



# PUBLIC TRUSTEESHIP IN SOUTH AFRICAN WATER LAW



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- **The historical background against which modern water management emerged is typified by racial inequality to access resources.**
- **Consequently, the Constitution sought drastically to amend the legal framework governing water resources to address the concerns of the gross social inequalities of access to water, whilst simultaneously ensuring the protection of water resources.**
- **This resulted in the promulgation of the...**





# NATIONAL WATER ACT 36 OF 1998

as part of the holistic action of liberating the country from the



apartheid



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# DOCTRINE OF PUBLIC TRUST



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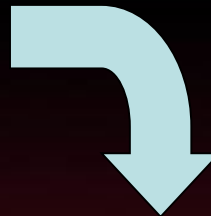
The denial of access to resources in the **past** has resulted in huge inequalities of access to water and water services in the **present** - the modern appreciation of water as a finite and precious resource against this background necessitated state management of the resource in the interests of the South African public.

As a result, trusteeship aims to place the state in a different role to that of its oppressive predecessors. Instead, the state is required to serve the people, by ensuring that the beneficial interest of the public is furthered in the context of the constitutional goals of ensuring equitable access to water and the protection of the environment. These constitutional goals require the promotion of the principles of equity and sustainability, as well as efficiency.





**NWA SUBSTITUTED a dispensation  
that differentiated**



**Private + public water**

new dispensation



**Water as a natural resource  
belongs to all the people of the  
country**



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Public trusteeship is a manifestation of the stewardship ethic rooted in section 24 of the Constitution. The Gauteng High Court stated in HTF Developers (2006) that 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.”

THIS IS WHERE ABSTRACT THEORY TOUCHES GROUND, WHERE THE IDEAS CONTAINED IN LEGISLATION MUST spill over in reality – for every decision maker, every or, administrator, every official, every water user need to grasp the meaning of the notion of stewardship and give life to it





Stewardship is 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.'

It displays certain unique characteristics (and this should be used as a yardstick against which every action relating to water should be measured):





- :a duty towards the environment,
- :the duty to conserve resources, the duty to protect and preserve resources,
- :a duty towards other people including future generations in 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.’ **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 exist between the resource and current and future generations.





In the South African water law context the national government is appointed as the public trustee of the nation's water resources.

From a property law perspective this means that although water belongs to the people, it vests in public ownership in the state with the national government designated as trustee on behalf of the people.



## DOCTRINE OF PUBLIC TRUST (DPT):

Through the wording of section 3 of the NWA an immense responsibility has been placed on the National Government of South Africa. This responsibility cascades down to the Minister of Water and Environmental Affairs through the wording of section 3. To ensure that the public as a whole benefits from the resource, the national government is awarded the fiduciary title over the country's water resources. Therefore the resource is “held in trust” by the ng to manage and control in the public interest.





## National Government as TRUSTEE:

It might seem trivial and theoretical at first glance, but it is very important to note that it is the 'national government' who is appointed as public trustee of the country's water resources. Although the Minister is nominated as the designated agent through whom national government must fulfill its fiduciary responsibility, it is the whole of national government, and not one specific department or minister, who bears the fiduciary responsibility. In practise this means that although the Minister dealing with water affairs is ultimately responsible, every minister must consider the impact that his/her department's actions or omissions may have on the nation's water resources. **Failure to recognize the pivotal role of national government as a whole will (and have) resulted in fragmented water governance with dire consequences.**



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## **BENEFICIARY:**

**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.**



Does the model enhance equitable access to the nation's water resources?

**In theory the trusteeship model should foster and bring about equitable access to the country's water resources. The country's water resources are removed from the private law domain (thus preventing barring of access) and regulated by the trustee (thus preventing the tragedy of the commons)**

**BUT:**

**In practice we are still confronted with the reality that access is a problem.**



Cheri-Lee Young wrote an insightful Phd Thesis titled - **PUBLIC TRUSTEESHIP AND WATER MANAGEMENT**: Developing the South African concept of public trusteeship to improve management of water resources in the context of South African water law. She answers this question in her conclusion when she states:



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It is well known that the problems associated with water management exist not necessarily as a consequence of the legislative framework itself, but rather the implementation thereof. In particular, the greatest hurdle to the proper management of water is inefficiency. In this respect, the state has a critical shortage of skills as well as sufficient finances to manage water properly. In addition, there are insufficient mechanisms in place to ensure the compliance and enforcement of licensing conditions and statutory obligations.







**The fact that the Water Tribunal is effectively dysfunctional is also seen as a hurdle in achieving equitable access. Where the costs of litigation are so high, in the absence of cheap and efficient mechanisms for dispute resolution, many legitimate complaints will fall by the way side. This is an untenable situation, and certainly not consistent with the values of trusteeship, which require the state to manage water resources for the benefit of the public.**

**Inherent in the PT construction is the capacity of the public to hold the state accountable to this duty. What is needed is a more flexible, less resource-intensive system that fits with actual capacity and takes people's local needs into account.**