

# STEWARDSHIP DOCTRINES OF PUBLIC TRUST: HAS THE EAGLE OF PUBLIC TRUST LANDED ON SOUTH AFRICAN SOIL?\*

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*The idea of a doctrine of public trust is a controversial one in South African law. Despite the fact that international commentators argue that a constitutional and statutory foundation has been laid for a doctrine of public trust to operate in South African law, very little has been written in South African literature on what the subject might entail. The reality is, however, that the philosophical notion that governments exercise a fiduciary trust on behalf of their people, and that 'certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace' has been incorporated in different pieces of environmental and natural resources-related legislation. This notion, as embodied in s 24 of the Constitution and subsequent statutes dealing with natural resources, establishes a stewardship ethic of public trusteeship and state custodianship in South African natural resources law. An analysis of the relevant natural resources legislation leads to the conclusion that the concept of public trusteeship has, in limited fields, been incorporated in South African law in unique stewardship doctrines of public trust. As this stewardship ethic has been created in different statutes, the consequences brought about by this statutory intervention depend exclusively on the symbioses between the provisions of each individual statute.*

## I INTRODUCTION

The idea of a doctrine of public trust is a controversial one in South African law. Despite the fact that international commentators argue that a constitutional and statutory foundation has been laid for the doctrine to operate in South African law,<sup>1</sup> very little has been written in South African literature on what the subject might entail; indeed, its existence in South African law is

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<sup>1</sup> Peter Sand 'Sovereignty bounded: Public trusteeship for common pool resources' (2004) 4 *Global Environmental Politics* 47 at 50; David Takacs 'The public trust doctrine, environmental human rights and the future of private property' (2008) 16 *New York University Environmental LJ* 711; Michael C Blumm & Rachel D Guthrie 'Internationalizing the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision' (2012) 45 *UC Davis LR* 741 at 749 and 788-4; Mary Turnipseed, Raphael Sagarin, Peter Barnes, Michael C Blumm, Patrick Parenteau & Peter H Sand 'Reinvigorating the public trust doctrine: Expert opinion on the potential of a public trust mandate in US and international environmental law' (2010) 52 *Environment: Science and Policy for Sustainable Development* 6 at 11; Michael C Blumm 'The public trust doctrine — A twenty-first century concept' (2010) 16 *Hastings North-West Journal of Environmental Law and Policy* 105 at 107.

frequently denied.<sup>2</sup> In *Minister of Minerals and Energy v Agri South Africa*<sup>3</sup> Wallis JA felt that it was unnecessary to enquire about the possible incorporation of a doctrine of public trust in South African mineral and petroleum law. The reality is, however, that the philosophical notion or ethic that governments exercise a fiduciary trust on behalf of their people and that ‘certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace’<sup>4</sup> has been incorporated in different pieces of environmental and natural resources-related legislation in this country.<sup>5</sup> Diverse and difficult questions arise when the sections of the different statutes that embody this principle are discussed. A first question is whether all these pieces of legislation aim to incorporate a single legal concept and interpretational framework within which the extent of the state’s responsibilities towards the nation’s natural resources are to be interpreted, or whether each statute creates a unique, novel legal concept? A second question is what the legal implications of this statutory concept (or concepts) are and whether the concept(s) incorporated in the different statutes affects the property rights regime through which a specific natural resource is regulated. It is impossible to answer all these questions in a single article.

From a property lawyer’s perspective one of the pressing issues is whether the concept of public trusteeship, embodied in one or more doctrines of public trust, has been introduced into the South African legal system through the different statutes and, if so, what implications this has for property law. Within the context of this specific issue alone, a plethora of questions arise. This article proposes to deal with only one issue: determining whether statutory stewardship doctrines of public trust have been incorporated in South African law. It is only if this crucial preliminary question can be answered in the affirmative that other issues, like the impact that such a development might have on the law of property, will become relevant.

## II DEFINING PUBLIC TRUSTEESHIP

‘Public trusteeship’ is a foreign phrase in South African law. The same holds true for ‘stewardship’. Since a mutual understanding of what the phrases

<sup>2</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) para 86; M O Dale, L Bekker, F J Bashall, M Chaskalson, C Dixon, G L Grobler & C D A Loxton *South African Mineral and Petroleum Law* (2005) MPRDA-115 (loose leaf, Issue 10); Hanri Mostert & Anne Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 271.

<sup>3</sup> *Minister of Minerals and Energy v Agri South Africa* *ibid.*

<sup>4</sup> J L Sax ‘The public trust doctrine in natural resource law: Effective in judicial intervention’ (1970) 68 *Michigan LR* 471 at 484. In the South African context the introduction of this philosophical notion coincided with radical political change, and so the notion is regarded by some as a political doctrine. This view stems from the fact that the idea of natural resources ‘belonging to the people’ is rooted in the ANC Freedom Charter, a political document that originated during 1955.

<sup>5</sup> See part III of this article for a detailed exposition of the relevant statutes. At this stage it suffices to mention that the relevant legislation incorporates *inter alia* water, minerals and petroleum, biodiversity and marine resources.

denote is essential for meaningful discourse on their possible relevance to South Africa, their definition is hence imperative. Because public trusteeship is often seen as a specific manifestation of stewardship<sup>6</sup> it is best to define the term 'stewardship' and then move on to defining the concept of 'public trusteeship'.

'Stewardship' and 'property' are not words that are traditionally uttered in the same sentence by South African property lawyers.<sup>7</sup> Stewardship is considered to be an ethical and religious norm,<sup>8</sup> and its impact on property law in the South African context has not yet been thoroughly analysed. This is surprising in light of the fact that the Gauteng High Court has stated that the imperative flowing from s 24 of the Constitution of the Republic of South Africa, 1996

'confers upon the authorities a stewardship whereby the present generation is constituted as the custodian or trustee of the environment for future generations. From this follows that owners of land no longer enjoy the absolute real rights known to earlier generations. An owner may not use his or her land in a way which may prejudice the community in which he or she lives because to a degree he or she holds the land in trust for future generations.'<sup>9</sup>

The court did not define the notion of stewardship, but according to its ordinary dictionary meaning — a meaning compatible with the use of the term in the context of the case — stewardship is the careful and responsible management of something entrusted to one's care.<sup>10</sup> Stewardship has also been described in literature as an 'approach towards problem solving that includes a long-term perspective, a focus on sustainability, and a deliberate attempt to understand and respect the delicate balance of the earth's ecosystem'.<sup>11</sup> It displays certain unique characteristics:<sup>12</sup> a duty towards the environment;<sup>13</sup> the duty to conserve resources;<sup>14</sup> the duty to protect and preserve resources; and a duty towards other people, including future generations, in

<sup>6</sup> Richard Barnes *Property Rights and Natural Resources* (2009) 247.

<sup>7</sup> None of the prominent South African property law handbooks discuss or even mention the term 'stewardship'.

<sup>8</sup> Elmarie van der Schyff 'Staatsinmenging in privaats-eiendom — verantwoordbaar vanuit Christelike perspektief?' (2003) 68 *Koers* 237 at 239.

<sup>9</sup> *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2006] ZAGPHC 132 para 19.

<sup>10</sup> [www.merriam-webster.com/dictionary/stewardship](http://www.merriam-webster.com/dictionary/stewardship).

<sup>11</sup> Rebecca Bratspies 'Finessing King Neptune: Fisheries management and the limits of international law' (2001) 25 *Harvard Environmental LR* 213 at 214.

<sup>12</sup> Barnes op cit note 6 at 156.

<sup>13</sup> The rising of environmental consciousness is evident from inter alia these sources: Joseph L Sax 'Property rights and the economy of nature: Understanding *Lucas v South Carolina Coastal Council*' (1992–1993) 45 *Stanford LR* 1433; R J Goldstein 'Green wood in the bundle of sticks: Fitting environmental ethics and ecology into real property law' (1997–1998) 25 *Boston College Environmental Affairs LR* 347.

<sup>14</sup> Edith Brown Weiss 'In fairness to future generations and sustainable development' (1992–1993) 8 *American University Journal of International Law & Policy* 19.

respect of the resource. Through stewardship ‘a stake in any natural resource is vested in both the immediate holder of the resource and the wider community’.<sup>15</sup> Although the holder, owner or manager of the resources is entrenched with a fiduciary responsibility, all stakeholders that interact with the resources are obliged to respect the fiduciary relationship that exists between the resource and current and future generations.

The view that owners may not use their property in ways that prejudice the community, and that other peoples’ interests regarding natural resources like land must be considered, corresponds with the acknowledged viewpoint that property has a ‘public or civic or propriety aspect to it that transcends individual economic interests’,<sup>16</sup> and the acknowledgement that ownership ‘should inherently be limited for the benefit of society at large’.<sup>17</sup> This reinvigoration of interest in the public function of property and the judicial recognition that a stewardship authority has been established regarding land as part of the environment seems to be a parallel development in South African property law, although it has not yet received sufficient attention from scholars in the field. The naked truth is however that ‘[t]he present generation holds the earth in trust for the next generation’.<sup>18</sup> We are the ‘transient caretakers’<sup>19</sup> who are holding the earth’s natural resources for generations yet to come.<sup>20</sup> Section 24 of the Constitution is the conduit through which the ethical norm of stewardship has found its way into South African law. As no part of the law functions in a vacuum it is inevitable that this development, which can primarily be assigned to the sphere of environmental law, will influence the law of property in so far as our conception of land and other natural resources are concerned.

(a) *Public trusteeship in a nutshell*

We need to turn to foreign sources in our quest to understand what ‘public trusteeship’ entails. The foundational principle on which the notion of public trusteeship is based is that state governments must manage and protect certain natural resources for the sole intergenerational benefit of their citizens.<sup>21</sup>

<sup>15</sup> Barnes op cit note 6 at 248.

<sup>16</sup> André van der Walt ‘The public aspect of private property’ (2004) 19 *SAPL* 676 at 707.

<sup>17</sup> G J Pienaar ‘Registration of informal land-use rights in South Africa — Giving teeth to (toothless) paper tigers?’ 2000 *TSAR* 422 at 447.

<sup>18</sup> *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC) para 102.

<sup>19</sup> The phrase was coined by Mervyn King & Teodorina Lessidrenska *Transient Caretakers: Making Life on Earth Sustainable* (2009).

<sup>20</sup> Malgosia Fitzmaurice *Contemporary Issues in International Environmental Law* (2009) 135.

<sup>21</sup> Following in the footsteps of Edith Brown Weiss ‘Intergenerational equity: A legal framework for global environmental change’ in Edith Brown Weiss (ed) *Environmental Change and International Law: New Challenges and Dimensions* (1992), the

According to Barnes<sup>22</sup> this formalisation of trusteeship is necessitated by the fact that the individual cannot always be expected to act in the public interest when it conflicts with his or her private interests. The ethical principle of stewardship underlies public trusteeship. The terms 'stewardship' and 'public trusteeship' are sometimes used as synonyms<sup>23</sup> and this underwrites the ethical principle that humankind is the guardian of the earth, not its owner.<sup>24</sup> Stewardship and public trusteeship give rise to a fiduciary responsibility towards the environment and community.

Peter Sand<sup>25</sup> highlights that public trusteeship, as legal notion, manifests or materialises in different guises even within a single legal system. This means that the stewardship ethic encapsulated in the notion of public trusteeship will influence different property regimes in different ways. He explains that the concept of public trusteeship acknowledges that certain natural resources, regardless of their allocation to public or private users, are defined as part of an 'inalienable public trust'. Certain authorities are in turn designated as 'public trustees' with the authority and responsibility to protect the resource. Every citizen, as a 'beneficiary' of the trust, may hold the trustees accountable and obtain judicial protection against encroachments or the deterioration of the natural resources. Sand emphasises that '[t]he message is simple: the sovereign rights of nation states over certain environmental resources are not proprietary, but *fiduciary*'.<sup>26</sup>

At first glance this exposition indicates a connection between public trusteeship and trust law. Although the relation between the two concepts necessitates a research article of its own, it suffices to state for current purposes that while there are proponents who link the two concepts,<sup>27</sup> there are persuasive arguments to the contrary.<sup>28</sup> For the purposes of this article,

term 'intergenerational' is used as collective phrase to refer to current and future generations of citizens.

<sup>22</sup> Barnes op cit note 6 at 22 and 51.

<sup>23</sup> Ibid at 247.

<sup>24</sup> Separate opinion of Weeramantry J in the *Gabèikovo-Nagymaros* case [1997] ICJ Rep 7 para 141 available at <http://www.icj-cij.org/docket/files/92/7383.pdf>.

<sup>25</sup> Sand op cit note 1 at 48. This view is supported by Blumm & Guthrie op cit note 1 at 807–8 and in Blumm op cit note 1 at 107. See also Blumm's exposition in Michael C Blumm 'The public trust doctrine and private property: The accommodation principle' (2010) 27 *Pace Environmental LR* 649 where he indicates that a review of representative public trust case law in the United States reveals that the doctrine is used as a vehicle for mediating between public and private rights in important natural resources, and that courts have accomplished this accommodation of public and private rights inter alia through the transformation of the definition of private property or through the recognition of a public easement on private property. It is evident from the discussion that the recognition of the principle of public trusteeship does not dictate the existence of a particular property rights regime.

<sup>26</sup> Sand ibid (author's emphasis).

<sup>27</sup> J S Stevens 'The public trust: A sovereign's ancient prerogative becomes the peoples' environmental right' (1980) 14 *UC Davis LR* 197–8; Sand op cit note 1 at 55.

<sup>28</sup> J L Huffman 'A fish out of water: The public trust doctrine in a constitutional democracy' (1989) 19 *Environmental Law* 527 at 535 and 538 points out that three

the word 'trust' must be interpreted to refer to the fiduciary responsibility attributed to the state through the incorporation of the concept of public trusteeship, rather than to the juristic concept or entity that is a trust.<sup>29</sup>

In light of the focus of this article, other important features that stem from Sand's explanation demand our attention. From Sand's description we glean that public trusteeship is an 'idea', an underlying philosophy, which manifests differently in different legal constructs. The essential elements that form the components necessary to breathe life into this principle are (i) a natural resource, (ii) used by a specific community of citizens, (iii) destined to be protected for intergenerational access, (iv) which is placed under the custodial or fiduciary control of a state authority. This state authority is then burdened with the responsibility to ensure that the resource is used, managed and protected in accordance with the public interest to guarantee intergenerational access and use.

The principle of public trusteeship manifests clearly in the Anglo-American public trust doctrine. Due to the fact that the public trust doctrine is an accepted, albeit a contested doctrine in American law, a brief overview of its operation will serve as a benchmark against which to measure and define the statutory notion of state 'custodianship' or 'trusteeship' emanating from the South African natural resources legislation that will be discussed below. This exposition will illustrate an important factor: that it is premature and unfounded to presuppose that the concept of public trusteeship automatically assumes the transformation of private property to public property, or inevitably leads to state ownership of natural resources.

parties are needed to create a trust in American law: the creator or settlor of the trust, the trustee, and the beneficiary. The objectives of the creator define the relationship between the parties holding legal and equitable title. When attempting to identify who are, respectively, the creator, trustee and beneficiary of the alleged public trust, Huffman indicates that the public can be identified as the beneficiary and the state as the trustee. He argues however that a single entity cannot simultaneously be the trustee and beneficiary of a trust. Because the democratic state is the agent of the people, it acts at the behest of the people and, therefore, for the benefit of the people. The people cannot act as fiduciary, through the state, for themselves. The identity of the creator is also uncertain.

<sup>29</sup> The tripartite nature of the creation and operation of trusts disqualifies the 'public trust' from being classified as a true legal trust in American law. There seems to be no unanimity on the nature of the modern Anglo-American public trust doctrine. The doctrine has been treated largely as a public-property right of access to certain public resources for various public purposes. It has thus been described as a public easement or a servitude. See Michael Blumm 'Public property and the democratization of western water law: A modern view of the public trust doctrine' (1989) 19 *Environmental Law* 573 at 580-1; T C Dunning 'The public trust: A fundamental doctrine of American property law' (1989) 19 *Environmental Law* 515 at 519; CF Wilkenson 'The headwaters of the public trust: Some thoughts on the source and scope of the traditional doctrine' (1989) 19 *Environmental Law* 425 at 450.

*(b) The American public trust doctrine*

As the American public trust doctrine is referred to primarily to assist in defining the concept of public trusteeship, a thorough exposition of the development and intricate mysteries of the doctrine falls outside the scope of this article.<sup>30</sup> It is the underlying principles upon which the doctrine is founded, and which lead to its development, that concern us here.

When the phrase 'public trust doctrine' is used in American legal literature, it refers either to a common-law doctrine or to a statutory doctrine incorporated in constitutional or statutory law.<sup>31</sup> The common-law doctrine was initially applicable only to watercourses affected by the tides of the sea and the land beneath them.<sup>32</sup> These watercourses, and the role they played in sustaining life and the economy of the day, were deemed so important that they had to be protected for the benefit of the public.<sup>33</sup> The common-law doctrine confirmed the state's dominium and sovereignty over 'the soils under tide water',<sup>34</sup> defining it as a fiduciary dominium while entrenching the public's right of access for the specified uses of fishing, commerce and navigation. This fiduciary dominium carried the inherent responsibility to protect the natural resource.<sup>35</sup> As a common-law doctrine that was tradition-

<sup>30</sup> For detailed discussions on the development of the public trust doctrine in American law see inter alia E van der Schyff 'Unpacking the public trust doctrine: A journey into foreign territory' (2010) 13 *PER* 122; J D Kearney & T W Merrill 'The origins of the American public trust doctrine: What really happened in *Illinois Central*' (2004) 71 *Univ of Chicago LR* 799; R J Lazarus 'Changing conceptions of property and sovereignty in natural resources: Questioning the public trust doctrine' (1986) 71 *Iowa LR* 631; H R Bader 'An analysis of the potential impact of the public trust doctrine on the sovereign's use of its eminent domain' (1994) 18 *Hamline LR* 50; H R Bader 'Antaeus and the public trust doctrine: A new approach to substantive environmental protection in the common law' (1992) 19 *Boston College Environmental Affairs LR* 749; Blumm op cit note 29; T P Brady "'But most of it belongs to those yet to be born": The public trust doctrine, NEPA and the stewardship ethic' (1990) 17 *Boston College Environmental Affairs LR* 621; H C Dunning 'The public trust: A fundamental doctrine of American property law' (1989) 19 *Environmental Law* 515; P O Dunphy 'Comments: The public trust doctrine' (1976) 59 *Marquette LR* 787; E Pearson 'The public trust doctrine in federal law' (2004) 24 *J of Land Resources & Environmental Law* 173; R Perruso 'The development of the doctrine of res communes in medieval and early modern Europe' (2002) 70 *LHR* 69; Sax op cit note 3; J L Sax 'Liberating the public trust doctrine from its historical shackles' (1980) 14 *UC Davis LR* 185; J Searle 'Private property rights yield to the environmental crisis: Perspectives on the public trust doctrine' (1990) 41 *SCLR* 897.

<sup>31</sup> G R Scott 'The expanding of the public trust doctrine: A warning to environmentalists and policy makers' (1998) 10 *Fordham Environmental LJ* 1.

<sup>32</sup> *Arnold v Mundy* 6 NJL 1 (1821); *Martin v Waddell's Lessee* 41 US 367 (Pet) (1842); *Shively v Bowlby* 152 US 1 (1894).

<sup>33</sup> *Illinois Central Railroad Company v Illinois* 146 US 387 (1892) 452.

<sup>34</sup> *Martin v Waddell's Lessee* supra note 32; *Knight v United States Land Association* 142 US 161 (1891).

<sup>35</sup> *State v City of Bowling Green* 313 NE 2d 409, 411 (Ohio 1974): '[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit . . . to protect the corpus of the trust property.' See too

ally applicable only to navigable watercourses and the protected uses of commerce, navigation and fishing, the public trust doctrine is nothing more and nothing less than a 'public ownership and access' doctrine.<sup>36</sup> It fundamentally acknowledges that some resources are so central to the well-being of the community that they are neither susceptible to private ownership nor to unrestricted state ownership.<sup>37</sup> These resources are thus owned by the state, but the state is not the owner in the ordinary private law sense of the concept. American courts have emphasised that state ownership of land subject to the public trust is held by a title different in character from that which states hold in land intended for sale.<sup>38</sup> It is a fiduciary ownership where the dominion of the property is vested in the sovereign as representative of the nation.<sup>39</sup>

The renowned scholar Joseph Sax identified the principles underlying the common law public trust doctrine and encouraged the development and extension of the doctrine as a mechanism to ensure environmental protection.<sup>40</sup> The legislatures and the judiciaries of different states heeded Sax's arguments.<sup>41</sup> In some areas the development was hesitant and cautious, with only the subtle expansion of public trust uses ascribed to land and watercourses already captured within the realm of the common-law doctrine.<sup>42</sup> In other areas the development was bold and daring, resulting not only in the

*National Audubon Society v Superior Court of Alpine County* 658 P 2d 709, 724 (Cal 1983), conveying the duty of the state to 'protect the people's common heritage of streams, lakes, marshlands and tidelands'. See also *City of Milwaukee v State* 214 NW 820, 830 (Wis 1927); *Just v Marinette County* 201 NW 2d 761 768–70 (1972).

<sup>36</sup> Blumm op cit note 1 at 105–6.

<sup>37</sup> Turnipseed et al op cit note 1 at 8.

<sup>38</sup> *Illinois Central Railroad Company v Illinois* supra note 33 at 452; *Shively v Bowlby* supra note 32 at 56; *National Audubon Society v Superior Court of Alpine County* supra note 35; *Glass v Goeckel* 473 Mich 667, 673 (2005).

<sup>39</sup> *Shively v Bowlby* supra note 32. It is this specific characteristic or attribute of the public trust doctrine that is viewed with suspicion by lawyers schooled in the Roman-Dutch tradition of private property.

<sup>40</sup> 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 development of the public trust doctrine in American environmental law. J M Olson 'The public trust doctrine: Procedural and substantive limitations on governmental reallocation of natural resources in Michigan' (1975) 2 *Detroit College LR* 161 at 162 referred to Sax's seminal work as the leading treatment on the public trust doctrine and emphasised that Sax's article was mandatory reading for a comprehensive understanding of the public trust doctrine.

<sup>41</sup> *Intellectuals Forum, Tirupathi v State of AP & ORS* (2006) INSC 86. See also Z C Kleinsasser 'Private and public property rights: Regulatory and physical takings and the public trust doctrine' (2005) 32 *Boston College Environmental Affairs LR* 421 at 425–6.

<sup>42</sup> Olson op cit note 40.

increase of recognised public trust uses,<sup>43</sup> but also the expansion of the reach of the doctrine to resources not previously affected by it.<sup>44</sup> The court in *Illinois Central Railroad Co v Illinois*<sup>45</sup> stated that the reach of the doctrine could be expanded to resources of ‘special character’ and ‘public concern’ that necessitated their protection for intergenerational use.<sup>46</sup> This resulted in the somewhat peculiar reality that in America the principles of public trusteeship are encapsulated in a series of public trust doctrines, operative in different ways in the different states.<sup>47</sup>

Considering that ‘the law is the handmaiden of social existence’<sup>48</sup> it is not strange that the doctrine overflowed the banks of tidal waters first to include navigable waters and later also land-bound resources, or that the uses deemed to be worthy of protection were extended to keep pace with the changing needs of society.<sup>49</sup> The expansion of the doctrine by the courts, and the incorporation of public trust principles to varying degrees in state constitutions and legislation, highlighted the fundamental value that underlies a doctrine of public trust. The process emphasised the state government’s inherent duty to protect certain natural resources for the sole benefit of its

<sup>43</sup> *Caminiti v Boyle* 107 Wn 2d 662 (1987) 669; *Washington State Geoduck Harvest Association v Washington State Department of Natural Resources* 124 Wn App 441 (2004) 448.

<sup>44</sup> Stevens op cit note 27 at 221–2. R E Walston ‘The public trust doctrine in the water rights context: The wrong environmental remedy’ (1982) 22 *Santa Clara LR* 63 stated (at 66) that the trust is a dynamic rather than static concept and seems destined to expand with the development and recognition of new public uses. See too T J Hannig ‘The public trust doctrine expansion and integration: A proposed balancing test’ (1983) 23 *Santa Clara LR* 211 226; A B Manzanetti ‘The Fifth Amendment as a limitation on the public trust doctrine in water law’ (1983–1984) 15 *Pacific LJ* 1308. Lazarus op cit note 30 at 652 stated that because of the flexibility of the doctrine ‘highways, driving ranges and shopping malls have passed the public muster’. See too Bader (1992) op cit note 30 at 755.

<sup>45</sup> *Supra* note 33 at 454–5.

<sup>46</sup> See also in this regard Brief for amicus curiae law professors — Exhibit A in the United States District Court for the Northern District of California San Francisco Division, in the matter between *Alec L et al and Lisa Jackson* — No. 3:11-cv-02203 EMC.

<sup>47</sup> R K Craig ‘A quick-and-dirty guide to the eastern public trust doctrines: basic issues, classification of states and state summaries’ available at [http://works.bepress.com/robin\\_craig/1](http://works.bepress.com/robin_craig/1), accessed on 12 December 2010.

<sup>48</sup> Huffman op cit note 28 at 531.

<sup>49</sup> *Moore v Sanborne* 2 Mich 519, 525 (1853) asserted that the servitude of public interest depends rather upon the purpose for which the public requires the use of its streams than upon any particular mode of use. Olson op cit note 40 at 182–3 argued that as the public interest changes it directly influences the scope of uses that need to be protected. Walston op cit note 24 at 81 explained that the function of the public trust doctrine is to ensure that the people retain a sovereign interest in their water resources so that they can adapt their resource use to changing public needs. This view is in conformity with the development that has taken place. See also *Borough of Neptune City v Borough of Avon-by-the-Sea* 61 NJ 296 (1972) 309.

current and future citizens — a duty described by some commentators as an ‘inalienable attribute of sovereignty’.<sup>50</sup>

The expansion of the traditional common-law public trust doctrine highlighted more than the fiduciary obligations of states to protect public access and use of certain natural resources. It clearly showed that the public trust doctrine had developed beyond its initial ‘public ownership and access’ model. The application of the doctrine was extended beyond public property to private property that met the qualification of being of intergenerational importance and of public concern, and while this development did not magically convert private property into public property, it resulted in a limitation of private property rights.<sup>51</sup> David Takacs<sup>52</sup> accurately states: ‘The public trust doctrine perseveres as a value system and an ethic as its expression in law mutates and evolves.’ Blumm<sup>53</sup> asserts that the public trust doctrine can accommodate both private property and public concerns through ‘continuous state supervision of trust resources, regardless of whether they are in public or private ownership’. He argues that ‘instead of threatening property rights, the doctrine functions to harmonize public and private rights in important resources, mostly those close to the land-water edge’,<sup>54</sup> and he insists that the doctrine is ‘hardly the antithesis of private property: instead, it functions to transform not eradicate private property rights’.<sup>55</sup> He claims that

<sup>50</sup> Brief for amicus curiae law professors op cit note 46.

<sup>51</sup> After the decision in *National Audubon Society v Superior Court of Alpine County* supra note 35 one of the main points of contention is that the expansion of the public trust doctrine interferes with private property rights by claiming a pre-existing title (in favour of the state) in property subject to the doctrine, thereby avoiding the takings issue, see Manzanetti op cit note 44 at 1305; P Q Dargan ‘Nigh the water of changing tides: Coastal zone management after *Lucas v South Carolina Coastal Council*’ (1993) 44 *South Carolina LR* 507. The argument is that no taking occurs due to the fact that through the working of the public trust doctrine the state had a pre-existing title on the property at hand. The private law owner acquired all rights to the property subject to the pre-existing title. The private law owner or right holder is thus regarded to have known the risks attached to attaining rights in the property and cannot now lament the loss of his rights. In this regard James L Huffman ‘Background principles and the rule of law’ (2008) 35 *Ecology Law Quarterly* 1 states (at 27): ‘[I]t is a distortion of the common law process to suggest that state courts and legislatures can modify or abandon established common law principles in the name of present day notion of the public interest and public right.’ It has also been argued that other injuries done to private property are the elimination of the right to exclude others from or restrict access to your property, the right to determine the use of the property (*ius utendi*) the right to neglect or abuse (*ius abutendi*) — R T Simmons ‘Property and the public trust doctrine’ 2007 PS-39 *Property and Environment Research Centre Policy Series* 13 available at <http://www.perc.org/pdf/ps39.pdf>, accessed on 25 July 2012. Blumm op cit note 25 at 652, and other proponents of the doctrine vehemently argue that the doctrine actually functions to mediate between public and private rights in an era when the emphasis is slowly moving from private to public rights.

<sup>52</sup> Takacs op cit note 1 at 711.

<sup>53</sup> Blumm op cit note 25 at 650.

<sup>54</sup> *Ibid* at 649 (see the abstract).

<sup>55</sup> *Ibid* at 650.

the application of the doctrine does not necessarily demand the ‘wholesale public ownership’ of a resource, and points out that American jurisprudence contains more than enough precedents to indicate that private parties can retain ownership of trust lands if they maintain the public purposes underlying the trust doctrine.<sup>56</sup> In this sense the application of the doctrine creates an easement held in common by the members of the public.<sup>57</sup> This public easement burdens the owner’s ownership of the resource with the fiduciary responsibility inherent to the public trust.<sup>58</sup> Although the legal nature of an easement is not fiduciary, it is the content of the easement that establishes the fiduciary character. It regulates the owner’s right to use his or her property to conform to trust purposes. In conclusion, it must be mentioned that the courts are regarded as the guardians and protectors of the public trust.<sup>59</sup>

(c) *Tying up loose ends*

From the brief analysis of the principles underlying American public trust law we find corroboration for Peter Sand’s exposition of public trusteeship given at the outset of the discussion. In summary it can thus be stated that from the American public trust doctrine we glean that for a public trust doctrine to be established, it needs either to be endorsed by common law or incorporated by statute. Statutory incorporation would necessitate the acknowledgement of the intergenerational importance of a resource, and the vesting of a fiduciary responsibility in a state authority to ensure that the public interest in the resource is upheld and protected. In this sense a doctrine of public trust vests the state authority with the necessary power to regulate access and use of the resource for the benefit of current and future generations. Although this fiduciary responsibility can, depending on the context and provisions of a specific statute, lead to the conclusion that a natural resource should forthwith be regarded as public property, it can likewise lead to ‘nothing more’ than the regulation of the use of a resource held in private ownership by acknowledging and accommodating the public interest. From a property law perspective it is also noteworthy that the public interest determines the nature and degree of public use and access. Simultaneously, though, it restricts and limits the rights of the owner of the resource, regardless of whether the resource is owned by the state as public property or by any private owner (which can include the state as juristic person).

### III ANALYSING SOUTH AFRICAN ENVIRONMENTAL AND NATURAL RESOURCE RELATED LEGISLATION

The discussion above indicates that certain words and phrases can be identified as ‘public trust’ language. Those are the words and phrases that

<sup>56</sup> Ibid at 661. *Marks v Whitney* 491 P 2d 374 (Cal 1971); *Arnold’s Inn Inc v Morgan* 310 NYS 2d 541, 547 (1970); *Glass v Goeckel* supra note 38.

<sup>57</sup> Huffman op cit note 28 at 527 and 531; Blumm op cit note 25 at 663; *Mathews v Bay Head* 471 A 2d 355 (NJ 1984).

<sup>58</sup> Sax op cit note 4 at 487; *Glass v Goeckel* supra note 38.

<sup>59</sup> *Citizens for Responsible Wildlife Management et al v State of Washington* 124 Wn App 566 (2004) 570–1.

affirm and link the intergenerational importance of certain natural resources and the fiduciary responsibility of the state to protect and manage the resource to ensure the realisation of those interests.

(a) *The use of public trust language in environmental and natural resource legislation*

International supporters of the public trust doctrine claim that the creation of a constitutional environmental right in s 24 of the Constitution laid the foundation for several statutes to incorporate a public trust doctrine in South African environmental and natural resources law.<sup>60</sup> The Gauteng High Court has already accepted that s 24 introduced the principle of ‘stewardship’ into South African law.<sup>61</sup> The first instance of public trust language being used in our law (apart from the Constitution) is found in the National Water Act 36 of 1998 (‘the NWA’). The preamble to the NWA states that water is a natural resource that belongs to all people. The heading of s 3 reads: ‘Public trusteeship of the nation’s water resources’. Section 3 of the NWA then states that the national government is appointed as public trustee of the nation’s water resources. It is not a coincidence that public trust language is used in the NWA. The White Paper on a National Water Policy for South Africa<sup>62</sup> states very clearly that the government of the day intended to create a doctrine of public trust:

‘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.’<sup>63</sup>

The NWA was followed closely by the National Environmental Management Act 107 of 1998 (‘NEMA’), where s 2 states that the ‘environment is held in trust for the people’ and the state is appointed as the custodian thereof. In 2004 the Mineral and Petroleum Resources Development Act 28 of 2002 followed suit with the declaration in s 3 that mineral and petroleum resources are the common heritage of all the people of South Africa, with the state the duly appointed custodian thereof for the benefit of all South Africans. In 2008 the concept was once again applied in the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (‘NEMA: ICM’). This Act unequivocally states that the ownership of coastal public property vests in the citizens of the Republic,<sup>64</sup> and that the state is the public trustee thereof.<sup>65</sup>

Although all the statutes mentioned above function in their own spheres

<sup>60</sup> Blumm & Guthrie op cit note 1 at 745 and 788–94. See generally all the other articles referred to in note 1.

<sup>61</sup> *HTF Developers* supra note 9.

<sup>62</sup> White Paper on a National Water Policy for South Africa, 1997 available at <http://www.dwaf.gov.za/Documents/Policies/mwpwp.pdf>, accessed on 25 July 2012.

<sup>63</sup> White Paper *ibid* para 5.1.2.

<sup>64</sup> Section 11 of NEMA: ICM.

<sup>65</sup> Section 12 of NEMA: ICM.

(with the exception of NEMA, which should be regarded as framework legislation for all environmentally-related legislation) there are a few common characteristics woven like a golden thread through them. The most important characteristics portrayed by the different statutes are that a fiduciary responsibility pertaining to a natural resource is imposed on the state or national government with the sole aim of protecting intergenerational interests. The discussion that follows will indicate that all these pieces of legislation identify a custodial authority with fiduciary responsibilities towards an identified beneficiary and specific subject matter.

(i) *Identifying the custodial authority*

In the NWA,<sup>66</sup> the national government is appointed as the trustee of the nation's water resources. In NEMA<sup>67</sup> the state is conferred the duty of public trustee and guardian of the nation's interests in and relating to the environment. In the MPRDA<sup>68</sup> the state is appointed the custodian of the nation's mineral resources, and in NEMA: ICM<sup>69</sup> the state is appointed public trustee of coastal public property. In each of these pieces of public trust legislation a specific minister of the national government is subsequently appointed to act as agent or delegatee of the state.

It can be argued that poor and haphazard draftsmanship caused the discrepancy in identifying the custodial authority in the NWA as the 'national government', while the 'state' is named in the remainder of the identified legislation. However, it can also be argued that water (as a resource) is so inherently important to the existence and total well-being of each South African, and that so many decisions in other governmental spheres impact on water use, that the legislature deemed it fit to bind national government in its totality with a fiduciary responsibility as far as water is concerned. The underlying idea captured in all these statutes is that the country's highest governing authority is cloaked with the responsibility to govern the environment generally, as well as certain specific natural resources. Although a specific minister is appointed to act on behalf of the government or the state, it is either the state or the whole of the national government that is cloaked with the responsibility of public trusteeship. Specific functions can be delegated to subordinate structures or functionaries in terms of these statutes,<sup>70</sup> but the public trustee or custodian remains ultimately accountable.

(ii) *The fiduciary responsibility*

The nature of the public trustee's responsibility provides another guideline in the quest to determine whether the idea of public trusteeship finds a place in

<sup>66</sup> Section 3.

<sup>67</sup> Section 2(4)(o).

<sup>68</sup> Section 3.

<sup>69</sup> Sections 2(c) and 11.

<sup>70</sup> Examples of the delegation of powers and functions can inter alia be found in s 8 of the MPRDA and s 63 of the NWA. The former provides for the delegation of duties to a regional manager and the latter for the delegation of powers and duties by the minister.

South African natural resources legislation. It is clear from the cluster of relevant legislation that the state or national government has an overwhelming fiduciary responsibility to deal with the resource in the public interest.<sup>71</sup> The sole aim of managing, protecting and conserving the environment and applicable natural resources is to ensure that all South Africans gain from the benefit. It is thus not the environment or a specific resource that is the beneficiary of this fiduciary responsibility of the state, but the South African nation. This is so because the nation's collective interest in the environment or a specific natural resource is safeguarded. The state or government (as appointed public trustee or custodian) acquires no proprietary interest in the environment or natural resources. The fiduciary responsibility that resonates through all the legislation under discussion defines the interest of the state or the government. The fiduciary responsibility of the trustee or custodian is defined in each of the applicable statutes, and in essence it boils down to the responsibility to protect and preserve the resource and manage resource use in a sustainable and equitable manner for the benefit of current and future users and stakeholders. Due to the fact that this fiduciary responsibility is rooted in s 24 of the Constitution, appropriate relief can be obtained through the provisions of s 38 of the Constitution against a trustee or custodian who neglects this duty. Due to the application of the subsidiarity principle, all possible common law remedies and statutory remedies provided for in the applicable legislation will however have to be exhausted before the constitutional remedy can be considered.<sup>72</sup> Applicable administrative law remedies must also be considered in appropriate circumstances, to ensure that the custodian or trustee effectively executes its fiduciary responsibilities and duties. The statutes under discussion confine and limit the state's (and national government's) interest in the resource to the role, obligation and responsibility determined by the specific statute. If the state or national government does not fulfil its duties, the courts of the country must then guard and protect the nation's interests.<sup>73</sup>

(iii) *The beneficiaries*

The different statutes clearly identify the relevant beneficiaries. The NWA<sup>74</sup> unequivocally states that 'water is a natural resource that belongs to all

<sup>71</sup> The words 'trust', 'trustee' and 'custodian' inherently denote a fiduciary responsibility. In all the identified statutes the state or national government is responsible for the management, development, use and protection of the resources in the interest of the nation or the citizens or 'all people'.

<sup>72</sup> A J van der Walt *Constitutional Property Law* 3 ed (2011) 66–7.

<sup>73</sup> Although *Meepo v Kotze* 2008 (1) SA 104 (NC) and *Bengweyama Minerals Pty Ltd v Genorah Resources* 2011 (4) SA 113 (CC) provide examples of the state's massive failure to comply with its duties as trustee, the courts stepped in and ensured justice. The necessary legal resources and remedies exist to ensure that the courts of the country can hold the custodian or trustee of a specific resource accountable for its actions.

<sup>74</sup> See the preamble to the Act.

people'. NEMA<sup>75</sup> states that the 'environment must be protected as the people's common heritage'. The MPRDA<sup>76</sup> affirms that 'South Africa's mineral and petroleum resources belong to the nation' and NEMA: ICM<sup>77</sup> that 'the ownership of coastal public property vests in the citizens of the Republic'. Although different terms are used to identify the beneficiaries under the different statutes — namely 'all people', 'the people', 'the nation', 'the citizens of the Republic' — it is clear that the South African nation as a whole is the beneficiary under all these statutes. Although the 'nation' has no legal personality, the term is used as a collective noun to denote a community of people associated with a particular territory. This community of people has shared interests; in this case, a shared interest in the environment or a particular natural resource. It is also worth noting that in addition to the constitutional declaration in s 24 that the environment must be protected for the benefit of current and future generations, all of these statutes specifically include future generations as stakeholders (and thus beneficiaries).<sup>78</sup>

None of these statutes are aimed at promoting individual interests. It is the joint interests of the public, the South African nation as a whole, that are advanced. Therefore, it can be deduced that a single person or legal entity cannot claim the benefits flowing from the legislation if the claim is not shaped by the public interest. Arguably, the public interest is an abstract concept that is difficult to define.<sup>79</sup> Public interest varies across different communities because different needs combine in different public interests.<sup>80</sup> In the South African natural resources context however, the public interest is delimited primarily by the values and fundamental rights entrenched in the Constitution, as well as the objectives of specific natural resource related legislation.<sup>81</sup> It combines the constitutional vision of an environment that is not harmful to health or well-being with the nation's commitment to reforms to bring about equitable access to all South Africa's natural resources.<sup>82</sup> It contains the distinctive elements of protecting intergenerational interests by promoting conservation, preventing pollution and ecological degradation, securing ecologically sustainable development, and justifying economic and social development.<sup>83</sup> These broad parameters of the public interest are in turn refined in the different natural resources statutes by the determination of context specific objectives and purposes. The public interest must be advanced and supported by every action taken in terms of the statutes. It is the individual-as-part-of-and-from-within-the-community

<sup>75</sup> Section 2(4)(o).

<sup>76</sup> Preamble.

<sup>77</sup> Section 11.

<sup>78</sup> NEMA s 1(xxix); NWA s 2(a); MPRDA s 1; NEMA: ICM s 12(b).

<sup>79</sup> Barnes *op cit* note 6 at 69.

<sup>80</sup> *Ibid* at 17.

<sup>81</sup> Barnes *ibid* argues that the scope of the public interest is delimited by the structure of legal rules founded in fundamental values.

<sup>82</sup> Sections 24(a) and 25(4) of the Constitution.

<sup>83</sup> Section 24(b) of the Constitution.

that benefits from the concept. To explain this idea an example might be beneficial. When the state considers an application for a licence to use water, it is not only the applicant's circumstances and the benefit that the applicant as an individual might gain or the detriment that might be suffered by the applicant as an individual that must be considered by the relevant authority. Additionally, the question as to how the granting of the licence will benefit the public interest is of conclusive importance. Several factors that should be considered whenever action is taken in terms of the NWA are listed in the Act, these embodying the somewhat abstract concept of public interest.<sup>84</sup>

If we take into consideration that all the statutes mentioned above deal with natural resources that should be managed, used and protected in the public interest — an interest that fuses the needs of current citizens with those of future generations — it is evident that individual interests must bow before public needs. This characteristic of these pieces of legislation defines and determines the boundaries of any personal-use rights or entitlements that can be acquired by individual parties. Primarily, it is the interests of the identified beneficiary, rather than those of the individual, that are protected by these statutes.

(iv) *The subject matter*

When scrutinising the applicable legislation, it becomes apparent that, depending on the focus of a specific statute, two categories of 'things' are dealt with in the Acts. With the exception of the 'environment' in NEMA and 'coastal public property' in NEMA: ICM, each of the statutes deals not only with a specific resource as a whole, but also with individual sections or parts of the resource. These smaller sections can be referred to as resource units to distinguish them from the resource en masse.<sup>85</sup> It is the resource as a whole that is the object of the nation's claim to the resources and focus of this contribution. The latter (ie the resource units) form the objects of private use rights that may still be acquired in the global resource. All use rights required in relation to a specific resource are acquired subject to the nation's pre-existing title.<sup>86</sup> To contextualise this idea, the individual subject-matter of the different pieces of legislation will be identified.

According to NEMA, the object of the nation's claim to the environment is the environment as a whole. This is apparent from the wording of NEMA, which very broadly defines the environment as:

- 'the surroundings within which humans exist and that are made up of—
- (i) the land, water and atmosphere of the earth;
  - (ii) micro-organisms, plant and animal life;

<sup>84</sup> *Goede Wellington Boerdery (Pty) Ltd v Makhanya NO & another* [2011] ZAGPPHC 141 para 5.5.

<sup>85</sup> For example the country's vast mineral resources versus the right to mine specific minerals at a specific location.

<sup>86</sup> Each of the public trust statutes regulates the acquisition of use-rights in terms of the resources. No right can be granted in perpetuity.

- (iii) any part or combination of (i) and (ii) and the inter-relationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.<sup>87</sup>

The NWA provides that the nation's water resources belong to all people. It is the whole of this resource, with all the water in the hydrological cycle, irrespective of its form and location, which forms the object of statutory rights to water. The MPRDA likewise provides that mineral and petroleum resources are the common heritage of all the people of South Africa.<sup>88</sup> Once again, it is the totality of mineral and petroleum resources that forms the object of statutory rights to mineral resources, irrespective of where they are embedded in the earth's treasure vault. The NEMA: ICM meticulously describes the phrase 'coastal public property' in s 7 and then vests ownership of this entire category in the citizens of the Republic.<sup>89</sup> Once again, it is the vast resource that is the object of the statutory rights created in the Act.

The legislation hence reveals that the nation's claim to a specific natural resource or the environment relates to the whole vast and unlimited abundance of the affected natural resource or the environment as it is found within the boundaries of the Republic.

#### IV AN ANSWER THAT ELICITS MORE QUESTIONS

The aim of this article is to determine whether the concept of public trusteeship, embodied in one or more stewardship doctrines of public trust, has been incorporated in South African law. If public-trust language and concepts, as they emanate from the foundational stewardship principle underlying public trusteeship applicable in American law are used as a yardstick, there can be little doubt that the philosophical ethic of public trusteeship has seeped into South African natural resources law. It is apparent that the legislature intended to create a state of affairs where the state or national government is ultimately responsible for the use, protection and

<sup>87</sup> Section 1 of NEMA.

<sup>88</sup> The MPRDA defines the concept 'mineral' as 'substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes —

- (a) water, other than water taken from land or sea for the extraction of any mineral from such water;
- (b) petroleum; or
- (c) peat. . . ?.

and 'petroleum' as 'any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation or gas arising from a marsh or other surface deposit;. . . ?.

<sup>89</sup> Section 11.

management of South Africa's natural resources in the interest and for the benefit of the greater South African society. This development emphasises the state's stewardship responsibility in relation to the natural resources within its territory. It highlights the importance of natural resources as national assets, and that their use, protection and management are in the public interest. The analysis of the applicable legislation indicates that the legislature chose to use different phrases and words to embody the notion of stewardship in the different statutes. It can therefore be argued that although the underlying philosophy of a stewardship ethic has been incorporated into South African natural resources legislation, it gave rise to various statutory 'stewardship doctrines of public trust'. These doctrines have s 24 of the Constitution and s 2(4)(o) of NEMA as common denominators, but each doctrine functions only within the sphere of the statute through which it is created.<sup>90</sup> The environmental lawyer would surely hail this development and praise the fundamental acknowledgement of state responsibility and regulatory power in protecting the country's natural resources. For the property lawyer, though, this development raises a plethora of questions.

As property lawyers, we hesitate to upset established expectations. We are concerned with the question how this phenomenon affects the property-rights regimes to which the respective resources are subject. From the example of the American public trust doctrine we have gleaned that public trusteeship can affect property in different ways. The environment, water, minerals and coastal property are all subjected to the notion of stewardship, embodied either as public trusteeship or state custodianship, but because this notion is contained in the provisions of different statutes, the full extent of its implications can only be determined while focusing on each individual statute. The consequences brought about by this statutory intervention depend exclusively on the symbioses between the provisions of each statute. A multitude of questions arise. For example, does the combined force of a

<sup>90</sup> Although the Anglo-American public trust doctrine is a manifestation of the recognition of a sovereign's fiduciary and stewardship responsibilities, it is but one such manifestation. Different legal concepts in different foreign jurisdictions embody the same notion. The use of the phrase 'doctrine of public trust' should thus not be seen as equating South African statutory stewardship doctrines of public trust to the Anglo-American public trust doctrine. As the word 'doctrine' carries the meaning of 'principle, set of guidelines, dogma, view, belief and policy' a statutory stewardship doctrine of public trust is principles of stewardship encapsulated in legislation. Examples of similar notions of stewardship are present in inter alia India, Pakistan, Brazil, Ecuador, Canada, the Philippines, Uganda, Kenya and Nigeria — compare Blumm & Guthrie op cit note 1 at 741–808. H Kube 'Private property in natural resources and the public weal in German law — Latent similarities to the public trust doctrine' 1997 *Natural Resources Law* 857 at 870 indicates that in Germany the Federal Water Code abolished the distinction between private usufructuary rights and public law entitlements to use water and replaced it with an "overarching resource-distributing and managing public law regime according to the concept of "Öffentliche Sache". Turnipseed et al op cit note 1 point out that the functional equivalent of public trusteeship may be found in the French *domaine public* over shoreline areas.

specific statute's provisions that are embraced in the public trust obligation alter the nature of ownership, impact on the content and extent of ownership, or do they merely regulate ownership? The consequences brought about by the statutory incorporation of the concept as it appears in the different statutes will depend on their interpretation within the context of a specific act. So, for argument's sake, it might be found that NEMA: ICM merely re-affirmed existing legal principles that applied to the management of South Africa's coastal resources, but that the MPRDA introduced an institutional regime change. It might be found that the notion of *res publicae* was incorporated statutorily or that a statutory public servitude was created. The possibilities are endless.<sup>91</sup> The question is thus not simply whether the incorporation of the notion of public trust — and stewardship — in South African law leads to the 'mere' regulation of natural resources or whether it unequivocally affirms that natural resources in South Africa should be regarded as public property.

This being said however, a preliminary observation might hint that the creation of statutory stewardship doctrines of public trust, together with the fact that the beneficiaries under the specific statutes comprise a specific genus, namely 'the nation', 'all people', and 'the citizens of the country', assessed against the constitutional imperative to promote equal access to the country's natural resources, has removed the affected resources from the sphere of private property. It is however important that we not jump to conclusions or deal randomly with this possibility, but to research its full impact thoroughly. While the implications that the statutory reinforcement of a stewardship ethic in stewardship doctrines of public trust might have on property and property-rights regimes still need to be determined, the unequivocal common denominator in all these statutes — the fiduciary responsibility of the government as the executive arm of the state in managing South Africa's resources — is clear. To merely brush it off or negate its existence will not honour or reflect the intention of the legislature.

## V CONCLUSION

As indicated earlier, the law has been described as the 'handmaiden of social existence'.<sup>92</sup> Considering that the law has no life of its own, and that property and property law have a social function to fulfil,<sup>93</sup> it is not strange to find a novel development in South African environmental law through which the use of natural resources is to be regulated. Research in the natural and environmental sciences has indicated that the earth's resources are not as unlimited as were once thought, and this realisation has spurred the development of legal principles and doctrines aimed at ensuring the sustainable and

<sup>91</sup> See the view of Wallis JA to this effect in *Minister of Minerals and Energy v Agri South Africa* supra note 2 para 86.

<sup>92</sup> Huffman op cit note 28 at 531.

<sup>93</sup> Stevens op cit note 27 at 223.

equitable use of natural resources.<sup>94</sup> In the South African context this development was heralded by s 24 of the Constitution, followed by the promulgation of specific natural resources related legislation. These statutes acknowledge the nation's collective interest in particular natural resources and unambiguously appoint the state or national government as trustee or custodian of particular natural resources. In order to determine the impact of this development on the law of property specifically, it is of primary importance to describe and label this novel notion.

The Gauteng High Court stated in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & others*<sup>95</sup> that s 24 of the Constitution 'confers upon the authorities a stewardship whereby the present generation is constituted as the custodian or trustee of the environment for future generations'. The court used the terms 'custodian' and 'trustee' as synonyms and linked them directly to the concept of stewardship. Consequently it was necessary to define the term 'stewardship' at the outset of this discussion. It was argued in the article that stewardship entails the responsible management of natural resources. It creates a duty to conserve, protect and preserve natural resources and facilitate sustainable resource-use for the benefit of current and future generations. Public trusteeship is seen as a particular manifestation of stewardship and the terms are often used as synonyms. Both terms underwrite the ethic that humankind is not the owner of the earth but its caretaker.

Public trusteeship as stewardship ethic manifests in different legal guises. The legal nature and consequences of the incorporation of the concept of public trusteeship differ according to the legal instrument used to entrench the stewardship ethic. It is however characterised by certain common denominators, namely (i) a natural resource, (ii) used by a specific community of citizens, (iii) destined to be protected for intergenerational access, (iv) which is placed under the custodial or fiduciary control of a state authority. In order to illustrate how these characteristics are displayed when the concept of public trusteeship is incorporated in a legal mechanism, the American public trust doctrine was referred to. The American public trust doctrine was merely used as a yard stick to indicate to which extent the stewardship ethic of public trusteeship can be incorporated in a legal mechanism.

An analysis of the applicable South African natural resources legislation has indicated that all the statutes under discussion deal with natural resources that are used by the people of South Africa and are destined to be protected for intergenerational use, while the management of these resources is placed under the custodianship or trusteeship of the state or national government. It is thus evident that the philosophical notion of public trusteeship has been created by statute in relation to the environment and specific natural resources. My proposal is that these statutorily entrenched philosophical

<sup>94</sup> In the South African context with its apartheid history, equity is a non-negotiable element.

<sup>95</sup> *Supra* note 9 para 19.

notions could be coined 'stewardship doctrines of public trust', to create a uniquely South African phrase that could be used as term of reference to distinguish the South African notion from its foreign counterparts like the American public trust doctrine. The labelling of this concept emphasises the stewardship responsibility inherent in 'trusteeship' and 'custodianship', and opens the concept up for further analysis. From this base, research can focus on comparing these 'stewardship doctrines of public trust' with inter alia the apartheid concept of the state holding land in trust for particular race groups under the South African Development Trust Act 18 of 1936,<sup>96</sup> as well as other foreign notions through which property and natural resources are regulated for the benefit of a whole community. Such further studies will be necessary to determine the legal consequences brought about by the statutory entrenchment of the stewardship ethic and the impact that this development will have (and has had) on different branches of the law, particularly property law, because the prediction has already been made that due to the statutory entrenchment of stewardship 'owners of land no longer enjoy the absolute real rights known to earlier generations'.

<sup>96</sup> Through the 1936 Act the majority of mineral rights in land set aside for the benefit of black communities were reserved in favour of the South African Development Trust, with the State President of the Republic as its trustee. The function of the Trust was to acquire and administer all released land. African people were not permitted to own land in their own right.