

In the foregoing essay, Professor Conlan clearly and concisely presents an overview of contemporary American federalism and why it is such an important aspect of today's public administration. He stresses that its current characteristics have moved away from "cooperative federalism" to "opportunistic federalism" and how this shift has changed the day-to-day operational realities of IGR, often negatively. Yet, opportunistic federalism can possess pluses as well, most notably by allowing considerable latitude for effective managerial initiatives to occur throughout various entities within the federal system.

The following case, "Wichita Confronts Contamination," by Susan Rosegrant of Harvard's John F. Kennedy School of Government, illustrates well several of the themes discussed in Conlan's essay. In the summer of 1990, the Kansas Department of Health and Environment (KDHE), acting on behalf of the federal Environmental Protection Agency (EPA), reported that Wichita, Kansas, was sitting on a vast underground polluted lake of various commercial and industrial chemicals. It was located beneath the central downtown business district, called the Gilbert-Mosley site, and the hazardous chemicals were known to cause cancer and other health problems. The report said the contamination was spreading about a foot a day, and it was feared that serious community health problems and water quality deterioration would result if this underground pollution went unchecked. Besides the very vocal public outcry for government to

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"do something about the problem," the report also triggered an immediate reaction from the banking community which stopped making loans to downtown residential and commercial owners in the Gilbert-Mosley area, thereby causing serious economic repercussions. What should the city do to protect its environment and economy—indeed the very health of its citizens?

In the following case, the city manager, Chris Cherches, who is faced with the responsibility of drafting a plan of action to deal with this crisis, must work with various intergovernmental bodies such as the KDHE and EPA to frame options and devise a strategy to clean up the affected site. In the process, Cherches achieves a workable plan, but one that very much develops within—and depends on—an IGR framework.

As you read this case, consider the following:

What features of opportunistic federalism as described by Professor Conlan does this case possess?

What are the potential benefits public administrations might derive from opportunistic federalism? How can it work for, rather than against, effective public management?

How might opportunistic federalism benefit communities, society, and the general public? How can it advance the public interest? Or, serve to negate it?

In this case, how did IGR entities help to identify the problem(s), frame the options for the city manager, and ultimately help him create a workable plan of action for the affected site?

Why were the environmental and IGR problems in this case so complex?

Identify the negotiations among the various IGR actors in this story. Why were these negotiations so critical in dealing with Wichita's contamination?

In general, what does this case tell us about the importance of IGR to the work of public administrators in the twenty-first century?

Wichita Confronts Contamination

SUSAN ROSEGRANT

In the summer of 1990, the central business district of Wichita, Kansas, faced familiar problems of urban decline, along with the prospect of revitalization. The downturn in the regional oil and gas industry had exacerbated the nationwide real estate slump, leaving

downtown Wichita stagnant. At the same time, local business leaders were pursuing a common formula for renewal: a project relying on substantial public improvements to leverage new private investment, a \$375 million undertaking in all.

In downtown Wichita, however, a special problem was brewing. Hazardous chemicals known to cause cancer and other health problems had been detected in some private and industrial wells in Wichita's core area. Banks were growing more careful about requiring site inspections, and even soil and water sampling, before they would grant loans. And in June, local manufacturer Coleman Co., Inc., the venerable maker of camp stoves and other outdoor equipment, approached the city's legal department for advice about a contamination problem it had first discovered during routine tests in the fall of 1988.

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In late August, the calm was shattered as the pieces of bad news suddenly fit together to form a frightening whole. The Kansas Department of Health and Environment (KDHE), acting on behalf of the Environmental Protection Agency (EPA), reported that Wichita was sitting on an underground lake polluted by a variety of commercial and industrial chemicals. The area of contamination—dubbed the Gilbert and Mosley site after a street intersection near its center—was extensive, covering a plot about four miles long and one-and-one-half miles wide. Moreover, the polluted aquifer lay squarely beneath the city's central business district. The 8,000 parcels affected had an assessed value of about \$86 million. Major banks, hotels, industrial headquarters, and homes all lay in the six-square-mile area. The worst pollution, consisting of high concentrations of trichloroethene, a chemical degreaser used to clean metal parts before painting, was found at Coleman's headquarters at the north end of the site.

Although KDHE had completed a preliminary study on Gilbert-Mosley the previous November, the August 1990 Listing Site Investigation was the first comprehensive contamination report that City Manager Chris Cherches had seen. According to his office's quick estimates, to clean the aquifer could cost as much as \$20 million and take as long as 20 years. KDHE offered just two options in its report recommendations: either the companies responsible for the contamination could band together to clean up the area, or the state would rank the site for National Priority Listing, the first step toward activating Superfund.¹

Contamination Fallout

The Wichita community did not view Gilbert-Mosley as a serious health risk. Although the contamination was moving south at the rate of about a foot a day, the polluted aquifer lay 15 feet below the surface and was not used for drinking water. "Kansas is not that concerned about water quality," explained William Cather, chair of the Sierra Club's small Kansas chapter. "We are concerned about water quantity."

But the potential economic impact of the contamination had the community up in arms. KDHE's report identified 508 area businesses as Potentially Responsible Parties (PRPs) under Superfund law. If Gilbert-Mosley became a Superfund site, all of these businesses would be potentially liable for cleanup

costs regardless of whether they had contributed to the contamination. In the days following release of the Listing Site Investigation, KDHE received a barrage of phone calls from business owners anxious to understand the implications of their PRP status.

Even more threatening, however, was the response of the financial community. Just a few months earlier, in *US vs. Fleet Factors Corp.*, the US 11th Circuit Court in Atlanta had ruled that a lender may incur Superfund liability "by participating in financial management to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."²

Simply put, the ruling opened lenders to Superfund liability. Not only that, because of their relatively "deep pockets," financial institutions made ideal targets for Superfund cleanup cost recovery.

In the wake of the dramatic report, Wichita bankers took abrupt action, halting virtually all lending activity in Gilbert-Mosley, the heart of the city. "I don't think you could have hit a banker over the head with a two-by-four and gotten him to make a loan then," declared J.V. Lentell, chairman of the Kansas State Bank and Trust Co. "We already knew property values were plummeting in the downtown area. Downtown was drying up. It was the last thing we needed."

The banks' redlining had an immediate impact on both commercial and residential property owners. David C. Burk, for example, an architect turned developer, had formed an investment company to develop restaurant, retail, apartment, and office space in a few blocks of abandoned brick warehouses near Coleman's headquarters. Although he had drilled 20 test holes without finding contamination before launching his ill-timed venture, all three buildings he had contracts on, as well as those he had options to buy, fell within the contaminated zone. "As soon as Gilbert-Mosley came in, we lost our investors," he reported grimly. Residents were similarly affected, as they found it suddenly impossible to sell their homes. "There were hundreds of tragedies wrapped up here," declared Mayor Bob Knight. "I started getting calls from sons and daughters, trying to make provisions for a parent who was left alone and aged, who were unable to liquidate property."

As city government struggled in the days following the report's release to understand and respond to the crisis, it became clear that the twin threats of uncertain liability and the bank-imposed real estate freeze posed a substantial hazard to the city's tax base. Properties in the area had generated more than \$12 million of the \$203 million in local property taxes the previous year,

but already, the county appraiser's office was receiving requests for reduced valuations. If all Gilbert-Mosley properties lost substantial value, or were frozen for months, or even years, not only would the redevelopment plan die, but the entire core area would be threatened. "When the groundwater problem came along," recalled city attorney Thomas R. Powell, "it looked like it was going to be the death knell."

The City Weighs Its Options

City Manager Cherches, who faced the immediate responsibility for drafting a plan, enlisted a cadre of staffers to study KDHE's two recommended options. In evaluating the possibilities, Cherches stressed that two priorities remained uppermost: to begin cleaning up the aquifer as soon as possible, and to preserve property values. The only way to do that: convince the banks to resume lending in the area.

1) Let Companies Responsible for Contamination Clean Up the Site

The first impulse on the part of some of Cherches's staff was to encourage Coleman and other polluters to take charge of the Gilbert-Mosley site. "In the very early stages, it was viewed as a business problem," recalled Mark Glaser, special assistant to the manager for management research. "The businesses contributed to the contamination. The businesses are basically responsible for cleaning up the contamination." Added city attorney Powell, "Our hope was that somehow Coleman would solve the problem."

But history argued strongly against this choice. Gilbert-Mosley was not the city's first experience with contaminated sites. Three years earlier, groundwater contamination had been discovered at a smaller site about two miles north of Gilbert-Mosley, known as 29th and Mead. There, also, the banks had stopped lending, and the county appraiser had lowered property values 40 percent. A group of about 100 potentially responsible parties at the site, including both the city and Coleman, had formed a PRP group to strike an agreement on how to pay for the initial EPA-required Remedial Investigation and Feasibility Study (RI/FS), which would identify sources and types of contamination along with remediation methods. But group negotiations had become divisive, then stalled, and the state had already

placed the site on the National Priorities List (NPL). If the group fared no better in determining ultimate cleanup liability, it would face full implementation of Superfund and many years of real estate paralysis.

Given this experience, it seemed highly unlikely that the more than 500 PRPs at Gilbert-Mosley would be able to reach a timely agreement on liability. In addition, it was questionable whether Coleman would cooperate. Although the company had been a lead party at 29th and Mead, it had not pushed for a speedy resolution. Moreover, while Coleman acknowledged that it had found some pollution at its Gilbert-Mosley site, it was already discounting its responsibility for the overall contamination. Remarkd city attorney Powell, "When they said they were going to pay for what they were responsible for, I didn't know if we would ever agree on what they were responsible for." If a PRP group at Gilbert-Mosley fared no better than the one at 29th and Mead, there would be no quick cleanup in sight, and no incentive for banks to resume lending until the threat of contamination had been removed.

2) Rank the Site for Possible Superfund Status

As unproductive as forming a PRP group might appear, Cherches and his staff soon concluded that KDHE's second option—to allow the site to be ranked for Superfund—was far less appealing.

If EPA became directly involved, Cherches learned, the cost of cleaning up Gilbert-Mosley would increase dramatically. The agency typically hired an oversight contractor, for example, to watch over the work of the regular contractor—a step that automatically added up to 40 percent to the cleanup bill. In addition, possible polluters faced the prospect of paying for the administrative oversight of EPA itself; the Superfund law called on EPA staffers to charge their time to the private firms. Moreover, EPA was allowed to overcharge as a means of replenishing its cleanup fund and punishing non-complying businesses.

The threat of prolonged multi-party litigation was an even bigger deterrent to reliance on Superfund. Because any business in a contaminated area could be held responsible for cleanup costs, regardless of its contribution, lawyers played a major part in any Superfund resolution, as polluters sought to spread the blame, and faultless property owners struggled to avoid liability. In fact, Superfund law spread potential liability to such a

broad number of parties, many of whom were wholly innocent, that any hope of quick resolution became mired in stalling tactics and litigation. This legal wrangling, along with third party lawsuits against polluters seeking damages due to contamination-related declines in property values, had given rise to Superfund's nickname as "The Lawyers' Full Employment Act of 1980." One city that Cherches talked to reported that its \$30 million cleanup had sparked an estimated \$700 million in civil law suits. A study commissioned by the American Insurance Association estimated that cleaning up 1,800 Superfund sites would generate \$8 billion in legal fees.³

Finally, both litigation, and the oversight and administrative steps that EPA requires, add years to a typical Superfund cleanup. Of the average 10 years taken to clean up a site, seven are spent on study and assessment, legal proceedings, and crafting a remedy before the actual cleanup begins.⁴ Judging from this track record, if Gilbert-Mosley became a Superfund site, it would be years before cleanup could even start.

According to Mayor Knight, who consulted a number of other mayors about Gilbert-Mosley, cities with major contamination problems faced a bleak prognosis. "I couldn't find any successful models," he recalled. "The only thing we found was failure: division, frustration, assigning blame, financial ruin, and, ultimately, the very worst thing that can happen to people who love cities, decline."

Special Assistant Glaser also placed successive phone calls in a desperate bid to find a new alternative:

What we kept hearing was, "I can't tell you what to do, but do something. Don't let it go Superfund. Once it goes Superfund, you're in trouble." We knew we had to do something, but nobody knew what that something would be.

A Third Option

Cherches rejected both of KDHE's options, and made up his mind fast. Within a week of the Listing Site Investigation's release, he decided to risk a major leap from existing precedents. Although no one had accused Wichita of being a polluter, and although the city had not even been listed as a PRP, Cherches proposed that the city take full responsibility for the Gilbert-Mosley cleanup. In doing so, Wichita would attempt to sidestep the time and resources normally spent on Superfund-

related litigation, and to create some mechanism to get banks to start lending in the contaminated area again.

The most obvious and immediate barrier to a city-led cleanup was finding an acceptable way to finance it. Cherches was determined that Coleman and other contributors would pay as much as possible for the contamination they had caused. But the city could not count on recouping all cleanup costs from responsible polluters. Some likely contributors were no longer in business, for example, and others lacked the resources to support their share of the cleanup. Moreover, in order to sell the idea to the state and EPA, the city would have to prove it had the funds available to support what could be a 20-year project without relying on uncertain corporate contributions.

Cherches's staff prepared a list of financing alternatives, and the most powerful argument against each, as follows:

- *Establish a special assessment district:* All property owners in the area would be charged an assessment to cover the cost of cleanup. Likely to create an uproar over the inequity of making a large group, comprised mostly of innocent property owners, pay for the pollution of a few.
- *Issue bonds:* Taxes would be raised throughout the city to help pay off the bonds. Could cause a property tax revolt, and would require a change in state statute to allow bonds to be used for ongoing maintenance of the cleanup program.
- *Create a tax increment finance district:* Would dedicate an increment of Gilbert-Mosley property taxes—bolstered by the cleanup—to pay for the program. An untried use of this concept, and, like the bond option, would require a change in state legislation.
- *County pay entire cost, with state assistance:* Based on rationale that the economic health of Wichita is important to the entire county. Would face certain opposition from the county, which believed polluters should pay the tab. The county might seek state reimbursement.
- *Impose a statewide tax:* Would spread the burden to the broadest number of constituents. Certain to provoke strong opposition from a rural state uninterested in solving Wichita's industrial problems.

In addition to the backing of the Wichita City Council, most of these plans would require the approval of the Sedgwick County Council, as well as the Wichita

School Board, since their tax bases would be affected.

Even with a financing mechanism in place, though, a city-led plan would face a number of additional obstacles. Politically, the concept probably wouldn't fly unless Coleman and other contributors could be held at least partially accountable. "Some of the very early public response was, 'Why would the city get involved and commit our tax dollars?'" recalled Glaser. "We were thinking of signing on the dotted line to say we would be responsible for \$20 million. Politically and fiscally, that doesn't wash. It's not even reasonable." Unfortunately, if the city wanted to take charge, it would have to make a commitment long before it knew the likelihood of getting major contributors other than Coleman to pay.

Cherches would also have to convince EPA, which had a reputation for being bureaucratic and inflexible, that the city had the resources and the commitment to take on such an unusual arrangement. There was no record of any city ever having stepped in to accept liability for a contamination problem it had not caused.

In addition, unless Wichita could come up with a way to revive lending in the contaminated district, it wouldn't make any difference who was responsible for the cleanup. The central business district could not afford to wait 20 years for life to return to normal.

Finally, a survey of the obstacles made it clear that the ultimate success of the plan would depend on a complex collaboration between multiple, and sometimes opposed, constituencies, including the city manager's office, the city council, the county commission, the school board, lenders, Coleman, KDHE, the state legislature, the governor, and EPA.

KDHE had already warned the city that it would have to report to EPA in January about progress at the Gilbert-Mosley site. Unless a cleanup plan had taken shape, the state would recommend that EPA take over. If Wichita was unable to solve any one of the obstacles it faced, it would have to confront the inevitability of Superfund, with all that could imply for the devastation of the city's core.

Developing the Plan

Wichita City Manager Chris Cherches moved fast to begin consolidating support for a city-led cleanup of the Gilbert-Mosley site. In order to present the plan to the various constituencies that would have to approve it, the city first had to decide how to pay for it. After weighing alternatives, Cherches concluded that creating a tax

increment finance (TIF) district would be the most equitable and politically palatable way to raise funds. The city's approach, however, was a novel twist on the traditional TIF concept. Typically, a TIF district is set up in an area slated for redevelopment. After city-backed improvements are in place, the difference between the old, depressed property assessments and the new, higher values that have resulted from the improvements creates an increment that is then used to pay for the revitalization effort.

Wichita, by contrast, proposed what could be called a tax "decrement" plan: as a result of the contamination, the city would devalue all the property in the Gilbert-Mosley area—for example, by the 40 percent that property had dropped at the 29th and Mead contamination site—and then would immediately raise values back to their pre-contamination level, under the argument that the city plan would restore lost value. The difference would create the increment to be set aside each year to finance the cleanup. Although the city could find no examples of TIF being used to support environmental remediation, Glaser felt it was an ideal use of the concept. "This seemed like it really fit what the full intent of TIF was designed to do," he declared.

The city's initial talks with the Kansas Department of Health and Environment (KDHE) about assuming responsibility for Gilbert-Mosley had been encouraging. With the TIF proposal in place, KDHE became openly enthusiastic. Cherches began negotiating a plan for the state to oversee Wichita's cleanup in EPA's stead, thereby avoiding the agency's usual high oversight costs. After presenting the proposed plan to the public, and winning the unanimous approval of the city council, he next approached the local financial community.

Lenders, Cherches soon discovered, made eager allies. After all, they risked not only losing the value of their Gilbert-Mosley investments, but of being held liable for the actual cleanup. They also understood the importance to Wichita's economy—and to their own businesses—of returning real estate activity in the contaminated area to normal. But bankers would not resume lending until they had some sort of legal protection from cleanup liability in place.

The concept that the city and the lenders devised to satisfy this need was deceptively simple. Innocent property owners, including residents, businesses, and banks, could apply to the city for a document called the Certificate and Release for Environmental Conditions. If granted, the document would release the holder from any cleanup liability. With such a release in hand, properties could again be bought and sold without the

specter of potential Superfund liability. But while the banking community overall embraced the plan, it would not implement it until the city had received EPA's assurance that it would not take over the site, negotiated firm agreements with KDHE and Coleman, and pushed through the changes in state law necessary to allow tax increment financing to be used for a long-term project.

Final Negotiations

Getting EPA's backing was easier than the city had expected. Cherches proposed that Wichita would follow all the usual EPA steps and requirements in cleaning up Gilbert-Mosley, but with KDHE acting as the primary oversight agency. Throughout the process, the city would report regularly to EPA on its progress. Although the city had expected some opposition, EPA actually had a great deal to gain and very little to lose: If the city succeeded, the agency could declare a victory with minimal expense or effort on its part. Conversely, if the plan failed, there was nothing to keep EPA from stepping in and implementing Superfund. After just one meeting in late November, Morris Kay, director of EPA's four-state Region VII, agreed in principle to support both the city-led plan and the state's offer to oversee the process. Although there was no written agreement guaranteeing that EPA would not intervene, Kay assured the city that as long as it was operating according to agency requirements, it would not intercede.

With EPA's support secure, the city still faced a major legislative challenge. A Kansas state law designed to ensure fiscal responsibility, the Cash Basis and Budget law, would not let local government commit operating revenues beyond one year. Wichita needed an exception to that law, and an amendment to TIF law, in order to be able to commit funds raised from a TIF district to a long-term environmental cleanup. Without the changes, the city would be unable to contract with KDHE to take on and finance what could be a 20-year effort.

Getting legislative approval of the TIF bill promised to be a struggle. The Cash Basis law was, in Cherches's words, a "sacred cow" that the legislature was loathe to touch. In addition, the traditional antagonism that existed between urban Wichita and the largely rural legislature was certain to complicate the bill's chances for passage. The city had to dispel the impression that its plan might be geared in Coleman's favor, a difficult task with the company's liability agreement still in negotiation. Moreover, because Kansas's part-time legislature met only

from January through April, the city had a limited window of opportunity to prove the merits of its plan.

Wichita's credibility wasn't helped in March when both the county assessor and the state property valuation director declared unworkable the city's original proposal to establish a tax increment by first lowering and then raising assessed property values. In its place, three Sedgwick County legislators responsible for reviewing the TIF bill worked with the city to craft a new amendment that allowed municipalities in the state that met narrowly defined requirements to earmark 20 percent of a specially created TIF district's base year property taxes, on an annual basis, for environmental cleanups. If the bill passed, Wichita would be able to reserve up to 20 percent of the first year's Gilbert-Mosley property tax revenues to use for groundwater cleanup each year, for the next 20 years.

On March 26, Wichita signed a consent decree with KDHE, spelling out the city's responsibilities, what KDHE's oversight obligations would be, and how the Certificate and Release program would work. But the major obstacle to legislative approval, the Coleman agreement, was not resolved until April 23, slightly more than a week before the legislature adjourned. The agreement divided the contaminated site into three zones: Coleman agreed to pay all cleanup costs for the area where it was the main polluter; it would split costs with the city in a second area where it was a contributor to contamination; and the city would be responsible for cleanup and cost recovery in the final area, where most of the pollution came from other sources. In addition, the camping equipment manufacturer agreed to pay \$1 million for the initial Remedial Investigation/Feasibility Study required by EPA.

Although Special Assistant Glaser had expected the Coleman negotiations to be perhaps the biggest barrier to settlement, the manufacturer actually had good cause to settle. The agreement allowed Coleman to convey a responsible civic and environmental image, an important consideration for a maker of outdoor equipment. In addition, if Gilbert-Mosley had become a Superfund site, Coleman would have faced substantially higher costs, and would have been left vulnerable to almost endless third-party lawsuits. In fact, Coleman had already been sued by property owners seeking damages due to contamination-related declines in property values. "I feel we got a pretty good deal from Coleman," said city attorney Thomas Powell. "They needed it as badly as we did."

One week after the Coleman agreement was signed, the Kansas legislature approved the TIF bill, and