The Owned Property Exclusion and Environmental Insurance Claims

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In courtrooms across the country, insurers and policyholders are doing battle over the contours of coverage for environmental liabilities. The owned property exclusion figures prominently in many of these coverage disputes.[1] Insurers routinely invoke the exclusion in an effort to bar or limit coverage whenever any of the contamination giving rise to a claim is on property owned or leased by the insured.

The case law relating to the owned property exclusion is far less extensive than that addressing other critical coverage issues—for example, the interpretation of "as damages," "neither expected nor intended," and "sudden and accidental." As with these other coverage issues, the courts do not speak to the owned property exclusion with a single voice.

For reasons to be shown, the owned property exclusion—if accorded a fair and reasonable interpretation consistent with the purpose of the exclusion as well as the reasonable expectations of the insured—should very rarely stand as an impediment to coverage.

OFF-SITE AIR AND GROUNDWATER CONTAMINATION

The easiest case, of course, is when contamination migrates off-site and affects the soil on adjacent property. Here, the cases consistently hold that the owned property exclusion does not bar coverage.[2] Likewise, when migrating contamination impacts groundwater, courts have generally held that the owned property exclusion does not apply.[3]

Often the same conditions that cause soil and water contamination also allow chemical pollutants to escape into the air, either in vapor or particulate form. As long ago as the Institute of Justinian, air has been considered *res communes*—common to all and property of none.[4] Though no reported decision has yet to consider the issue, the owned property exclusion should not bar coverage to the extent that claims arise out of actual or alleged air pollution.

Numerous courts have held that the owned property exclusion does not bar coverage of expenses incurred to prevent or mitigate off-site or

groundwater contamination.[5] The fact that expenses are incurred for on-site remediation does not preclude coverage if the purpose, at least in part, is to prevent or mitigate damage to another. As stated by the court in *Lehigh Elect. & Eng'g Co. v. Selected Risks Ins. Co.*, the owned property exclusion:

> . . . does not exclude coverage where the concern is not really the premises of the insured, but rather the imminent risk of substantial harm to the property of others.[6]

Affording coverage for the expense of preventing or reducing third-party damage is consistent with well-established principles of mitigation. As the California Supreme Court recently observed in *AIU Ins. Co. v. Superior Court*, "[a]lthough ... mitigation *per se* is not a necessary incident of property damage... it would be illogical for mitigation costs not to be covered and remedial costs to be covered."[7]

Coverage for expenses incurred to avoid a serious and imminent threat of third-party damage should not depend on whether the migrating contamination has yet reached neighboring property or groundwater. Were this the rule, coverage would become a game of territorial tag—the insured winning coverage if, but only if, the first thimbleful of migrating contamination reaches groundwater or a neighbor's property. If, on the other hand, the migrating plume is discovered and arrested before crossing these magic lines, the expense of remediation—though perhaps the same—would be shouldered by the insured.

To the limited extent that courts have considered this precise issue, most conclude that coverage should *not* turn on whether the migrating contamination was abated before or after it affected groundwater or off-site property.[8] As stated in *Lehigh Elec. & Eng'g. Co. v. Selected Risks Ins. Co.*:

> [T]here is no logical or just reason why an insured should allow a condition on his land to result in damage to others simply to assure and secure coverage when preventive measures could prevent . . . substantial damage or loss to the property of others. . . .
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> If damage to others is imminent and substantial, it would be unreasonable and unjust to require actual damage or loss before affording coverage.[9]

In summary, the owned property exclusion should not bar coverage for damage to off-site property, air, or groundwater. Nor should it preclude coverage for the expense of on-site remediation activity if the activity is undertaken to mitigate a serious threat of such damage.[10] These rules relating to groundwater , air, and off-site contamination should not depend on whether the government or a private party is the claimant in the underlying proceeding.

ON-SITE SOIL CONTAMINATION

There remains to be considered the case of localized soil contamination—contamination that is confined to property owned by the insured and that does not threaten either groundwater or off-site property. Here, too, the owned property exclusion should not preclude coverage—at least not where the claim for coverage arises out of a governmental clean-up mandate.[11]

Defining the Inquiry

Because the analytical issues raised by localized soil contamination are certainly the most difficult, it is worth taking note of the rules of interpretation that provide the touchstone for any such analysis.

A standard form insurance policy is a contract of adhesion that must be interpreted broadly to provide the greatest possible protection for the insured.[12] Exclusions are to be narrowly construed and the insurer has the burden of showing that such a provision applies.[13]

An insurance policy must be construed to protect the reasonable expectations of the insured.[14] Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and any reasonable doubt must be resolved in favor of coverage.[15] A policy provision that is unambiguous in one context may be ambiguous in another.[16] Because an insurance policy must be construed to effectuate rather than frustrate its purpose, if "semantically permissible" it must be interpreted to provide coverage for losses to which the insurance relates.[17]

These rules define the relevant inquiry. Courts in a number of jurisdictions have determined that in the special context of environmental claims and migrating contamination, the owned property exclusion is ambiguous.[18] Coverage for localized soil contamination must be sustained if there is any reasonable interpretation of the insurance policy that would support it—even if the insurer proffers another interpretation that is also reasonable. As stated by the California Supreme Court in *State Farm Auto Ins. Co. v. Jacober*:

> even assuming that the insurer's suggestions are reasonable interpretations which would bar recovery..., we must nonetheless... [find] coverage so long as there is any other reasonable interpretation under which recovery would be permitted . . .[19]

Coverage for Governmentally Mandated Cleanup of On-Site Soil Contamination

It has long been recognized that the government as "sovereign" has a protected interest in *all* natural resources. In *Georgia v. Tennessee Copper Co.*,[20] the State of Georgia brought suit against certain Tennessee copper companies to enjoin the discharge of noxious gases over its territory. The

United States Supreme Court held that an injunction should issue to protect Georgia's residual property interest in all of its natural resources.

> This is a suit by a state for an injury to it in its capacity of quasi-sovereign. *In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.* It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.[21]

In the years since *Tennessee Copper*, numerous state and federal courts have expressly acknowledged the interest held by the sovereign in all natural resources. For example, in *State of Maine v. M/V Tamano*,[22] the court stated:

> It has long been established by decisions of the Supreme Court...that a State has sovereign interests in its...natural resources, which interests are separate and distinct from the interests of its individual citizens.[23]

And in *Hackensack Meadowlands Dev. Comm'n v. Mun. Sanitary Landfill Auth.*, the court stated:

> [T]here resides in each of the several states a power to protect its natural resources. This power is part of what has been called its quasi-sovereignty.[24]

Body of law on sovereign interests

The sovereign interest in all natural resources is reflected and amplified in what has now become a vast body of state and federal statutory and regulatory environmental law. For example, the California Government Code provides:

> . . . It is the policy of this state to prevent destruction, pollution, or irreparable impairment of the environment and the natural resources of this state.[25]

Natural resources are defined broadly to include:

> *land*, water, air, minerals, vegetation, wildlife, silence, historic or aesthetic sites, or any other natural resources which, *irrespective of ownership*, contribute, or in the future may contribute, to the health, safety, welfare, or enjoyment of a substantial number of persons, or the substantial balance of an ecological community.[26]

In short, the state, as sovereign, has a residual interest in all natural resources—even soil on private property. When government action is taken

to protect this interest, application of the owned property exclusion should not depend on what natural resource the state seeks to protect. Whenever environmental remediation is compelled by the government, the insured's claim is not for property damage to its own property, but rather for damage to a third party—namely, the government—which, as sovereign, has an independent interest in all natural resources. The owned property exclusion should not apply in such a case. This proposition finds strong support in several recent decisions.

In *Unigard Mutual Ins. Co., et al. v. McCarty's, Inc.*,[27] the insured sought coverage for claims arising out of soil contamination on property it once owned and used for a metal recycling business. The insurers moved for summary judgment, arguing that there could be no coverage in the absence of off-site or groundwater contamination. Reliance was placed on a technical report that concluded that chemical contamination was confined to shallow soils and had not affected neighboring property or groundwater. The report also indicated that the risk of future migration to adjacent property or groundwater was "extremely low."

The *Unigard* court rejected the insurers' construction of the owned property exclusion, stating:

> Obviously the cost of repairing the insureds' own property for the insureds' benefit cannot be recouped because of the exclusionary provision which denies coverage for property damage to property owned ... by ... the insured. But this exclusion does not prevent coverage for *liability to third parties* caused by property damage to the insureds' property. In fact, when the broad definition of 'property damage' is read together with the exclusion and the policies' introductory paragraph on liability, *it is clear that coverage is expressly provided when the insured becomes liable to third parties for events confined exclusively to the insureds' premises.* A careful reading of the policies shows that while coverage is excluded for the actual *property damage* to the insureds' property, coverage is extended for *liability to third parties* caused by that property damage. In this suit the EPA alleges that the PCB dumping has harmed the environment and endangered the public. *The EPA is not bringing this suit to restore defendants' land for defendants' benefit. Instead, the suit is brought on behalf of a third party—the public.* The policy provides third-party coverage.

The trial court decision in *Intel v. Hartford Acc. & Indem. Co*,[28] adopts a similar approach. And although there was groundwater damage in *Intel*, it is clear from the court's opinion that the result would have been the same even in the absence of damage to groundwater:

> Although the Court's conclusion that ground-water contamination is damage to third parties is sufficient to eliminate Exclusion K [the owned property exclusion], *other damage to third parties is also present.* The EPA's as-

> sessment of Intel's property is tantamount to a governmental finding that the land is a public nuisance . . . *The costs incurred by Intel to abate this public danger must fall outside the ambit of Exclusion K.*

The *Intel* decision gives full recognition to the sovereign interest of the government in *all* natural resources. This is particularly evident in the Court's analysis of the damage issue.

> In this case, EPA and California authorities have concluded that certain steps are necessary to meet the health and safety mandates of the laws...As a matter of law, the Court finds that *all expenses incurred by Intel pursuant to the Consent Decree are governmentally-mandated cleanup expenses which are fully compensable* under the terms of the Hartford comprehensive general liability policy.
>
> *Pre-Consent Decree response costs are also compensable to the extent that they are consistent with the Consent Decree or form a foundation for the work embodied in the Consent Decree.* It would be contrary to the public interest to deny insureds compensation for these costs, because it would discourage [Potentially Responsible Parties] from taking the initiative to implement cleanup prior to the arrival on the scene of the EPA . . . . *[I]f the EPA is likely to have authorized the expenditures* as consistent with the [National Contingency Plan] or as necessary in the aid of protecting the public health or welfare, then *the associated response costs are properly attributable to the insurer.*[29]

Under the rule applied in *Intel*, coverage is provided for any on-site remediation expense compelled by the government, whether or not the particular expense is required to respond to a threat of off-site or groundwater damage. In affording coverage for *all governmentally-mandated cleanup expenses* as well as for any expenses that the government is "likely" to have required, the *Intel* court construed the owned property exclusion in a manner protective of the insured's reasonable expectations and consistent with the practical realities of the twentieth century.

Polkow

Similarly, in *Polkow v. Citizens Ins. Co. of America*,[30] a case involving allegations of groundwater contamination, the court asserted the sovereign's interest in all natural resources as an alternative ground for finding the owned property exclusion inapplicable:

> Alternatively, we conclude that the alleged contamination in this case falls outside of the policy exclusion for damage to the insured's own property for reasons broader in scope. *We hold that these allegations are essentially for injury to the public interest in the well-being of the environment and natural*

resources of this state. This public interest is apparent in the tenor of the statutory framework for environmental protection which . . . vests the [Department of Natural Resources] and the Attorney General with substantial powers to preserve and protect the environment. . . . *[T]his public interest is enough to defeat an exclusion for damage to the insured's own property*. . . (Emphasis added.)[31]

LESSONS TO BE LEARNED FROM THE GROUNDWATER CASES

The danger of slavish adherence to wooden concepts of ownership is well illustrated by the groundwater contamination cases. As noted above, the existence of groundwater contamination has generally been held sufficient to defeat the owned property exclusion. Unfortunately, however, the analysis often employed to reach this result is dubious and threatens to deprive property owners in some states of coverage based on technical distinctions that bear no relevance whatsoever to environmental liability or insurance law.

Claussen

In *Claussen v. Aetna Cas. & Sur. Co.*,[32] the owner of a Florida landfill sought coverage in connection with an EPA proceeding wherein it was alleged that the landfill had contaminated groundwater. Aetna argued that the owned property exclusion precluded coverage because under forum-state law—the law of Georgia—groundwater is technically owned by the surface owner. The district court rejected this argument—opting instead to apply the water law of Florida under which a landowner does not own underlying groundwater.[33]

Who Owns Groundwater?

Whether a policyholder "owns" percolating groundwater depends on whether the property is located in a state that follows the English rule—often referred to as the rule of "absolute ownership"—or instead, one of several other rules that have evolved to allocate groundwater between competing users: the reasonable use rule, the eastern correlative rights rule, the western correlative rights rule, or the rule of prior appropriation.[34]

Under the English rule—still followed in Georgia and several other states—it is said that a landowner owns upward to the sky and downward to the center of the earth.[35] A landowner in such a jurisdiction generally does not incur liability when groundwater usage depletes or obstructs the supply of a neighbor. The use of groundwater in a jurisdiction following one of the other rules is restricted—the specific restriction depending on which rule is followed.[36]

Resolution of coverage for groundwater contamination on the basis of these arcane rules of water law makes little sense.[37] Rules of groundwater

allocation evolved to address questions of liability for the obstruction or diversion of another's groundwater supply.[38] They are relevant to little else—certainly not to insurance or environmental law. In fact, these rules have been completely ignored by courts called upon to assess liability for *groundwater pollution*. As one commentator observed after a survey of water pollution cases:

> One would expect that the same rules which govern use, diversion and obstruction would govern pollution of groundwater . . . But such is not the case . . . . Of the 203 cases involving pollution of percolating groundwater in the United States, England and Canada . . . [o]nly two cases followed one of the percolating groundwater allocation rules.[39]

Ironically, an analysis of the way the English rule actually operates demonstrates that "absolute ownership" is something of a misnomer. In fact, the position of a groundwater user in an "absolute ownership" jurisdiction is more tenuous than that of a user in a jurisdiction following some other rule. In an "absolute ownership" state, each user suffers the risk that a neighbor with a stronger pump or deeper well can lawfully steal that which he "owns." It seems the label of "ownership" has assumed a magic all its own—divorced from reality but sufficient, at least according to the insurer in *Claussen*, to warrant denial of coverage.

A policyholder should not be required to unravel the mysteries of water law to determine whether there is coverage for claims by the government for groundwater contamination. To the reasonable insured, a search for clues to coverage in ephemeral water allocation rules must seem, at best, a journey through Wonderland and, in some cases, a Kafkaesque ordeal. For example in some states, it is not always clear what rules of groundwater allocation and "ownership" are controlling.[40] In other states two different rules of groundwater allocation exist side by side—one for percolating groundwater and another for water that flows in an underground stream.[41] Without an elaborate and expensive hydrogeological investigation to determine whether groundwater is one or the other, a policyholder in such a state cannot begin to evaluate coverage under a *Claussen*-type analysis.[42]

Principles of groundwater ownership are not only arcane and complex—they are subject to change. For example, in Ohio until recently the English rule of absolute ownership was applied to percolating groundwater while a rule of riparian rights was applied to underground streams.[43] In 1984, the Ohio Supreme Court repudiated the English rule for percolating groundwater and adopted a rule of reasonable use.[44] Policyholders interested in the scope of coverage for groundwater contamination would do well to monitor legislative as well as judicial activities. For example, as recently as 1985, the Illinois legislature decided to abandon the English rule in favor of a 'reasonable use' rule.[45]

It is inconceivable that anyone understood the Ohio Supreme Court decision or the Illinois legislation to herald a change in the scope of insurance coverage for property owners. Nor did these developments precipitate any decline in property values by virtue of the loss of some supposedly meaningful right of ownership in groundwater.

The historical happenstance that leaves landowners in some states—unbeknownst to them—vested with ownership of groundwater has no practical significance whatsoever for purposes here. The rule of absolute ownership has certainly not inhibited lawmakers from adopting water quality programs every bit as comprehensive and demanding as those in other jurisdictions.

In sum, there can be little justification for resolving coverage disputes on the basis of obscure principles of water law about which even the most reasonable insured would be blissfully ignorant. The potential for arbitrary and inequitable results is obvious. Imagine a chemical spill on a tract of land straddling the boundary line between Florida and Georgia. If the spill results in localized groundwater contamination, coverage would depend on whether the spill was north or south of the border. All factors could be the same: same insurance policy, same policyholder, same spill, same environmental consequences, same agency response, same remediation expense—only the result would be different.

Reasonable Expectations of the Insured

This cannot possibly be reconciled with the fundamental precept of insurance law that requires protection of the reasonable expectations of the insured. The importance and vitality of this doctrine is well-illustrated by the recent decision of the California Supreme Court in *AIU Ins. Co. v. Superior Court.*[46] In *AIU*, the California Supreme Court held that money that an insured pays to fund a private cleanup in response to an injunction is covered even though the insurance policy expressly limits coverage to money paid *"as damages."* Significantly, the *AIU* court acknowledged that its interpretation rendered the words 'as damages' "meaningless."[47] However, the court concluded that a reasonable insured would expect such expenses to be covered if the expense of a similar cleanup undertaken by the government would be covered.

The *AIU* court reasoned that it would defeat the reasonable expectations of the insured for coverage to hinge on a mere fortuity—namely, the government's decision to seek injunctive relief rather than to perform the cleanup and seek reimbursement. In much the same way it would defy the reasonable expectations of an insured if coverage for a spill in Georgia were denied simply because of the greater resilience in that state of an ancient and irrelevant rule of water allocation—even though the identical spill would be covered in Florida.

CONCEPTS OF OWNERSHIP AND PROPERTY IN THE TWENTIETH CENTURY

The analysis in *Claussen* presumes that an insured's expectations of coverage are formulated by reference to archaic abstractions about ownership instead of the insured's real life experience. Would it not be more reasonable to assume that expectations of coverage derive from, and are consistent with, concepts of "property" and "ownership" as they have actually evolved during the twentieth century?

Property and Ownership: The Sovereign State

The concept of property as absolute dominion no longer prevails. Property is often—and more aptly—described as a bundle of rights or interests. The rights in the bundle change over time. As Professor Cribbet observed, "the traditional bundle of sticks . . . is a different bundle of rights and responsibilities than that which existed early in the century."[48]

Since World War II there have been profound changes in the concept of "property."[49] The rights in the bundle have "shifted and dwindled" and the measure of what one owns is dramatically different from what it once was.[50] An important and undeniable aspect of this change is the return to the public domain of control over natural resources. As one commentator recently observed:

> In recent decades . . . trends in natural resources law increasingly have eroded traditional concepts of private property rights in natural resources and substituted new notions of sovereign power over those resources.[51]

These changes have occurred with respect to *all* natural resources—including land which is privately held. As Professor Lazurus comments:

> What is especially interesting about the trend in private property rights in natural resources is that rights in resources such as land, traditionally a matter of exclusive private ownership, and rights in resources such as air, traditionally a matter of communal ownership, apparently converge to a middle ground at which the government attempts to accommodate society's interest in environmental quality and resource conservation and its simultaneous interest in providing for some level of private property rights.[52]

The state's dominion over land is just as pervasive as it is over any other natural resource—at least for purposes of abating contamination. In the event of a chemical release—even one that is completely confined to soil on "private" property—state and federal agencies are empowered to exercise rights of occupation and control which, for any other purpose, would be reserved to the holder of title. And if the private and public interests clash—such as when environmental remediation requires disruption or destruction

of private property—the interest of the sovereign prevails.

Although statutory and judicial declarations in some states purport to vest "ownership" of all water resources in the state,[53] such pronouncements add little to the analysis. Indeed, it has long been recognized—even in the face of such pronouncements—that the state "owns" water in a limited sense only. The concept of "state ownership" of water evolved to legitimize control and regulation by the state pursuant to its police power. The state "owns" water—just as it retains an interest in land—in its capacity as sovereign, not in any proprietary sense.[54]

More than forty years ago, the United State Supreme Court observed:

> The whole ownership theory, in fact, is now generally regarded as but *a fiction* expressive in shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. (Emphasis added.)[55]

Several years later Roscoe Pound addressed the same issue:

> [T]he so-called state ownership . . . is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river, as it owns the furniture in the state house . . . . What is meant is that conservation of important social resources requires regulations. . . .[56]

More recently a commentator on water law observed:

> State ownership means only that the states are able to exercise their police power. . . . If one must persist in speaking in terms of ownership it would seem better to say that the states own the water to the extent that they control its use, not that they control because they own it.[57]

In short, the true character of the state's "ownership" of water is not materially different from the residual interest it holds in land. In each case—as in the case of any natural resource—the sovereign "owns" those sticks in the bundle that allow for environmental regulation and conservation.

State and federal permitting regulations

Perhaps the most compelling evidence that the sovereign "owns" environmental rights in all natural resources is to be found in state and federal permitting programs. In effect, these programs bestow on permit-holders the right to use up or impair natural resources, including the right—under specified circumstances—to discharge or dispose of pollutants.[58]

Where environmental remediation is mandated by the government, a distinction between on-site soil and other natural resources is no more tenable than the distinction discussed earlier between groundwater in

Florida and groundwater in Georgia; or the distinction under Ohio law between percolating groundwater and underground streams. Soil contamination caused by a spill at the center of the policyholder's property will elicit the same agency response, and will entail the same remediation expense, as it will if it occurs near the perimeter and migrates off-site. In each case, the government acts as guardian of the public interest—a function that does not depend on injury to an adjacent landowner.

The purpose of the owned property exclusion is to preserve the distinction between a liability policy (which is intended to provide coverage for liability to another) and a first-party policy (which is intended to cover loss to the insured). This distinction supports a reasonable expectation that there will be coverage for remediation activity compelled by the government. An environmental claim—even a claim arising out of soil contamination on the insured's property—is like any other liability claim and bears little resemblance to a conventional first-party claim. When a first-party claim is made—for example, to allow repair of a tree-crumpled roof—the sums paid are solely for the benefit of the insured. The roof is repaired because the insured wants it repaired—not because failure to do so may lead to jail. In contrast, the policyholder directed to clean up contamination, like the judgment debtor in a tort action, has no choice. Subsurface contamination generally does not interfere with any use of the property—nor does remediation restore any lost function. Any notion that remediation is for the benefit of the insured rather than to address injury to the public interest is belied by the fact that the cost of remediation often exceeds the value of the affected property.[59] A policyholder facing such liability is certainly reasonable in expecting coverage under a *Comprehensive General* Liability policy—a policy that purports to provide comprehensive protection against third-party liabilities.

OTHER PRACTICAL CONSIDERATIONS

A rule that requires off-site or groundwater damage to trigger coverage creates an unfortunate incentive to forgo aggressive mitigation in favor of a more cautious approach designed to do nothing more or any sooner than the law requires. Insureds who act quickly and responsibly to avoid off-site and groundwater contamination are punished with a loss of coverage. Those less quick to discover or respond to an environmental problem receive the insurance protection for which they paid.

A rule that draws distinctions between on-site soil and other natural resources is not only arbitrary and unfair—it is unworkable. Such a rule presumes an ability to determine with precision when contaminated groundwater or adjacent property is first affected. For example, determining which in a series of successive policies must respond, or whether coverage was triggered before the introduction of an absolute pollution exclusion,

might well require fixing the date when off-site or groundwater damage first occurred. This is not unlike asking a forestry expert to fix the date when a decaying tree first fell to the ground.

While techniques of mathematical modeling exist that permit educated speculation on such matters, these methodologies are expensive and subject to error. A recent publication prepared for the U.S. Environmental Protection Agency on the current state of such technology reports that the difficulties encountered in applying theoretical models to actual cases:

> can cause *substantial errors in the most careful analysis*. Assumptions and simplifications . . . must often be made in order to obtain mathematically tractable solutions. Because of this, the magnitude of errors that arise from each assumption and simplification must be carefully evaluated. The phrase magnitude of errors is emphasized because *highly accurate evaluations usually are not possible*. Even rough approximations are rarely trivial exercises because they frequently demand estimates of some things which are as yet ill-defined.
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> In many ways there may be too much confidence among those not directly involved in groundwater quality research regarding current abilities to predict transport and fate of contaminants in the subsurface.[60]

In short, because contaminants travel unseen in ways not completely understood, a rule that distinguishes between on-site soil and other natural resources relegates coverage determinations—at least in some cases—to a technical game of blind man's bluff. This difficulty has not escaped the attention of the courts. For example, the district court in *New Castle County v. Continental Cas. Co.* adopted a continuous trigger of coverage because

> [i]t would be impossible . . . to determine when the first molecule of contaminant damaged neighboring property or at what rate the contamination spread . . . This Court will not impose on either party the task of proving the impossible . . . [T]hus every policy from the start of the injurious process is triggered.[51]

Timing of the Discovery

While the characteristics of chemical migration support use of a continuous trigger of coverage, this alone is not enough to address the problems inherent in a rule that distinguishes on-site soil from other natural resources. Suppose, for example, that migrating contamination from a chemical spill on January 1, 1975, would—if not abated—first reach off-site soil exactly seven years later on January 1, 1982.[62] If the contamination was not discovered until February 1982—after it had already affected adjacent property—the continuous trigger theory applied in *New Castle* would require each policy from 1975 through 1982 to respond. If, however, the con-

tamination was discovered and arrested several months earlier, *no* policy would be triggered under a rule that distinguishes on-site soil from other natural resources.

The liability of carriers with policies in effect long before discovery of the contamination would hinge on mere fortuity—namely, whether discovery occurred before or after initial groundwater or off-site impact. The same polluting event that would trigger coverage of all policies if not discovered until after such impact, might trigger none if discovered only a few months earlier. It would come as an "unexpected, if not incomprehensible shock to the insured" to learn that the owned property exclusion could be interpreted to make coverage under a policy in effect at the time of a chemical release depend on when someone happened to stumble upon the contamination many years later.[63]

PRIVATE ACTIONS ARISING OUT OF ON-SITE SOIL CONTAMINATION

Depending on the circumstances, the rationale for affording coverage for mandatory remediation of localized soil contamination may or may not apply when the underlying dispute is between private parties. As noted, coverage must be afforded for remediation compelled by the government because in such a case the insured's claim is not for damage to its own property, but rather for damage to the independent property interests of a third party—namely, the sovereign—which has a residual interest in all natural resources.

If a dispute between private parties arises out of a governmentally mandated cleanup, coverage must be provided for precisely the same reason. For example, if the government conducts a cleanup of localized soil contamination and thereafter sues only one of two co-owners for reimbursement, a private action for contribution against the noncontributing co-owner must be covered. Like the government action in the first instance, the claim arises out of damage to the independent property interests of the sovereign. The mere fortuity that the government chose to pursue only one co-owner should not deprive the second co-owner of coverage when, in substance, the same claim is asserted by the party forced to respond on behalf of both.

To the extent a claim for localized on-site soil contamination does *not* arise out of a governmentally compelled cleanup, the owned property exclusion should preclude coverage. This would be the case, for example, if low-level localized soil contamination—contamination below the applicable government action level—gives rise to a lawsuit between private parties. A suit by one co-owner against another for negligence in causing the contamination would not be covered. In such a case, the damage giving rise to the claim is damage to the same property interests—the same sticks in the

bundle—that are owned by the insured.

For much the same reason, the owned property exclusion would preclude coverage for claims brought by a landlord against a tenant arising out of localized soil contamination that is not the subject of a government action. Here again, the claim is not for damage to the independent residual interest of the public in all natural resources—but rather to property interests that remain vested in a private titleholder. The fact that these interests are transferred—either for a specified term pursuant to lease, or permanently by outright sale—should not expand coverage for on-site damage that would not be covered in the absence of such a transfer. In this regard, the owned property exclusion bars coverage for damage to property interests transferred to a tenant, and the closely related 'alienated property' exclusion bars coverage for damage to property interests transferred to a purchaser.[64] Obviously, a titleholder can grant neither tenant nor purchaser the residual interest in property owned by the sovereign—and so these exclusions should not be applied when claims arise out of damage to the public's interest in the property. The analysis in *Intel* and *Unigard* demonstrate how and why this is the case.

In *Intel* a tenant sought coverage for the expense of remediating contamination that affected the leasehold property as well as groundwater. As noted above, the *Intel* Court found coverage for *all* governmentally mandated expenses—in part, on the theory that any such expenses were incurred as a result of injury to the public. With respect to nonmandated expenses, only those that "solely relate[d]" to the leased property would be excluded.[65] In short, the owned property exclusion would bar coverage of an expense only if it was not mandated by the government *and* not required to prevent off-site or groundwater damage.

In *Unigard*, the insured sought coverage both for claims brought by EPA as well as for claims brought by a party that purchased the affected property. Because the EPA enforcement proceeding named both the insured and the purchaser as defendants, the purchaser's action included claims for contribution and indemnification. In analyzing the impact of the alienated premises exclusion, the *Unigard* Court reasoned:

> this exclusion only prohibits coverage for property damage to alienated premises, not liability to third parties. Where suit is brought simply to restore the premises for the benefit of the new owner, the exclusion clearly applies ... [The action brought by] Pacific [the purchaser] contains claims for indemnification and contribution which allege that if Pacific is found liable to the EPA, Pacific is entitled to recoup its losses from the defendant McCarty's Inc. [the insured]. If the indemnity or contribution claims are ultimately successful, McCarty's Inc., would essentially be liable for the EPA cleanup costs which are not excluded by Transportation's policy. Thus with regard to the indemnification and contribution claims, the Court cannot

> hold that Transportation has no duty to defend or indemnify McCarty's Inc. With regard to any other damages Pacific seeks in order to restore the property sold to it by McCarty's, Transportation's policy clearly excludes coverage under the alienated-property provision. . . .[66]

In summary, the owned property exclusion bars coverage of some—but not all—claims arising out of soil contamination confined to property owned or leased by the insured. If such a claim for coverage arises out of a dispute between private parties that is not precipitated by a governmental mandate for remediation, the owned property exclusion is properly applied. In any other case, the owned property exclusion should not bar coverage.

CONCLUSION

The owned property exclusion will surely be the subject of substantial litigation in the years ahead. Whether a consistent and coherent approach will evolve for its application to environmental claims remains to be seen. There should be no doubt, however, as to the need for such an approach.

Nothing can be said in defense of a rule that relegates litigants to the kaleidoscopic netherworld of state water law to determine coverage for contamination. The cases analyzing the owned property exclusion in the context of groundwater contamination, while generally finding coverage on the facts presented, do precisely that.

Denial of coverage simply because affected groundwater percolates rather than flows in a stream, or because it is located in a state where disputes over groundwater allocation are still resolved as they once were in England, defies common sense. One should not be required to consult a phalanx of water lawyers to read a policy that purports to provide coverage on a nationwide basis.

The groundwater contamination cases highlight the need for an analytical approach that is better suited to the unique circumstances of environmental claims. The framework for such an approach can be found in the *Unigard*, *Intel*, and *Polkow* decisions. These cases acknowledge that if environmental remediation is compelled by the government, the insured's claim is not for damage to its own property, but rather for damage to the independent interest of the sovereign in all natural resources.

If remediation is mandated by the government, a distinction between on-site soil and other natural resources is no more appropriate than a distinction between percolating groundwater and an underground stream. Resolving coverage on the basis of such a distinction is out of step with the practical realities of environmental law and prevailing concepts of "property"; it requires greater certainty about chemical migration than current technology permits; and it discourages aggressive mitigation. Most significant,it tramples upon the expectations of the insured by allowing coverage to hinge on mere fortuity—whether, for example, drought conditions have lowered

the water table; how close to the front gate a truck spill occurs; or whether a caretaker happens upon contamination before or after it crosses the fence line.

Courts have had little difficulty construing the owned property exclusion to permit coverage of on-site remediation if needed to address a *threat* of third-party injury. If the same on-site activity is required to address an *actual* third-party injury, the arguments for coverage are all the more compelling.

NOTES

1. The 1973 ISO Comprehensive General Liability policy excludes "property damage to property owned or occupied by or rented to the insured." The 1985 ISO Commercial Liability Policy excludes "property damage to property you own, rent or occupy."

2. *See, e.g., Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813 (1989) (appeal pending); *Allstate Ins. Co. v. Quinn Const. Co.*, 713 F. Supp. 35 (D. Mass. 1989); *New Castle County v. Continental Casualty Co.*, 933 F.2d 1162 (3rd Cir. 1991).

3. *See, e.g., Claussen v. Aetna Casualty & Surety Co.*, 754 F. Supp. 1576 (S.D. Ga. 1990); *Bankers Trust Co. v. Hartford Acci. & Indemn.*, 518 F. Supp. 371 (S.D.N.Y. 1981) *vacated due to settlement*, 621 F. Supp. 685 (S.D.N.Y. 1981); *United States v. Conservation Chemical Co.*, 653 F. Supp. 152 (W.D. Mo. 1986); *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843-4 (1983); *Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813, 819 (1989), *appeal pending; State v. N.Y. Cent. Mut. Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S. 2d 402 (1989). *But, see, Northwestern Nat. Ins. Co. v. Kinney*, 444 N.W.2d 107 (Iowa App. 1989).

4. *See, National Audubon v. Superior Court*, 33 Cal. 3d 419, 433-4 (1983), *cert. denied, Los Angeles Dept. of Water & Power v. National Audubon Soc.*, 464 U.S. 977 (1983).

5. *See, e.g., Lehigh Elec. & Eng'g Co. v. Selected Risks Ins. Co.*, 30 Pa. D.&C. 3d 120 (Pa. Comm. Pl. Luzerne County 1982); *Aronson Assoc., Inc. v. Pennsylvania Nat'l Mutual Cas. Ins. Co.*, 14 Pa. D.&C. 3d 1 (C.C.Pl. 1977), *aff'd* 272 Pa. Super. 606, 422 A. 2d 689 (1979); *Claussen v. Aetna Casualty & Surety Co.*, 754 F. Supp. 1576 (S.D. Ga. 1990); *Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813 (1989) (appeal pending); *Bankers Trust Co. v. Hartford Acci. & Indem.*, 518 F. Supp. 371 (S.D.N.Y. 1981) *vacated due to settlement*, 621 F. Supp. 685 (S.D.N.Y. 1981); *Allstate Ins. Co. v. Quinn Const. Co.*, 713 F. Supp. 35 (D. Mass. 1989); *Consolidated Rail Corp. v. Certain Underwriters*, No. 84-2609, slip op. (E.D. Pa. June 3, 1986) *reprinted in* Insurance Industry Lit. Rptr. July 2, 1986 at 2097; *United States v. Conservation Chemical Co.*, 653 F. Supp. 152 (W.D. Mo. 1986); *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800, 816 (D. Del. 1989) 933 F.2d 1162 (3rd Cir. 1991). *Jones Truck Lines, et al. v. Transport Insurance Co.*, 1989 U.S. Dist. LEXIS 7219 (E.D. Pa. 1989); 1989 U.S. Dist. LEXIS 5092 (E.D. Pa., 1989); *Boyce Thompson Institute v. Insurance Co. of North America*, 751 F. Supp. 1137 (S.D.N.Y. 1990); *State v. N.Y. Cent. Mut. Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (A.D.3 Dept. 1989).

6. 30 Pa. D.&C. 3d. 120, 126, 128-129 (Pa. Comm. Pl. Luzerne County 1982). *See, also, Broadwell Realty Services, Inc. v. Fidelity & Cas. Co.*, 218 N.J. Super. 516, 528 A.2d. 76, 82 (The fact that preventive measures are taken on the insured's property rather than on adjacent land has "no legal significance.")

7. 51 Cal. 3d at 833, n. 14, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990); *See also, Intel Corp. v. Hartford Acci. & Indemn Co.*, 692 F. Supp. 1171, 1190-2 (N.D. Cal. 1988) (appeal pending); *Lehigh Electric & Eng'g Co. v. Selected Risks Ins. Co.*, 30 Pa. D.&C. 3d 120, (Pa.

Comm. Pl. Luzerne County 1982).

8. *See, e.g., Lehigh Elec. & Eng'g. Co. v. Selected Risks Ins. Co.*, 30 Pa. D.&C. 3d 120 (Pa. Comm. Pl. Luzerne County, 1982); *Jones Truck Lines, et al. v. Transport Insurance Co.*, 1989 U.S. Dist. LEXIS 7219 (1989); 1989 U.S. Dist. LEXIS 5092 (1989); *Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 229 N.J. Super. 56, 550 A.2d 1235, 1240 (1988) (owned property exclusion might not be applicable if "immediate and imminent" threat to third party property; remanded for further proceedings); *Diamond Shamrock v. Aetna Casualty*, 23 N.J. Super. 1, 554 A.2d 1342 (1989) (same); *State of New Jersey v. Signo Trading Int'l.*, 235 N.J. Super. 321, 562 A.2d 251 (N.J. Super. A.D. 1989) *cert. granted*, 500 A.2d 980 (1989) (owned property exclusion held to be applicable because threat of third-party damage found to be neither imminent nor immediate) (appeal pending). *See, also, Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F. Supp. 35, 41 (D. Mass. 1989) ("In the unique context of environmental contamination, where prevention can be far more economical than post-incident cure, it serves no legitimate purpose to assert that soil and groundwater pollution must be allowed to spread over boundary lines before they can be said to have caused the damage to other people's property which liability insurance is intended to indemnify. *Claussen v. Aetna Casualty & Surety Company*, 754 F. Supp. 1576, 1580 (S.D. Ga. 1990)) ("in essence, the demonstrated danger to third person's property is damage to another's property, which is covered by the insurance policy . . . [E]ven if the pollution had not yet damaged the surrounding land and water, the imminent threat justified cleaning up the site to prevent damage to the surroundings. . . . Construing the insurance policies to cover prevention techniques is the only reasonable result under the circumstances . . ."); *C.K. Smith & Co. v. American Empire Surplus Lines Ins. Co.*, (No. 85-32950, slip op. at 4 (Mass. Sup'r. Sept. 27, 1989) *reprinted in* Insurance Industry Lit. Rptr. October 10, 1989, at 8198 ("the 'owned property' exclusion does not bar recovery of cleanup costs where the environmental contamination presented a danger to the property of another.") *But, see, Western World Ins. Co. v. Dana*, No. S-90-1374, slip. op., (E.D. Cal., June 20, 1991) 91 Daily Journal D.A.R. 8448 (on-site soil) remediation not covered as mitigation expense absent off-site or groundwater damage).

9. 30 Pa. D.&C. 3d 120, 126, 129 (Pa. Comm. Pl. Luzerne C'ty. 1982).

10. If some, but not all, of the on-site activity will prevent or mitigate off-site or groundwater damage, an allocation between covered and non-covered expenses may be required. *See, e.g., Jones Truck Lines, et al. v. Transport Insurance Co.*, 1989 U.S. Dist. LEXIS 7219 (E.D. Pa. 1989); 1989 U.S. Dist. LEXIS 5092 (E.D. Pa. 1989); *Broadwell Realty Services, Inc. v. Fidelity and Casualty Company of New York*, 218 N.J. Super. 516, 528 A.2d 76 (1987).

11. The case law on this point is limited and in conflict. *See, Boyce Thompson Institute v. Insurance Co. of N.A.*, 751 F. Supp. 1137, 1142 (S.D.N.Y. 1990) (describing case law as "unsettled"). *Compare, Unigard Mutual Ins. Co. et. al. v. McCarty's, Inc.*, 756 F. Supp. 1366 (D. Idaho 1988) with *Western World Ins. Co. v. Dana*, No. S-90-1374, slip. op. (E.D. Cal., June 20, 1991) 91 Daily Journal D.A.R. 8448 (no coverage for soil contamination). Most reported cases that address the owned property exclusion did involve some groundwater or off-site damage, and therefore did not present the issue of localized soil contamination. *See,* cases cited at footnotes 2 and 3. Cases that posit a need for the threat of off-site or groundwater damage to trigger coverage are at least implicitly inconsistent with affording coverage for localized soil contamination. Nonetheless, as stated above, in almost all of the owned property exclusion cases it appears that the court did not consider or analyze the arguments discussed below supporting coverage for localized soil contamination.

12. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 269-270, 54 Cal. Rptr. 104, 419 P.2d 168 (1966); *State Farm Mut. Auto, Ins. Co. v. Partridge*, 10 Cal. 3d 94, 101, 109 Cal. Rptr. 133, 514 P.2d 123 (1973).

13. *Harris v. Glens Falls Ins. Co.*, 6 Cal. 3d 699, 701, 100 Cal. Rptr. 133, 493 P.2d 261 (1972); *Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 808, 18 Cal. Rptr. 628, 640 P.2d 764 (1982).

14. *Century Bank v. St. Paul Fire & Marine Co.*, 40 Cal. 3d, 319, 321, 93 Cal. Rptr. 569, 482 P2d 193 (1971). *Reserve Ins. Co. v. Pisciotta, supra.*

15. *Crane v. State Farm Fire & Cas. Co.*, 5 Cal. 3d 112, 115, 95 Cal. Rptr. 513, 485 P.2d 1129 (1971); *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990); *AIU, supra*, 51 Cal. 3d at 822.

16. *See, e.g., AIU, supra*, 51 Cal. 3d at 841, n.18 ("damages" held to be ambiguous in the special context of environmental claims).

17. *Harris v. Glens Falls Ins. Co.*, 6 Cal. 3d 699, 701, 100 Cal. Rptr. 133, 493 P.2d 861 (1972); *Crane v. State Farm Fire & Cas. Co., supra*, 5 Cal. 3d at 115.

18. *See, e.g., Lehigh Elec. & Eng'g Co. v. Selected Risks Ins. Co.*, 30 Pa. D.&C. 3d 120, 129 (Pa. Comm. Pl. Luzerne County 1982) ("this exclusionary clause is susceptible of various interpretations and . . . should be construed . . . in favor of the insured"); *Bankers Trust Co. v. Hartford Acci. & Indemn. Co.*, 518 F. Supp. 371, 374 (S.D.N.Y. 1981), *vacated due to settlement*, 621 F. Supp. 685 (S.D.N.Y. 1981) ("because the policies are ambiguous as applied to this situation, the proper construction is one that yields a reasonable result"); *Township of Gloucester v. Maryland Gas Co.*, 668 F. Supp. 394, 400 (D.N.J. 1987).

19. 10 Cal. 3d 193, 202-3, 110 Cal. Rptr. 1, 514 P.2d 953 (1973).

20. 206 U.S. 230; 27 S. Ct. 618 (1907).

21. 206 U.S. at 237, 27 S. Ct. at 619. (Emphasis added.)

22. 357 F. Supp. 1097, 1100 (D. Me. 1973).

23. 357 F. Supp. 1097, 1100 (D. Me. 1973).

24. 68 N.J. 451, 477, 348 A.2d 505, 518 (1975), *rev'd on other grounds*, 437 U.S. 617 (1978); *See, also, Lansco, Inc. v. Dep't of Envtl. Protection*, 138 N.J. Super. 275, 350 A.2d 520, 524 (1975) *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977) ("It has long been established that the sovereign's interest in the preservation of public resources and the environment enables it to maintain an action to prevent injury thereto."); *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1051 (2nd Cir. 1985) (state as "guardian of the environment"); *Missouri v. Illinois*, 180 U.S. 208, 21 S. Ct. 331, 344 (1901); 17 Wright & Miller, Federal Practice and Procedure §4047 (1988) and cases cited at n.14, 15 (state's right to protect its quasi-sovereign interest by suit under doctrine of *parens patriae*).

25. Cal. Gov't. Code §12600.

26. Cal. Gov't. Code §12605. *See also*, Cal. Gov't. Code §12607 (Attorney General may sue "any person for the protection of the natural resources of the state from pollution, impairment, or destruction."); Cal. Health & Safety Code (H&S) §4010 *et seq.* (California Safe Drinking Water Act); H&S §25100 (Hazardous Waste Control Act); H&S §25300 *et seq.* (Hazardous Substance Account); H&S §39000 *et seq.* (Air Resources); Cal. Water Code §13000 *et seq.* (Water Quality); La. Constr. Art. IX; Pa. Const. Art I §27; Clean Air Act, 42 U.S.C.A §§7401 *et seq.* (1982); National Environmental Policy Act, 42 U.S.C.A. §§4321-4347 (1982); Federal Water Pollution Control Act, 33 U.S.C.A. §§1251-1376 (1982); Comprehensive Environmental Response and Liability Act of 1980, as amended, 42 U.S.C.A. §§9601 *et seq.*

27. 756 F. Supp. 1366 (D. Idaho 1988).

28. 692 F. Supp. 1171 (N.D. Cal. 1988), *appeal pending*.

29. 692 F. Supp. at 1194 (Emphasis added).

30. 180 Mich. App. 651, 447 N.W.2d 853 (1989), *appeal pending*.

31. 447 N.W.2d. at 857 (emphasis added); *See also, Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813, 819 (Mich. App. 1989) (appeal pending) ("The improper release of toxic wastes may cause property damage not only to the actual owner of the land, but also to the government because of its independent interest, behind the titles of its citizens, in all the air and earth (i.e., its natural resources) within its domain."); *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541, 1550 (S.D. Fla. 1987) ("[W]here the property damage alleged constitutes damage to the environment... such property in truth belongs not to the Plaintiffs, but rather to the State and the citizens thereof, and simply is not capable of being privately owned."); *Aronson Assocs. Inc. v. Pennsylvania Nat'l Mutual Casualty Ins. Co.*, 14 Pa. D.&C. 3d 1,9 (C.C. Pl. 1977), *aff'd mem.* 272 Pa. Super. 606, 422 A.2d 689 (1979) ("Because a basis for civil liability to the Commonwealth exists, the exclusions relating to property owned by the insured are likewise inapplicable"); *Boyce Thompson Institute v. Insurance Co. of N.A.*, 751 F. Supp. 1137, 1141 (S.D.N.Y. 1990). One court has recently held that the sovereign's interest in soil is not sufficient to overcome the owned property exclusion. *See also, Western World Ins. Co. v. Dana*, No. S-90-1374, slip. op., (E.D. Cal., June 20, 1991) 91 Daily Journal D.A.R. 8448 (state interest in soil on private property held to be insufficient to defeat owned property exclusion); *State of New Jersey v. Signo Trading Int'l. supra*, at 857.

32. 754 F. Supp. 1576 (S.D. Ga. 1990).

33. The *Claussen* Court identified two alternative grounds for finding the owned property exclusion inapplicable—first, that off-site damage may have occurred and second, that such damage was, at the very least, threatened. 754 F. Supp. at 1580.

34. Davis, *Wells and Streams*, 37 Mo. Law Rev. 189, 201-204 (1972); *See generally*, 78 Am. Jur. 2d *Waters* §§156 *et seq.*; Annotation, 29 ALR 2d 1354, *Liability For Obstruction Or Diversion of Subterranean Waters In Use of Land.*

35. The English rule has been codified in some states. *See, e.g.*, Codes Ga. Ann'd. §§44-1-2(B); 51-9-9.

36. *See, Wells and Streams, supra* at 201-204.

37. In addition to *Claussen*, several other owned property exclusion cases have applied the same analysis, determining "ownership" of contaminated groundwater by reference to state law regarding groundwater allocation. *See, e.g., United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838, 843-4 (1983) (groundwater not owned by overlying landowner under Michigan law); *U.S. v. Conservation Chemical Co.*, 653 F. Supp. 152 (W.D. Mo. 1986) (same; Missouri law); *Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813, 819 (1989), *appeal pending* (same; Puerto Rico law); *Aronson Associates v. Pa. Nat'l Casualty Ins.*, 14 Pa. D.&C. 3d 1, 9 (C.C. Pl. 1977), *aff'd mem.* 272 Pa. Super. 606, 422 A.3d 689 (1979) (streams and pools owned by state under Pennsylvania law); *State v. N.Y. Cent. Mut. Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (1989) (groundwater is a natural resource protected by state as trustee under New York law).

To date no reported decision has denied coverage on the basis that controlling state law vests ownership of contaminated groundwater in the surface owner. However, in *Allstate Ins. Co. v. Quinn Const. Co.*, 713 F. Supp. 35, 40 n.7 (D. Mass. 1989), the court suggested that because Massachusetts follows the absolute ownership rule it would have been forced to deny coverage were it not for the fact that there was off-site contamination in addition to

groundwater damage.

38. A state's adoption of, and adherence to, one rule over another was often the result of historical beliefs about how best to promote development, as well as about the inherent nature of groundwater. *See,* 78 Am. Jur. 2d *Waters* §157 at 607; Davis, *Wells and Streams, supra,* at 201-202.

39. Davis, *Groundwater Pollution: Case Law Theories for Relief,* 39 Mo. Law Review 117, 120 (1974).

40. *See, e.g., Higday v. Nickolaus,* 469 S.W.2d 859 (Mo. 1971) (adopting rule of reasonable use after observing that existing law was limited and provided little guidance).

41. *Wells and Streams, supra,* at 201.

42. The distinction between percolating groundwater and underground streams has been "roundly criticized" by some hydrogeologists and experts in water law. *See, Higday v. Nickolaus,* 469 S.W.2d 859, 865 n.2 (1971).

43. *Huelsmann v. State,* 56 Ohio App. 2d 100, 381 N.E. 2d 950, 952 (1977).

44. *Cline v. American Aggregates Corp.,* 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984).

45. Water Use Act of 1983, Ill. Rev. Stat. 1985, ch. 5, par. 1601 *et seq. See, Bridgeman v. Sanitary Dist. of Decatur,* 164 Ill. App. 3d 287, 517 N.E. 2d 309, 314 (1987) ("the [Water Use] Act represents a significant change in groundwater law in Illinois").

46. Cal. 3d. 807, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990).

47. 51 Cal. 3d at 838.

48. Cribbet, *Concepts In Transition: The Search For A New Definition of Property,* 1986 U. Ill. L. Rev. 1,1 (1986); *See also,* Property Law and Legal Education, Essays In Honor of John E. Cribbet (P. Hay & M. Hoeflich, Eds. (1988)), Freyfogle, "The Evolution of Property Rights: California Water Law As A Case Study," 73 at 75; ("[T]he boundaries of private property rights are constantly shifting and this shifting process is an inherent part of our legal tradition.")

49. *See,* Cribbet, *supra,* at 1. *See also,* Note, *Private Property Rights Yield To The Environmental Crisis,* 41 S.C. L. Rev. 897, 915 (1990) ("From a theoretical standpoint, the resultant trends are indicative of dramatic and previously unimagined changes in the American conception of property ownership and the balance between public and private rights.")

50. Freyfogle, *supra,* at 74.

51. Lazurus, *Changing Conceptions of Private Property And Sovereignty In Natural Resources: Questioning The Public Trust Doctrine,* 71 Iowa L. Rev. 631, 633 (1983). *See, also,* Note, 41 S.C. L. Rev 897, *supra* at 917 ("[T]he recognition of public rights in private natural resources . . . illustrates changing conceptions of sovereignty and the role of the sovereign in allocation of these resources"); Sax, *Some Thoughts On The Decline of Private Property,* 58 Wash. L. Rev. 481 (1983).

52. Lazurus, *supra,* at 700 n.412. *See also,* Freyfogle, *Context and Accommodation In Modern Property Law, supra,* at 1552 ("... property rights in water differ little from property rights in land and other resources. All resource users are context dependent particularly as crowding brings users closer together . . . [T]he vision of property as absolute dominion is no more accurate in non-water settings. It is the myth that is stronger in other contexts, not the reality.")

53. *See, e.g.*, Cal. Water Code §102.

54. *See*, 1 Weil, *Water Rights In Western States* (3rd ed. 1911) §172 at 187 (the state "acts in its sovereign capacity only—not as owner of the water; the state operates only under the police power."); Trelease, *Government Ownership And Trusteeship of Water*, 45 Cal. L. Rev. 638, 653 ("We usually mean by 'state ownership' that in a crowded world the social interest in the use and conservation of the water resources has become more important than some individual interests."); Lasky, *From Prior Appropriation To Economic Distribution of Water*, 1 Rocky Mtn. L. Rev. 161, 187 (1929) ("It may be that using the words 'state ownership' instead of 'the social interest in the conservation and economical use of natural resources' is only a quibble over phraseology.")

55. *Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

56. Pound, An Introduction to the Philosophy of Law (rev. ed. 1954), at 111.

57. Goldberg, *Interposition—Wild West Water Law*, 17 Stan. L. Rev. 1, 25 (1964).

58. *See, e.g.*, 42 U.S.C. §6925 (1982) (permits for disposal of hazardous waste under the Resource Conservation and Recovery Act, 33 U.S.C. §1342 (1982) (Clean Water Act permits)); 42 U.S.C. §§7401, 7661 (Clean Air Act permits).

59. *See, e.g., Unigard Mutual Ins. Co. v. McCarty's Inc.*, 756 F. Supp. 1366, 1369 (D. Idaho 1988) ("The EPA is not bringing this suit to restore defendants' land for defendants' benefit"), *Intel Corp. v. Hartford Acc. and Indemn. Co.*, 692 F. Supp. 1171, 1184 (N.D. Cal. 1988), appeal pending,("Intel's actions are not taken merely to restore the property of its lessor. . . . The EPA's involvement serves to underscore the public nature of the damage.")

60. Barcelona et al., *Handbook of Groundwater Protection*, Hemisphere Information Resource Center, Hemisphere Publishing Corporation, 1988 at 151–152, 163-164.

61. 933 F.2d 1162 (3rd Cir. 1991).

62. This hypothetical assumes an ability to predict with precision the progress of subsurface chemical migration which, as noted, does not exist.

63. *See, AIU, supra*, 51 Cal. 3d at 825, quoting *Aerojet General Corp. v. Superior Ct.* 211 Cal. App. 3d 216 at 229 (1989). Application of the rule that coverage is triggered when a threat of off-site or groundwater damage becomes serious and imminent does not make the result any less arbitrary. Assuming that the contamination is discovered and abated before groundwater or off-site damage, the threat of such damage might be viewed by some courts as sufficiently imminent to trigger coverage under only the most recent policy—the policy most likely to incorporate an absolute pollution exclusion. Again, the policyholder is robbed of coverage under earlier policies that provide broader coverage for no reason other than the fortuitous timing of discovery after expiration of the policy.

64. The owner property exclusion excludes "property damage to property . . . rented to the insured" and the alienated property exclusion excludes "property damage to premises alienated" by the insured.

65. 692 F. Supp., at 1194.

66. 756 F. Supp. 1366, 1369-70 (D. Idaho 1988).