The concept of public trusteeship as embedded in the South African National Water Act, 1998

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by

Elmarie van der Schyff
Faculty of Law
North-West University
Potchefstroom

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List of Latin terms and phrases

This list is not exhaustive. Phrases that were defined in the texts are not all included here.

de facto – in fact, in practice, real, actual.

dominium – legal title.

ius privatum / jus privatum – private right.

ius publicum / jus publicum – public right.

modi – way, method.

populi Romani – citizens of Rome.

res – thing.

res extra commercio – things that falls outside commerce that cannot be privately owned.

res extra nostrum patrimonium – things that cannot be privately owned.

res in commercium – things that can be privately owned and be part of commerce.

res omnium communes – things common to all men.

res publicae – public things, public goods, public property.

Introduction

With the promulgation of the *National Water Act* [NWA] 36 of 1998 South Africans witnessed the birth of a new legal concept in South African natural resources jurisprudence.[1] The concept of public trusteeship that initially emerged in the *White Paper on a National Water Policy for South Africa* [*White Paper*][2] was formally entrenched in sections 2 and 3 of the NWA.

The concept of public trusteeship was romanticized in the *White Paper* and the drafters wrote in high spirits –

> To make sure that the values of our democracy and our Constitution are given force in South Africa's new water law, the idea of water as a public good will be redeveloped into a doctrine of public trust which is uniquely South African and is designed to fit South Africa's specific circumstances. In its role of guardian of our Nation's water resources national Government will keep the right to influence the country's economic and social development – for the benefit of present and future generations – through the responsibility for determining the proper use of the nation's water resources.

The reality is, however, that increasing competition between various water users and the inability to meet growing demands due to the natural scarcity of national fresh water resources hamper water reform aimed at addressing equity and redress issues. The question that lingers in one's mind is whether the doctrine of public trust also referred to as the concept of public trusteeship, as incorporated in the NWA, is rising to the occasion.

This study is aimed at analysing the concept of public trusteeship as it is found in the NWA in order to determine [1] the roles, responsibilities and obligations of all the role players in

1 "Jurisprudence" can be defined as *the "philosophy or science of law"; "a system of law"* or *" a branch of law, or the law as it applies to a particular area of life"* – Encarta Dictionary, English (U.K). All of the mentioned meanings can be read into the term for the context of this report.

2 1 April 1997 http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf [used 9/08/2010].

decentralized water management and governance and [2] the legal implications that the concept holds for water governance and water users in order to facilitate the development of the visionary "doctrine of public trust which is uniquely South African and is designed to fit South Africa's specific circumstances." To obtain these objectives the report is structured in three main parts. Part A is focused on contextualizing the concept of public trusteeship as embodied in the NWA. Part B is focused on the roles and responsibilities of all the role players in decentralized water management and governance. Throughout the report comment boxes will be used to highlight the implications of specific legal principles. Part C is directed at providing insight in the legal implications that the doctrine holds and in how the doctrine of public trust as embodied in the NWA can effectively be used to balance seemingly opposing demands on water resources and support water reform aimed at addressing equity and redress issues.

Part A: Contextualising the concept of public trusteeship as embodied in the NWA

Within the context of the study as a whole, this part of the report is aimed at contextualizing the concept of public trusteeship. It is aimed at giving an account of public trusteeship [1] in common property internationally, [2] in South African law and [3] its incorporation in the National Water Act. This part is therefore structured in three main sections, each section addressing one of the aforementioned aspects.

A1 Public trusteeship in common property internationally

1.1 The notion of common property

Elinor Ostrom,[3] receiver of the 2009 Nobel Memorial Prize in Economic Science, states the importance of avoiding confusion between the concepts (1) common property and open-access regimes, (2) common-pool resources and common-property regimes, and (3) a resource system and the flow of resource units. It is thus necessary to consider the notion of common property briefly at the outset of the discussion.

Is it correct to classify water as "common property"? Ostrom and Hess[4] indicate that terminology often creates theoretical problems that are difficult to overcome. They point out that the term "common-property resource" is regularly used to describe a "type of economic good that is better referred to as a *common-pool resource*". The use of the term 'property' to refer to a specific type of 'good' creates the impression that goods sharing specific attributes tend to share the same property regime. Only when a specific property regime allows the 'good' to attain specific characteristics that classify it as property, should the term be used.

3 Ostrom E and Hess C "Private and Common Property Rights" (2007) 1-116, 6. Available at SSRN: http://ssrn.com/abstract=1304699.

4 Ostrom and Hess note 3 above at 8.

This being said, it is necessary to discern the most important attributes shared by all common-pool resources. Once again we turn to Ostrom and Hess for guidance:[5]

> All common-pool resources share two attributes of importance for economic activities: (1) it is costly to exclude individuals from using the good either through physical barriers or legal instruments and (2) the benefits consumed by one individual subtract from the benefits available to other.

Common-pool resources share characteristics with public and private goods. Similar to public goods, it is difficult to develop physical or institutional means of excluding beneficiaries. The characteristic shared with private goods is that one person's "consumption subtracts from the quantity available to other". It is also important to understand that common-pool resources consist of two distinct components, the resource system (e.g., lakes and rivers) and a flow of resource units or benefits (e.g., water).[6]

It is trite that flowing water has never been regarded as something capable of being possessed or owned under any South African water law dispensation. This principle founded in Roman law[7] has stood the test of time for the reason that the physical attributes of flowing water renders it impossible to be classified as property.[8] Surface water other than flowing or running water which was not "flowing or found in, or derived from a natural river, or if it was derived from such a river, the water in the river was not suitable or enough for irrigation on two or more pieces of land riparian thereto which were the subjects of separate original grants"[9] were however being regarded as goods that could be possessed or owned due to the fact that it was confined within determinable borders and

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5 *Ibid.*

6 The discussion on common-pool resources is merely cursory for it falls outside the main scope of the report.

7 Burger A *A study of Roman water law with specific reference to allocation and prior appropriation* WRC Report TT 279/06 August 2006, 13. According to Thompson H *Water Law* 2006 Juta Cape Town, 18 all water in flowing rivers were regarded to be *res omnium communes* – even though the rivers were classified as private rivers, this was to be distinguished from water in lakes and ponds found on private property.

8 Flowing water is not containable. A unit can be separated and contained.

9 Thompson note 7 above at 13.

exhibited the qualities required to be acknowledged as 'things' susceptible to be possessed or owned. South African flowing water resources exhibit the characteristics of common-pool resources. It is both "costly to exclude individuals from using the good either through physical barriers or legal instruments and (2) the benefits consumed by one individual subtract from the benefits available to other."[10] The NWA discarded the previous distinction between private and public water and regard all water within the hydrological cycle as a national resource. As such it cannot be regarded as goods that can be possessed or owned by anyone in the conventional sense of possession or ownership until it has been lawfully appropriated. As stated by Ostrom and Hess[11] the property regime incorporated to manage the common-pool resource would ultimately define whether the common-pool resource under discussion exhibits the necessary attributes to be classified as property. This aspect is specifically dealt with in parts B and C of this report.

> Under South African law water in its natural state is distinguishable from other 'things' due to its inherent characteristics. It is not possible to possess or own any water as private property as long as it is in the hydrological cycle.

At this stage it is important to note that one must differentiate between water in its natural state that forms part of the unitary interdependent hydrological cycle (the resource system) and the right or entitlement to use water provided in the NWA (the resource benefit/unit). The importance of this differentiation as it relates to the nature of the entitlement to use water and the claim towards water in the hydrological cycle will be dealt with in part C of this report.

1.2 Property regimes

Different types of property regimes can be used to govern common-pool resources. Ostrom and Hess elaborate:

10 Ostrom and Hess note 3 above at 8.
11 Ostrom and Hess note 3 above.

> Common-pool resources may be owned by national, regional or local governments, by communal groups, by private individuals or corporations or used as open-access resources by whomever can gain access.

Ostrom and Hess[12] indicate that in property regimes that are open-access no one has the legal right to exclude anyone from using the resources. They state-

> Open-access regimes (res nullius) – including the classic cases of the open sea and the atmosphere – have long been considered in legal doctrine as involving no limits on who is authorized to use a resource.[13]

Open-access regimes might be inherited from preceding legal systems, they can also result from the "ineffective exclusion of non-owners by the entity assigned formal rights of ownership or they might be the consequence of conscious public policies directed at guaranteeing the access of all citizens to the use of a resource within a political jurisdiction. The concept of *ius publicum* applies to open-access regimes.

In common property regimes, however, the members of a "clearly demarked group have a legal right to exclude nonmembers of that group from using the resource."[14]

In the South African context it is important to note that the Constitution is specifically aimed at guaranteeing the right of sufficient access to water to all people. It is also stated in the NWA that water is a natural resource that belongs to all people. In a sense the South African water dispensation represents a hybrid system. Although everybody is guaranteed the right of access to water, the access is regulated to such an extent that users who are not members of a clearly demarked group do not have access to specific

12 Ostrom and Hess note 3 above.

13 It is these resources that are in danger of being over-consumed and misused, specifically if the resource generates highly valued products and there is a lack of rules defining property rights. Where no property rights have been defined, or use is not authorized, the resource is most often not contained within a nation-state or no entity has successfully laid claim to legitimate ownership, Ostrom and Hess note 3 above at 6.

14 Ostrom and Hess note 3 above at 6.

water.[15] It is contended that access to the resource system as is guaranteed while access to specific quantities of the flow of resource units is regulated in the public interest.

> The manner in which a country or nation's national law deals with a particular natural resource will determine whether the resource or its attributes will be regarded as 'property' in the said legal system.
>
> The South African legal system guarantees access to sufficient water to everybody in South Africa but no legislation legitimizes ownership of water. Certain entitlement to use water may be acquired if the provisions of the NWA are adhered to.

With the terminology sorted the discussion can focus on the concept of public trusteeship.

1.3 The concept of public trusteeship

"What, then, is the idea of public trusteeship?" This question vocalizes the underlying question to be answered in this report. Peter Sand[16] wrote:

> In very simplified language, it means that certain natural resources – e.g., watercourses, wildlife, or wilderness areas – regardless of their allocation to public or private users are defined as part of an 'inalienable public trust', certain authorities – e.g., federal agencies, state governments, or indigenous tribal institutions – are designated as 'public trustees' for protection of those resources; every citizen, as 'beneficiary' of the trust, may invoke its terms to hold the trustees accountable and to obtain judicial protection against encroachments or deterioration.

This quotation highlights a very important characteristic of public trusteeship that should constantly be kept in mind, – the concept as legal notion manifests or materializes in

15 E.g., for specific uses a license must be obtained. Users without the necessary permission will be excluded.

16 Sand PH "Sovereignty Bounded: Public Trusteeship for Common Pool Resources" 2004 *Global Environmental Politics* 47-71, 48.

different guises even within one legal system.[17] The application and consequences of the concept of public trusteeship depend greatly on the legal construct in which it is entrenched.[18] Hence, public trusteeship is not molded identically in different legal regimes. The single corresponding characteristic that lies at the heart of the concept of public trusteeship and that will be intrinsically part of any legal construct founded upon the concept, is that the 'public trustee' is cloaked with a fiduciary responsibility in respect of certain specified natural resources. A fiduciary responsibility that must be exercised on behalf the 'people'.[19]

Before the manifestation of the concept of public trusteeship in different international legal regimes is discussed, it is necessary to root the concept in its philosophical foundations.

1.4 Philosophical foundations for the concept of public trusteeship[20]

The concept of public trusteeship is founded securely in legal philosophy. John Locke stated in his *Second Treatise on Civil Government*[21] (1685) that governments merely exercise a "fiduciary trust" on behalf of their people. Roscoe Pound[22] suggested that the role of states in the management of common natural resources must be limited to "a sort of guardianship for social purposes" and Karl Marx[23] voiced the opinion that

17 It is clear that public trusteeship cannot summarily be equated with state ownership; neither does it automatically exclude allocation to private users.

18 See 1.5 *infra*.

19 'People' refers to the citizens of a particular state.

20 The content of this paragraph corresponds to a significant extent with Van der Schyff, E "Unpacking the public trust doctrine: a journey into foreign territory" an article by the author of this report to be published in an upcoming volume of the legal journal *PER*. The journal can be accessed through http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/index1.html. It is an extraction from the authors unpublished LLD thesis – "The constitutionality of the Mineral and Petroleum resources development Act 28 of 2002" PU for CHE (now NWU) 2006.

21 Locke, J. *Second* Treatise on Civil Government http://www.constitution.org/jl/2ndtreat.htm [2006/11/15] Chapter 11 s 139.

22 Pound, R. 1954 *An introduction to the Philosophy of Law* (Revised edition Yale University Press New Haven 1992) 111.

23 Marx, K. *Capital* vol 3 (Vintage Publishers New York 1981) 911. This passage is frequently quoted. See *inter alia* Foster JB "Marx's Theory of Metabolic Rift: Classical Foundations for Environmental Sociology" 2006 105:2 *AJS* 385.

> From the standpoint of a higher socio-economic formation, the private property of particular individuals in the earth will appear just as absurd as private property of one man in other men. Even an entire society, a nation, or all simultaneously existing societies taken together, are not owners of the earth. They are simply its possessors, its beneficiaries, and have to bequeath it in an improved state to succeeding generations as *boni patres familias*.

These excerpts clearly emphasize the fiduciary responsibility of states in regard to certain natural resources, a responsibility that goes above and beyond a state's proprietary rights in these resources. It is noteworthy that the concept of public trusteeship rises above boundaries of political and juridical systems of society in accentuating the accountability of states for the management of the natural resources in their jurisdiction.

It has been stated above that the concept of public trusteeship manifests in different legal constructs internationally. The remainder of this section will focus on identifying some of the different legal constructs used by different legal jurisdictions to incorporate the concept.

1.5 The manifestation of the concept of public trusteeship in different international legal regimes.

As stated above, the philosophical notion underlying the concept of public trusteeship has been entrenched in different legal constructs in different property regimes. To gain full insight in these legal constructs will require deep research in the different legal regimes, the extent of which goes beyond the limits of this report.[24] As it is, however, one of the primary aims of this report to give an account of public trusteeship in common property (or common-pool resources) internationally, an effort will therefore be made to give a representative overview.

24 The notion of the public trust in global context – international law- is not researched in this report.

1.5.1 *USA*: Public Trust Doctrine

The most discussed legal construct through which the concept of public trusteeship is implicitly entrenched in a legal system, is the American **public trust doctrine.** Although not uncontested, the public trust doctrine is well established in US environmental law. The plethora of literature available on the subject speaks for itself.[25] When the American public trust doctrine is under discussion, the reader should note that there is not just one public trust doctrine functional in the United States of America. It is rather a case of public trust principles encapsulated in different public trust doctrines in the different states.[26]

Some proponents of the public trust doctrine proclaim that it can be traced back to Roman law.[27] This view is questioned by some. Whatever the origins of the doctrine, it has been incorporated in American jurisprudence for the greatest part of the United States of America – if not as a common law doctrine, then through statutory enactments.[28] It has been stated that the US courts have expanded and

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25 See *inter alia* Dunning HC "The Public Trust: A Fundamental Doctrine of American Property Law" 1989 19 *Envtl L* 515-526; Dunphy PO "Comments: The Public Trust Doctrine" 1976 59:4 *Marq LR* 787-808; Fernandez JL "Untwisting the Common Law: Public Trust and the Massachusets Colonial Ordinance" 1998 62:2 *Alb L R* 623-665; Hannig TJ "The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test" 1983 23 *Santa Clara LR* 211-236; Huffman JL "Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson" 1986 63 *Denv ULR* 565-584; Huffman JL "A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy" 1989 19 *Envtl L* 527-572; Kearney JD and Merrill TW "The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*" 2004 71 *U Chi LR* 799-931; Lazarus RJ "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine" 1986 71 *Iowa LR* 631-716; Manzanetti AB "The *Fifth Amendment* as a Limitation on the Public Trust Doctrine in Water Law" 1984 15 *Pac LJ* 1291-1319; Morris ST "Taking Stock of the Public Trust Doctrine: Can States Provide for Beach Access without Running Afoul of Regulatory Takings Jurisprudence?" 2003 52 *Catholic ULR* 1015-1040; Pearson E "The Public Trust Doctrine in Federal Law" 2004 24 *J Land Resources & Envtl L* 173-178.

26 Craig RK "A quick-and-dirty guide to the eastern public trust doctrines: basic issues, classification of states and State issues" http://works.bepress.com/robin_craig/1 [used on 12/12/2010].

27 See 3.1.1 *infra* for an exposition of Roman law principles that can be regarded as the roots of the concept of public trusteeship. A thorough historical overview of related principles does not fall into the ambit of this work. One can take cognisance of the application of a similar notion in old French law that streams did not just become the private property of the King but were in the public domain, destined for public use and not susceptible to private ownership – Code Napoleon, art 538 (Off. Ed. 1810)(Fr).

28 See for example the Constitution of the State of Hawaii, 1995.

given the doctrine its current shape whereby it covers the entire spectrum of the environment.[29] There are considerable differences regarding the extent to which the doctrine has been accepted in the different States. However, the main characteristics of the doctrine, or the underlying public trust principles, are shared.

At the core of the public trust doctrine we find the fiduciary obligation of the state to hold resources for the benefit of the public. The doctrine essentially recognizes that certain public uses ought to be specifically protected.[30] It entails the distinction between private title and public rights and recognizes that the state, as sovereign, acts as trustee of public rights in certain natural resources.[31] The public trust doctrine fundamentally acknowledges that some resources are so central to the well being of the community that they are neither susceptible to private ownership nor unrestricted state ownership.

Regarding what can be coined the American federal public trust doctrine it is assumed that the public trust doctrine and public rights in water follows state title.[32] Where this line of thought is applicable American courts have emphasized that state ownership of land subject to the public trust are held by a title different in character from that which states hold in land intended for sale. Lands intended for sale can be granted unrestricted to private owners by the sovereign. However, the title *jus privatum* in property falling under the public trust belongs to the sovereign, while the *dominium, jus publicum,* is vested in the sovereign as representative of the nation for the public benefit. In a very insightful article Craig indicates however that the public trust doctrine as developed in some of the eastern states diverts from this rigid rule and applies public trust principles to water even where the state does not own the beds and banks of those waters.[33]

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29 *Intellectuals Forum, Tiruphathi v State of A.P. & ORS* (2006) INSC 86. See also Kleinsasser Z "Regulatory and Physical Takings and the Public Trust Doctrine" 2005 *Boston College Environmental affairs Law Review* 421 at 425-426.

30 *Martin v Waddell's Lessee* 41 US 367 (Pet) (1942).

31 *Glass v Goeckel* 437 *Mich* 667 (2005) 673.

32 Craig note 26 above at 10.

33 Craig note 26 above at 11.

> Initially applicable only to tidal waters, the once ebb-and-flow restricted doctrine navigated itself through the watercourses of America into the full scope of resource protection. Through the seminal work of Jonathan Sax, the public trust doctrine was developed into one of the most powerful environmental protection tools of the millennium.[34]

Albeit not formally entrenched in common law doctrine, the concept of public trusteeship has also been endorsed in other foreign legal jurisdictions. Where the concept of public trusteeship is not inherently present in a legal system through its historical roots, the concept has been entrenched through legislation or recognised by the judiciary. The discussion that follows does not proclaim to be an all encompassing account of instances where the concept of public trusteeship surfaces in international legal constructs. Neither is it a thorough exposition of the application of the concept in the legal regimes mentioned here-under. It is merely an indication of the wide spread application and different *modi* of incorporation of the philosophical notion underlying the concept of public trusteeship.

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34 As a professor of Law, first at Michigan Law School then at California, Berkeley, Joseph Sax completed meticulous research in the field of Public Trust Law. His seminal work *The Public Trust Doctrine in Natural Resource Law: Effective in Judicial Intervention* published in 1970, has sparked the usage and development of the Public Trust doctrine in American environmental law. Olson J "The Public Trust Doctrine: Procedural and substantive limitations on governmental reallocation of natural resources in Michigan" 1975 *Det CLR* 162 referred to Sax's seminal work as the leading treatment on the public trust doctrine and emphasized that Sax's article was a mandatory reading for a comprehensive understanding of the public trust doctrine. Huffman JL "Trusting the public interest to judges: A comment on the public writings of Professors Sax, Wilkinson, Dunning and Johnson" 1986 *Denv ULR 566* stated: "the rebirth and dramatic growth of the public trust doctrine is in no small part the product of a classic article on the subject by Jonathan Sax". Dunning HC "The public trust: A fundamental doctrine of American property law" 1989 *Envtl L* 524 voiced a more balanced opinion when he stated that Professor Sax's work drew the attention of environmental law students to the public doctrine during a period of heightened public interest in environmental protection and among that environmental law scholars, interest and attention have remained high. Brady TP "But most of it belongs to those yet to be born" 1990 *BC Envt Aff LR* 622. Bader HR "Antaeus and the public trust doctrine: A new approach to substantive environmental protection in the common law" 1994 *Hamline LR* 52 contended that Sax *resuscitated* the public trust doctrine and applied it to modern environmental problems.

1.5.2 *Nigeria*: Land Use Act, 1978 included in the Laws of the Federation of Nigeria 1990

Through this Act all land comprised in the territory of each State (except land that is vested in the Federal government or its agencies) is vested solely in the Governor of the State, who holds such land **in trust** for **the people**. The land must be administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act.

1.5.3 *Uganda*: 1995 Constitution Article 237 (2) (b) and Land Act 16 of 1998

Article 237(2) (b) of the Constitution of Uganda explicitly determines that the government or a local government shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and all land reserved – or to be reserved – for ecological and tourist purposes for the common good of all citizens. Section 45 reiterates the legal position and operationalises the provisions of the Constitution. In *Advocates Coalition for Development and Environment (ACODE) v Attorney General and NEMA*, 13 July 2005, High Court of Uganda, Miscellaneous Cause No. 0100 OF 2004[35] the effect of the public trust doctrine was explained clearly. The court indicated that even where individuals were granted private rights in land, these rights or interests were always subservient to the *ius publicum* – i.e., the public right to use and enjoy trust land. The court explained the essence of the 'doctrine of public trust' as the legal right of the public to use certain land and water. The court then stated that this doctrine of public trust governs the use of property where a given authority in trust holds title for citizens.

> Citizens have two co-existing interests in trust land; the *jus publicum*, which is the public right to use enjoy trust land, and the *jus privatum*,

35 See also the application of the concept of public trusteeship in *Siraji Waiswa v Kakira Sugar Works Ltd* Misc. Application No. 230 of 2001.

which is the private property right that may exist in the use, and possession of trust lands.

1.5.4 *Ghana*: The Minerals and Mining Act 703 of 2006

Section 1 of this Act proclaims that with regard to every mineral in its natural state in Ghana's national territory, is the property of the Republic and is vested in the President in trust for the people of Ghana.

1.5.5 *Liberia*: National Forestry Reform Law, 2006

Section 2 (1) of this Act stipulates that all the forest resources in Liberia, except forests resources located in Communal Forests and forest resources that have been developed on private or deeded land through artificial regeneration are held in trust by the Republic for the benefit of the People. It should be noted that some view this provision not as strengthening the public interest in the said resources but as excluding communities from a resource subject to collective ownership.[36]

1.5.6 *Kenya:* Incorporation through case law

In *Waweru v Republic* (2007) AHRLR 149 (KeHC 2006) the Court held that the doctrine of public trust can be taken into consideration in determining environmental cases due to the fact that section 3 of the Environment Management and Coordination Act, 1999 provides for the consideration of universal principles.

36 Wily LA "So who owns the forest" 2007 Sustainable Development Institute: Liberia, 241.

1.5.7 *The Islands of St Christopher and Nevis*: National Conservation and Environment Protection Act, 1987

In terms of section 9 of this Act all protected areas, historical buildings and monuments vests in the Conservation Commission (a body created in terms of section 8 of the Act) and the Conservation Commission holds these property in trust for the benefit of the people of St Christopher and Nevis.

1.5.8 *Brazil*: The Constitution of the Federal Republic of Brazil, 1988 [BFC]

After declaring the environment "an asset for common use", section 225 of the BFC confers on both the Government and the citizens the duty to defend and preserve the environment for future and common generations. This can be seen as a modification of the traditional approach whereby the State is the sole guardian of the environment.[37]

1.5.9 *India*: Incorporation through case law

The doctrine of public trust was incorporated as a part of Indian Law by India's highest Court in *Metha v Kamal Nath,* 1997 (1) SCC 388 and *inter alia* applied in the subsequent cases of *M.I. Builders v Radhey Shyam Sahu* (1999) 6 SCC 464 and *Intellectuals Forum, Tiruphathi v State of A.P. & ORS* (2006) INSC 86. The State is thus regarded as the trustee of the public with regards to natural resources. As a result it can only dispose of natural resources in a manner that is consistent with the nature of the trust.

37 Sarlet I and Fensterseifer T "Brazil" in *The Role of the Judiciary in Environmental Governance* Kotze LJ and Paterson AR (eds) 2009 Kluwer Law International: The Netherlands, 249-267.

1.5.10 *Canada:*

The public trust doctrine has not formally been recognised by Canadian courts.[38] An interesting phenomenon emerges from two pieces of legislation. In 2002 the Environment Act was promulgated in the Yukon. In the preamble the government is recognized as the trustee of the public trust and responsible for the protection of the collective interest of the people of the Yukon in the quality of the natural environment. The term 'public trust' is defined in section 2 as

> the collective interest of the people of the Yukon in the quality of the natural environment and the protection of the natural environment for the benefit of present and future generations;

In section 38 the government of the Yukon is formally appointed or nominated as the trustee of the public trust. A similar position is found in section 6 of the 2002 Environment Act of the Northwest Territories.

1.5.11 Conclusionary comments

The exposition above gives one insight in the various ways that the concept of public trusteeship can be entrenched in a legal regime. It is clear that the concept is not intrinsically linked to a specific property regime or resource. The doctrine of public trust does not only find application when the resource in question vests 'sovereign ownership' in the State.[39] It is also apparent that the concept is acknowledged as a universal principal when the environment is the subject of discussion.

38 Pentland R "Public Trust Doctrine- Potential in Canadian Water and Environmental Management" 2009 POLIS Discussion Paper 09-03.

39 For an opposing opinion see Pope A and Mostert H "The Principles of the Law of Property in South Africa" 2010, Oxford University Press Cape Town, 211.

The notion of water or other natural resources, belonging to 'all' while being managed, regulated and protected by the State, is a universally accepted principal and should not be degraded to merely being the brainchild of a post-1994 power hungry government.

A2 Public trusteeship in South African law

The abovementioned discussion on the manifestation of the concept of public trusteeship in different legal regimes highlights the fact that the concept becomes relevant when common property or common-pool resources are the subject matter. It is thus necessary to determine whether the notions 'common property' and 'public trusteeship' can be traced back to the common law roots underlying South African jurisprudence. Thereafter it will be necessary to search through early South African case law to determine whether the concept was applied and developed. In the third instance this part of the report needs to focus on the post-constitutional emergence of statutory doctrines of public trust in South African legislation and case law. In the final instance it is imperative to focus on the relationship between public trusteeship and property rights.

2.1 *Public trusteeship in South African law I: The origin of public trusteeship in South African law.*[40]

Since most scholars trace the roots of the concept of public trusteeship back to the *Institutes of Justinian*, a body of Roman civil law compiled in approximately 530 AD[41] it is

40 This discussion is extracted from the author's unpublished LLD thesis note 20 above.

41 Smith GP and Sweeney MW "The public trust doctrine and natural law, emanations within a penumbra" 2006 13 *Boston College Environmental Affairs* 307-343, 310; Fernandez JL "Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance" 1998 62:2 *Albany Law Review* 632-665, 627; Coquilette DR "Mosses from and Old Manse: Another look at some historic property cases about the environment" 1979 64 *Cornell Law Review* 761-821, 800. Sax JL "Liberating the public Trust from its Historical Shackles" 1980 *UC Davis Law R*eview 185-232, 185. It should however be noted that a different opinion is held by *inter alia* MacGrady G "The navigability concept in the civil and common law: Historical development, current importance, and some doctrines that don't hold water" 1975 3 *Florida State University Law Review* 511-615, 522.

necessary to investigate whether traces of public trusteeship in common property can be found in our legal system's ancient roots.[42]

2.1.1 *Roman law*

One of the most significant indications of the existence of property not belonging to any individual but to the people at large, is found in the Institutes of Gaius.[43] The significance of Gaius's contribution is unfortunately not found in the clarity of the principle of law written down by him. On the contrary, Francis de Zulueta[44] refers to Gaius's treatment of the aspect as *jejune in the extreme.* However, despite the apparent vagueness surrounding Gaius's classification of *res*[45] it remains significant because Gaius, one of the most respected of Roman jurists whose works have either created or interpreted the rules of ancient jurisprudence,[46] is frequently first mentioned as source when the division of things according to Roman law is discussed. From this classification it is clear that certain things (*res*) could not be privately owned.[47] Things unsusceptible to private ownership[48] were classified by Gaius as being *res extra nostrum patrimonium* as opposed to *res in nostro patrimonio.*[49] For the purpose of this study the focus will fall solely on that category of things that was known as *res extra nostrum patrimonium.* Both *res divine iuris*[50] and those

42 The content of this section has mainly been extracted from the author's unpublished LLD thesis "The Constitutionality of the Mineral and Petroleum Resources Development Act, 2002" 2007 NWU

43 G 2.10; G 2.11. These texts are being referred to by Justinian in D 1.8.1 as the starting point for the discussion relating to the subdivision of things. [G refers to Gaius's Institutes].

44 De Zulueta F *The Institutes of Gaius* 1975 Claredon Press Oxford (hereafter referred to as De Zuluetta *The Institutes of* Gaius] 56.

45 De Zulueta *The Institutes of Gaius* 55.

46 Scott SP *The Civil Law* vol 1 1932 Central Trust Company Cincinnati, 13; Van Zyl DH *Geskiedenis en Beginsels van die Romeinse Privaatreg* 1977 Butterwoths Durban, 39, 40.

47 G 2.1; Inst 2.1 *pr*; D 1.8.2 *pr*. See also Van der Vyver JD "*Étatisation of Public Property" in Visser DP (ed)* Essays on the Law of History 1989 Juta Johannesburg, *26.*

48 One must keep in mind that the translation "private ownership" refers to the concept of "ownership" as it was known and applied in the specific era.

49 G 2.1. According to Kaser *Das Römische Privatrecht* vol 1 3rd ed 1971 CH Beck'sche Verlagsbuchhandlung München, 318 this division was rephrased during the classical period to *res quarum commercium est* and *non est.*

50 G 2.2.

things classified as public things[51] within the overarching class of *res humani iuris*[52] were included in this category.

All sacred, religious and sanctified things were subject to divine law.[53] Kaser[54] aptly states:

> Die Sachen göttlichen Rechts sind privater Rechte unfähig und gliedern sich weiter in res sacrae, religiosae, sanctae.

Although a discussion of things subject to divine law falls beyond the parameters of this study, it is important to note that it can be inferred from Kaser's discussion[55] that *res divini iuris* should be differentiated from things categorised as *res humani iuris* but regarded as *res extra nostrum patrimonium* because they were considered to be *res publicae.* The reason for the differentiation being that with reference to *res divini iuris* "*dies bedeutet 'nullius in bonis esse' bei Gai.2,9, nicht Herrenlosigkeit*".

Gaius did not illustrate his understanding of what is included under *res publicae* by giving specific examples of things so considered. He merely stated *quae publicae sunt, nullius in bonis esse creduntur, ipsius enim uniuersitatis esse creduntur…* This broad usage of the phrase *res publicae* might be misleading in creating the illusion that only one category or class of *public things*[56] existed under Roman law.[57]

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51 G 2.10. Van Zyl *Geskiedenis en Beginsels* note 46 above at 122 stated that all *res humani iuris* were unsusceptible to private ownership "… terwyl die *res humani iuris* daardie sake was wat, hoewel hulle nie vir private eiendomsreg vatbaar was nie, aan alle mense gesamentlik toegekom het" *[while the* res humani iuris *were those things that although they could not be privately owned, accrued to all people jointly].* He based this preposition on G 2.2. However, this cannot be correct as it is stated in G 2.10 that things subject to human law were **either** public or private and it is further explicitly stated in G 2.11 that only things which are public are considered to be the property of no individual for they are held to belong to the whole of the community, while things which are private are the property of individuals.

52 G 2.2.

53 G 2.8 -14.

54 Kaser *Das Römische Privatrecht* note 49 above at 320.

55 Kaser *Das Römische Privatrecht* note 49 above at 320.

56 *The Digest of Justinian* Latin text edited by Mommsen T vol 1 and IV 1985 University of Pensylvania Press Philadelphia, 24.

57 Gaius used the phrase *res publicae* in conjunction with *"…ipsius enim uniuersitatis esse creduntur…* A strict interpretation could warrant the limitation of Gaius's use of *res publicae* to those things later

The nuanced distinction between the classes of *res humani iuris* becomes clear through the enactments of Justinian in both the *Institutiones* and the *Digest.*[58] Justinian states in the *Institutiones* that all things are either common by the law of nations (*res omnium communes)*, or public (*res publicae)*, or belonging to a corporate public body[59] or community[60] (*res universitatis*) or nobody's (*res nullius*) or for the greater part, the property of individuals.[61] However, it will be a mistake to think that this distinction is more transparent than Gaius's merely because it is more elaborate. The jurists compiling the *Institutiones* were unfortunately not very meticulous in their usage of terminology[62] and commentators hold different opinions regarding the existence and extent of the distinction between things common and things public.[63] The internal tension within the content and position, function and character of *res publicae* and *res omnium communes* comes to light when the notes of commentators on the relevant texts are studied.[64] Most writers find it difficult to differentiate clearly between the two terms.[65] Bonfante's[66] opinion that there was merely a difference in degrees between *res publicae* and *res communes* is echoed by

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defined as *res universitatis.* However, Bonfante B *Grondbeginselen van het Romeinsche Recht voor Nederland* 1919 Wolters Groningen, 251 indicates that this is merely an example of the loose usage of the terminology as Gaius is actually referring to *res publicae* when he used the terminology in conjunction with the phrase *universitatis.* Voet *Commentarius ad Pandectas* 1.8.2 opined that Gaius did indeed include things belonging to a corporation under things public. One must keep in mind that the 'corporation' mentioned in this context is far removed from the legal *persona* known in current legal systems.

58 While the legal principles are merely stated in the *Institutiones* specific sources are referred to in the *Digest* indicating that these were indeed a compilation of existing rules *and* law and not merely the law as Justinian wanted it to be as opined by *Lazarus RJ "*Changing conceptions of property and sovereignty in natural resources: Questioning the public trust doctrine*" 1986 Iowa LR 631.*

59 Borkowski A and Du Plessis P *Textbook on Roman Law* 3rd ed 2005 Oxford University Press, 154.

60 Perruso R " The development of the doctrine of res communes in medieval and early modern Europe" 2002 *LHR* 74.

61 Inst 2.1.pr. – *Quædam enim naturali jure communia sunt omnium, quædam publica, qædam universitatis, quædam nullius, pleraque singulorum.*[Inst. Refers to the Institutes of Justinian]

62 Van der Vyver *Étatisation* note 47 above at 265; Bonfante *Grondbeginselen* note 57 above at 250; Perusso note 60 above at 75.

63 *Voet Commentarius ad Pandectas* 1.8.2. The synonymous usage of the phrases ius *naturale* and *ius gentium* in this context contributes to the confusion.

64 Kotze JA highlighted this difference of opinion in the judgement given in *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 620.

65 Schultz F *Classical Roman Law* 1951 Oxford University Press London, 27 indicates that the word *communis* was sometimes used as an equivalent to *publicus*.

66 Bonfante *Grondbeginselen* note 57 above at 251.

Van Warmelo[67] who opined that the distinction between *res publicae* and *res communes* was not of great importance.[68] Perruso[69] focuses on an important aspect when he states that although the distinction between common and public property may have been intended by Marcian and the compilers of the *Corpus Iuris* to be without any concrete juridical effect, the distinction was not without significance. If one keeps in mind that the roots of the public trust doctrine are said to be intertwined in Roman law and flow from the notion of *res omnium communes*, it is necessary to determine the meaning that was attributed to the concept in Roman law.

When the text of the *Institutiones* is used as a starting point, it is clear that the air, running water, the sea[70] and consequently the shores of the sea, were regarded as things common to mankind.[71] The first traces of apparent contradiction are found in the very next text where it is stipulated that rivers which can surely be classified as running water and, therefore, common to mankind, are not only specifically being categorized as things public,[72] but that the right of fishing in rivers is consequently (*ideoque)* being described as *omnibus commune est,* it is common to all men.

Therefore, the first question that comes to mind is what characteristics or attributes did specific *res* have to possess to be classified as *res omnium communes* or *res publicae.* The second and related question is why the necessity for the distinction. Was *res omnium communes* dealt with in a different manner? Both groups of things are being described as unsusceptible to private ownership but who was ultimately responsible for the protection

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67 Van Warmelo P *'n* I*nleiding tot die Studie van die Romeinse Reg* 1965 Balkema Kaapstad Amstedram, 112. Van Warmelo regarded *res extra patrimonium* as *res nullius.* This viewpoint is contentious as *res nullius* was susceptible to private ownership by way of *occupation* and *res extra patrimonium* was not susceptible to private ownership.

68 In his notes in his translation of Voet's *Commentarius* Books 1-IV 153

69 Perruso note 60 above at 73.

70 It is interesting to note that Marcian is quoted in the D 1.8.4 on saying *nemo igitur ad littus maris piscandi causa accedere prohibetur* and subjoins his warrant, *idque Divus Pius piscatoribus Formianis resripsit* that is, no man is forbidden to come to the seaside to fish, as the emperor Divus Pius did write to the fishers of Formian. From this passage it can be deduced that some emperors at least, claimed the exclusive right to fishing from the seashore.

71 Inst 2.1.1.

72 Inst 2.1.2.

and maintenance of these things and what were the rights of individuals towards these things?

When *res universitatis*, *res publicae* and *res omnium communes* are considered, it is by far the easiest to describe or label *res universitatis*. Sandars'[73] explanation of the concept is concise and clear. He explains that a *universitas* is a corporate body created by the state such as a municipality or the guilds[74] of different trades. Where such a *universitas* had things which it owned for the use of the public it was spoken of as *res universitatis.*[75] As these things were owned by the *universitas*, one can infer that the duty to maintain and protect them fell on the corporate body. Both Gaius[76] and Ulpian[77] emphasised that *res universitatis* and *res publicae* were not mere synonyms for the same concept. Ulpian[78] explained that things that were earmarked for the mutual use of the populace and cities were not classified as *res universitatis* but remained *res publicae.*

Res publicae, on the other hand, denoted a category of things that belonged to the Roman people.[79] According to Kaser[80] *res publicae* in its technical sense indicated state property or state owned property. Schulz[81] explained that the term *res publicae* meant "things belonging to the Roman people, it is the *res communes populi Romani*". It was subject to public law and although the state's rights and claim to the particular thing was ownership, it was a public (*öffentliches*) ownership over which the principles of the private law did not apply.[82] The public- or common use of the property was regulated by the state and the

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73 *The Institutes of* Justinian with English introduction, translation and notes by Sandars TC 14th ed 1917 Longmans Green and Co London, 92.

74 *Collegia*.

75 Things like slaves or land belonging to a *collegium* that could be sold and were actually held by the corporate body in the same way as an individual would hold an asset that is in *nostro patrimonio* were not regarded to be *res universitas.* Public baths and theatres are examples of *res universitatis.*

76 D 50.16.16. [De refers to the Digest of Justinian].

77 D 50.16.15.

78 D 50.16.17.

79 Van der Vyver *Étatisation* note 47 above at 265.

80 Kaser *Das Römische Privatrecht* note 49 above at 322. Kaser did not differentiate here between *res universitatis* and *res publicae.*

81 Schulz *Classical Roman Law* note 65 above at 89.

82 Kaser *Das Römische Privatrecht* note 49 above at 322:

deprivation, withdrawal and cancellation of common use were also state affairs. An individual was not granted any private rights in the property by the state, but remedies were available against other private persons who obstructed or hindered the individual's right to use the property. Examples of *res publicae* mentioned by Kaser included rivers,[83] ports, sewer systems, public roads and theatres.

Res omnium communes were there for the use and the enjoyment of the entire human race.[84] The air, flowing water, the sea and the shores of the sea are explicitly and specifically mentioned as the things encompassed by this category. Although these things could not be privately owned, it was possible to secure or establish exclusive use over a specific portion of the property for a limited time period.[85] Subject to the requirement that public use would not consequentially be impeded and the resource not impaired,[86] individuals could erect buildings on the shore[87] or on piles in the sea.[88] There are even indications that private rights were allocated to individuals over specific portions of the sea.[89] The use and enjoyment of *res omnium communes* could be regulated by law and in some instances obtaining a permit[90] was compulsory before an individual could exercise

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Das Recht des Staates an diesen Sachen ist zwar ein (von der Souveränität vershiedenes) Eigentum, aber ein öffentliches, auf das die Grundsätze des Privatrechts nicht angewandt warden.

Public law was the law whereby the legal relations of the *populus Romani* were regulated. Whenever the Roman state was the subject of a legal relationship, the relationship was withdrawn from private law and public law was applied – see Schultz *Classical Roman Law* note 65 above at 27.

83 It is clear from the wording of D 43.12.1.3 that only perennial rivers were regarded as public rivers. Buckland *Manual* 108 sheds light on the apparent discrepancy found in the classification of rivers as *res publicae.* He stated that the riverbed was not public as it ordinarily belonged to the riparian owners. The running water was *res communes* – it is the river as such which was regarded as public and he opined that the river was public only *quod usum.*

84 Van der Vyver *Étatisation* note 47 above at 264.

85 D 1.8.6 pr – Marcian indicates that when a building is erected on the shore the people who build there are constituted owners of the ground, but only as long as the building remains there for when the building collapses the place reverts to its previous condition as if by right of *postliminium.*

86 D 43.8.3.1.

87 D 43.11.3.20; D1.8.5.1.

88 D 43.11. 4.20; D 41.1.30.4.

89 D 47.10.14.

90 D 39.2.24 *pr;* D 41.1.50, D 43.24.3.

any right with relation to these things. Certain common uses were also allowed without the requirement of obtaining a permit.[91]

No specific text could be found that attributed the safeguarding, preservation and protection of *res omnium communes* specifically to the state. Seen however that permits were issued by the *praetor* and that government could interdict trespassers not adhering to the requirement of obtaining a permit or hindering another individual's usage of the common property, it can be inferred that the state was the authority responsible for the protection and regulation of *res omnium communes*. This corresponds with Sandars' opinion voiced in his commentary on the Institutes of Justinian.[92] When referring to the law as stated by Celsus[93] – *Litora in quæ populus Romanus imperium habet populi Romanni esse arbitror* he says:

> if we are to bring this opinion of Celsus into harmony with the opinions of other jurists, we must understand *'populi Romani esse'* to mean 'are subject to the guardianship of the Roman people'.

When these two concepts are compared it seems that *res omnium communes* were destined for the use by anyone in the world, while *res publicae* were allocated to the citizens or inhabitants of the state[94] and depicted by the phrase *res communes populi Romani.* Both these categories of things were withdrawn from the domain of private law. It seems that Rudolph Sohm[95] was one of few writers who succeeded in clearly distinguishing between the two concepts. He explained that *res omnium communes* could not strictly speaking be regarded as 'things' in the legal sense of the term as they were by

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91 D 47.10.13.7 – the entitlement to fish or cast a net in the sea.

92 Sandars *Institutes* note 73 above at 91. Sandars did not differentiate clearly between the concepts *publicus* and *communis.* He indicated that these two words were sometimes used as synonyms. He does, however (subconsciously) differentiate between "Things public belong to a particular people, but may be used and enjoyed by all men" (this description denotes *res publicae*) and "… it is not the property of the particular people whose territory is adjacent to the shore but it belongs to them to see that none of the uses of the shore are lost by the act of individuals" – (this description corresponds with *res omnium communes*).

93 D.43.8.3.

94 This submission is supported by Van Warmelo note 67 above *Inleiding* 112.

95 Sohm R *Institutiones* 1907 Oxford Claredon Press 371.

reason of their innermost nature not susceptible to human domain.[96] This opinion was later qualified by Bonfante[97] who stated that q*ualification* res communes *related to the* content of things in their natural state and their unlimited quantities with regard to their use by people. He stressed that parts of the air and flowing water could on their own be private property.

Thomas[98] put the essence of the concept in words when he wrote:

> These were things of common enjoyment, available to all living persons by virtue of their existence and thus incapable of private appropriation because their utilisation was an incidence of personality not of property.[99]

Res *publicae*[100] on the other hand could not be regarded as objects of exclusive individual rights *after the manner of private rights*[101] because they were *publico usui destinatae*,[102] denoted to the common use of all, directly benefiting all individuals alike and, therefore, withdrawn from the domain of private law. These things were not regarded *res extra commercium* because of any inherent attribute disqualifying them from being owned or controlled by man, but because they were reserved through the positive law for the benefit and general use by the citizens. [103]

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96 He compared and equated the nature of *res omnium communes* with that of the sun, the moon the stars, and the atmosphere of the earth.

97 Bonfante *Grondbeginselen* note 62 above at 251.

98 Thomas JAC *Textbook of Roman* Law 1986 Juta Cape Town 129.

99 This viewpoint is supported by the stipulation contained in D 47.10.13.7 determining that redress for interference with one's enjoyment of *res omnium communes* was not a proprietary action but the *actio iniuriarum*.

100 Sohm *Institutiones* note 95 above at par 59 stressed that certain things could be owned by the state as if by a private person e.g. money and slaves, these things were not *extra nostrum patrimonium* as they were not directly *publico usui destinatae*.

101 Sohm *Institutiones* note 95 above at par 59.

102 M*eant for public service.*

103 Bonfante *Grondbeginselen* note 62 above at 252.

2.1.2 Roman-Dutch Law

Grotius did not support the notion that some things were not capable of private ownership.[104] Although he acknowledged the existence of the division of things into the categories *res divini iuris* and res *humani iuris,*[105] he held the opinion that all these things belonged to man, albeit for different purposes.[106] He therefore divided all things into four categories with a view of them being the object of ownership. Things he regarded to be the property of all men were defined as *res communes*. It is important to note that Grotius did not only assign the use of what he saw as *res communes* to mankind, but awarded ownership of those commodities to mankind as it remained undivided between men. *Res publicae*[107] and *res universitatis* were the terms defining those things that were the property of certain large societies of men.[108] State property was specifically categorised as *res publicae*[109] and it is further stipulated that all public property belonged to the state.[110] Property of individual men was *res singulorum* and property belonging to no one *res nullius.*

Grotius identified the sea and air as things common to all men[111] because they possessed certain characteristics.[112] Because of "their vastness and on account of the common

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104 Van der Vyver *Ètatisation* note 47 above at 272.

105 De Groot H *Inleidinge tot de Hollandsche Rechts*-geleertheyt 1738 Amsterdam – hereafter referred to as Grotius *Inleidinge,* 2.1.15.

106 Grotius *Inleidinge* 2.1.15 -
… doch alles wel ingezien zijnde zal men bevinden dat alle die zaken den menscehn toe-behooren, maer tot verscheiden ghebruick. […everything considered, it would be found that all things belong to humans but for different purposes].

107 Grotius *Mare Liberum* Van Deman Magoffin translation http://oll.libertyfund.org/Texts/Grotius0110/Freedom [2005/06/17] on 17 explained that he regarded public property as the "*private property of a whole nation."*

108 Grotius *Inleidinge* 2.1.16. Van der Vyver *Etatisation* note 47 above 275 opined that Grotius did not uphold the distinction made in Roman law between *res publicae* and things belonging to corporate bodies such as towns and cities. In light of the stipulations contained in Grotius *Inleidinge* 2.1.24 and 31 the writer hereof is unable to support such a contention

109 Grotius *Inleidinge* 2.1.24.

110 Grotius *Inleidinge* 2.1.29.

111 Grotius *Inleidinge* 2.1.17; Grotius *Inleidinge* 2.1.22.

112 Grotius's reasoning for defining the air and the sea as *res omnium communes* is explained and elaborated on in his work *Mare Liberum*. In the translation by Van Deman Magoffin http://oll.libertyfund.org/Texts/Grotius0110/Freedom [2005/06/17] on 3, the origin of the rule is emphasised:

service which they have to render"[113] the rights of foreigners[114] to sail and fish in the open sea, even along the Dutch coastline, were acknowledged.[115] The necessity for government regulations concerning the use of the sea was stressed by him.[116] Grotius distinguished between the open sea and the open shore. Contrary to the Roman definition, he opined that the rights of mankind only extended as far as the sand of the sea which was for the greater part of time, or at mean-tide,[117] under water. The open shore

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> Now, as there are some things which every man enjoys in common with all other men, and as there are other things which are distinctly his and belong to no one else, just so has nature willed that some of the things which she has created for the use of mankind remain common to all, and that others through the industry of labor of each man become his own.

He referred to older writers like Seneca and Cicero and poets like Vergil and Ovid to underline the long recognised existence of the rule. It is in chapter 5 of the work that one finds the core of his argument. In the first instance he indicated that the words 'sovereignty' and 'common possession' had other meanings in the earliest stages of human existence than those attributed to them at the 'present' time. In ancient times 'ownership' merely meant the privilege of lawfully using common property. He refers to Cicero, Horace and Avienus to indicate that in this sense all things were held in common property in ancient times and that the notion of private ownership did not exist in those times. One must, therefore, be aware of the fact that "Poverty of language compels the use of the same words for things that are not the same". The transition to the 'present' notion of ownership developed gradually "nature herself pointing the way". Things possessing certain characteristics like being consumable or being able to be appropriated or possessed were capable of being held in private ownership. This appropriation came through occupation. Grotius continued to indicate that as states began to be established a new category of ownership originated namely public ownership. This term denoted that things public were the property of the people. Public and private property arose in the same way. However, things that could not be appropriated through occupation and all things which could be used by one person without loss to anyone else ought to remain in the same condition as when it was first created by nature – common to all men. Air accordingly belongs to this category as it is not susceptible to occupation and its common use is destined for all men. Grotius asserted that occupation of the sea is neither permissible by nature nor on grounds of public utility. The sea "is for the same reason common to all because it is so limitless that it cannot become a possession of any one". It is within this 'limitlessness' that the distinction is found between rivers and the sea. With reference to Johannes Faber Grotius stated on 19 "A nation can take possession of a river, as it is enclosed within their boundaries, with the sea, they cannot do so".

113 Grotius *Inleidinge* 2.1.17.

114 Although this was the principle, Grotius deviated from this principle in a legal opinion based on the question whether the inhabitants of his country may prevent strangers from fishing in the water of the Island Spitzbergen. He argued that because the English, Danes and other nations have adopted laws whereby no strangers were allowed to fish on their coasts within a specific range, mostly canon-range, these nations could be compelled to abide by their own laws and consequently be denied the right to fish on the Dutch coast line – De Bruyn *The Opinions of Grotius* 131.

115 Grotius *Inleidinge* 2.1.18.

116 Grotius *Inleidinge* 2.1.19.

117 Mean-tide is midway between high-water and low-water. – Maasdorp AFS *The introduction to Dutch jurisprudence of Hugo Grotius* 3rd ed 1903 Juta Cape Town, 43.

belonged to the people of the country[118] and one can, therefore, infer that it was regarded as *res publicae.* [119]

Another Roman principle that was not applied in Roman-Dutch law related to fishing in rivers. It was not lawful for every man to fish in the public rivers[120] using any method other than fishing with a rod[121] as the right of fishing where the state was proprietor of the rivers[122] belonged to the state.[123] Because certain rivers[124] were regarded to be public and state owned, the governments of Holland and West-Friesland were entitled to levy tolls and other taxes[125] for use of the rivers by foreigners.[126] These taxes and levies were to be used for the conservation of the rivers.[127]

That the apparent clarity enfolding the notion of *res communes*[128] as it was understood in Roman-Dutch law is misleading, is illustrated by the following remark by Van der Vyver:[129]

> In his comments on these passages Van der Keessel poured cold water on Grotius's exposition of *res omnium communes* and the entitlements supposedly sanctioned as a matter of '*het algemeene recht'* in respect thereof.

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118 Grotius *Inleidinge* 2.1.21.

119 Voet *Commentarius ad Pandectas* 1.8.9. held a different opinion as he regarded the open shore among the *regalia* or domains of the Emperor.

120 Maasdorp AFS *Institutes of South African Law* vol II 9th ed edited and revised by Hall CG 1976 Juta Cape Town, 81 indicated that it was the general opinion of the old Roman-Dutch law writers that the rivers of Holland belonged to the sovereign.

121 Grotius *Inleidinge* 2.1.28 and Wessels JH *History of the Roman-Dutch Law* 1908 African Book Company Grahamstown, 475 indicated that the right of fishing was thrown open to all subjects if Holland in 1795 and the law of Holland were made the same as the Roman law of Justinian.

122 Grotius *Inleidinge* 2.1.25.

123 According to the stipulation contained in Grotius *Inleidinge* 2.1.27 the state granted the right of fishing to the Counts. The principle that the right of fishing belonged to the State in those rivers owned by the State seems to be a remnant of the Germanic institution of *regalia* – Van der Vyver *Ètatisation* note 47 above at 272, 274. Also see Wessels *History* note 121 at 474 in this regard.

124 These were rivers flowing perennially within the borders of the Netherlands.

125 Grotius *Inleidinge* 2.1.26.

126 Grotius *Inleidinge* 2.1.25.

127 Grotius Inleidinge 2.1.26.

128 William Welwod interpreted the notion of *commune* to be equivialent to *publicum, quasi populicum*, thus signifying a thing common for the usage of any sort of people and not for all nations – Grotius H *The Free Sea* translated by Richard Hakluyt 1609 edited by David Armatage http://oll.libertyfund.org/ToC/0450.php [2005/06/17] 69.

129 Van der Vyver *Étatisation* note 47 above at 273.

According to Van der Keessel[130] one should in the first instance note that the air and the sea are not legal objects and consequently not capable of being owned. It should accordingly not be understood as though everybody had ownership in respect thereof, but rather that everybody had the use of such things. He also indicated that the right of foreigners to fish in the seas along the Dutch coastline did not stem from the principle of *res omnium communes*, but originated from the natural law as much as it did from international treaties.[131]

Johannes Voet was another renowned jurist who commented on the distinction between *res omnium communes* and *res publicae.* When Voet's remarks on the subject are evaluated, it must be kept in mind that he was mainly commenting on the Pandects. One finds mere brief references to the state of law of his time. Voet attenuated Justinian's classification of things to two major categories, namely things that are somebody's and things that are nobodies.[132] *Res omnium communes* were then said to be those things which are nobody's which fall under human law.[133] Any individual could take for himself what is enough for himself,[134] but these things could not be *seized wholesale by private persons.*[135]

130 Van der Keessel DG *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam* Hollandicam translated in Afrikaans by Goning HL 1961, hereafter referred to as Prael *ad Gr Inl* at 2.1.17.

131 *Prael ad Gr Inl* 2.1.18. In defence of Grotius it must be stated that he did indicate in *Mare Liberum* translated by Van Deman Magoffin http://oll.libertyfund.org/Texts/Grotius0110/Freedom [2005/06/17] on 16 that "what the Romans call 'common to all men by natural law' and what is now regarded as being 'public according to the law of nations' are to be viewed as synonyms in modern language".

132 Voet J *Commentarius ad Pandectas* as translated by Gane P in *The Selective Voet being the Commentary on the Pandects by Johannes* Voet 1955 Butterworths Durban, hereafter referred to as Voet *Commentarius ad* Pandecta at 1.8.1.

133 It would seem that Voet and Grotius had a major difference of opinion on this aspect. Grotius H *Mare Liberum translated by* Van Deman Magoffin http://oll.libertyfund.org/Texts/Grotius0110/Freedom on 16 differentiates between the meaning of *res* nullius when things marked out for common use are the subject and when things that are capable of being appropriated e.g. game and fish are under discussion. In the first instance *res nullius* denotes nothing more than things not susceptible to private ownership.

134 Voet *Commentarius ad Pandectas* 1.8.3. Voet did not qualify the terms "what is enough for himself". Seen in the light of the qualification that follows one can aver that it meant enough to sustain livelihood.

135 Voet *Commentarius ad Pandectas* 1.8.3.

Res publicae were those things in public ownership of many persons[136] falling under the main category of things belonging to somebody.[137] They were differentiated from *res communes* because they had already *begun to be in ownership*.[138] Voet stated, however, that the shores of the sea and rivers were not reckoned to be *res publicae* because they were considered among the *regalia* or domains of the Emperors. This state of affairs can be attributed to the Germanic heritage and feudal practices of his time.[139]

Simon van der Leeuwen saw *res omnium communes* as an example of things within the patrimony of man,[140] therefore, the common property of all persons. In this he sided with Grotius and parted with Voet. He held that no-one was entitled to appropriate to himself the exclusive use of common property as everyone was entitled to its use and enjoyment.[141] He also differentiated between things not allotted to someone but capable of appropriation, like fish and game, and things which were common to all human persons.[142] Van der Leeuwen confirmed that *res publicae* became part of the *regalia* and that the ownership of *res publicae* and the use and enjoyment thereof have been separated.[143] While the use of the seashore was common and public, it belonged to the Prince who had the administration and authority over it.[144]

An important aspect that must be taken into consideration is discussed by Bort.[145] He pointed out that the Counts were initially allowed to alienate things falling within the category of *domeyn-goederen* (previously known as *res publicae*) provided that it was not

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136 Voet *Commentarius ad Pandectas* 1.8.1, 1.8.8.
137 Voet *Commentarius ad Pandectas* 1.8.10 acknowledged the existence of another kind of public property namely *res universitatis.*
138 Voet *Commentarius ad Pandectas* 1.8.8.
139 Van der Vyver *Ètatisation* note 47 above at 279.
140 Van Leeuwen S *Censura* Forensis Part 1 of Book 5 translated by Hewett M 1991 SA Law Commission Research Series no 15, hereafter referred to as Cens *For* at 1.2.1.5.
141 *Cens For* 1.2.1.7.
142 *Cens For* 1.2.1.7.
143 *Cens For* 1.2.1.7. He is supported in this by Huber who held the view that all things public belonged either to the state or to a structured community of people the so-called *Gemeente* – Huber U *Heedendaegse Rechtsgeleetheyt* 3rd ed 1726 Visscher Amsterdam 2.1.16.
144 Kotze J.A. *Surveyor-General (Cape) v Estate De Villiers* 1923 588 on 623.
145 Bort P *Tract van de domeynen van Hollandt cap 2,* 1702 Leyden *notes 3-5*.

to the serious detriment of the public interest.[146] However, a resolution was passed by the States of Holland on the 15th September 1620 forbidding the future sale, transfer, pledge or other cession of the country's *regalia domeynen* or other public rights and property except upon express resolution passed by the States in their public capacity.[147]

Given the difference of opinion reflected in the above outline of Roman-Dutch authorities on the notion of *res omnium communes* it is difficult to ascertain what the state of affairs was as far as the nature of *res omnium communes* is concerned. The fact that *res omnium communes* were to the avail of every human person was, however, never disputed. It seems that the air and the open sea were the only two categories of things considered to be *res communes*[148] due to the feudal influence of the time. *Res publicae* became subject to the ownership of the state but the

> public retained an interest in the use and enjoyment of those objects destined for general use by members of the community.[149]

Although the notion of public trusteeship is not directly derived from the South-African Roman-Dutch rooted common law it does share characteristics with both *res publicae and res omnium communes* for it denotes that a nation or humankind –as an entity - can attain certain rights in specific kinds of property.

2.1.3 Approaching the origin of the concept of public trusteeship in South African law from another angle

It can be argued that the idea that the country's natural resources belong to "the people" originated from the African National Congress' Freedom Charter. The Freedom Charter is

146 Bort *Tract van de domeynen van Hollandt cap 2,* note 145 above at *notes 3-5*.
147 *Groot Placaat Boek 3* on 734 as referred to by Van der Vyfer *Ètatisation* note 47 above at 283.
148 Van der Vyver *Ètatisation* note 47 above 282 opined that the seashore was also regarded as *res communes.* This opinion is correct if one considers the boundaries set for the shore. However, it was a very small area that was regarded to be *res communes*. The rest of the shore was regarded to be under the *regalia* of the Emperors.
149 Van der Vyver *Ètatisation* note 47 above at 283.

a specific type of national heritage that is tied to a democratic stream in South African politics.[150] Many hold the opinion that he Constitution which is the supreme law of the Republic is based on the values of the Freedom Charter.[151] In the Freedom Charter it is stated[152],

> The national wealth of our country, the heritage of South Africans, shall be restored to the people.

This is, however, a mere ideological statement and not indicative of the mechanism employed to reach the stated objective. Another, more viable explanation, is that the concept can be traced back to many of the Customary and Indigenous Law principles. This aspect still needs to be researched.

It remains now to determine how the idea of property belonging to 'all' featured in pre-constitutional South African case law.

2.2 Public trusteeship in South African law II: The concept of public trusteeship in pre-constitutional South African case law

Due to the Roman-Dutch roots of South African common law, the Roman-Dutch view was followed in South African jurisprudence. As a result the air and the open sea were the only two categories of things considered to be *res omnium communes* while *res publicae* became subject to the ownership of the state with the public retaining an interest in the use and enjoyment of those objects destined for general use by members of the community.

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150 Suttner R "Talking to the ancestors: National heritage, the Freedom Charter and nation-building in South Africa" 2005 http://free-books-online.net/Talking-to-the-Ancestors:-National-heritage,-the-Freedom-Charter-pdf 6.

151 Suttner "Talking to the ancestors" note 150 above at 3.

152 The Freedom Charter http//:www.anc.org.za/ancdocs/history/charter.html.

Although the open sea and air were not regarded as legal objects and could, therefore, not be 'owned' by anybody, the state regulated the use and prohibited the abuse and pollution of these 'entities' from early in history.

It was mainly in cases where water-rights[153] and rights to the seashore[154] were the nature of the state's interests in *res publicae* came under discussion. Interesting aspects emerge when case law dealing with water-rights and rights to the seashore are scrutinised. In the first place it is evident that the principle of custodial sovereignty is not a novice to South African jurisprudence, but that the state has previously been regarded as the custodian of at least the seashore. Secondly, it is obvious that the public's right to water has duly been guarded by the state. Thirdly, it is noticeable that a differentiation was made between two *modi* according to which the state held property.

The motivation for the first of the three abovementioned suppositions is found in case law. In 1891 it was held by De Villiers CJ in *Anderson and Murison v Colonial Government*:[155]

> No doubt the Government are (sic) in one sense the custodian of the seashore, but they are such only on behalf of the public. They may as Voet (1.8.9) points out, grant permission to individuals to build on the seashore … but that permission is, I take it, subject to the condition that the rights of the public shall not be interfered with.

Although aspects of *res publicae* featured in very early cases,[156] it seems that *Surveyor-General (Cape) v Estate De Villiers*[157] was the first case where an historical overview of both these principles was given. The nature of the state's right relating to the seashore

153 See cases referred to in this paragraph *infra.*
154 E.g. *Anderson and Murison v Colonial Government* (1891) 8 SC 293 on 296, *Colonial Government v Town Council of Cape Town* (1902) 19 SC 87.
155 *Anderson and Murison v Colonial Government* (1891) 8 SC 293 on 296.
156 E.g. *Anderson and Murison v Colonial Government* (1891) 8 SC 293.
157 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588.

was clarified in *Surveyor-General (Cape) v Estate De Villiers*[158] where Kotze JA[159] stated more than 30 years later:

> while the ownership of the seashore is in the Crown, the public has the free right of its lawful use.

Here one is directly confronted with the terms 'custodian', 'crown ownership' and 'public right of free use'. These terms are not only used in relation to each other, but lead to the other noteworthy observation regarding to the two *modi* according to which the state held property.

In *Rex v Lapierre*[160] a distinction was made between property held by state to which the public has a 'right of user' and property held by the state in the same way as an individual would hold an asset that is in *nostro patrimonio.*[161] Here the High Court of the Orange Free State held that:[162]

> The expression "private property" … is used in contradistinction to property to which the public have a common right of user; consequently the property of the Crown, which is not subject to such a right of user, falls within the meaning of the term.

In 1902 this principle was elaborated on in *Colonial Government v Town Council of Cape Town*[163] where it was held in relation to the seabed that:

158 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 on 624.
159 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 on 624.
160 *Rex v Lapierre* 1905 ORC 61.
161 This distinction led to the finding that some state property was deemed to be inalienable and others not. In *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194 Innes CJ held that:
> Rights which from their nature involved a recognition of sovereignty … were not prescribable. And the same may be said of inalienable State domains.
162 *Rex v Lapierre* 1905 ORC 61.
163 *Colonial Government v Town Council of Cape Town* 1902 19 SC 87.

> The Crown is not the owner of the land in the same sense that it owns Crown lands above high water mark, but it enjoys the supreme right of control, which carries with it the right of claiming ownership of the land itself whenever the land ceases to be covered by water.

Although it came to be generally accepted that ownership of the seashore was vested in the crown,[164] the crown was not granted the competence to freely dispose of the asset. The nature of ownership of the sea shore rebelled against such a contention. Despite the fact that the State President was 'declared' to be the owner of the seashore in terms of the *Seashore Act*[165] of 1935, ownership was linked to the office and not the person.[166] The public's rights were still protected to such an extent that Schreiner JA held in a concurring judgement in *Consolidated Diamond Mines v Administrator, SWA*[167] that although the state "could effectively grant rights out of its regalia to private persons"[168] it could not grant ownership of the foreshore to a private person in the absence of legislative authority,[169] and Steyn JA in a dissenting judgement regarded the government as "merely the custodian of the seashore on behalf of the public". It is clear that although the state was deemed to be the owner of the seashore, it was restricted to a great extent in its dealings with the seashore and the public's rights had to be protected and considered when dealing with the seashore. A distinction was made between the *modi* of state ownership of the seashore and other assets held by the state that could be alienated.

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164 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 on 624. Different opinions were held on this subject and Steyn JA in *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A) at 643 in a dissenting judgement regarded the Government as "merely the custodian of the seashore on behalf of the public".

165 *Seashore Act* 21 of 1935.

166 Van der Vyfer denotes this as the *Ètatisation* of *res publicae.* This view cannot be supported as it must merely be seen as an effort to bring the seashore under the ambit of the property concept of the time and private ownership was the ultimate method to 'protect' property. As stated in *Surveyor-General (Cape) v Estate De Villiers* 23 AD on 594 "the *dominium* of the beach must be in someone...". The public's rights are still protected within the ambit of the wider public interest.

167 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A).

168 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A) 638. See the earlier case of *Rex v Carelse* 1943 CPD 242 where it is explicitly stated that the act is declatory of the common law and preserves the rights of the public.

169 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A) 636.

The remaining supposition relates to the public's right to water.

Maasdorp[170] referred to the *Origineel Placaat Boek* to indicate that the Dutch East Company claimed an absolute right to control the use of streams for irrigational purposes in its own interests[171] and stated:

> That the State… was actually *dominus fluminis* is apparent throughout the resolutions of the Council of Policy from 1770 onwards …. As *dominus fluminus* the Company exacted a preferential user both for its gardens and its mills.

Although the concept of the state as *dominus fluminis* was incomprehensible to English and Scottish lawyers appointed when the Cape of Good Hope became a British Colony, the rights of the Crown to regulate rivers were kept intact while the principle of riparian ownership was introduced.[172] The public's right to certain privileges in relation to water was also protected despite the introduction of riparian ownership. In *Van Heerden v Weise*[173] the court held:

> When once the public nature of the stream or river is established, the rights of each riparian proprietar (*sic)*… are limited by the natural rights of the public.

Henry Juta[174] defined the scope of the public's interest as:

> Public streams are public or common to all in this sense, that every man drink of it or apply it to the necessary purpose of supporting life.

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170 Maasdorp *Institutes* note 120 above at 81.
171 Maasdorp *Institutes* note 120 above at 82.
172 Maasdorp *Institutes* note 120 above at 84.
173 *Van Heerden v Wiese* 1 BUCH AC 5 1880.
174 Juta HH *A selection of leading cases for the use of students and the profession generally, with notes* 1898 Juta Cape Town, 421.

Through regarding the state as *dominus fluminis* while simultaneously protecting the public 'right to use' the state's *dominium* was upheld as far as *res publicae* was concerned. Even with regard to riparian ownership, proprietary rights had to bow before the public rights of navigation and fishing, and the state retained the supreme right of control. *Butgereit v Transvaal Canoe Union*[175] is indicative thereof that the entitlement of members of the public to the use and enjoyment of perennial rivers remained intact save to the extent that the public's common law rights have been restricted by state regulation.

2.2.1 Conclusionary remarks

It is clear that the notion of property belonging to all, is not new to the South African law. Even the concept that the State is bequeathed the ownership of a specific resource, an ownership laced with custodial responsibility, is not a foreign concept to South African jurisprudence. It would, however, not be correct to regard the concept of public trusteeship as it emerges in recent natural resources legislation as a mere resurrection of the common law concepts of either *res publicae* or *res omnium communes*. It is a legislative introduction of a new legal doctrine that displays similarities with, but goes beyond known common law principles. The content of the concept should be determined within the context of the different statutes where it appears.

The discussion above revealed that a doctrine of public trust was never formally acknowledged in South African law. The inherent attributes of this doctrine did, however, find their way into the South African legal system through the common law constructs of *res publicae* and *res omnium communes.*

175 *Butgereit v Transvaal Canoe Union* 1988 1 SA 759 (A).

2.3 *Public trusteeship in South African law III: The post-constitutional emergence of statutory doctrines of public trust in South Africa*

There is currently an academic debate about whether a (one or more) public trust doctrine has been introduced to South-African natural resources law[176] or whether the language of relevant provisions referring to public trusteeship boils down to nothing more than socialist rhetoric.[177] One of the causes of this debate is the fact that the legislature was not consistent in the language used in each of the affected pieces of legislation. Terms and phrases like 'custodian' and 'trustee', 'owns' and 'belongs to', theoretical and intricate phrases which may sound like synonyms to the layman, have been used alternately in different pieces of legislation. What is clear, however, is the legislature's intention to create a legal construct that statutorily entrench the State's fiduciary responsibility towards its citizens while recognizing the fact that some resources cannot be dealt with in contemporary private law relationships.

Before the manifestation of public trusteeship in the NWA will be scrutinized, the focus will fall on the concept of public trusteeship in other pieces of natural resource related legislation and relevant case law.

2.3.1 Legislation

Excluding the NWA, the concept of public trusteeship is embraced in the following statutes:

S 2(o) of National Environmental Management Act [NEMA] 107 of 1998 – The environment is held in **public trust** for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

176 Pope A and Moster H "The Principles of the Law of property in South Africa" 2010 Oxford University Press Cape Town, 211.

177 Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 2004 Juta Cape Town.

S 3(1) of the Mineral and Petroleum Resources Development Act, 28 of 2002 – Mineral and petroleum resources are the **common heritage** of all the people of South Africa and the State is the **custodian** thereof for the benefit of all South Africans.

S 11(1) of NEMA: Integrated Coastal management Act [ICM], 24 of 2008 – The **ownership** of coastal public properly **vests in the citizens** of the Republic and coastal public properly must be **held in trust by the State** on behalf of the citizens of the Republic.

S 12 of NEMA : ICM – **The State, in its capacity as the public trustee** of all coastal public property, must— *(a)* ensure that coastal public property is used, managed, protected, conserved and enhanced in the **interests of the whole community**; and *b)* take whatever reasonable legislative and other measures ii considers necessary to conserve and protect coastal public properly for the **benefit of present and future generations.**

S 3 of NEMA: Biodiversity Act, 10 of 2004 – In fulfilling the rights contained in section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity, must—(*a*) manage, conserve and sustain South Africa's biodiversity and its components and genetic resources; and (*b*) implement this Act to achieve the progressive realization of those rights. [Although the term 'trust' or trustee' does not feature in this section, the section's heading reads – "State's trusteeship of biological diversity".]

Although the indiscriminate use of language will probable hamper the initial contextualizing of this new concept, its effect will ripple through South African law. A very clear indication of what the legislature intended to achieve with the environmental related legislation, is found in the *White Paper on Environmental Management Policy [EMP] for South Africa*. While it is true that the White paper is merely a policy document it gives good guidance for interpreting concepts unless the contrary shouts out from the promulgated legislation.

The *EMP* states as goal the promotion of equitable access to and sustainable use of natural and cultural resources and promotes environmentally sustainable lifestyles. In the *EMP* the government acknowledges that it has a constitutional duty to protect the environment for the benefit of current and future generations. And then very importantly- it is stated that the government "accepts the duties and responsibilities implied by the doctrine of the Public trust". It is thus important to accept that the universal principal contained in the doctrine of public trust should be kept in mind when South-Africa's natural resources legislation is interpreted.

Due to the fact that the concept of public trusteeship is a novel concept in South African law, the concept has not yet been scrutinized thoroughly by the judiciary. In the following section an overview will be given of the most important case law that referred to the concept.

2.3.2 Case law

The Courts acknowledged the government's duty to act as trustee of the environment to the benefit of the people of South Africa in *inter alia South African Shore Angling Association and Another v Minister of Environmental Affairs* 2002 (5) SA 511 (SE) and BP *Southern Africa (Pty) Ltd v MEC for Agricultural Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W). The problem regarding the concept of public trusteeship does not revolve around the fact that the State is appointed custodian or trustee but the consequences that this concept holds for the private property and property rights. It has been argued that the doctrine of public trust opens the door for uncompensated government infringements of private property or property rights due to the fact that a pre-existing title or interest is acknowledged in certain goods.

The question that proponents of private property regimes ask is always – "Who is the owner of ….?". This is no easy question to answer. The discussion above at paragraph 1 indicated that different property regimes can be found with relation to different natural

resources. Even in South-Africa there is a distinct difference between 'the environment' as subject of public trusteeship and specific natural resources like water and minerals. It is my contention that the wording of each individual act dealing with a specific resource should be scrutinized to find to which extent the concept of public trusteeship has been incorporated with reference to a specific resource, and the impact that such incorporation has on the pre-existing property regime. The impact of the concept of trusteeship on current property regimes will remain a contentious issue. It is, however, contended that the reference to ownership and property rights introduces an analogy to private property law here that is misleading. This aspect will be dealt with in the final report. To indicate the necessity for such a discussion, the reader's attention is drawn to the following cases.

The only reported decisions that hint of a new property concept under public trusteeship is the recent decisions of *De Beers Consolidated Mines v Ataqua Mining (Pty) Ltd and Others*[178] and *De Beers Consolidated Mines v Regional Manager, Mineral Regulation Free State Region: DME.*[179] Here the courts found that the state has done away with the legal notion of private ownership of mining and mineral rights and that such rights vest in the custodianship of the state. It is then further stated that:

> the state in granting prospecting benefits or permits is not dealing with the mineral resources of the public as a holder of common law rights nor does it deal with these minerals as a subject of mineral rights of private persons. Since 1 May 2004 all mineral resources belong to the nation and the state is vested with the custodianship and control of such mineral resources.

With relation to water the most recent, and controversial, decision is contained in *Mostert v The State* [2009] ZASCA 171. Here the judge held that water flowing in stream or river is not capable of being stolen. A riparian owner who abstracts more water from such a water resource than that to which he or she is legally entitled can thus commit a statutory

178 *De Beers Consolidated Mines v Ataqua Mining (Pty) Ltd and Others – (High Court of South Africa Orange Free State Provincial Division)- Case No: 3215/06*

179 *De Beers Consolidated Mines v Regional Manager, Mineral Regulation Free State Region: DME – (High Court of South Africa Orange Free) Caseno 1690/2007.*

offence under s 151 of the NWA but does not commit the offence of theft. He founded his view on the fact that nobody 'owns' the water and argued that the 1998 Act does no more than place all water within the aegis of state control, which control the state had in any event exercised over public water before it came into operation.

The aspect of ownership of water is an aspect that needs to be followed up in subsequent reports. This will only be possible if the effect of public trusteeship on property rights is researched. Specific sections in the parts B and C of this report will be dedicated to this contentious issue for it is contended that public trusteeship entails more than merely recognizing the government's role in managing, protecting and determining the proper use of the country's water resources.[180] As regime-changing concept its influence will reach far and deep.

Although not previously applicable in the South African legal context, the concept of public trusteeship has statutorily found its way into South African law. This concept cannot be ignored or wished away for it will be part of South African law unless and until it is statutorily expelled.

A3 Public trusteeship as introduced in the *National Water Act*

Due to the fact that this part of the report is solely aimed at contextualizing the concept of public trusteeship, with the second part of the report focusing on the roles, responsibilities, obligations and entitlements of all role players, this section will only deal with the occurrence of public trusteeship entrenched in South African water law legislation. The

180 Thompson H *Water Law* 2006 Juta Cape Town, 279; Stein R "Water law in a Democratic South-Africa: A Country Case Study Examining the Introduction of a Public Rights System" 2005 *Texas Law Review* 2167 – 2183; Francis R "Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics and Political Power" 2006 *Georgetown International Environmental Law Review* 149-196; Van der Schyff E and Viljoen G "Water and the public trust doctrine – a South African perspective" 2008 *The Journal for Transdisciplinary Research in Southern Africa* 339-353.

effect and consequences that the incorporation of the concept holds for the role players will be dealt with in the second report.

In synchronization with the *EMP* (paragraph 2.3.1 above) the *White Paper on a Water Policy for South Africa* [*White paper*] declares government's intention to implement the doctrine of public trust. The reality of public trusteeship echoes through the *White Paper.* The intention to redevelop the idea of water as public good into a doctrine of public trust, similar to the US public trust doctrine but uniquely South African, is evident. It is also a reading of this *White Paper* that highlights the fact that the terms "custodian" and "public trustee" should be regarded as synonyms when interpreting the concept of public trusteeship.[181]

The legislature rooted this vision firmly in the South African water law dispensation with the promulgation of the NWA. The preamble of NWA proclaims that water is a natural resource that belongs to all people and determines in sec 3(1): As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.[182]

It is evident from the *White Paper* that the concept of public trusteeship is central to the approach to water management.[183] It can be deduced that the doctrine of public trust was incorporated in the NWA with the sole purpose of achieving the objectives stated in section 2 of the Act. It was the 'mechanism' that the legislature deployed to ensure that the country's water resources are managed in the best interest of all its citizens and the community at large.

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181 *White paper on a Water Policy for South Africa*, 58.

182 The said minister is ultimately responsible- and therefore it was very disconcerting to take read Proclamation 39 of 2010 published in Government Gazette 33437, of 4 August 2010 whereby the State President assigned certain powers and functions (*inter alia* the appeal authority) that are exercised or performed by the Minister of Water and Environmental Affairs to the Minister of Justice and Constitutional Development.

183 *White Paper* par. 5.1.2.

With one, relatively short provision, a new future has been announced for South Africa's water law dispensation. The meaning and implications of public trusteeship as it is incorporated in the NWA will be dealt with in parts B and C of this report.

A4 Concluding part A

It was stated above in the introduction, that within the context of the study as a whole, this part of the report can be described as contextualizing the concept of public trusteeship. It focused on giving an account of public trusteeship [1] in common property internationally, [2] in South African law and [3] its incorporation in the National Water Act.

Research indicated that the concept of public trusteeship encapsulates a sovereign's fiduciary responsibility to hold the environment and certain natural resources in trust for current and future generations. The concept of public trusteeship is often referred to as a doctrine of public trust, or the public trust doctrine. The study revealed that this concept, with strong philosophical foundations, has been incorporated in numerous foreign legal regimes. This concept cannot be confined to one legal construct but it materializes in different legal constructs in different legal regimes. It is a universally recognised concept.

The research has shown further that the concept of public trusteeship, albeit not formally recognised as legal doctrine in South African common law, demonstrates striking similarities with the legal consequences of the property constructs *res publicae* and *res omnium communes.* This being said, the concept should not be confused with the said common law constructs for it is a brand new statutorily created concept in South African law.

The purpose of introducing a concept of public trusteeship to South African law is indicated in the policy documents relevant to water as natural resource and the environment. The government accepted its fiduciary responsibility and acknowledged that certain resources cannot be dealt with in contemporary private law relationships. The

universally accepted doctrine of public trust provided a perfect mechanism to curb private rights in public property while avoiding the tragedy of the commons. As the study revealed, the concept of public trusteeship is a flexible tool that can be utilized together with other resource-governing regimes and property regimes.

The NWA revolves around the concept of public trusteeship. It is contended that the water law dispensation was changed in totality. It was implicitly stated in the *White Paper on a Water Policy for South Africa* that the idea of water as 'public good' would be redeveloped. The full extent and implications of this 'redevelopment' will be dealt with in the second part of this report.

Part B: Public trusteeship: defining roles, responsibilities and obligations of role players in decentralised water management and governance

This is the second part of the report delivered under the broad theme – 'The concept of public trusteeship as embedded in the National Water Act of South Africa of 1998'. The primary aim of this part is to discuss how the roles, responsibilities and obligations of role players in decentralised water management and governance are defined by the concept of public trusteeship.

To attain this aim, the concept of public trusteeship as defined in the first report will be revisited to contextualise the study. In this report it will be necessary to focus intently on section 3 of the National Water Act 36 of 1998 (NWA) as the section founding the statutory doctrine of public trusteeship. An analysis of section 3 is necessary to understand to which extent the incorporation of the doctrine imposes obligations on the different water governance structures.

In the course of the report the institutional framework for water governance will be looked at to indicate both the extent of decentralisation and to identify the different role players. It also needs to be determined whether all the role players in the context of decentralised water governance and management are cloaked with the fiduciary responsibility conferred by the concept of public trusteeship.

B1 The concept of public trusteeship revisited

This report focuses solely on the concept of public trusteeship as it is created through the NWA.

With the promulgation of the NWA a reorganisation of an entire area of law occurred.[184] The two main catalysts of change that led to the promulgation of the NWA can probably be

184 Soltau F Environmental justice, water rights and property 1999 *Acta Juridica* 229-253, 246.

identified as scientific development and political change. The scientific truth that water as a scarce natural resource occurs in many different forms which all form part of a unitary, interdependent hydrological cycle, necessitated an integrated approach to water management. The democratic awareness that condemned the reservation of access to water for a privileged group drove the political process of change. Both science and politics were accommodated through the statutory creation of the concept of public trusteeship, a concept that grew with the NWA out of an extensive process of public consultation.[185]

Through the concept of public trusteeship the nature of the country's water resources as a public common, an indivisible national asset,[186] with the state as its guardian and trustee, was entrenched in South African law. The state has been reinstated as *dominus fluminus*[187] of the nation's water resources.[188] The concept of public trusteeship, however, does far more than merely acknowledging the state's right to regulate the flow of water in the country. Being entrenched in legislation, this statutory doctrine defines the duties and obligations of the state while it defines the nation's right in the country's water resources and the corresponding responsibilities ensuing from this right.

1.1 Analysing section 3 of the NWA

In order to grasp the rich nuances ingrained in the concept of public trusteeship, the provision giving birth to it needs to be analysed. Section 3 of the NWA is suitably titled 'Public trusteeship of nation's water resources" and it is the ideal starting point for analysing the concept of public trusteeship. One needs to dissect the different elements that form the building blocks of this section to understand its true effect and meaning. In

185 Soltau note 184 above, 241.
186 White Paper on a national water policy for South Africa.
187 This phrase meant in essence that the state had the right to control the flow and use of water.
188 With the British occupation of the Cape in 1806, the Roman-Dutch law doctrine of the state being *dominus fluminis* gradually faded. English law provided for a distinction between two forms of water, namely public water and private water. This distinction had the consequence that the state as *dominus fluminis* played an increasingly insignificant role in the allocation and regulation of private water under private ownership – Hall C G *The Origin and Development of Water Rights in South Africa (*Oxford, Oxfordshire : Oxford University Press, 1939) 32.

the part that follows, section 3 of the NWA has been copied and the different individual elements that work in unison to create the concept of public trusteeship have been highlighted. When reading this quotation the reader must focus on the different elements that are colour coded. This section comprises of three sub-sections and an attempt has been made to indicate the corresponding elements in the different sub-section by using corresponding colour-coding.

Section 3(1) stipulates:

As the public trustee of the nation's water resources the National Government acting through the Minister, must ensure that **water** is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner for the benefit of all persons and in accordance with its constitutional mandate.

Section 3(2) elaborates on the Minister's duty and states very clearly that the Minister is **ultimately responsible** to ensure that **water** is

allocated equitably and used beneficially in the public's interest

while promoting environmental values.

Section 3(3) stipulates that the National Government acting through the Minister has the power to regulate the use, flow and control of all **water** in the Republic.

This reading of section 3 sheds light on the identity of the public trustee, the mandate of the public trustee, the identity of the beneficiary of the public trust, the trust *corpus*[189] and the extent of the beneficiary's rights in terms of the trust *corpus.*

1.1.1 The identity of the public trustee

Section 3(1) provides an important insight into the identity of the public trustee:

As the public trustee of the nation's water resources the National Government acting through the Minister …

It is stated unequivocally in section 3 of the NWA that the **National Government** is appointed as public trustee of the nation's water resources. Contrary to what is stated in paragraph 3.5.2.1 of the National Water Resource Strategy,[190] the Minister is not the "public trustee of water resources on behalf of the national government". The Minister is

189 The phrase 'trust *corpus'* refers to the assets or property or things that are held by the trustee on behalf of the beneficiary.

190 National Water Resource Strategy, First Edition, September 2004, Part 5 Chapter 3.

merely the ‘designated agent’ or functionary through which the National Government exercises its functions as public trustee.

The public trustee (National Government) – acting through its agent or functionary- is by and large responsible to ensure that water is protected, developed, used, conserved, managed and controlled in an equitable and sustainable manner for the benefit of all persons, in accordance with its constitutional mandate. For this reason, the National Government has the power to regulate the use, flow and control of all water in the Republic in terms of section 3(2). The responsibility to guard the interests of the nation in respect of its water resources rests squarely in the hands of National Government. This is a very important aspect, for it accentuates the magnitude of the public trustee’s responsibility. By appointing the National Government as public trustee, the NWA ensures that the ‘office’ of the public trustee transcends departmental boundaries. In all matters that can potentially impact on or affect the nation’s water resources, the National Government must execute its custodial duty.

Although the Minister of Water Affairs is the designated agent of the National Government it is the National Government who is appointed as public trustee of the nation’s water resources. It can therefore be assumed that every functionary of the National Government must constantly determine how his/her department’s activities impacts on the nation’s water resources and ensure that these water resources are not detrimentally affected by any decisions or actions of the National Government.

It is therefore not only the actions or omissions of the Minister of Water Affairs that can give rise to legal actions against the Government for not effectively executing its fiduciary responsibility as public trustee.

1.1.2 The mandate of the public trustee

Section 3 further determines the mandate within which the National Government as public trustee represented by the Minister, must exercise the assigned responsibility.
It is stated clearly in section 3(1) that the public trustee must –

…ensure that **water** is protected, used, developed, conserved, managed and

The public trustee's mandate is clearly stated in section 3(1). The water resources must be protected, used, developed, conserved and managed. Due to the fact that the NWA clearly prescribes the range of activities that the public trustee must undertake in relation to the resource, no action that is (a) not specifically mentioned in section 3(1) of the NWA or (b) that cannot by implication be incorporated in the class of actions/activities mentioned in section 3(1), may be allowed. In other words, no action that cannot be categorised as protecting, using, developing, conserving, managing or controlling the water resources in the country, may be executed by the public trustee with regard to the nation's water resources. It is thus clear that the public trustee may not alienate or burden the nations' water resources.

The NWA goes further than to prescribe and limit the class of actions that can be undertaken with regards to the nation's water resources. It also prescribes the manner or way in which these actions must be undertaken:

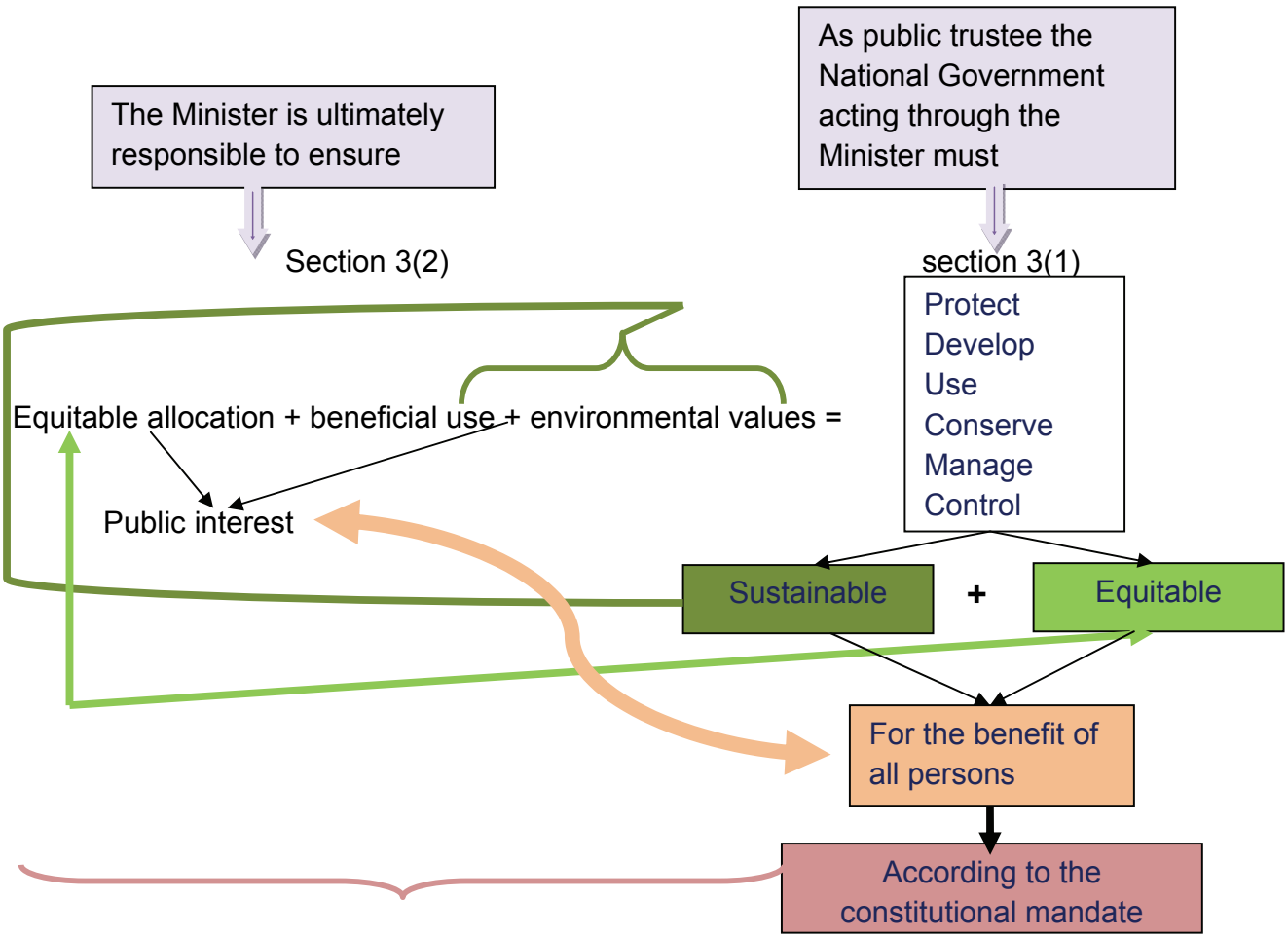
… in a sustainable and equitable manner for the benefit of all

and in accordance with its constitutional mandate …

The public trustee's mandate is further refined with the provisions contained in section 3(2). While section 3(1) prescribes the extent of the public trustee's obligation, section 3(2) narrows it down to practicalities. Through section 3(2) the Minister's responsibilities as functionary of the public trustee is specified. Section 3(2) can be regarded as the way in which the idea contained in section 3(1) must materialise. Here we find the set of criteria that should guide all actions taken by the Minister to ensure that the obligation created in section 3(1) is fulfilled.

… the Minister is **ultimately responsible** to ensure that **water** is allocated equitably and used beneficially in the public's interest while promoting environmental values.

Sections 3(1) and 3(2) are mirror images of each other and every element that is contained in section 3(1) reverberates in section 3(2). In order to highlight the collaboration between these two sub-sections the individual elements of section 3(2) are linked to the elements in section 3(1) from which they originate.



The effect of the collaboration between section 3(1) and 3(2) is that the requirements set down in section 3(1) that the nation's water resources must be protected, developed, used, conserved, managed and controlled in a sustainable and equitable manner will be realised and given effect to when the Minister ensures that water is allocated equitably and used beneficially while promoting environmental values [3(2)]. These actions will be for the benefit of all people and according to the public trustee's constitutional mandate if it is carried out in the public interest.[191]

1.1.3 The trust *corpus*

The trust *corpus* comprises of the assets that fall within the public trustee's authority. It is clear from the content of the NWA that 'water' in each of the different forms in which it manifests in the hydrological cycle is subject to the authority and trusteeship on the National Government.

As the public trustee of the nation's water resources …

The totality of the country's water resources therefore falls under the authority of the public trustee.

> The previous distinction between public and private water has fallen away. The differentiation between groundwater and surface water is no longer of any relevance.

1.1.4 **The beneficiary of the public trust**

The beneficiary of the public trust is identified in section 3(1) in the phrase –

… for the benefit of all persons …

191 It is indicated in paragraph 1.1.4.1 *infra* that the notion of public interest as used in the NWA is defined by the requirement that the public trustee act in accordance with its constitutional mandate.

The public trustee (National Government) must ensure that **all persons** benefit under its trusteeship (section 3(1)) and the Minister is expressly instructed in section 3(2) to further the **public interest.** Read with the preamble of the NWA where it is stated that *water is a natural resource that belongs to all people* it is clear that the National Government is appointed as public trustee on behalf of all the people of South Africa. The whole nation, and not a specific faction or political entity, is thus the beneficiaries of the public trust.
The nature of the beneficiaries' entitlement toward the nation's water resources remains to be determined.

1.1.4.1 The NWA and the "public right" to the nation's water resources

A reading of section 3 of the NWA reveals that the public interest and the envisaged 'benefit of all persons' seems to be the definitive goal that the public trustee must strive to achieve when protecting, using, developing, managing and controlling the trust *corpus*. It is not the mere equitable allocation or beneficial use of water that are the prescribed outcomes of the public trustee's responsibilities. It is the equitable allocation and beneficial use of water **in the public's interest**, which are the sought after, desired and prescribed outcomes of the NWA.

It is asserted in this report that through the heavy emphasis placed on the 'public interest' a corresponding public right is created. If the National Government, as public trustee, is compelled to act in a specific manner when dealing with the nation's water resources, a corresponding right comes into existence -the public right to demand that the Government deals with the resource in the manner prescribed by the NWA. In acceptance of this postulation, the content of this public right needs to be determined.

1.1.4.1.1 Defining the public interest and public right

An understanding of the concept 'public interest' may shed light on the content of the public right to water.

Several definitions have been offered to define the concept 'public interest:

- The public interest refers to the interest of society as a whole.[192]
- The public interest refers to the "common well-being" or "general welfare."[193]
- The public interest refers to the common interest of persons in their capacity as members of the public[194]

It is, unfortunately, quite clear that the term 'public interest' defies precise definition. Although the concept can be summarised as "referring to considerations affecting the good order and functioning of the community and government affairs, for the well-being of citizens",[195] it remains an abstract concept for there is no single and immutable public interest.

How then does one define the public interest as it applies in relation to the NWA?

The meaning and extent of the concept 'public interest' as it features in the NWA and establishes the public right to the nation's water resources, must first be sought within the provisions of the NWA itself. Once again the analysis of section 3 of the NWA provides an answer. The legislature, part of the democratic state dispensation, used three notions in section 3 to outline the parameters of the public interest. It is argued here, that within the entwinement of the notions 'sustainable use', 'equitable use', and 'constitutional mandate' the public interest is defined.

The NWA prescribes in section 3(1) that the public trustee's obligation should be exercised in accordance with its constitutional mandate. It is asserted that the constitutional mandate, together with the specific requirements of sustainable and equitable use prescribed in section 3(1), provide the parameters within which the concept public interest must be interpreted. The imperative that the public trustee must act in accordance with its constitutional mandate in the sphere of water governance incorporates

192 ftp.wmo.int/pages/about/doc/R&Op-II(02)APPENDIX_G.doc
193 en.wikipedia.org/wiki/Public_interest
194 http://www.answers.com/topic/public-interest
195 http://www.ombo.nsw.gov.au/publication/PDF/factsheets/FS_PublicSector_16_Public_Interest.pdf

the other two aspects namely sustainable and equitable use, specifically mentioned in section 3(1). It simultaneously gives greater priority to the elements of sustainability and equity.

The constitutional mandate as it relates specifically to the nation's water resources revolves mainly around the right of all people in the country to an environment that is not harmful to their health or well-being, the right to have the environment protected for the benefit or present and future generations[196] (this manifests in the emphasis placed on sustainable use) and the right to have access to sufficient food and water.[197] Other, less direct but equally important aspects that underlies the public trustee's constitutional mandate is the aspects of equality[198] (that manifests in the requirement that the Minister must ensure that equitable allocations are made); property[199], access to information[200], just administrative action[201], access to courts[202] basic values and principles governing public administration[203] and the obligation to see to the effective performance of municipalities.[204]

It can thus be stated that all actions that promote equitable and sustainable water use while giving effect to all applicable constitutional principles will be in the public interest. Stated in a different way – every person in South-Africa has the right to demand that every action undertaken by the National Government that affects the nation's water resources must promote sustainable and equitable water use while endorsing all applicable constitutional principles. This right is held by the public as a whole, and can thus be defined as a public right. [205]

196 Constitution of the Republic of South Africa, 1996 s 24.
197 Constitution of the Republic of South Africa, 1996 s 27(2).
198 Constitution of the Republic of South Africa, 1996 s 9.
199 Constitution of the Republic of South Africa, 1996 s 25.
200 Constitution of the Republic of South Africa, 1996 s 32.
201 Constitution of the Republic of South Africa, 1996 s 33.
202 Constitution of the Republic of South Africa, 1996 s 34.
203 Constitution of the Republic of South Africa, 1996 s 195.
204 Constitution of the Republic of South Africa, 1996 s 155(7).
205 It can also be argued that is not merely a public right but a private right held in common by all members of the public.

In recognition of this public right the NWA creates ample opportunities for members of the public to participate effectively in the water management processes. This is not only done by promoting decentralised water resources management, an aspect that will be discussed in paragraph 3 *infra*, but through actively seeking public opinion on numerous matters and requiring that the Minister and other relevant authorities must actually consider all comments received before final decisions are made.[206]

> The NWA creates the framework within which all decisions relating to the nation's water resources must be taken. In the NWA the public right to water as well as the extent of the responsibilities and rights of role players are founded. Individual interests will be measured against public interests.

1.1.5 Conclusionary remarks

A comparative insight on the using of public trust principles in protecting 'water for the people' highlights the required focus and aim of public trust law.[207] Olson stated that public trust law should:

- Declare that the streams, lakes and rivers, and tributary groundwater of a state are a single hydrological system and impressed with a public trust, that the state holds and manages its water consistent with this public trust.
- Ensure that when approving, licensing, permitting the use, diversion, reallocation of flows and levels of the water of the state, no such approval should be authorised if the standards of the public trust doctrine have not been met. These are that –
    - they serve a primary public purpose;
    - there is no material impairment of water, water dependent natural resources, or use and enjoyment of citizens.

206 See *inter alia* ss 8, 13, 16, 38 and 56 of the NWA.

207 Olson J, Michigan attorney representing Michigan Citizens for Water Conservation as cited by Caplan R in Using Public Trust and Rights to Nature to Protects Maine's Water for People and Nature www.defendingwaterinmaine.org/2010/02

- Ensure that citizens whose use and interest are likely or will be affected by conduct or by approvals, licenses, permits of the state or any subdivision or local unit of government, have the right to bring an action in the courts to protect the public trust in its water and related natural resources by declaratory and injunctive or other equitable relief.
- Nothing in state law shall diminish the right of local jurisdictions to act in keeping with the public trust to safeguard the community, including its ecosystem.

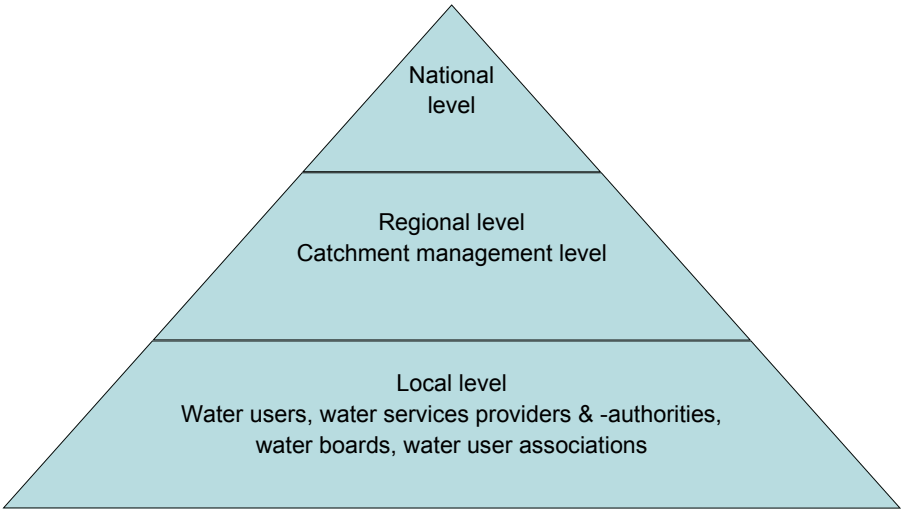
It is proposed that the exposition of the identity of the public trustee, its mandate, the trust *corpus* and the identity and entitlements of the beneficiary under the public trust as created through section 3 of the NWA indicates that the NWA fulfills all the requirements of public trust law as stated by Olson.

It remains to be determined how the concept of public trusteeship affects the roles and obligations of other role players in the water resources management.

B2 Decentralised water resources management

One of the NWA's implicit objectives is to decentralise responsibility and authority for water resources management to appropriate regional and local institutions. Nomquphu, Braun and Mitchell[208] describe the current water management system as a three-tier water management system.

208 Nomquphu W, Braun E and Mitchell S The changing water resources monitoring environment in South Africa 2007 *South African Journal of science* 306-310, 307.



The roles of the different role players are highlighted within this three-tier water management system. On the highest level, the national level, the NWA determines that the Minister has the overall responsibility of water resources management in South-Africa. Consequently all the water management institutions are subject to the Minister's authority. This fact is also true in relation to water services and sanitation delivered in terms of the Water Services Act, 108 of 1997 (WSA). The WSA recognises and confirms the National Government's role as custodian of the nation's water resources. In addition it is stipulated in section 155(7) of the Constitution that the National Government[209] has the legislative and executive authority to see to the effective performance of municipalities regarding water service delivery and sanitation by regulating the exercise by municipalities of their executive authority

Catchment management agencies (CMA), water user associations (WUA), bodies responsible for international water management and all persons who fulfill the functions of a water management institution in terms of the NWA falls into the broad category 'water management institutions'. The foundational idea of the NWA is that the Minister's responsibility to deal with the nation's water resources will eventually cascade down

209 It is also provided that the provincial government has certain authority.

through CMA's on the regional level to applicable institutions on the local level. Where a CMA has been established the Minister may only intervene when the CMA does not exercise its powers within the framework of the law. The NWA secures the Minister's overall responsibility in determining that in those cases where an established CMA is not functional, all the CMA's powers, duties and functions vest in the Minister.[210] It is thus clear that the Minister has an overseeing responsibility, not to meddle in decisions legitimately taken, but ensuring the effective functioning of the CMA.

With the exception of four responsibilities,[211] the Minister may delegate, in writing, certain powers vested in her/him to departmental officials, office holders, CMA's, water management institutions, advisory boards and water boards. By delegating powers and duties, the Minister is not absolving himself/herself from the responsibility created in section 3 of the NWA. It is stipulated in section 159(c) of the NWA that "a power so delegated, when exercised or performed by the delegate, must be regarded as having been exercised or performed by the person making the delegation". Once again, the overseeing responsibility of the Minister is emphasised. If the Minister can be held accountable for actions, or the lack of action when needed, because a functionary or water management institution to whom power was delegated refrained from acting responsibly when circumstances demanded it, the Minister must ensure that a mechanism is in place to detect such acts or omissions timeously.

The implication of section 159 of the NWA is that all functionaries in the water resources management sphere are bound to exercise their duties and obligations taking into account all the aspects that the Minister, as delegated functionary of the public trustee, would have done. In this sense the obligations linked to and flowing from public trusteeship forms part of the "framework of the law" within which functionaries and water resources management institutions must operate.

210 NWA s 72(2).
211 NWA s 63(2)

In summary it can be stated that the National Government is the only public trustee of the nation's water resources. It cannot relinquish or cede its duties as public trustee and remains responsible for all actions taken in connection with the nation's water resources. This does not mean that only the National Government, acting through the Minister, has the responsibility to ensure adherence to public trust principles. Each and every power, duty and obligation assigned in terms of the NWA to any WMI originates from within the National Government's overall power, duties and obligation as public trustee. As such it is cloaked with the requirements emanating from the concept of public trusteeship before it is delegated or assigned to a relevant WMI. Due to the application of the principle *delegatus delegare non potest* (a delegator cannot delegate more rights that he/she holds) it is impossible for the public trustee to delegate any authority in respect of the nation's water resources that is 'free' from the obligations brought about by the concept of public trusteeship. As a result all actions, or omissions,[212] by a WMI must adhere to the criteria set out in paragraph 1.1.2 and 1.1.4 *supra and* answer all the questions below affirmatively before it can be regarded to be legitimate in terms of the NWA:

- ✓ Does the decision or action promote sustainable use of a water source?
  - Has the impact of that decision or action might have on the future use of the water resource been considered?
  - Was a thorough assessment done of the impact that the actions will have on the environment?
- ✓ Does the decision or action promote equitable use of a water sources?
  - Is opposing claims on and interests in the resources balanced by considering all the criteria set out in the relevant provisions of the NWA, starting with section 2?
- ✓ Does the decision promote sufficient access to water?
- ✓ Is the potential impact that the decision or action might have on existing property rights thoroughly considered?

212 In some instances it can be the omission to act in a prescribed way that constitute an 'action' that needs to be scrutinized.

- ✓ Has all the potential stakeholders and interested parties been included and accommodated in the decision-making process preceding the action?
- ✓ Do all the stakeholders and interested parties have access to information relevant to the decision or action?
- ✓ Are the basic values and principles governing public administration adhered to?
- ✓ Is the decision or action promoting the public interest?
- ✓ Is the decision taken in the manner prescribed in the relevant provisions of the NWA?

Decentralisation of water governance may be aimed at bringing water management closer to the people, but it does not diminish the public trustee's overarching responsibility in protecting, using, developing, conserving, managing and controlling the nation's water resources in a sustainable and equitable manner, for the benefit of all persons in accordance with its constitutional mandate.

2.1 Tabulating the role players' duties, obligations and responsibilities as defined by the concept of public trusteeship

In this part of the report all the role-players' duties, obligations and responsibilities will be extracted from the NWA and tabulated. The focus falls on duties and obligations, and not on the powers ascribed by the NWA to the different role players. [213] That will be dealt with in the third and final report.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
National Government, acting through the Minister	Public Trustee	3(1)	Responsible authority for and over the nation's water resources on behalf of the nation
	Ensure that water	3(1)	This duty cannot be

213 This table does not include specific powers of role-players but focuses on their duties and obligations. It is therefore only 'must'-provisions of the NWA, excluding provisions contained in the Schedules attached to the NAW, that have been tabularised and not 'may'-provisions.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	resources are protected, used, developed, conserved managed and controlled in a sustainable and equitable manner		relinquished or entrusted to another authority. Implicit to public trusteeship of water resources is that the resources may not be alienated or dealt with in a manner that is not furthering the public interest.
Minister (Where a CMA has been established the sections marked with an * is not obligations ascribed to the Minister but to the CMA)	Must realise the public trustee's obligation as created in section 3(1) in a very specific manner- by ensuring equitable allocation and beneficial use of water while promoting environmental values.	3(2)	Advancing and protecting the public interest in the nation's water resources is the ultimate goal.
	Establish and review the national water resource strategy	5	Public trustee values must be embedded in this strategy as it provides the framework and foundation for water protection, use, development, conservation, management and control.
	Provide for the balancing of different stakeholders' needs in the national water resource strategy Future generations is to be considered a stakeholder	6 6(b)	The public interest is compiled of many different and sometimes opposing interests. As representative of the public trustee, the Minister must develop a water resource strategy where the different needs can be accommodated and balanced.
	Ask for and consider comments and inputs from members of the public whenever the	5, 13,16, 36, 38, 39, 45, 56, 69, 78, 88,	The Minister, as designated functionary of the public trustee, must constantly determine the public interest and act accordingly.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	NWA prescribes it.	92, 96, 110	Beneficiary's input is of great importance.
	Give effect to the national water resource strategy	7	The Minister must ensure that policy and practice meets and that the principles contained in the strategy touch ground.
	Give effect to the catchment management strategy	11	The Minister must ensure that policy and practice meets and that the principles contained in the strategy touch ground.
	Give effect to the determination of class of water resource and resource quality objectives.	14	The Minister must ensure that policy and practice meets and that the principles contained in the strategy touch ground.
	Give effect to the Reserve as determined	17	The Minister must ensure that policy and practice meets and that the principles contained in the strategy touch ground.
	Develop and prescribe a system for classifying water resources. Establish procedures for determining the Reserve.	12	Measures necessary for the minister to ensure sustainable water use.
	As soon as reasonably practical determine the Reserve	16	Necessary to ensure sustainable water use and to give effect to environmental values.
	Determine a class of water resource in accordance with the prescribed classification system	13	In fulfilling these obligations the criteria as stated in section 3(2) must be adhered to and form the basis of all decisions made
	Make a preliminary determination of the Reserve before authorising the use of water	17	Necessary to promote sustainable water use and to give effect to environmental values.
	Take account of water available in	23	Necessary to ensure sustainable water use and to

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	the resource when determining the quantity of water which may be allocated by a CMA.		give effect to environmental values and sustainable use.
	When making regulations on use of water all relevant considerations – including those mentioned in section 26(4) must be considered. Adhere to statutorily prescribed procedures.	26 69, 70, 71	These considerations underline the factors that the public trustee must balance.
	Take into consideration all relevant factors when issuing a general authorisation or license to use water.	27	These considerations underline the factors that the public trustee must balance.
	*If security is required to protect a water resource, the responsible authority must determine the type, extent and duration of the security.	*30	Ensuring that remedial actions can be taken to protect the resource if harmed.
	*If a person is required by notice to verify an existing water use the notice must comply with statutory provisions. The applicant must be afforded the opportunity to make representations.	*35	Adhering to principles of administrative justice.
	When making a declaration of stream flow	36	Acting as functionary of the public trustee relevant factors that impacts on the public

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	reduction activities the Minister must consider statutorily prescribed factors.		interest must be considered. Factors must be balanced to provide a just decision.
	May only declare an activity to be a controlled activity if satisfied that the activity in question is likely to impact detrimentally on a water resource.	38	Such declaration would impede the beneficiary's dealing with the trust *corpus* and it must therefore be strictly regulated.
	If a general authorisation to use water is issued, the statutorily prescribed notice must be published.	39	Public as beneficiary must be kept informed of the trustee's dealings with the resource.
	Parties who applied for licenses must be allowed the opportunity to make representations.	41	Promote access and just administrative action.
	If a decision has been made regarding a license application the applicant and all relevant parties must be notified promptly and if asked to do so- reasons must be given for the decision.	42	Promote just administrative action.
	If a notice is issued regarding compulsory license applications, the notice must meet prescribed standards.	43	Promote principles ingrained in the concept of public trusteeship.
	Proposed allocation schedules must be prepared according to prescribed	45	Balance the interest of different stakeholders.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	requirements.		
	*When a license to use water is reviewed the licensee must be awarded the opportunity to make representations.	*49	Promote just administrative action.
	*When considering an application for amendment or renewal of a license all relevant mattes must be taken into account as if this is an initial application.	*52	Balance the interests of different stakeholders and promote the principles ingrained in the concept of public trusteeship.
	*Must direct a party to correct failures before a license can be withdrawn. Must provide an opportunity for the affected party to make representations.	* 54	Protect the resource and promote just administrative action.
	*When required to do so issue a certificate stating the amount of unpaid water charges.	*60	
	Consider prescribed factors before assigning a power or duty to a CMA. Must promote the management of water resources at catchment management level	73, 78	Give effect to objective of decentralised water resources management.
	If considering to give a directive to a water management institution (WMI) give statutorily prescribed notice	74	Promote just administrative action, fulfilling overseeing duty,

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	and procedures to the WMI and allow WMI to comment.		
	Appoint the governing board of a CMA and advisory committee taking into consideration the criteria stated in the relevant provision.	81	Promote participation of different stakeholders.
	Convene the first meeting of the CMA and appoint a chairperson	82	
	If an organ of state or governing body request the Minister to remove the member nominated by them from a governing board, the Minister must do it.	83	
	If the Minister makes regulations he/she must consider statutorily prescribed considerations.	90, 116	Consider the different stakeholders.
	If the Minster has taken over the power of a water user association, he/she must cease to exercise the power when he/she is satisfied that the WUA is once more able to exercise its duties.	95	Promote decentralised water resources management.
	If the Minister accepts the proposal of an irrigation board to be transformed in a	98	Promote decentralised water resources management.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	WUA a notice have to be published declaring the board to be a WUA.		
	Prepare an environmental impact assessment before constructing a water work	110	Foster environmental values.
	If the Minister contemplates issuing a directive with regards to dam safety the Minister must be satisfied that the repairs directed is necessary, adequate, effective and appropriate and the Minister must consider the impact on public safety, property, resource quality and socio-economic aspects.	118	Fostering the public interest.
	Minister must consider statutorily prescribed factors when declaring a dam as a dam with a safety risk.	121	Balance the interests of different stakeholders.
	Minister must consult with specific technical authorities before issuing regulations regarding dam safety.	123	Take good informed decisions in public interest.
	Establish a national monitoring system on water resources as soon as reasonably practical.	137	Promote public trusteeship principles for to balance different needs information on the mentioned aspects is necessary.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	The system must provide for the collection of data necessary to assess a water quality, quantity in various water resources, use, rehabilitation, of water resources Compliance, health of aquatic ecosystems, atmospheric conditions that may influence water resources.		
	Establish mechanisms and procedures to coordinate the monitoring of water resources.	138	Balancing all interests in the resource.
	Establish national information systems regarding water resources.	139	Balancing all interests in the resource.
Director-General	Give effect to the national water resource strategy	7	The spirit of public trusteeship and its ensuing responsibilities will be encapsulated in the strategy and must therefore be given effect to.
	Give effect to the determination of class of water resource and resource quality objectives.	15	Put policy into practice. Concretise the concept of public trusteeship on ground level.
	Give effect to the Reserve as determined	18	Put policy into practice. Concretise the concept of public trusteeship on ground level.
	Must determine the conditions of employment of employees on a	76	

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	contract basis.		
Organ of State	Give effect to the national water resource strategy	7	The spirit of public trusteeship and its ensuing responsibilities will be encapsulated in the strategy and must therefore be given effect to.
	Give effect to the determination of class of water resource and resource quality objectives.	15	Put policy into practice. Concretise the concept of public trusteeship on ground level.
	Give effect to the Reserve as determined	18	Put policy into practice. Concretise the concept of public trusteeship on ground level.
Water management Institution	Give effect to the national water resource strategy	7	The spirit of public trusteeship and its ensuing responsibilities will be encapsulated in the strategy and must therefore be given effect to.
	Give effect to the determination of class of water resource and resource quality objectives.	15	Put policy into practice. Concretise the concept of public trusteeship on ground level.
	Give effect to the Reserve as determined	18	Put policy into practice. Concretise the concept of public trusteeship on ground level.
	If water use charges are made it must be made in accordance with the pricing strategy for water use charges as set by the Minister.	57	Put policy into practice. Concretise the concept of public trusteeship on ground level.
	When required to do so, issue a certificate stating the amount of unpaid water charges.	60	

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	Must adhere to directives given by Minister.	74, 95	Minister represents the public trustee and is on the highest level of authority.
	Within six months after the commencement of the NWA all irrigation boards had to prepare and submit a proposal to transform the board in a WUA.	98	Take part in and foster the process of decentralised water resources management.
	Must make information available to the public in regards of floods, drought, water works, risks posed by dams, flood levels, risked posed by quality of water, any matter connected with water which the public needs to know.	145	Public as beneficiary of the public trust must be knowledgeable with respect to matters pertaining to water.
	Must determine the employment conditions and remuneration of the members of the Water Tribunal in consultation with the Minister of finance.	146	
Catchment management agency	Establish a catchment management strategy Incorporate statutory principles of public trusteeship in the strategy. Consult with the Minister and all	8, 10, 80 9 10	Public trust principles must be contained in the catchment management strategy All stakeholders' inputs are required. The Minister-

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	parties who have an interest in or may be affected by the catchment management strategy.		representing the public trustee- must be consulted for the ultimate responsibility for all actions pertaining to water lies in his/her office
	Give effect to the catchment management strategy.	11	Ensure that policy is put into practice.
	Ask for and consider comments and inputs from members of the public whenever the NWA prescribes it.	8	The beneficiary of the public trust must be able to comment on all actions that can affect the trust *corpus.*
	Must comply with determinations of quantity of water which may be allocated as made by the Minister	23	Protecting the environment, foster sustainable and equitable use.
	Take into consideration all relevant factors when issuing a general authorisation or license to use water.	27	Balancing opposing interests taking into consideration elements of public trusteeship.
	If security is required to protect a water resources, the responsible authority must determine the type, extent and duration of the security.	30	Protecting water resources.
	If a person is required by notice to verify an existing water use the notice must comply with statutory provisions. The applicant must	35	Balancing opposing interests, promote just administrative action and possible property rights.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	be afforded the opportunity to make representations		
	If a general authorisation to use water is issued, the statutorily prescribed notice must be published.	39	The public as beneficiary must be kept informed of aspects relating to water resources.
	Parties who applied for licenses must be allowed the opportunity to make representations.	41	Promote just administrative action.
	If a decision has been made regarding a license application the applicant and all relevant parties must be notified promptly and if asked to do so, reasons must be given for the decision.	42	Promote just administrative action, balance opposing interests.
	If a notice is issued regarding compulsory license applications, the notice must meet prescribed standards.	43	Promote just administrative action.
	Proposed allocation schedules must be prepared according to prescribed requirements.	45	Balancing opposing interests.
	When a license to use water is reviewed the licensee must be awarded the opportunity to make representations.	49	Promote just administrative action.
	When considering	52	Balancing different interests.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	an application for amendment or renewal of a license all relevant mattes must be taken into account as if this is an initial application.		
	Must direct a party to correct failures before a license can be withdrawn. Must provide an opportunity for the affected party to make representations.	54	Promote just administrative action taking into account possible property rights.
	Perform its duties taking into consideration prescribed matters.	79	The scope of the public trustee's responsibilities and s 2 of the NWA must also form part of these considerations.
	Exercise the functions as set out in the NWA.	80	All these functions are infused with the public trustee's responsibilities.
	When engaged in litigation provides the Director-General with copies of all documents relating to litigation.	84	
	Investigate and advise interested persons on and promote community participation in the protection, use, development, conservation, management, and control of water Co-ordinate the related activities of water users and wmi within its water management area	80	Promote public participation, recognising public interest, balance different interests.

Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	Co-ordinate services with development plan in terms of WSA		
	If a CMA has established committees it must determine how they function.	82	
Bodies implementing international agreements	Must act accountable and manage its functions separately.	105	
	Must report on its performance, including its financial performance as required by the relevant statutes.	106	
Public (beneficiary of the public trust)	Must give inputs and voice opinions and comments whenever the opportunity to express an opinion or comment is created.	5, 8, 13, 16, 36, 38, 39, 45, 56, 69, 78, 88, 92, 96, 110	As beneficiary of the public trust and determinant of the content and extent of the public interest, members of the public must voice their opinions.
	Knowledge of an incident that gives rise to pollution or which may have a detrimental effect on any water source must be reported Responsible person must take steps to contain or minimise the effects of the incident, undertake cleanup procedures, remedy the effect of the incident	20	The public trust beneficiary's are not without obligations. As beneficiary of the trust the members of the public also have certain responsibilities.

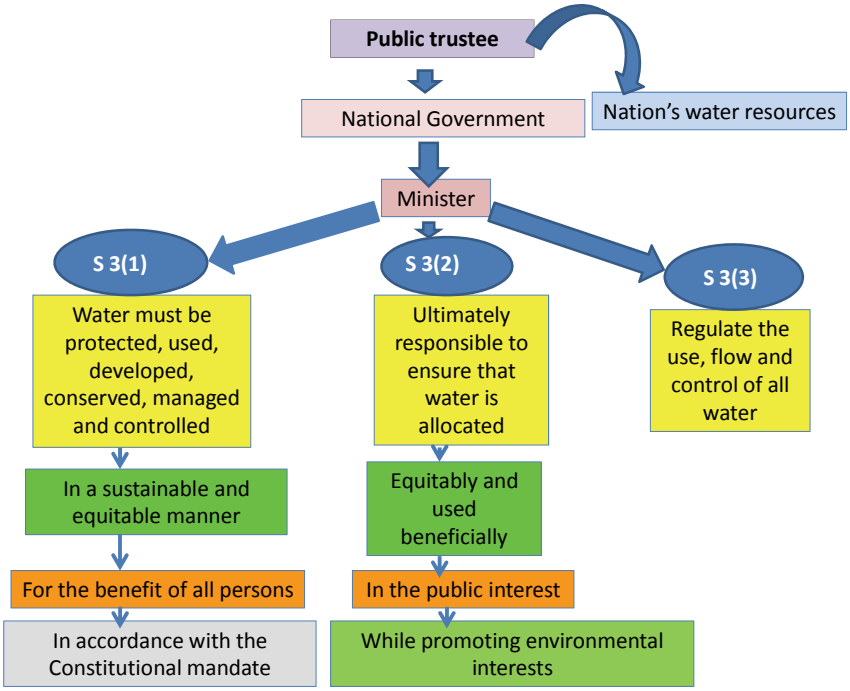
Role-Player	Duty as prescribed in NWA	Relevant section of NWA	Embodiment of public trusteeship principles
	Take measures as directed by CMA.		
	May only use water as prescribed in the NWA.	21, 22	Promote sustainable and equitable use.
	Application for licenses must be made as prescribed.	40, 41	Promote just administrative action.
Landowner / occupier / person in control of land	Must take all reasonable measures to prevent occurrence, continuing or recurring of water pollution	19	Emphasis responsibility to protect the resource.
Licensee	Must inform the responsible authority of succession in title	51	
Dam owners	Must act in accordance with statutory provisions relating to control measures for dams with a safety risk	118	The public trust beneficiary's are not without obligations. As beneficiary of the trust the members of the public also have certain responsibilities.
	Owner of a dam with a safety risk must register that dam.	120	
	Successor in title must promptly inform the Director - General of succession.	120	
High Court	Must determine just and equitable compensation for granting of servitudes by taking into account matters contemplated in s 25 of the Constitution and s 131 of NWA	131	Balancing opposing interests.

The exposition above indicates how the principles of public trusteeship as it originates in section 3 of the NWA is brought to life and applied by its incorporation in the different provisions of the NWA.

B3 Conclusionary remarks

This was the second part of a report that is aimed at deciphering the concept of public trusteeship as embedded in the National Water Act 36 of 1998. The first part was focused on contextualising the context of public trusteeship by giving an account of public trusteeship [1] in common property internationally, [2] in South African law and [3] its incorporation in the NWA. This provided a broad theoretical foundation for the second. Where the first part described the theory underlying public trusteeship, the second indicated the effect that this concept has on the roles, responsibilities and obligations of role players in decentralised water resources management and governance and the manner in which principles of public trusteeship is implemented through the provisions of the NWA.

Due to the fact that the concept of public trusteeship in respect of the nation's water resources are statutorily introduced to the South African water law dispensation, its meaning and consequences need to be found within the wording of the NWA. An analysis of the provision founding public trusteeship in the NWA, section 3, revealed the identity of the public trustee, its mandate and obligations, the identity of the trust *corpus,* the identity of the beneficiary under the public trust and the extent of the beneficiary's right. The analysis of section 3 further indicated the interrelated nature of the three sub-sections through which the public trustee's mandate and obligations, and the extent of the beneficiary's interest in the trust *corpus* is defined.



The concept of public trusteeship influences the roles and responsibilities of role players directly by providing the criteria against which all decisions that can potentially impact on the nation's water resources must be measured. This criteria originates from the mandate and obligations conferred on the National Government as public trustee. The public trustee's mandate and responsibilities also determine the extent of the beneficiary's interest in the nation's water resources.

The report indicates that although decentralised water governance is aimed at bringing water management closer to the people, it does not diminish the public trustee's overarching responsibility towards protecting, using, developing, conserving, managing and controlling the nation's water resources in a sustainable and equitable manner, for the benefit of all persons in accordance with its constitutional mandate. The attributes of public trusteeship is irrevocably ingrained in all powers, obligations and functions that cascades from the public trustee on the highest management level through to management institutions on the local level of water management. For this reason all actions taken or refrained from and all decisions that may impact on the nation's water

resources must promote sustainable and equitable use in the public interest while promoting environmental values. An analysis of the provisions of the NWA that confer positive duties and obligations on different role players indicated that the provisions of the NWA subscribes to the obligation created in section 3 of the NWA. Throughout the NWA provisions are aimed at including the public in decision making processes, ensuring the balancing of the interests of all stakeholders[214] and promoting the public interest.

It now remains to focus on the legal implications brought about by the incorporation of the concept of public trusteeship. Part C of this report will be dedicated to focus on specific legal implications and to indicate whether the doctrine of public trusteeship is an efficient tool to reach the objectives set out in the NWA.

214 Stakeholders include the public as whole, individual interested parties, the environment, future generations and the international community.

Part C: Legal implications brought about by the incorporation of the concept of public trusteeship

In parts A and B of this report the concept of public trusteeship has been contextualised and the way in which the concept defines the roles, responsibilities and obligations of role players in decentralised water management and governance have been discussed. This final part is dedicated to a discussion that focuses on the most pertinent legal implications of the concept of public trusteeship. Once these legal implications of the concept as incorporated in the NWA have been scrutinized it may provide an answer to the question as how the doctrine of public trust as embodied in the NWA can effectively be used to balance seemingly opposing demands on water resources and support water reform aimed at addressing equity and redress issues.

Throughout this discussion, the reader must keep in mind that unless otherwise stated, this discussion is but an academic discourse for the highest courts of the country have not yet had the opportunity to interpret the concept of public trusteeship as incorporated in the NWA. Some of the aspects dealt with in this section has already been researched by the writer hereof and liberal use was made of prior findings.

The most pertinent legal implications identified to be discussed in this report before an attempt will be made to indicate how the doctrine of public trust as embodied in the NWA can effectively be used to balance seemingly opposing demands on water resources and support water reform aimed at addressing equity and redress issues, are:

- Water as property;
- The extent of the government's claim regarding the nation's water resources;
- The extent of the public right to the nation's water resources;
- The limitation of entitlements to use water.

C1 Water as property

The NWA deals with water as a "scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle". It is stipulated very clearly in the NWA that water is a resource that belongs to all people and that the public trustee must ensure that water is protected, used, developed, conserved, managed and controlled to the benefit of all persons. The word 'belongs' reverberates a very strong proprietary connotation and the question that arises now is, should water be regarded as property? Throughout South Africa's water history, 'water' in its natural flowing state has never been regarded as property susceptible to private ownership or possession. The NWA did not alter this situation, in fact, through the provisions of the NWA all water are now regarded as falling within the broad category of 'national resource". As being classified as natural resource one can assume that water - all the water in the hydrological cycle - is regarded as 'an' entity. This entity is regarded as a public good or public property. Public property has always been subjected to public law with the state acting as the supreme regulator of the use of the property.[215] As a matter of fact, the well known writer on Roman law, Kaser stated without reserve that the right of the state in relation to public property (public things) was public ownership. Van der Vyfer[216] later stated that *res publicae* (public things /public property) became subject to the ownership of the state. This public ownership must not be confused with private ownership and to avoid confusion it is suggested that the term "legal title" should rather be used. The NWA did more than merely categorise all water as public property- through section 3 the concept of public trusteeship was introduced. Through this concept the state's *dominium* (title) in the nation's water resources are affirmed and delineated as purely fiduciary. The "people" as a generic entity, acquired the use and enjoyment of the nation's water resources.[217]

215 Kaser *Das Römische Privatrecht* 322.
216 Van der Vyfer note 47 above at 283.
217 Although the people as a generic entity acquired the use and enjoyment of the nation's water resources, this use and enjoyment is subject to the provisions of the NWA. The use and enjoyment are regulated to ensure *inter alia* "the sustainable use of water for the benefit of all users".

The boundaries and responsibility attached to the *dominium* and the extent of the use and enjoyment are legislatively determined. In the following paragraphs the focus will fall on the state's dominium and the "people's" rights as it manifests in the NWA.

C2 The extent of the government's claim regarding the nation's water resources[218]

Through the statutory incorporation of the concept of public trusteeship, government's activities with the country's water resources are constrained to the sphere created by the objectives and purpose of the NWA.[219] In addition an obligation is created through which the government is positively compelled to see that the said objectives are pursued. The provisions of the NWA should thus be interpreted "with due regard to the constitutional rights, norms and values the Legislature sought to encapsulate, protect and advance in the act. The more prominent rights, norms and values appear to be the custodial role of the state ..."[220]

The government is obliged to take positive action and must ardently strive to ensure that the nation's water resources is to be protected, used, developed, managed and controlled in ways to meet basic human needs of present and future generations; promote equitable access to water; redress results of past racial discrimination; promote efficient, sustainable and beneficial use of water in the public interest and facilitate social and economic development.[221] This responsibility is irretrievably intertwined with the legal title to the country's water resources. It simultaneously limits the state's entitlement to deal with the

218 The content of this paragraph is to a large extend a re-writing and incorporation of a part of an article published in 2008 with co-author G Viljoen -"Water and the Public Trust Doctrine – the South African Perspective" *The Journal for Transdisciplinary Research in Southern Africa* 2008 4:2 339-353.

219 Preamble and s 2 of the NWA. One should always keep in mind that the NWA was promulgated with the aim to fulfil the constitutional obligation created through the provision of section 27 of the Constitution of the Republic of South Africa, 1996 where it is determined that "Everyone has the right to have access to ... sufficient food and water.."

220 *Sechaba v Kotze and others* [2007] All SA 811 (NC) 818 – the principle as voiced with regards to the mineral law dispensation applies *mutatis mutandis* to the water law regime.

221 S 2 NWA.

trust property to the exact parameters as set in the NWA. Any act of the state that does not adhere to these objectives will therefore be regarded *ultra vires*.[222]

If the government is found to be recalcitrant or noncompliant, the public's right of user as created by the doctrine creates judicially enforceable rights held in common by all the people of the country. *Locus standi* is thus awarded to any member of the public who can prove that the government is not complying with the objectives held in common by all the members of the public – "the people" – thus awarded a legal remedy to ensure government compliance.

It is clear that the government's title to the country's water resources is severely restricted. The trust property cannot be alienated,[223] equitable access to water needs to be established and the necessary measures must be taken to ensure the sustainable, efficient and effective use of water.[224] At the same time special attention is to be given to internationally shared water courses.[225] Although these objectives set the parameters and limits for the government's dealing with the country's water resources, it will be indicated below that in pursuing this responsibility, the state's regulative authority is increased through the public trust doctrine to the extent that the opinion has been voiced that the doctrine destroys the basic fabric of property law.[226]

It can be stated that while the doctrine limits the government's dealings with property subject to the doctrine it simultaneously provides the mechanism for the State to give effect to statutory obligations regarding water in pursuing the objectives and purpose of the NWA.

222 *National Audubon Society v Superior Court of Alpine County* 33 Cal 3 d 419, 658 P 2d 709, 189 Cal Rptr 346, modified, 33 Cal 3d 726a, cert denied, 104 S Ct 413 (1983).
223 Blumm M "Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine" 1989 19 *Environmental Law* 537-604 on 584, 585.
224 Thompson *Water Law* n 7 above 161.
225 NWA Chapter 10.
226 Scott GR "The Expanding of the Public Trust Doctrine: A Warning to Environmentalists and Policy Makers" 1998 10 *Fordham Environmental Law Journal* 1-70 on 4.

C3 The extent of the public right to the nation's water resources[227]

The people's public rights in the country's water resources are determined according to, as well as restricted by, the provisions contained in the NWA itself. Due to the fact that courts cannot usurp the functions of the legislature,[228] courts will not be able to determine the scope of the public interest to fall outside the parameters set by the NWA - These parameters can only be narrowed or widened by further legislation.[229]

It is also imperative to state that the judicial recognition of the people's right in and to the country's water resources does not mean that any individual person has an unrestricted right of access and use.[230] Any entitlement awarded to any *legal persona* must be compatible with the collective objectives and public interest in the water resources. As several objectives have been stated in the NWA, the government must balance opposing interests to attain the statutorily set equilibrium. The hierarchy of entitlements as set out in paragraph C5 hereunder as well as the objectives stated in section 2 of the NWA will be the criteria against which opposing interests needs to be balanced.

C4 The limitation of entitlements to use water[231]

With the introduction of the public trust doctrine the concept of rights clothed or covered-with the public interest has been introduced. While this doctrine may be advantageous to the people of the country as a collective unit, individuals might experience a less

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227 The content of this paragraph is to a large extend a re-writing and incorporation of a part of an article published in 2008 with co-author G Viljoen -"Water and the Public Trust Doctrine – the South African Perspective" *The Journal for Transdisciplinary Research in Southern Africa* 2008 4:2 339-353.

228 *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and others* (OFS) 3215/06 decided 13 December 2007 –unreported.

229 If it is however an issue of interpretation, the courts will have to consider South African, Roman Dutch and Roman law and also law of other jurisdictions.

230 S 4 of the NWA determines to a great extent the scope of access by prescribing the entitlements to water use.

231 The content of this paragraph is to a large extend a re-writing and incorporation of a part of an article published in 2008 with co-author G Viljoen -"Water and the Public Trust Doctrine – the South African Perspective" *The Journal for Transdisciplinary Research in Southern Africa* 2008 4:2 339-353.

favourable approach whenever the entitlements awarded to them are curtailed or cancelled when drastic action is deemed necessary to protect the existence of the corpus of the trust or to adhere to the public's right of user as expressed in the NWA. The deprivation of exclusive water use-rights held by *legal personae* under the previous water regime is a consequence of the introduction of the vast regulatory authority codified in the NWA.[232] Section 22 (6)-(10) provides that any person who has applied for a licence in respect of an existing lawful water use, and whose application has been refused or who has been granted a licence for a lesser use than the existing water use, may claim compensation for any financial loss suffered. The only prerequisite is that the refusing of the licence or curtailment of the existing water use must result in severe prejudice to the economic viability of the undertaking in respect of which the water was beneficially used. Very important, however, is that it is expressly stipulated in section 22 (7) that when the amount of compensation is being calculated any reduction in existing lawful water use that was made in order to provide for the reserve; rectify an over allocation of water use from the resource in question or rectify an unfair or disproportionate water use, must be disregarded. This provision ensures that water reform is not unnecessarily hampered by unrealistic compensatory claims. It is also in line with the constitutional provision in section 25 that land reform will not be hindered by awarding a certain measure of constitutional protection to property.

The NWA further expressly provides for the withdrawal of, or alteration to, entitlements to use water in *inter alia* sections 28, 31 and 54. Section 28 determines that a licence may not be granted for a period longer that 40 years[233] and requires that all licences must be reviewed at intervals of not more than 5 years.[234] During this review under section 49, the responsible authority may amend any condition of the licence other than the period thereof. The curtailment of the entitlement will, in the writer's opinion, not be regarded as an expropriation due to the fact that entitlements to water that are awarded, are awarded under the veil of the public trust and inherently proned to strive to achieve the collective

232 S 3, 4 NWA.
233 S 28(1)(e) NWA.
234 S 28(1)(f) NWA.

objectives of the public trust.[235] The government's regulatory authority continues to cling to licences issued in terms of the NWA. Any entitlement acquired in the trust resource is acquired subject to whatever state action may be deemed necessary to protect the public's interest in the trust resource. If it would be in the public's interest as defined by the content of the NWA to amend the conditions of the licence, the responsible authority is compelled to do so by following the appropriate procedures created in the NWA. The fact that the NWA provides for the payment of compensation in section 49(4) "if an amendment of a licence condition on review severely prejudices the economic viability of any undertaking in respect of which the licence was issued" should be regarded a measure incorporated by the legislature to "soften the blow" of strict regulatory actions which may harm specific water users. Once again, the importance of redress is emphasised by the link to section 22 (6) – (10). Even where severe economic prejudice is caused by the curtailment of the licence, limitations that are necessary in to order provide for the Reserve; rectify an over allocation of water use from the resource in question or to rectify an unfair or disproportionate water use must be disregarded. These limitations, when they occur, should not be regarded as expropriation in the strict legal sense of the word. The reserved sovereign prerogatives in the country's water resources preclude the assertion of vested rights to water contrary to public trust purposes.

In addition to the procedure provided for in sections 28 and 49 of the NWA, section 31 expressly states that the issue of a licence is not a guarantee of supply of water. The NWA does not even provide for compensation payable in circumstances where no water is available. Section 54 also provides that the responsible authority may by notice to any

235 While the ordinary meaning of expropriation is to 'deprive of property", expropriation in the South African legal context entails more than the mere taking away or divesting of property. An individual who is deprived of property or a right in property might feel that he is the victim of expropriation while in the legal sense additional requirements are set before a divesting or depriving act will be regarded as expropriation – Van der Walt AJ *Constitutional Property* Law Juta Cape Town 2005 on132. Expropriation equals the sum of taking away (deprivation) plus acquisition – Van der Schyff E "Constructive appropriation – the key to constructive expropriation? Guidelines from Canada" 2007 40:2 *The Comparative and International Law Journal of Southern Africa* 306-321 on 310.

person entitled to use water under the NWA suspend or withdraw the entitlement in specific circumstances brought about by the conduct or omission of the licencee.[236]

C5 Promoting equitable access and redress results of past racial and gender discrimination through the provisions of the *NWA*[237]

It may boldly be argued that by stating unambiguously that

(b) promoting equitable access to water; [and]

(c) redressing the results of past racial and gender discrimination

are two of the factors to be considered in the use, protection, conservation and management of the country's water resources. They are also to be considered two of the factors through which the public interest is defined. The people's use and enjoyment of the nation's water resources are thus inherently focused on achieving, amongst other, these objectives even if it brings about the total extinguishing of previously granted entitlements or existing lawful uses.[238] This idea is strengthened if it is taken into consideration that a hierarchy of entitlements to use water emerges from the provisions of the NWA.

5.1 Hierarchy of entitlements to use water

From the provisions of the NWA it is clear that a hierarchy of entitlements to use water is recognised. In section 4(1) it is provided for that water may be used without a licence for reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use. Unless a notice has been issued in terms of section 43 of the NWA

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236 The reader is also referred to s 64 where express provision is made to expropriate any property for any purpose contemplated in the NWA, if that purpose is a public purpose or is in the public interest. Thompson *Water Law* note 7 above 282 opines that entitlements to water may also be expropriated. Since this section provides for expropriation in the strict legal sense compensation will be determined according to the constitutionally prescribed determinants.

237 The content of this paragraph is to a large extend a re-writing and incorporation of a part of an article published in 2008 with co-author G Viljoen -"Water and the Public Trust Doctrine – the South African Perspective" *The Journal for Transdisciplinary Research in Southern Africa* 2008 4:2 339-353.

238 DWAF strategy -http://www.dwaf.gov.za/WAR/documents/WARStrategyNov06.pdf. [12/11/2008].

through which the machinery for compulsory licensing is set in motion, existing lawful water uses can continue unlicenced. All other water uses have to be licenced. This section provides explicitly for equitable access and redresses results of past racial and gender discrimination as the need to achieve equity in water allocations and the promotion of the beneficial use of water are two of the factors that may be relied on to call for the compulsory licensing of water use of a specific water resource.

The NWA strives to better normal living conditions by allowing for the unlicenced use of water for reasonable domestic, gardening and animal watering purposes. Furthermore, compulsory licensing of water uses in respect of a specific resource can be called for if equity requires it. This is another manifestation of the government's commitment to address results of racial discrimination. The objectives of the NWA should constantly be measured and taken into consideration when licence applications are considered. These objectives are reiterated explicitly in section 27 of the NWA. The factors that should be taken into account that may impact on poverty alleviation are *inter alia:*

> "(b) the need to redress the results of past racial and gender discrimination;
> (c) efficient and beneficial use of water in the public interest;
> (d) the socio-economic impact—
> (i) of the water use or uses if authorised; or
> (ii) of the failure to authorise the water use or uses."

The application of section 27 provides for more than the improvement of living conditions. Here equitable access and redressing results of past racial and gender discrimination can take shape by granting much needed access to water to upcoming farmers or industrialists. It must be stressed however, that all the factors mentioned in section 27 should be balanced to ensure that all water use entitlements allocated foster the aims of the public trust by promoting the public interest in the people's water.

Section 61 provides for rendering financial assistance to any person for the purposes of the NWA taking into account all relevant considerations including:

(a) the need for equity;
(b) the need for transparency;
(c) the need for redressing the results of past racial and gender discrimination;
(d) the purpose of the financial assistance;
(e) the financial position of the recipient: and
(f) the need for water resource protection.

In the final instance it is imperative to take cognisance of the fact that section 49 of the NWA provides for the amendment of licences to use water if "it is necessary or desirable to accommodate demands brought about by changes in socio-economic circumstances, and it is in the public interest to meet those demands." Through the application of this provisions water use allocations can be altered to fulfill the needs of the poor if circumstances require it.

C6 Conclusion

To conclude this report it is necessary to recapture. In part A of this report the concept of public trusteeship was contextualised by first gaining a comparative insight and then looking at the incorporation of the concept in other South African statutes. Part B of the report focused on the concept of public trusteeship as entrenched in the NWA by doing an analysis of section 3. Thereafter the effect that this concept has on the roles, responsibilities and obligations of role players in decentralised water resources management and governance and the manner in which principles of public trusteeship is implemented through the provisions of the NWA were addressed. In the third and final part of the report the most pertinent legal implications of the incorporation of the concept of public trusteeship were discussed before an attempt was made to indicate how the doctrine of public trust as embodied in the NWA can effectively be used to balance seemingly opposing demands on water resources and support water reform aimed at addressing equity and redress results of past racial and gender discrimination.

It was argued that through the application of the concept of public trusteeship water as natural resource was completely removed from the sphere of private property by awarding the severely limited and burdened *dominium* of the totality of the water resources in the country to the state but the right of use and enjoyment to the people as a collective entity. This right of use and enjoyment awarded to the people as collective entity does not mean that individual *personae* have an unrestricted right to access and use. The state is encumbered with the responsibility to regulate access to and the use of South Africa's water resources in the interest of the public at large. Although the state was awarded the legal title in water this title is simultaneously being restricted to the scope set down in the NWA and burdened with the immense fiduciary responsibility to strive towards achieving the purpose of the NWA.

Poverty alleviation will be a natural consequence of the application of the provisions of the NWA as the "need to redress the results of past racial and gender discrimination" is explicitly stated as one of the factors that determines the extent of the public interest in the nation's water recourses. It also forms part of the government's responsibility when dealing with the water resources. The NWA promotes the improvement of the living conditions of the poor by prescribing that water use for reasonable domestic use, gardening and animal watering should be allowed without a licence. It also provides for the alleviation of poverty by providing access to water to e.g. upcoming farmers. The public interest cuts so deep that the NWA allows for the curtailment of existing lawful water uses and the revision of licences if it would promote the purposes of the NWA.

The goal has been set and in a certain sense the concept of public trusteeship as it is embodied in the NWA describes a utopia- a vision to be realised through the implementation of the NWA. Unfortunately we are left with an unfailing truth- in this broken reality we call 'Now', legal mechanisms are only as effective as the people steering them. It is imperative that the Minister of Water Affairs, together with the national government, embrace their role as guardian of the nation's water resources and start living up to the

obligations created in the NWA. The people of the country should also rise and challenge the public trustee to fulfill its duties as set out in the NWA.

Bibliography

ARTICLES, REPORTS AND DISCUSION PAPERS

Bader HR “Antaeus and the public trust doctrine: A new approach to substantive environmental protection in the common law” 1994 *Hamline LR* 50-63.

Blumm M “Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine” 1989 19 *Environmental Law* 537-604.

Brady TP “But most of it belongs to those yet to be born” 1990 *BC Envt Aff LR* 621-646.

Burger A *A study of Roman water law with specific reference to allocation and prior appropriation* WRC Report TT 279/06 August 2006.

Coquilette DR “Mosses from and Old Manse: Another look at some historic property cases about the environment” 1979 64 *Cornell Law Review* 761-821.

Dunning HC “The Public Trust: A Fundamental Doctrine of American Property Law” 1989 19 *Envtl L* 515-526.

Dunphy PO “Comments: The Public Trust Doctrine” 1976 59:4 *Marq LR* 787-808.

Fernandez JL “Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance” 1998 62:2 *Alb L R* 623-665.

Foster JB "Marx’s Theory of Metabolic Rift: Classical Foundations for Environmental Sociology" 2006 105:2 *AJS* 366-405.

Francis R “Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics and Political Power” 2006 *Georgetown International Environmental Law Review* 149-196.

Huffman JL “Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson” 1986 63 *Denv ULR* 565-584.

Huffman JL “A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy” 1989 19 *Envtl L* 527-572.

Kearney JD and Merrill TW “The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*” 2004 71 *U Chi LR* 799-931.

Kleinsasser Z “Regulatory and Physical Takings and the Public Trust Doctrine” 2005 *Boston College Environmental affairs Law Review* 421

Lazarus RJ “Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine” 1986 71 *Iowa LR* 631-716.

MacGrady G “The navigability concept in the civil and common law: Historical development, current importance, and some doctrines that don’t hold water” 1975 3 *Florida State University Law Review* 511-615.

Manzanetti AB “The *Fifth Amendment* as a Limitation on the Public Trust Doctrine in Water Law” 1984 15 *Pac LJ* 1291-1319.

Morris ST “Taking Stock of the Public Trust Doctrine: Can States Provide for Beach Access without Running Afoul of Regulatory Takings Jurisprudence?” 2003 52 *Catholic ULR* 1015-1040.

Olson J “The Public Trust Doctrine: Procedural and substantive limitations on governmental reallocation of natural resources in Michigan” 1975 *Det CLR* 162

Pearson E “The Public Trust Doctrine in Federal Law” 2004 24 *J Land Resources & Envtl L* 173-178.

Pentland R “Public Trust Doctrine- Potential in Canadian Water and Environmental Management” 2009 POLIS Discussion Paper 09-03.

Perruso R “The development of the doctrine of res communes in medieval and early modern Europe” 2002 *LHR* 69-93.

Sand PH “Sovereignty Bounded: Public Trusteeship for Common Pool Resources” 2004 *Global Environmental Politics* 47-71.

Sax JL “The Public Trust Doctrine in Natural Resource Law: Effective in Judicial Intervention” 1970 68:3 *Mich LR* 471-566.

Sax JL “Liberating the public Trust from its Historical Shackles” 1980 *UC Davis Law R*eview 185-232.

Scott GR “The Expanding of the Public Trust Doctrine: A Warning to Environmentalists and Policy Makers” 1998 10 *Fordham Environmental Law Journal* 1-70.

Smith GP and Sweeney MW “The public trust doctrine and natural law, emanations within a penumbra” 2006 13 *Boston College Environmental Affairs* 307-343.

Soltau F Environmental justice, water rights and property 1999 *Acta Juridica* 229-253.

Stein R “Water law in a Democratic South-Africa: A Country Case Study Examining the Introduction of a Public Rights System” 2005 *Texas Law Review* 2167-2183.

Wily LA “So who owns the forest” 2007 Sustainable Development Institute: Liberia, 241.

Van der Schyff E “Constructive appropriation – the key to constructive expropriation? Guidelines from Canada” 2007 40:2 *The Comparative and International Law Journal of Southern Africa* 306-321.

Van der Schyff E and Viljoen G “Water and the public trust doctrine – a South African perspective” 2008 *The Journal for Transdisciplinary Research in Southern Africa* 339-353.

BOOKS

Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* 2004 Juta Cape Town.

Bonfante B *Grondbeginselen van het Romeinsche Recht voor Nederland* 1919 Wolters Groningen.

Borkowski A and Du Plessis P *Textbook on Roman Law* 3rd ed 2005 Oxford University Press.

De Zulueta F *The Institutes of Gaius* 1975 Claredon Press Oxford.

Hall C G *The Origin and Development of Water Rights in South Africa 1939* Oxford, Oxfordshire : Oxford University Press.

Huber U *Heedendaegse Rechtsgeleetheyt* 3rd ed 1726 Visscher Amsterdam.

Juta HH *A selection of leading cases for the use of students and the profession generally, with notes* 898 Juta Cape Town.

Kaser *Das Römische Privatrecht* vol 1 3rd ed 1971 CH Beck'sche Verlagsbuchhandlung München.

Maasdorp AFS *The introduction to Dutch jurisprudence of Hugo Grotius* 3rd ed 1903 Juta Cape Town.

Maasdorp AFS *Institutes of South African Law* vol II 9th ed edited and revised by Hall CG 1976 Juta Cape Town.

Marx, K. *Capital* vol 3 1981 Vintage Publishers New York 1981.

Pope A and Mostert H *The Principles of the Law of Property in South Africa* 2010, Oxford University Press Cape Town.

Pound, R. 1954 *An introduction to the Philosophy of Law* 1992 Revised edition Yale University Press New Haven.

Sarlet I and Fensterseifer T "Brazil" in *The Role of the Judiciary in Environmental Governance* Kotze LJ and Paterson AR (eds) 2009 Kluwer Law International: The Netherlands.

Scott SP *The Civil Law* vol 1 1932 Central Trust Company Cincinnati.

Schultz F *Classical Roman Law* 1951 Oxford University Press London.

Sohm R *Institutiones* 1907 Oxford Claredon Press.

Thomas JAC *Textbook of Roman* Law 1986 Juta Cape Town.

Thompson H *Water Law* 2006 Juta Cape Town.

Van der Schyff E unpublished LLD thesis – "The constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002" PU for CHE (now NWU) 2006.

Van der Vyver JD "*Étatisation of Public Property" in Visser DP (ed)* Essays on the Law of History 1989 Juta Johannesburg.

Van der Walt AJ *Constitutional Property* Law 2005 Juta Cape Town.

Van Warmelo P *'n Inleiding tot die Studie van die Romeinse Reg* 1965 Balkema Kaapstad Amsterdam.

Van Zyl DH *Geskiedenis en Beginsels van die Romeinse Privaatreg* 1977 Butterwoths Durban.

Wessels JW *History of the Roman-Dutch Law* 1908 African Book Company Grahamstown.

ELECTRONIC RESOURCES

Caplan R in Using Public Trust and Rights to Nature to Protects Maine's Water for People and Nature www.defendingwaterinmaine.org [used on 2/12/2010]

Craig RK "A quick-and-dirty guide to the eastern public trust doctrines: basic issues, classification of states and State issues" http://works.bepress.com/robin_craig/1 [used on 12/12/2010]

DWAF strategy -http://www.dwaf.gov.za/WAR/documents/WARStrategyNov06.pdf. [12/11/2008].

Encarta Dictionary, English (U.K)

Grotius *Mare Liberum* Van Deman Magoffin translation http://oll.libertyfund.org/Texts/Grotius0110/Freedom [2005/06/17]

Grotius H *The Free Sea* translated by Richard Hakluyt 1609 edited by David Armatage http://oll.libertyfund.org/ToC/0450.php [2005/06/17]

Locke, J. *Second* Treatise on Civil Government http://www.constitution.org/jl/2ndtreat.htm [2006/11/15]

Ostrom E and Hess C "Private and Common Property Rights" (2007) 1-116, 6. SSRN: http://ssrn.com/abstract=1304699.

Suttner R "Talking to the ancestors: National heritage, the Freedom Charter and nation-building in South Africa" 2005 http://free-books-online.net/Talking-to-the-Ancestors:-National-heritage,-the-Freedom-Charter-pdf

NATIONAL AND FOREIGN LEGISLATION AND POLICY DOCUMENTS

Foreign:

Brazil: The Constitution of the Federal Republic of Brazil, 1988 [BFC].

Canada: The Environment Act, 2002.

France: Code Napoleon, art 538 (Off. Ed. 1810)(Fr).

Ghana: The Minerals and Mining Act 703 of 2006.

Kenya: Environment Management and Coordination Act, 1999.

Liberia: National Forestry Reform Law, 2006.

Nigeria: Land Use Act, 1978

The Islands of St Christopher and Nevis: National Conservation and Environment Protection Act, 1987.

Uganda: 1995 Constitution Article 237 (2) (b) and Land Act 16 of 1998

USA: Constitution of the State of Hawaii, 1995

National:

National Environmental Management Act [NEMA] 107 of 1998.

NEMA: Integrated Coastal management Act [ICM], 24 of 2008.

NEMA: Biodiversity Act, 10 of 2004.

National Water Act 36 of 1998.

Mineral and Petroleum Resources Development Act, 28 of 2002.

National Water Resource Strategy, First Edition, September 2004.

White Paper on Environmental Management Policy [EMP] for South Africa.

Seashore Act 21 of 1935.

White Paper on a National Water Policy for South Africa 1 April 1997 http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf [used 9/08/2010].

NATIONAL AND FOREIGN CASE LAW

Foreign:

India:

Intellectuals Forum, Tiruphathi v State of A.P. & ORS (2006) INSC 86.

Metha v Kamal Nath, 1997 (1) SCC 388.

M.I. Builders v Radhey Shyam Sahu (1999) 6 SCC 464.

Kenya:

Waweru v Republic (2007) AHRLR 149 (KeHC 2006).

USA:

Glass v Goeckel 437 *Mich* 667 (2005) 673.

Martin v Waddell's Lessee 41 US 367 (Pet) (1942).

National Audubon Society v Superior Court of Alpine County 33 Cal 3 d 419, 658 P 2d 709, 189 Cal Rptr 346, modified, 33 Cal 3d 726a, cert denied, 104 S Ct 413 (1983).

Uganda:

Advocates Coalition for Development and Environment (ACODE) v Attorney General and NEMA, 13 July 2005, High Court of Uganda, Miscellaneous Cause No. 0100 OF 2004.

Siraji Waiswa v Kakira Sugar Works Ltd Misc. Application No. 230 of 2001.

National:

Anderson and Murison v Colonial Government (1891) 8 SC 293.

BP *Southern Africa (Pty) Ltd v MEC for Agricultural Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

Colonial Government v Town Council of Cape Town (1902) 19 SC 87.

Consolidated Diamond Mines v Administrator, SWA 1958 4 SA 572 (A).

De Beers Consolidated Mines v Ataqua Mining (Pty) Ltd and Others – (High Court of South Africa Orange Free State Provincial Division)- Case No: 3215/06.

De Beers Consolidated Mines v Regional Manager, Mineral Regulation Free State Region: DME – (High Court of South Africa Orange Free) Caseno 1690/2007.

Mostert v The State [2009] ZASCA 171.

Rex v Carelse 1943 CPD 242.

Rex v Lapierre 1905 ORC 61.

Sechaba v Kotze and others [2007] All SA 811 (NC).

South African Shore Angling Association and Another v Minister of Environmental Affairs 2002 (5) SA 511 (SE).

Surveyor-General (Cape) v Estate De Villiers 1923 AD 588.

Van Heerden v Wiese 1 BUCH AC 5 1880.

OLD AUTHORITIES

Bort P *Tract van de domeynen van Hollandt cap 2,* 1702 Leyden.

De Groot H *Inleidinge tot de Hollandsche Rechts*-geleertheyt 1738 Amsterdam.

The Digest of Justinian Latin text edited by Mommsen T vol 1 and IV 1985 University of Pennsylvania Press Philadelphia, 24.

The Institutes of Justinian with English introduction, translation and notes by Sandars TC 14th ed 1917 Longmans Green and Co London.

Van der Keessel DG *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam* Hollandicam translated in Afrikaans by Goning HL 1961.

Van Leeuwen S *Censura* Forensis Part 1 of Book 5 translated by Hewett M 1991 SA Law Commission Research Series no 15.

Voet J *Commentarius ad Pandectas* as translated by Gane P in *The Selective Voet being the Commentary on the Pandects by Johannes* Voet 1955 Butterworths Durban.