Budget

- 38 Compact for Education
- 39 Compact for Pension Portability for Educators
- 40 Compact on Adoption and Medical Assistance
- 41 Compact on Mental Health
- 42 Compact on Placement of Children
- 43 Compact on Taxation of Motor Fuels Consumed by Interstate Buses
- 44 Connecticut River Atlantic Salmon Compact
- 45 Connecticut River Valley Flood Control Compact
- 46 Costilla Creek Compact
- 47 Cumbres and Toltec Scenic Railroad Compact
- 48 Delaware River and Bay Authority Compact
- 49 Delaware River Basin Compact
- 50 Delaware River Joint Toll Bridge Compact
- 51 Delaware River Port Authority Compact
- 52 Delaware Valley Urban Area Compact
- 53 Delmarva Advisory Council Agreement
- 54 Driver License Compact
- 55 Emergency Management Assistance Compact
- 56 Furlough Compact
- 57 Great Lakes Basin Compact
- 58 Great Lakes Forest Fire Compact
- 59 Great Lakes -- St. Lawrence River Basin Water Resources Compact
- 60 Gulf States Marine Fisheries Compact
- 61 Health Care Compact
- 62 Historic Chattahoochee Compact
- 63 Indiana-Kentucky Boundary Compact
- 64 Interpleader Compact
- 65 Interstate Mining Compact
- 66 Interstate Compact Defining a Portion of the Arizona-Nevada Boundary on the Colorado River
- 67 Interstate Compact for Adult Offender Supervision
- 68 Interstate Compact for Juveniles
- 69 Interstate Compact For Mutual Military Aid In An Emergency
- 70 Interstate Compact on Adoption and Medical Assistance
- 71 Interstate Compact on Agricultural Grain Marketing
- 72 Interstate Compact on Educational Opportunity for Military Children
- 73 Interstate Compact on Energy
- 74 Interstate Compact on Industrialized/Modular Buildings
- 75 Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutual Wagering
- 76 Interstate Compact on Mentally Disordered Offenders
- 77 Interstate Compact on the Placement of Children
- 78 Interstate Compact to Conserve Oil and Gas
- 79 Interstate Corrections Compact

- 80 Interstate Earthquake Emergency Compact
- 81 Interstate Forest Fire Suppression Compact
- 82 Interstate High Speed Rail Network Compact
- 83 Interstate Insurance Product Regulation Compact
- 84 Interstate Insurance Receivership Compact
- 85 Interstate Jobs Protection Compact
- 86 Interstate Library Compact
- 87 Interstate Mining Compact
- 88 Interstate Mutual Aid Compact
- 89 Interstate Pest Control Compact
- 90 Interstate Rail Passenger Network Compact
- 91 Iowa-Nebraska Boundary Compact
- 92 Jennings Randolph Lake Project Compact
- 93 Kansas and Missouri Metropolitan Culture District Compact
- 94 Kansas City Area Transportation Compact
- 95 Kansas City Area Transportation District and Authority Compact
- 96 Kansas-Missouri Boundary Compact
- 97 Kansas-Missouri Flood Prevention and Control Compact
- 98 Klamath River Compact
- 99 La Plata River Compact
- 100 Low-Level Radioactive Waste Disposal Compact
- 101 Maine-New Hampshire Boundary Compact
- 102 Maine-New Hampshire School District Compact
- 103 Maryland and Virginia Boundary Agreement of 1785
- 104 Merrimack River Flood Control Compact
- 105 Middle Atlantic Forest Fire Protection Compact
- 106 Midwest Interstate Low-Level Radioactive Waste Compact
- 107 Midwest Interstate Passenger Rail Compact
- 108 Midwestern Higher Education Compact
- 109 Military Aid Agreement/Compact Authorization
- 110 Mississippi River Interstate Pollution Phase Out Compact
- 111 Mississippi-Alabama Railroad Authority Compact
- 112 Mississippi-Louisiana Rapid Rail Transit Compact
- 113 Missouri River Toll Bridge Compact
- 114 Missouri-Nebraska Boundary Compact
- 115 Multistate Highway Transportation Agreement
- 116 Multistate Lottery Agreement
- 117 Multistate Reciprocal Agreement
- 118 Multistate Tax Compact
- 119 National Crime Prevention and Privacy Compact
- 120 National Guard Mutual Assistance Compact
- 121 National Guard Mutual Assistance Counter-Drug Activities Compact

- 122 National Popular Vote Interstate Compact
- 123 Nebraska-Missouri Boundary Compact
- 124 Nebraska-South Dakota Boundary Compact
- 125 New England Compact on Involuntary Detention for Tuberculosis Control
- 126 New England Corrections Compact
- 127 New England Higher Education Compact
- 128 New England Interstate Water Pollution Control Compact
- 129 New England Police Compact
- 130 New England Radiological Health Protection Compact
- 131 New England Truck Permit Agreement for Oversize, Non-Divisible, Interstate Loads
- 132 New Hampshire-Massachusetts Interstate Sewage and Waste Disposal Facilities Compact
- 133 New Hampshire-Vermont Interstate Public Water Supply Compact
- 134 New Hampshire-Vermont Interstate School Compact
- 135 New Hampshire-Vermont Interstate Sewage and Waste Disposal Facilities Compact
- 136 New Jersey-Pennsylvania Turnpike Bridge Compact
- 137 New York-New Jersey Port Authority Compact of 1921
- 138 Nonresident Violator Compact
- 139 Northeast Interstate Low-Level Radioactive Waste Management Compact
- 140 Northeast Mississippi-Northwest Alabama Railroad Authority Compact
- 141 Northeastern Interstate Forest Fire Protection Compact
- 142 Northwest Compact on Low-Level Radioactive Waste Management
- 143 Northwest Wildland Fire Protection Agreement
- 144 Nurse Licensure Compact
- 145 Ogdensburg Bridge and Port Authority Compact
- 146 Ohio River Valley Water Sanitation Compact
- 147 Oregon-Washington Columbia River Boundary Compact
- 148 Pacific Marine Fisheries Compact
- 149 Pacific Ocean Resources Compact
- 150 Pacific States Agreement on Radioactive Materials Transportation
- 151 Palisades Interstate Park Compact
- 152 Pecos River Compact
- 153 Portsmouth-Kittery Bridge Compact
- 154 Potomac Highlands Airport Authority Compact
- 155 Potomac River Bridges Towing Compact
- 156 Potomac River Compact of 1958
- 157 Potomac Valley Compact
- 158 Pymatuning Lake Compact
- 159 Railroad Passenger Transportation Compact
- 160 Red River Compact
- 161 Republican River Compact
- 162 Rhode Island-Massachusetts Low-Level Radioactive Waste Management Compact
- 163 Rio Grande Compact

- 164 Rocky Mountain Low-Level Radioactive Waste Compact
- 165 Sabine River Compact
- 166 Snake River Compact
- 167 South Central Interstate Forest Fire Protection Compact
- 168 South Dakota-Nebraska Boundary Compact
- 169 South Platte River Compact
- 170 Southeast Interstate Low-Level Radioactive Waste Compact
- 171 Southeastern Forest Fire Protection Compact
- 172 Southern Dairy Compact
- 173 Southern Growth Policies Compact
- 174 Southern Regional Education Compact
- 175 Southwestern Low-Level Radioactive Waste Disposal Compact
- 176 Statewide Mutual Aid Compact
- 177 Surplus Lines Insurance Multi-State Compliance Compact
- 178 Susquehanna River Basin Compact
- 179 Tahoe Conservancy Agency Compact
- 180 Tahoe Regional Planning Compact
- 181 Tennessee Interstate Furlough Compact
- 182 Tennessee-Tombigbee Waterway Development Compact
- 183 Thames River Flood Control Compact
- 184 Tri-State Lotto Compact
- 185 Tri-State Sanitation Compact
- 186 Uniform Unclaimed Property Act
- 187 Upper Colorado River Basin Compact
- 188 Upper Niobrara River Compact
- 189 Vehicle Equipment Safety Compact
- 190 Virginia and West Virginia Boundary Agreement of 1863
- 191 Virginia and West Virginia Boundary Compact of 1959
- 192 Virginia and West Virginia Boundary Compact of 1998
- 193 Virginia-District of Columbia Boundary Line Compact of 1946
- 194 Virginia-Kentucky Boundary Compact
- 195 Virginia-Maryland Boundary Agreement of 1878
- 196 Virginia-North Carolina Boundary Agreement of 1791
- 197 Virginia-North Carolina Boundary Agreement of 1970
- 198 Virginia-Tennessee Boundary Agreement
- 199 Wabash Valley Compact
- 200 Washington Metropolitan Area Transit Regulation Compact
- 201 Washington-Oregon Boundary Compact
- 202 Waterfront Commission Compact
- 203 Western Corrections Compact
- 204 Western Interstate Energy Compact
- 205 Western Regional Education Compact

- 206 Wheeling Creek Watershed Protection and Flood Prevention District Compact
- 207 Wildlife Violator Compact
- 208 Woodrow Wilson Bridge and Tunnel Compact
- 209 Yellowstone River Compact