

"DOMESTIC TERRORISTS" VS. "BLACKMAILERS":  
UNRESOLVED CONFLICT BETWEEN MUNICIPALITIES  
AND RURAL WATER DISTRICTS

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While Congressional intent for rural aid was intended to create harmonious relations between both rural and urban communities, this case study reveals a situation in which ongoing zero-sum game resulting in court battles and millions of dollars in legal fees where one side benefits from federalism and the other from protracted court battles through breaking down "Made service available." More specifically, this study examines creative federalism and role in the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* case study. Also, 79 rural water cases over the last 40 years are examined to determine relative outcomes. This case study is significant as it is not only a practical showcase of the expense both sides pay for this conflict over a natural resource, but also in a theoretical sense as it helps fill the gap in the literature regarding our understanding of conflict in intergovernmental relations, especially between two local entities focused on self-interested growth.<sup>1</sup>

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<sup>1</sup> I want to thank the editors and reviewers of *Oklahoma Politics* for their helpful comments and making this paper a better one.

**On April 23, 1971**, in room 318 of the Old Senate Building, Oklahoma’s U.S. Senator Henry Bellmon sat in a subcommittee for Rural Development with Senator Hubert Humphrey serving as chairman. Senator Bellmon shared his views on the state of rural development in America. “...[T]here is not a subject confronting the Nation and the Senate,” he said, “that will have greater impact on the future of our country than rural development” (Hearing 1971, 49).

The purpose of rural development, according to that subcommittee, is “to help create a nation of greater beauty, deeper satisfactions, and expanded opportunities for all Americans, now and in the future, both in urban and rural areas” (Hearing 1971, 28). As Subcommittee Chair Senator Hubert Humphrey stated, the Agricultural Act of 1970 set the subcommittee’s mandate: “The Congress commits itself to a sound balance between rural and urban America” (pg. 1).

Humphrey’s observation was derived from his vision of creative federalism; he felt people should have more power and, ideally, “this is made a reality when the government and the people team up and work together” (Garrettson 1993, 236). Creative federalism, a Great Society creation of President Lyndon Johnson, focused more on race and class, but also on the tension between municipalities and rural water districts nationwide.

This paper argues that the legacy of Creative Federalism’s transformation into its more coercive form can be seen in the competition between rural and urban water interests fostered by federal preemption of state and local water policymaking authority. The ensuing clash between rural and urban water interests, in which both seek to maximize their self-interest, is illustrated well in the specific case of *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10<sup>th</sup> Cir., 2010) and, in general, through the examination of rural water cases in Federal court over the last 40 years.

This battle between municipalities and rural water districts is important for five reasons. First, water rights issues are critical to growing cities. Because of this, the National League of Cities (NLC), proposed

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legislation to remove the monopoly over water use jurisdiction enjoyed by rural water districts. Based on a resolution from the Oklahoma Municipal League (OML), the proposed legislation would amend §1926(b) of the Rural Development Loan Act, the source of jurisdictional protection that rural water districts nationwide claim. The resolution states in part: “municipalities are increasingly frustrated in their efforts to promote economic development on their borders when rural water districts gird municipalities with monopolies on water service” (National League of Cities Resolution 2009). Guthrie, Oklahoma is an example of this problem in development as the rural water jurisdiction surrounds the city limits, inhibiting growth potential of the city.

Second, between 1969 and 2011, more than 100 trials have pitted rural water districts and municipalities against each other.<sup>2</sup> These legal battles may also become more frequent as emerging exurbs<sup>3</sup> bump up against rural water districts. These legal fights are often protracted as municipalities challenge whether “service is made available” by rural water districts. This statutory standard defines when rural water districts can claim jurisdiction instead of municipalities based on rural water’s preemption power under federal statutes (See also *Making Service Available: Breaking down of Preemption*).

Third, these sometimes protracted battles can be filled with animosity instead of the Congressional intent of harmony between the rural and urban. To illustrate, the hostility can be intense: prominent Tulsa attorney, who represents rural water districts<sup>4</sup> nationwide, goes as far as to call municipalities “domestic terrorists” (Harris 2002, 1).

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<sup>2</sup> Sometimes it is rural water versus other rural water districts or rural water versus counties.

<sup>3</sup> The Brookings Institute defines Exurbs as “communities located on the urban fringe that have at least 20 percent of their workers commuting to jobs in an urbanized area.”

[http://www.brookings.edu/reports/2006/10metropolitanpolicy\\_berube.aspx](http://www.brookings.edu/reports/2006/10metropolitanpolicy_berube.aspx) (accessed February 4, 2012). The “A Comprehensive Plan For the City of Guthrie, Oklahoma” (2002), states that 44 percent of Guthrie residents commute.

<sup>4</sup> Rural water district are also known as “private water associations” or “special water districts” (Hounsel 2001). There is not an agreed upon definition of districts or associations such as this because some are public and others

What drives an otherwise responsible municipal government to engage in domestic terrorism by threatening to terminate the water supply to local citizens, putting the health, safety, and financial well-being of rural residents at risk?

But, the feeling seems to be mutual as Scott Hounsel (2001) in a *Texas Law Review* article claimed that rural water districts act like “blackmailers.”

... the monopoly power of section 1926(b) provider allows for a type of extortion or blackmail of a neighboring city for the transfer of water-service rights and, more importantly, the ability of an owner to develop land more intensely” (pg. 176).

In essence, rural water districts derive their preemption authority from federal legislation and their legal organization from the state,<sup>5</sup> with municipalities empowered by their respective state constitution. In 2007, there were more than 1,000 rural water districts in Oklahoma, serving more than 10,000 residents each (Stoecker and Childers 2007).

Fourth, this local-local conflict ultimately depends on the U.S. Supreme Court for resolution because Congressional intent and its backing of federal preemption are often unclearly defined. This conflict over control of water has led to brutal court battles costing both rural water districts and municipalities hundreds of thousands of dollars in court costs and legal fees, with potential settlements in the millions of dollars.

Fifth, this protracted litigation illustrates the role of federalism in this unique local-local conflict over water. Water is becoming more of a concern as increased demands for water resources will create more

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private. There are actually quasi-governmental as state statutes created these political subdivisions (Leshy 1983).

<sup>5</sup> The Oklahoma state legislature created the Rural Water Districts Act in 1963 (OWRB 1980). It was established as a public nonprofit to provide for facilities and water for rural residents. By 1979, there were 400 such districts in Oklahoma.

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conflict between rural and urban settings and scholars should study in this area more (Matthews 2010).

**BACKGROUND**

Most municipalities and rural water entities are not in dispute as they have worked out “good neighbor” relationships through cooperative agreements (“U.S.C. 1926(b) – Solution of Last Resort” 2012). While there are more than 100 cases nationwide that have surfaced in local-local litigation, there were more than 1,000 rural water districts in Oklahoma in 2007 alone, serving more than 10,000 residents each (Stoecker and Childers 2007). The National Rural Water Association (NRWA) represents 28,353 utilities across America.<sup>6</sup> In context, disputes are not involved in every relationship between rural water and municipalities, but they are in enough of them that often old local rivalries and political disagreements encourage this litigation and cost taxpayers millions of dollars (“U.S.C. 1926(b) -- Solution of Last Resort” 2012).

One major factor driving these disputes is a so-called “bright line rule.” Found (for example) in 7 USC §1926(b), this rule ensures rural water districts are protected against municipal encroachment in order to enable rural district compliance with federal water development loan repayment requirements. According to the National Rural Water Association (NRWA), this statute is important because it makes sure “small and rural communities would be able to repay loans.” This legislation prevents “any portion of a water system to be ‘forcibly’ annexed or ‘cherry picked’ by another system or municipality. Such annexation often results in the remaining customers being solely responsible for repayment of the loan, with fewer customers to share the burden, resulting in a higher cost (hardship) per customer and greater risk of default” (U.S.C. 1926(b) – Solution of Last Resort 2012).

A “bright line” is where Congressional intent is clear and a line not to be crossed is drawn by federal law. Where these conflicts result in legal disputes, courts generally side with rural water districts because they

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<sup>6</sup> National Rural Water Association (NRWA) website. 2012. <http://www.nrwa.org/about/about.aspx>. (Accessed September 7, 2012).

interpret 7 USC §1926(b) as providing preemptive position to repayment of rural water district indebtedness to the USDA. On the other side, municipalities have every incentive to keep the case in court in order to attempt to break down federal preemption by challenging whether rural water districts adequately have “made service available”—a standard set in the law as a pre-condition to establishing rural districts’ preemptive position.

*Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10<sup>th</sup> Cir., 2010) is significant not only as a practical showcase of the expense both sides pay for these conflicts, but also in helping to fill the theoretical gap in the literature regarding our understanding of conflict in intergovernmental relations (Clovis 2006) where local jurisdictions derive their powers from both state and federal sources. One entity is the municipality, which is a creature of the state.<sup>7</sup> The other entity is the rural water district (single purpose jurisdiction) often surrounding a municipality which, by statute, is a local public nonprofit.<sup>8</sup>

Preemption itself is often at the core of these federal-state conflicts, giving rural water districts an advantage in court as long as they can show they are “making service available” (See *Making Service Available: Breaking down of Preemption*). Fundamentally, Creative Federalism intended to create harmonious working relationships between rural and urban governmental entities as well between all levels of government (Garrettson 1993). This case study, involving a municipality and a rural water district, will show it has not done so in this instance, as this case has been mired in court battles that create animosity, not harmony as

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<sup>7</sup> Dillon’s rule holds that local governments are “creatures of the state” and can only undertake activities the state specifically authorizes. See *City of Clinton v. Cedar Rapids and Missouri River Railroad Co.*, 24 Iowa 455-475 (1868) in Judd and Swanstrom (2006).

<sup>8</sup> Oklahoma Statutes. Title 82. Waters and Water Rights. Chapter 18. Rural Water, Sewer, Gas and Solid Waste Management Districts Act. § 1324.2. 1. "District" means a public nonprofit water district, a nonprofit sewer district, a public nonprofit natural gas distribution district or a nonprofit solid waste management district or a district for the operation of all or a combination of waterworks, sewage facilities, natural gas distribution facilities and solid waste management systems, created pursuant to this act," <http://bradley-ok.us/Water/managementact.html>.

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hoped for by Congressional intent, across the rural/urban and intergovernmental divides.

### FEDERALISM

*...two of the most difficult problems with which people in the United States must live. One is water, the other is federalism. Both are subjects of fiercely-held emotional attitudes.”<sup>9</sup>*

Federalism is about relationships. Elazar (1990) notes the root word from which “federalism” originated—*Foedus*—suggests a covenant, or binding agreement. This state-federal relationship has shifted overtime. The Great Depression altered the balance from Dual Federalism to Cooperative Federalism, a strong national government in cooperating with all governmental levels to implement New Deal programs. Cooperative Federalism suggested that all levels of government would act cooperatively and jointly to resolve common problems, instead of creating separate individual policies (Kincaid 1990). After the Korean War, cooperation became of greater importance to deal with the changes in society, accommodating tensions in race, class, the affluent society as well as city-suburb and urban-rural and divisions (Kincaid 1990).

By the late 1960s, Lyndon B. Johnson's push for a Creative Federalism, a variant of Cooperative Federalism, established a new domestic emphasis on direct federal-local cooperation and on public-private partnerships. This type of federalism focused on national government channeling federal funds to local governments directly in order to deal with problems states could not, or would not assuage. Thus, the federal role expanded to work directly with sub-national local governments through (for example) categorical grants, bypassing the states (National Academy of Public Administration 2006).<sup>10</sup>

In 1971, under the Nixon Administration, the revenue sharing program was implemented, including—specifically—ensuring low-interest loans to rural water districts and for other rural needs. Kincaid (1990) argues,

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<sup>9</sup> Corker, Charles. E. quoted in Gerlak, Andrea. 2005, pg. 232.

<sup>10</sup> These categorical grants had the effect of reallocating funds to attain precise functions through strict compliance with a limited range of criteria.

nevertheless, that over time the demand to enlarge national power changed Creative Federalism to what he critically names Coercive Federalism, in which the federal government diminishes reliance on fiscal tools to encourage intergovernmental policy cooperation and amplifies dependence on regulatory tools, such as preemption, to guarantee the supremacy of federal policy. In reaction to these national policy mandates the Reagan administration took a new direction, termed New Federalism, where restrictive categorical grants were transformed to block grants (Gerlak 2005).<sup>11</sup>

## FEDERAL PREEMPTION

Federal preemption is the termination of a state law when it specifically conflicts with Federal law (Hawkins 1992). Preemption has become a central feature of our federal system. Under the supremacy clause of the U.S. Constitution, without preemption the federal government would be a crippled giant; but, like everything else, too much of a good thing can be bad (Hawkins 1992: v). Basically, the doctrine of preemption says “state law is nullified to the extent that it actually conflicts with federal law” (O’Reilly 2006: 15). Conflict arises when “compliance with both federal and state regulations is a physical

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<sup>11</sup> By the 1970s, there was a reaction to the increase in size of government and an increase in the perception of burdensome taxes-New Federalism. New Federalism gave these administrations new tools, such as revenue-sharing plans and the consolidation of federal aid programs into six revenue-sharing programs. The plan was to reassign responsibility, funds, and authority to states and local governments in an attempt to manage the intergovernmental grant system more efficiently. Although not completely successful, the Nixon initiative did raise the debate on the differing roles of various governmental levels (Gerlak 2005). Gerlak (2005) states that New Federalism is a political philosophy of devolution, which is a transfer of power from the federal government to that of the state. However, since the late 1970s, Shannon and Kee (1989) argue, the U.S. entered a new period of time they call “Competitive Federalism” with federal, state and local governments pitted against each other in a competitive struggle for taxpayer support and resources, which they see as actually a good outcome. In what Shannon and Kee (1989: 6) call a “fend for yourself fiscal environment,” different levels of government compete and acts as an equilibrium between Washington D.C. and state and local governments.



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impossibility.”<sup>12</sup> When it comes to local-local conflict, municipalities and rural water supporters fight over jurisdiction and service, backed up by states for the former and federal preemption with the latter, which undermines an even-playing field in competition for customers.

Municipalities also seek development opportunities, but do not have the same protection. This scenario is not unusual as federal preemption is the doctrine most used in Constitutional law (Gardbaum 1994). “The advocates of expanded preemption seem to regard states as distribution channels for federal dollars or as historical vestiges. Some advocates view the anti-preemption advocates as a reckless minority of guerrilla litigators” (O’Reilly 2006: 35). Alternatively, those against preemption say: “Each time a state law is preempted, an expression of democracy is extinguished. State legislatures find that they have less and less authority to respond to the needs and the demands of their constituents” (National Conference of State Legislatures 2006). “Federal preemption is a political choice, wrapped in a legal device and applied bluntly or subtly to win conflicts between large and small sovereign entities” (O’Reilly 2006: 206).

In the 1992 U.S. Advisory Commission on Intergovernmental Relations study on preemption, state officials acknowledged the importance of federal preemption, but articulated their concern about some of its outcomes. More specifically, federal courts “often imply federal preemption where there is no explicit statutory statement” (Hawkins 1992 p. iii). O’Reilly (2006) concurs. Scholars have noted that Congress often fails to express its actual intent in regards to preemption, especially when 535 people have different perspectives in a specific Congressional session. “Congress is rarely clear about the scope of what is preempted or how particular situations should be handled. Courts must decide what is preempted and this inevitably is an inquiry into congressional intent” (Chemerinsky 2008: 230). “The purpose of Congress is the ultimate touchstone in every preemption case”<sup>13</sup> (Vladeck 2009). Wolfam and Stevick (2001) argued the concept of an express preemption defense has narrowed and is more defined, while

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<sup>12</sup> See *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 152 (1982), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), in O’Reilly, pg. 15-16.

<sup>13</sup> See also *See Altria Group*, 129 S. Ct. at 543.

conflict preemption has broadened because it is based on court interpretation. “The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.”<sup>14</sup> Nonetheless, Vladeck (2009) argued since there is a lack of clarity on preemption issues, it is a serious problem for state legislatures and Congress in working to find common ground in the apportionment of regulatory power. Barbash and Keamen (1984), even report that former Supreme Court Justice Justice Blackmun once noted that a Congress member told him “that legislators purposely insert unintelligible language in a statute and let the court ‘tell us what we mean’ ” (pg A42).

Preemption fights blossomed throughout the 1980s up to the present as federal bureaucratic regulations have become more and more centralized (Zimmerman 1993; O’Reilly 2006). Since its founding, 53 percent of the 439 significant preemption statutes passed by Congress were created after 1969 (Hawkins 1992). Davis (2002) found federal preemption is on the increase and an accepted agency norm while those critical of preemption are the exception. It might not be surprising then that all the cases between rural water and municipalities have occurred since 1969.<sup>15</sup>

The saying: “Where you stand on it depends on where you sit” (O’Reilly 2006: 20) aptly illustrates how different people view the value of preemption in conflicts over water use. On the one hand, rural water districts and other utilities not only promote rural water development, but also these districts gain greater security for the loans the USDA makes to them.<sup>16</sup> Those entities that are indebted with USDA rural development loans gain federal preemption protection as the courts interpret it in Title 7 U.S.C §1926(b).<sup>17</sup> In *City of Madison v. Bear Creek*

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<sup>14</sup> See *Free v. Bland*, 369 U.S. 663, 666 (1962).

<sup>15</sup> My research both online and in Westlaw.

<sup>16</sup> See *Pittsburg County No. 7 v. City of McAlester and the McAlester Public Works Authority*, 358 F.3d at 715.

<sup>17</sup> “The service provided or made available through any [indebted rural water] association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any

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*Water Association*, 816 F.2d 1057 (5<sup>th</sup> Cir. 1987) the Court ruled that §1926(b) preempted state and local law in order to protect the federal financial commitment. There are two interrelated goals for federal preemption in §1926(b):<sup>18</sup> protecting rural water associations’ jurisdiction from competitors who might encroach on their territory; and 2) protecting the government’s financial interests by avoiding the reduction of water associations’ financial base needed to ensure loan payback. In addition, the intention of federal protection is also to support rural water development by enlarging the number of potential consumers in rural areas.<sup>19</sup> Water associations, in this case, rural water Logan-1, maintain federal protection and backing through continued indebtedness to the USDA, according to statute, as long as they continue to “make service available” in the area of dispute.<sup>2021</sup>

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such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.”

7 U.S.C. § 1926(b) as quoted in *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (2010) OK 51 Case Number: 107468.

<http://law.justia.com/cases/oklahoma/supreme-court/2010/459740.html>.

<sup>18</sup> 7 Section §1926(b)'s protection serves two goals. See *Pittsburg County*, 358 F.3d at 715. “First, it provides for: greater security for the federal loans made under the program ...By 'protecting the territory served by such an association[']s facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system,' § 1926 protects the financial interests of the United States, which is a secured creditor of the water association, from reduction of the water association's revenue base.” as quoted in *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (2010) OK 51 Case Number: 107468. <http://law.justia.com/cases/oklahoma/supreme-court/2010/459740.html>.

<sup>19</sup> See *Rural Water Dist. No. 1, Ellsworth County v. City of Wilson*, 243 F.3d 1263, 1270, (10<sup>th</sup> Cir., 2001); *Scioto County Regional Water Dist. No. 1 v. Scioto Water Inc.*, 103 F.3d 38, 40 (6<sup>th</sup> Cir. 1996).

<sup>20</sup> See *Moongate Water v. Dona Ana Mut. Domestic Water Consumers Ass'n*, (10<sup>th</sup> Cir., 2005) 420 F.3d at 1084.

<sup>21</sup> This does not mean the whole disputed area, but only when Logan County Rural Water specifically has a right under state law to provide service and in the past has done so, or can do so in a reasonable time. See *Sequoyab County*, 191 F.3d at 1201-03.

Federal law preemption for water districts, indebted through USDA loans, is important to the agency in two ways: 1) to secure repayment of the federal debt; and 2) reduce the cost of service by expanding the number of customers. In fact, in *North Alamo Water Supply Corporation v. City of San Juan, Texas*, 90 F.3d 910 (5th Cir. 1996) the Court opined: “The service area of a federally indebted water association is sacrosanct. . . . The statute should be liberally interpreted to protect . . . rural water associations from municipal encroachment.”

The purpose of rural development, according to the Congressional subcommittee hearing on rural development in April 1971 is “to help create a nation of greater beauty, deeper satisfactions, and expanded opportunities for all Americans, now and in the future, both in urban and rural areas” (Hearing before the Subcommittee on Rural Development 1971: 28). Rural Development Subcommittee chair Senator Hubert Humphrey stated the Agricultural Act of 1970 set the subcommittee’s mandate: “The Congress commits itself to a sound balance between rural and urban America” (pg. 1). Later in the subcommittee report, he went further: “Rural and urban communities should no longer siphon off one another’s strengths and resources nor shunt problems and burdens from one to the other. They would progress together in a dynamic balance, as partners in the best sense” (pg 48). Oklahoma Senator Bellmon added: “...there is no subject confronting the Nation and the Senate that will have greater impact on the future of our country than rural development” (Hearing before the Subcommittee on Rural Development 1971: 49).

Yet this Congressional intent of harmonization between rural water districts has been undermined by the fact federal conflict preemption pits two competing entities favoring two different policies. Lowi (1972; Dye 1990) designated municipal and rural water policy goals as developmental, while the federal government’s policy is also developmental, but with different objectives. Developmental policies focus on the economic well-being of the community.

CASE STUDY <sup>22</sup>

*Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10<sup>th</sup> Cir., 2010) illustrates these aspects of Federalism. The conflict between the Logan County Rural Water District and the City of Guthrie examines the “what” and “how” in understanding the role federal preemption plays in the conflict over water in Oklahoma. First, the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* is examined in a series of court trials, from The Logan County District Court through to the Oklahoma State Supreme Court and the U.S. Federal 10<sup>th</sup> Circuit Court of Appeals.<sup>23</sup> Then 79 trials, representing 60 cases representing court cases between rural water districts and municipalities are reviewed to establish patterns and broaden our understanding of the research question, specifically on why cases become protracted with lengthy appeals (See Table 1).

## CASE STUDY HISTORICAL BACKGROUND

Since 1961, when "Congress amended the Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921-2009n) to allow nonprofit

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<sup>22</sup> Yin (1994: 23) describes a case study as a question that empirically examines a current and observable occurrence “within its real-life context.” Case studies are useful when the distinctions between the context and the phenomenon itself are not essentially clear and use more than one source of evidence to examine it. Yin (1994) argues that while it is generally appropriate to say that a case study is generalizable to a larger population, this assumes that it was taken from a random sample of cases, which has been selected from a larger universe of cases. Yin (1994) argues, however, it is false to say that a case study is only a single case study as if it were a single respondent. Sake (1995) argues further for a different way of looking at case studies in which they are centered on a more intuitive, empirically-grounded generalization. He calls it “naturalistic” generalization. This type of generalization is based on the congruent association linking the case study and the reader’s understanding. Sake (1995) argues that the data produced by a case study would often reverberate experientially with a wide range of readers, thereby making it possible for a greater comprehension of the case at hand. Therefore, this case study, I argue, is naturalistically generalizable to a larger population.

<sup>23</sup> A single-site case study creates within a single case a multitude of in-case “observations” which often reflect on interactions, social relations, actions, organizational practices, etc. See Yanow & Freitas 2008.

water associations to borrow federal funds for the conservation, development, use, and control of water . . . primarily serving . . . rural residents"<sup>24</sup> rural water districts have had access to the United States Department of Agriculture (USDA)<sup>25</sup> loans. A subunit of the USDA, called the Rural Utilities Service (RUS)'s Water and Waste Disposal Direct and Guaranteed Loans<sup>26</sup>, provides loans to rural entities, such as rural water districts not exceeding 40 years in length and not exceeding 5 percent interest. In fiscal year 2010, approximately \$1 billion was loaned to those who qualify in rural areas (Cowen 2010).

Recently, Congress showed its support for such rural programs when it rebuffed an amendment by Oklahoma Senator Tom Coburn to reduce rural development programs by \$1 billion—his amendment failed 13 to 85 (Casteel 2011). While Oklahoma's Senator Jim Inhofe backed Coburn's amendment, he was critical because it would undermine the ability for rural areas to keep up with federal wastewater and drinking water standards. Senator Inhofe remarked:

I support the overall goal of the amendment to reduce federal spending on duplicative or unnecessary federal programs. However, I would have preferred a more tactical approach that did not include cutting important rural loans that are paid back to the federal government.

The Rural Water, Logan-1 Board attained its first of several rural water loans in 1976, planting the seeds of conflict with the City of Guthrie.

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<sup>24</sup> See *Moongate Water Co. v. Dona Ana Mut. Domestic Water Consumers Ass'n*, 420 F.3d 1082, 1084 (10<sup>th</sup> Cir., 2005)(quoting 7 U.S.C. § 1926(a)(1)).

<sup>25</sup> *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (2010) OK 51 Case Number: 107468 State Supreme Court.

<http://law.justia.com/cases/oklahoma/supreme-court/2010/459740.html>

<sup>26</sup> The Rural Utilities Service (RUS) is one of its operating units. The RDA was replaced by the Office of Rural Development following the USDA reorganization in 1994 authorized by P.L. 103-354 and yet again with the Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127), which increased loan amounts and eligibility to more than 10,000 in population. The RUS program “supports construction and improvements to rural community water systems unable to get reasonable credit in the private market” (Cowan 2010: 33).

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The City of Guthrie is a historic city, Oklahoma's first capital,<sup>27</sup> and serves as an exurb to the Oklahoma City Metro area. Developers see exurbs as attractive places to live (Foreman 2005). In addition, developers often look to the outskirts of town because it is cheaper to develop than in the city itself and more accessible.<sup>28</sup>

According to Glenn Hayes, Guthrie city manager at the time of the initial lawsuit in 2005, Guthrie planned to extend a water line down Division Street toward the edge of the town to supply water to two developments in the area. The project had been in the works since 2002 – prior to his tenure as the city manager. On June 1, 2004, the Guthrie City Council approved this water line extension project's funding, which was one of four developmental infrastructure projects (worth \$2.6 million) bundled into one loan project. The project was submitted to the Oklahoma Water Resources Board<sup>29</sup> and in process prior to Hayes' knowledge of the water line's encroachment into Logan County Rural Water district's territory. The city manager thought, at the time, the water lines were still within city limits.<sup>30</sup> In reality, the water district's territory stayed the same even though the city's borders expanded with the annexation of land south of town in to the rural water district's territory in 1972 (See Appendix 1).<sup>31</sup> The line itself cost \$155,000, according to Wanda Calvert, Guthrie city clerk.<sup>32</sup>

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<sup>27</sup> See Franks and Lambert. 1997.

<sup>28</sup> See "How important is Location When Buying a Home?" 2011. Real Estate Home Edition. <http://www.immrc.org/tag/outskirts-of-town> (accessed February 8, 2012).

<sup>29</sup> While the loan package went to the Oklahoma Water Resources Board (OWRB), it was a pass through to access the Drinking Water State Revolving Fund (DWSRF) loan program funds. Guthrie Public Works Authority Minutes, June 1, 2004. More specifically, the OWRB Financial Assistance Division manages two loan programs, providing federal Clean Water Act (CWA) and Drinking Water Act (DWA) funds for community wastewater and water treatment/distribution projects.

See <http://www.owrb.ok.gov/about/divisions/fa/fa1.php>

<sup>30</sup> Hayes, Glenn. March 6, 2006. Legal Deposition. *The Rural Water Sewer and Solid Waste Management v. City of Guthrie*.

<sup>31</sup> Ibid.

<sup>32</sup> Calvert, Wanda. 2011. Interview. October 25.

The water line extension happened in the first place through discussions in his office between Hayes and two developers to see if the development was in process. Both Jim McBride, representing the Mission Hills development, and Barry Cogburn, for the Pleasant Hills development, noted in their legal depositions they likely would not have developed if they did not have access to city water. Neither of them had approached the Logan County Rural Water District because no one realized the two proposed developments were actually in Logan County Rural Water's jurisdiction.<sup>33</sup>

In 2005, the Rural Water, Logan-1 Board sued the City of Guthrie, asserting the City had encroached on Logan-1's service area. This encroachment infringed on the water district's service area as stipulated in § 1926(b), which protects it from competition when indebted to the USDA.<sup>34</sup> <sup>35</sup> The former Guthrie City Manager Glenn Hayes said the city extended water lines [into Rural Water territory] with the "intent for extending the infrastructure south ... to promote growth."<sup>36</sup>

In 2010, the Oklahoma State Supreme Court, while not deciding whether Guthrie was right or wrong in supplying water to Pleasant Hills Development, did hold that Article 5, section 51 of the Oklahoma Constitution is not violated when a rural water district obtains a loan

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<sup>33</sup> See Barry Cogburn December 15, 2005 and Jim McBride June 8, 2006 depositions.

<sup>34</sup> The terms of §1926(b) loan agreements had also been authorized by the Oklahoma Legislature pursuant to title 82, section 1324.10(A)(4). See *Rural Water Sys. No. 1 v. City of Sioux Ctr.*, 967 F.Supp. 1483, 1529 (1997), *Sequoyah County Rural Water District No. 7 v. Town of Muldrow* and *Muldrow Public Works Authority* 191 F.3d at 1202, 1202 n.8, 1203, & 1204 n.10).

<sup>35</sup> There are actually two Guthrie cases, one on the state level and another on the federal level. Carrie Vaughn, lawyer with Williams, Loving, and Davies in Oklahoma City, represented Guthrie on the state-level case; it started in 2008 in the State District Court of Logan County. In this case, the City of Guthrie won a summary judgment. The important outcomes of the case stipulated whether it was an "essential facility." The Court agreed with Guthrie that it was not an "essential facility," therefore, was not forced to sell water to the Logan County Rural Water district.

<sup>36</sup> Hayes, Glenn. March 6, 2006. Legal Deposition. *The Rural Water Sewer and Solid Waste Management v. City of Guthrie*.



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under §1926(b).<sup>37</sup> In 2011, the case made it to the 10<sup>th</sup> Circuit Court of Appeals, where the court noted it would not specifically address the explicit protection of areas currently not served by the water district and where there was no current request for water.<sup>38</sup>

In June, 2011, the 10<sup>th</sup> Circuit Court of Appeals dealt with two questions: 1) whether Article 5, Section 51 of the Oklahoma Constitution prevented a rural water district from entering into or enforcing loan agreements that contain protection from competition by other water districts; and 2) whether there was a “police power” or “public safety” exception in the same state Constitutional provision “against exclusive rights, privileges, or immunities” that would validate a rural water district’s loan agreement that included protection from competition during the term of the contract.<sup>39</sup> The Circuit Court held in favor of the Rural Water, Logan-1 argument that Article 5, Section 51 has not violated or contradicted its right to a USDA loan, but also that the Oklahoma State Legislature did not grant an exclusive right or franchise to rural water either, which made conflict preemption stand. The 10<sup>th</sup> Circuit Court of Appeals remanded the case back to the district court to determine what the federal law required for water service, and whether Logan County Rural Water was compliant in their service.<sup>40</sup>

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<sup>37</sup> Article 5, section 51 of the Oklahoma Constitution says specifically, “Exclusive Rights, Privileges or Immunities. The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.”

<sup>38</sup> See *Moongate Water Co. v. Dona Ana Mut. Domestic Water Consumers Association*, 420 F.3d 1082, 1089-90 (10<sup>th</sup> Cir., 2005). Future customers do not factor in because there is not an immediate conflict with them. There needs to be a development plan in the works.

<sup>39</sup> See *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (10<sup>th</sup> Cir., 2010). No. 107,468. June 29, 2010.

<sup>40</sup> Court remanded the case back to the district court for further proceedings with respect to what the federal law requires in terms of water service, and for findings on the degree to which Plaintiff was compliant in terms of its service to the City.

## MAXIMIZING SELF INTEREST

For Guthrie, this meant extending their infrastructure in hopes that developers would build, bringing in more citizens who would, in turn, buy products and produce sales taxes as revenue in town. Logan County Rural Water district, no. 1, had developmental goals, too; they were trying to extend their lines to ongoing development in their jurisdiction. These two development-directed policy goals created conflict (Dye 1990) as each side tried to maximize their advantage and achieve what was in their own self-interest.

Logan county rural water districts have the ability to develop north and surrounding the northern boundaries of Guthrie, but the city does not have room to develop (See Appendix 1). The rural water district and municipal goals are both oppositional because they are focused on mutually exclusive goals to develop for themselves in the framework of a federalism that fosters conflict, not consensus or competition. Federal preemption places a bias toward rural water districts in order for those entities to pay back their loans.

This maximizing of self-interest, in this case, helps facilitate conflict because of differing policy goals and ambiguous Congressional intent. Deutsch (1972) finds that the most destructive conflicts happen when behavior is created through competitive systems based on self-interest. Matthews (2010) argues that conflicts flare because of the self-interested approach stakeholders have toward their rights.

On top of this, the lawyers in the case have incentives to maximize their interests as well—dragging out court cases means more legal fees. For example, Jim Milton, lawyer from Doerner, Saunders, Daniel & Anderson, L.L.P., said Logan County Rural Water litigation cost estimates were \$337,000 for the rural water lawyer; and at the same time, \$350,000 for Guthrie’s state-level case, according to Carrie Vaughn, lawyer with Lester, Loving, and Davies in Oklahoma City representing Guthrie.<sup>41</sup> Jim Milton estimated the federal case litigation cost Guthrie \$800,000.<sup>42</sup> Actually, Guthrie will not pay the nearly one

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<sup>41</sup> Kerry Vaughn interview. October 21, 2011.

<sup>42</sup> Jim Milton interview. October 21, 2011.

## “DOMESTIC TERRORISTS” vs. “BLACKMAILERS”

million dollars in court costs and attorney fees, instead the City’s legal costs were covered by their liability insurers, the Oklahoma Municipal Assurance Group (OMAG).<sup>43</sup> While there is no empirical proof that these cases were extended because of legal incentives to do so, it makes logical sense as more court and arbitration appearances means more money for lawyers who are maximizing their utility<sup>44</sup>. And, by defending the City of Guthrie, OMAG may (possibly) defer future liability in other cities with a win in court for the municipality, thereby, maximizing their utility over time.

### MAKING SERVICE AVAILABLE: Breaking Down of Preemption

When courts side with rural water districts they usually win, automatically. This results because of the “bright line” rule, and therefore, conflict preemption, which was reinforced in §1926(b) cases through *City of Madison, Miss v. Bear Creek Water Assn, Inc., 1987*. The case says specifically, “A bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and the rural water authority, even if it limits the municipality's options.”<sup>45</sup>

However, 7 USC §1926(b) states:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor

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<sup>43</sup> OMAG’s mission is “risk financing and loss prevention service provider for Oklahoma municipalities.” OMAG website: “Mission.”

<http://www.omag.org/> (accessed November 14, 2011).

<sup>44</sup> Each side has met at least 4 times through the arbitration process without success, according to an interview with Guthrie City Manager, Matt Mueller.

<sup>45</sup> See *City of Madison, Miss v. Bear Creek Water Assn, Inc.*, 816 F.2d 1057 (5th Cir.1987) in Steve Harris. “1926(b) - What is it? How can it help your water district?” [www.ruralwater.org/sec1926b/harrisa.txt](http://www.ruralwater.org/sec1926b/harrisa.txt) (accessed September 25, 2011).

shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.<sup>46</sup>

Since it is unclear what “service provided or made available” means by Congressional intent, the courts have been left to define it. More specifically, according to 7 U.S.C. §1926(b), preemption applies to protect: 1) water or sewer system indebtedness to USDA; 2) customers actually served, and 3) areas where service is “Made Available.” The phrase “Made Available” in the statute though is undefined. The Courts have come up with two main considerations: 1) “Pipes in the Ground” or Physical Ability to Serve (Proximity, Timing, Cost); and 2) Legal Right or Legal Duty to Serve as defined by the correct boundaries and a designated service area or Certificates of Convenience and Necessity (CCN).<sup>47</sup> Nevertheless, the mere possession of a CCN is not enough; the protection is limited to areas where: 1) the rural water district is already providing service or presently has the physical means to serve;<sup>48</sup> and they are “within or adjacent to”<sup>49</sup> 2) unreasonable costs or delays are a factor in making service available;<sup>50</sup> 3) the sewer loan does not actually protect the water system and its customers; <sup>51</sup> 4) a pre-existing service encroachment is not abruptly alleviated by closing on federal loan;<sup>52</sup> and 5) there was an inadequate infrastructure and “unfulfilled intent” to provide the service necessary.<sup>53</sup>

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<sup>46</sup> 7 U.S.C. §1926(b), August 8, 1961.

<sup>47</sup> To obtain a CCN a utility must show it possess the financial, managerial, and technical capabilities to supply constant and sufficient service and that they are competent to operate water and sewer facilities in compliance with applicable state and federal regulatory requirements. (See Rogers 2004).

<sup>48</sup> See *Creedmoor-Maha v. TCEQ* 307 SW3d 505 (Tex. 3<sup>rd</sup> Cir., 2010).

<sup>49</sup> See *Lexington-South Elkhorn Water Dist. V. City of Wilmore*, Kyl., 93 F. 3d 230(6<sup>th</sup> Cir., 1996).

<sup>50</sup> See *Rural Water Dist. No. 1 v. City of Wilson, Kansas*. (10 Cir., 2001).

<sup>51</sup> See *PWS Dist No. 3 Laclede Co.*( 8<sup>th</sup> Cir., 2010).

<sup>52</sup> Ibid.

<sup>53</sup> See *Bell Arthur Water Corp. v. Greenville Utility Commission*, 173 F. 3d 517 (4<sup>th</sup> Cir., 1999).

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In the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10<sup>th</sup> Cir., 2010), the 10<sup>th</sup> Circuit Court of Appeals was not persuaded by the argument fire protection should be considered as to whether service is being made available, as the Court held that “Logan-1 was not legally obligated to provide fire protection.” The City of Guthrie argued that while there are administrative regulations pertaining to water and fire protection, two different administrative rules apply. One rule addresses a “[w]ater main design for all systems providing fire protection.”<sup>54</sup> While the other rule addresses, “[w]ater main design for systems providing domestic water only,” which “applies only to water systems without full fire protection capabilities.”<sup>55</sup> The Court noted that these two regulations apparently foresee that some water systems will provide fire protection service; it rejects Guthrie’s arguments on the need for Logan-1 to provide fire protection. Jim Milton, City of Guthrie’s lawyer, has petitioned, on the behalf of the City of Guthrie, to the 10<sup>th</sup> Circuit Court of Appeals for a Petition for rehearing *En Banc*, arguing that because of a subsequent decision in *Eudora*, (see discussion below), fire protection should indeed be considered.<sup>56</sup> If the case does not obtain a rehearing with new facts, either side is expected to appeal to the U.S. Supreme Court to finally resolve the issue at hand—the first case to be heard there involving a municipal-rural water conflict (if the appeal is accepted). Still to be decided is whether the City of Guthrie had the right to sell water to the developments in 2003 and beyond.

Recently, the September 2011, *Rural Water Dist. No. 4 v. City of Eudora* (10<sup>th</sup> Circuit 2011) case clarified the relevance of fire protection as an issue in these water jurisdiction conflicts. The 10<sup>th</sup> Circuit Court of Appeals reaffirmed that the rural water district must: 1) establish that it made service available before the allegedly encroaching association began providing service; 2) and that it must demonstrate that it has adequate facilities within or “adjacent to the area” to provide service to the area within a reasonable time after a request for service is made. However, the 10<sup>th</sup> Circuit Court also held the rural water district is not required to prove that its charges for providing service are reasonable.

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<sup>54</sup> Okla. Admin. Code 252:626-19-3

<sup>55</sup> Okla. Admin. Code 252:626-19-4

<sup>56</sup> Milton, James. 2011. Petition for Rehearing *En Banc* and Alternative Petition for Plane Rehearing by Defendants-Counterclaimants-Third-Party Plaintiffs-Appellants City of Guthrie and The Guthrie Public Works Authority.”

Instead, the allegedly encroaching municipality must prove that the rural water district's costs of services are unreasonable, excessive, and confiscatory in order to escape Section §1926(b) protection on this basis. The 10<sup>th</sup> Circuit Court of Appeals also took a significant step back from its prior holdings that fire protection is irrelevant in §1926(b) cases. The Court determined that fire protection services may be considered on the issue of whether the rural water district's charges for providing water service are unreasonable, excessive, and confiscatory. According to the reasoning in *Eudora*,

Of course, at no time does a water district's decision to provide or forgo fire-protection services affect its ability to establish that it has sufficient 'pipes in the ground' to make service available, and it is up to the party challenging the water district's §1926(b) protection to prove that the water district's costs are unreasonable, excessive, and confiscatory. Moreover, costs must be examined individually for each property. Thus, the relationship between fire-protection services and costs is highly context-specific.<sup>57</sup>

### RURAL WATER CASES NATIONWIDE

In a review of 79 trials nationwide, representing 60 rural water versus municipalities cases specifically, rural water districts won 68 percent of the time (41 out of 60 cases). They seem to win because of the aforementioned “bright line” rule. Cases in the late 1980s though, starting with *City of Madison* (1987), broke down the “bright line” rule. Jim Milton, Guthrie’s lawyer in the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10<sup>th</sup> Cir., 2010) said, “We managed to convince the 10<sup>th</sup> Circuit Court of Appeal’s panel to reject what the court said was a ‘ritualistic or bright line approach in determining a district's exclusive right to serve customers within its geographical boundaries.’” Milton said that this ruling at least gave his side a ‘toe

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<sup>57</sup> In *Eudora*, the justices also found that a city's annexation of territory, by itself, does not cause curtailment under §1926(b).

## “DOMESTIC TERRORISTS” vs. “BLACKMAILERS”

hold’ in pulling the protection back.”<sup>58</sup> Protection breaks down when municipalities can show either the rural water district does not have jurisdiction or they cannot show “service was made available.”<sup>59</sup> For example, in *Eudora*, the municipalities successfully showed that fire protection could be considered as to whether service is being made available and Jim Milton noted that this would be used on appeal in the *Guthrie* case.<sup>60</sup>

In examining protracted, or prolonged, cases with several trials heard on the Federal Appellate level over the course of several years, cities appear to have incentives to prolong cases because of their ability to win rises. In 11 protracted cases examined,<sup>61</sup> two of which split their decisions, only 38.4 percent favor the rural water district, which is nearly half the likelihood of winning against municipalities when examining the 79 cases (See Table 1). This is important because as expected, the rural water districts using federal preemption win most of the time. However, when the municipality, county, or developer was able to show that the district did not actually “make service available,” the “the bright line” rule breaks down, lengthening the case. Lawyers also benefit from such a system. Consequently, it makes sense to actors to prolong conflict, especially for municipalities in an effort to even the playing field as municipalities focus on breaking down “making service available.” The latest tactic by municipalities is arguing that rural areas

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<sup>58</sup> Milton, Jim. Email correspondence. September 28, 2011. Doerner, Saunders, Daniel & Anderson, L.L.P, Tulsa, Oklahoma.

<sup>59</sup> “In order to prevail on a § 1926(b) claim, the water association claiming protection must establish the following three elements(1) it is an ‘association’ within the meaning of the Act, (2) it is indebted to the Department of Agriculture (formerly Farmers Home Administration, now RECDs), and (3) it has provided or made service available to the disputed area.” See *Village of Grafton, King, Ltd. v. Rural Lorain County Water Authority et.al.* 419 F.3d 562 (2005).

<sup>60</sup> See *Rural Water Dist. No. 4 v. City of Eudora* (10th Circuit 2011).

<sup>61</sup> Cases: *Scioto* (1996) 6th Circuit; *Rural Water Dis 1 Ellsworth* (2001) 10th Circuit; *Rural Water Sioux* (2000) 8th Circuit; *View Caps* (1983; 84) Texas; *Bell Arthur* (1999) 4th Circuit; *City of Madison* (1987) 5th Circuit; *Glenpool* (1988; 92) 10th Circuit; *Le Ax* (2003) 6th Circuit; *Melissa* (2001; 2004) Texas; *Moongate* (2002) 10th Circuit; *Pittsburg* (00;03;03;04) 10th Circuit.

do not provide adequate fire service because fire vehicles are not able to access fire hydrants with enough water pressure.<sup>62</sup>

**Table 1: Cases by Winner**

<b>CASES (67)</b>	<b>Municipality</b>	<b>Rural Water</b>	<b>Landowner</b>	<b>Second Utility</b>	<b>County</b>	<b>Total n</b>
<b>All cases (n)</b>	19	41	4	8	7	79
<b>Percentage</b>	28%	61%	5.9	11%	10.4%	100%
<b>Only Municipalities and Rural Water (n)</b>	19	41				60
<b>Percentage</b>	32%	68%				100%
<b>Protracted cases only (n)</b>	5	5	0	2	1	13
<b>Percentage</b>	38.4 %	38.4 %	0	15.3%	7.6%	110%
<b>Protracted cases (Municipalities &amp; Rural water) (n)</b>	5	5				10
<b>Percentage</b>	50%	50%				100%

## DISCUSSION

Federalism, especially the emphasis on its fiscal dimensions, involves questions regarding what the optimal distribution of authority (centralized or decentralized) is. It is argued here that when the federal government takes the lead, it tends to give a higher value to the equality of public goods, especially for minority groups—in this case, the rural communities. Conversely, scholars who proffer a more decentralized arrangement argue in favor of allowing some local variation because those on the local level possess a better understanding of their individual preferences and potential alternatives, therefore providing a

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<sup>62</sup> Interview of Matt Mueller, Guthrie City Manager.



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better service to their customers than in a more centralized system (Smith 2011).<sup>63</sup>

In an economic sense, Blight and Shafto (1989: 63-64) suggest that consumers themselves are rational beings and essentially seek to maximize their self-interest and their short-term economic interests are satisfied in the marketplace through buying “competing economic goods in such a way that the highest possible level of utility is achieved.” Bakker (2003) <sup>64</sup>argued, however, water itself is hard to define and commodify. It can be treated as either an economic good (private good) or a public good.<sup>65</sup> Throughout much of the 19<sup>th</sup> and 20<sup>th</sup> centuries water was treated as a public good, but has more and more been classified as a private good in the marketplace where utility is maximized (Kaika 2005). *Comanche County Rural Water Dist. No. 1 v. City of Lawton*, stated water is a public good when sold by a city within its city limits, but a private good when sold by a city outside its city limits. Therefore, water outside of a city is subject to competition from other providers which seek development opportunities to maximize their utility.

Some economists assume resources are public goods when they are shared for the benefits of a collection of users (Feldman 1986:141). Feldman argues in favor of the possibility of an assorted collection of decision-makers assembled much like public service utilities, each of which possesses a sizeable degree of independence (pg. 142). Citizens cooperate through the trade of services as well as goods in structured markets, where such collaboration indicates a reciprocal gain (Buchanan and Gordon Tullock 1962). Federalism is portrayed with both positive

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<sup>63</sup> Granting powers to factions that share preferences for a public service may also enhance efficiency by allowing these factions to create artificially-scarce goods at costs borne only by them (Olson 1969).

<sup>64</sup> See *Comanche County Rural Water Dist. No. 1 v. City of Lawton*, 1972. OK 117, 501 P.2d 490, 493

<sup>65</sup> This is because as Bakker (2003) articulated water supply is a “natural monopoly.” It is a natural monopoly because the initial infrastructure costs ensure the biggest supplier in a market, often the first supplier in a market. Therefore, this supplier has an overpowering cost advantage over other actual and potential contenders competing for a market share. Therefore, Bakker (2003) found there was only one market seller.

and negative attributes, demonstrated in the organizational behaviors which, depending on the perspective, “lead to tensions among different levels and entities of government” (Clovis 2006: 9). Clovis is pointing out that each level of government, like individuals, competes for resources to maximize their utility. As Milton Friedman once wrote: “One man's opportunism is another man's statesmanship” (Friedman 1975). Accordingly, competition is essential to increase efficiency and, therefore, not a bad thing. This means that the type of federalism seen in this case study might break down because there really is no competition between the municipality and rural water when Logan, District no. 1 is indebted to the federal government for a rural water loan. In fact, rural water acts like a monopoly under section §1926(b) when protection lasts “during the term” of the loan only (See 7 U.S.C. §1926(b) (1994). Harris (2002) noted rural residents are obligated to sue their local water district for failure to seek damages for a municipal violation of §1926 (b).<sup>66</sup> And, it makes sense to game the system by not paying off the loan early (or to sell their jurisdiction to a municipality). Rural water districts, thus, find ways to gain advantages for their development over that of others.

Because 1926(b) protection expires when the note is paid (and if no other debt to FmHA exists), it is a good strategy for rural water districts not to pay off their notes any earlier than necessary. The interest expense is a small price to pay for the protection the statute provides. It is also a good reason to apply for another loan (FmHA/RUS) well in advance of the existing loan reaching maturity (p. 12).

Logan County Rural Water district, no. 1 manager Robert Thompson was asked in a deposition: “Was one of the reasons why you wanted that funding was to obtain this federal protection?” in the Logan County Rural Water case, and his answer was “Well, to maintain it, yes, keep it.”<sup>67</sup> Therefore, in keeping the federal loan, the water district maximizes its organization’s utility.

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<sup>66</sup> (See also *Wayne v. Village of Sebring* 1994).

<sup>67</sup> Thompson, Robert May 25, 2006. Legal Deposition. *The Rural Water Sewer and Solid Waste Management v. City of Guthrie*.

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In this case there are several participants: 1) Rural Water Board representing the Rural Water District, no. 1 (as well as USDA; Congress) vs. 2) Municipalities (builders and developers). Each party tends to maximize their utility and is self-interested, leading these parties to exploit opportunities to help themselves in the short run. This is similar to Conlan's (2010) idea that, in this way, actors are encouraged to pursue their individual interests over that of the larger community. For example, the Logan County Rural Water District's manager stated in a deposition during the case that his Logan County Rural Water board members are a lot like shareholders in a company where profit is paramount and typically a sole concern.<sup>68</sup> Furthermore, Congress, while not always clear on how to go about obtaining a harmonization between rural and urban communities, makes it clear that it needs to be paid back.<sup>69</sup> The municipality also looked at it in self-interested terms.

Conflict occurs when ambiguity of the law is high because of lack of agreement on a set of goals (in this case, by Congress). As discussed before, while Congressional intent supports rural development, there is also Congressional intent to harmonize rural-urban relationships. Conflict preemption means the courts tussle with the unwritten Congressional intent and generally side with rural water districts because the federal government prioritizes that it has to be paid back. In addition, policy conflict exists when organizations view policies as acting directly on their direct interests and when the organizations have incompatible views (Mosier 2007). Actually, Mosier (2007) argues that ambiguity in itself should not be seen as a flaw in policy because such ambiguity can ease agreement. This ambiguity can create opportunity to learn new goals. Then again, ambiguity coupled with incompatible goals, can create miscommunication and conflict.

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<sup>68</sup> Ibid.

<sup>69</sup> "(1) to encourage rural water development by expanding the number of potential users, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of federally indebted water associations by protecting them from expansion by nearby municipalities." See, e.g., 93 F.3d at 233 (citing *Madison*, 816 F.2d at 1060, in turn citing S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.Code Cong. & Admin. News 2243, 2309).

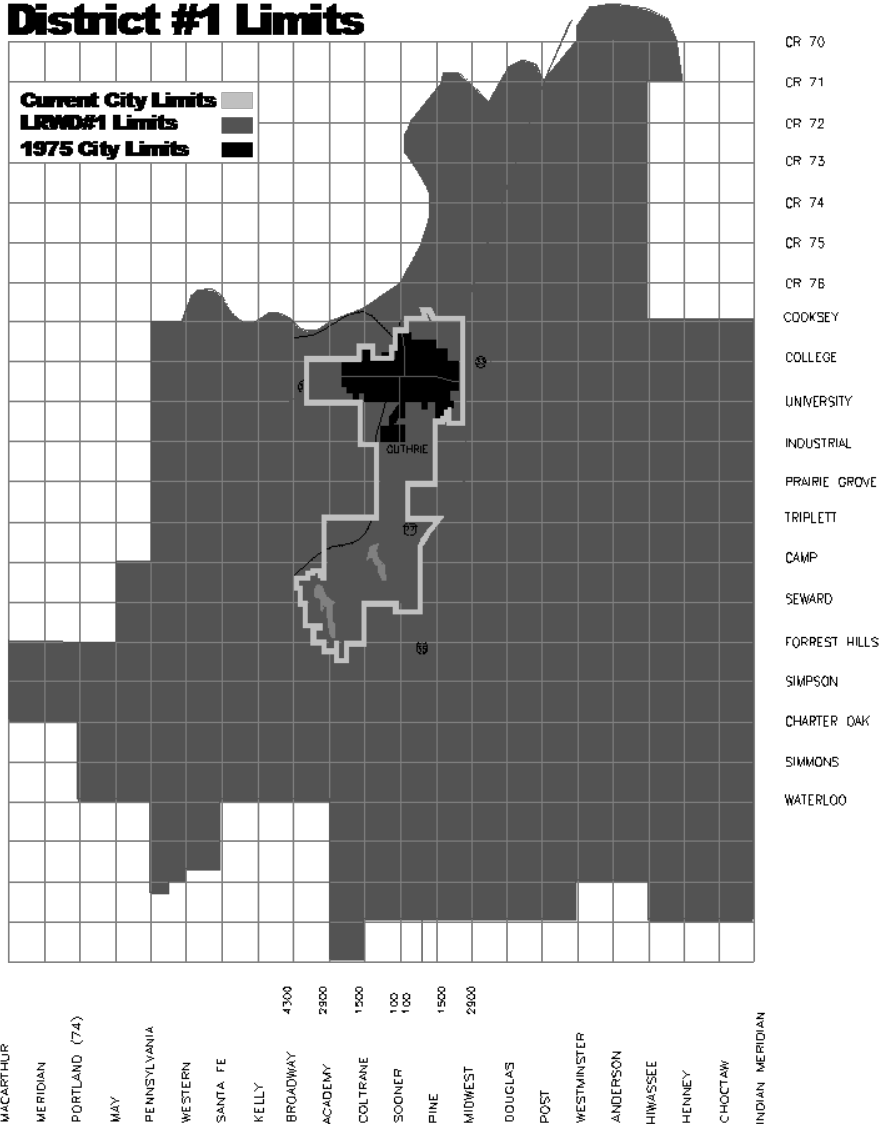
## CONCLUSION

This case study, exploring *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10<sup>th</sup> Cir., 2010), illustrates both maximizing self-interest by all parties involved and high ambiguity as to the congressional intent—creating conflict in courts. By utilizing the hammer of federal preemption as determined by the courts protracted conflict can result. The 79 trials in last 40 years, over water provision disputes between rural and urban stakeholders examined in this paper, demonstrate that harmony between these entities has not improved much as Senators Humphrey and Bellmon had hoped. While thousands of municipalities and rural water districts do not end up in court, there are many municipalities and rural water districts that are mired in court battles, undermining their respective goals for further developmental growth and the broad Congressional intent for rural development. The federal government’s philosophical shift from cooperative federalism to a more coercive form, in order to ensure ambiguous Congressional goals, has experienced failed results at least in obtaining goals of rural and urban harmony in many locales. Those entities that find themselves in court nationwide, as they fight over an ever more scarce resource, are often passionate in their conflict—as evidenced by the name calling often lobbed on both sides in this local vs. local conflict—unnecessarily pitting so called “Domestic Terrorists” vs. “Blackmailers.” Future research must explore how rural and urban entities may learn to work together to resolve these jurisdictional disputes without generating such intense levels of conflict.

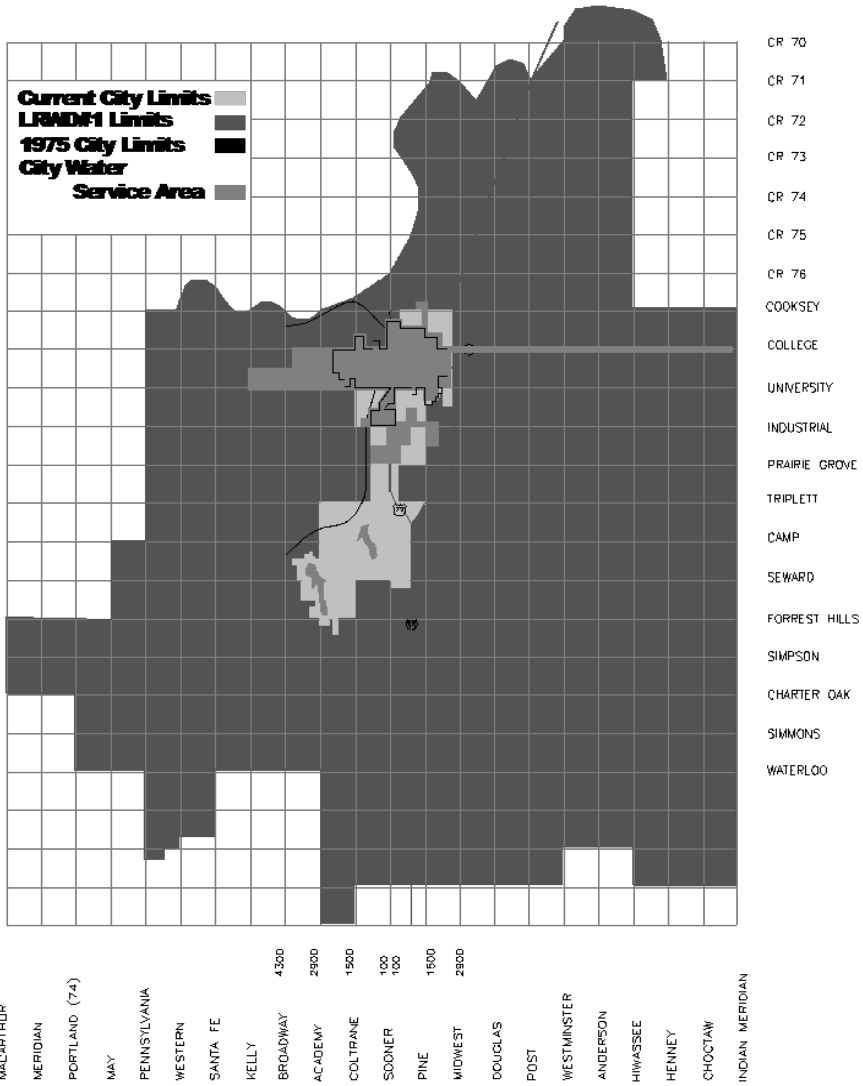
“DOMESTIC TERRORISTS” vs. “BLACKMAILERS”

APPENDIX 1

**City of Guthrie - Current City Limits, 1975 City Limits and Rural Water District #1 Limits**

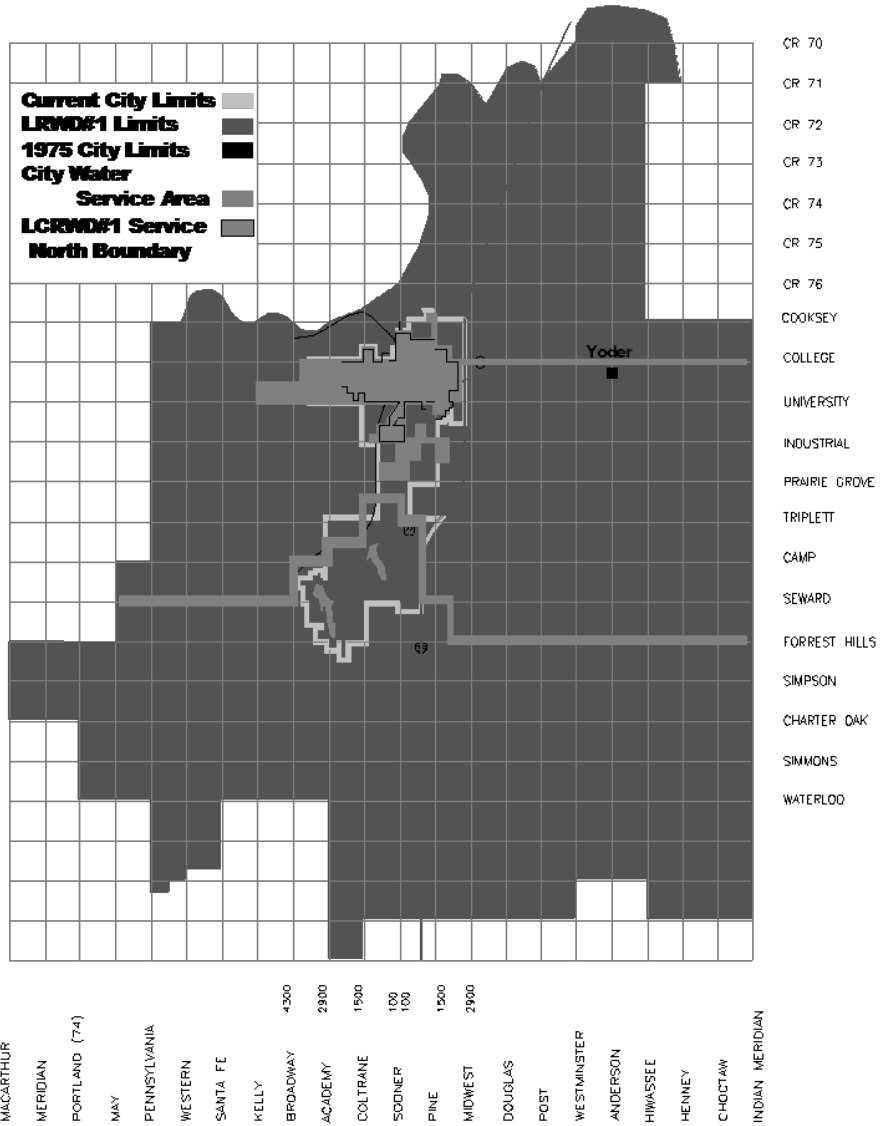


# City of Guthrie - City Water Service Area



“DOMESTIC TERRORISTS” vs. “BLACKMAILERS”

# City of Guthrie - Northern Boundary of LRWD#1 Water Service Area



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*Comanche County Rural Water Dist. No. 1 v. City of Lawton*, 1972 OK 117, 501 P.2d 490, 492.

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