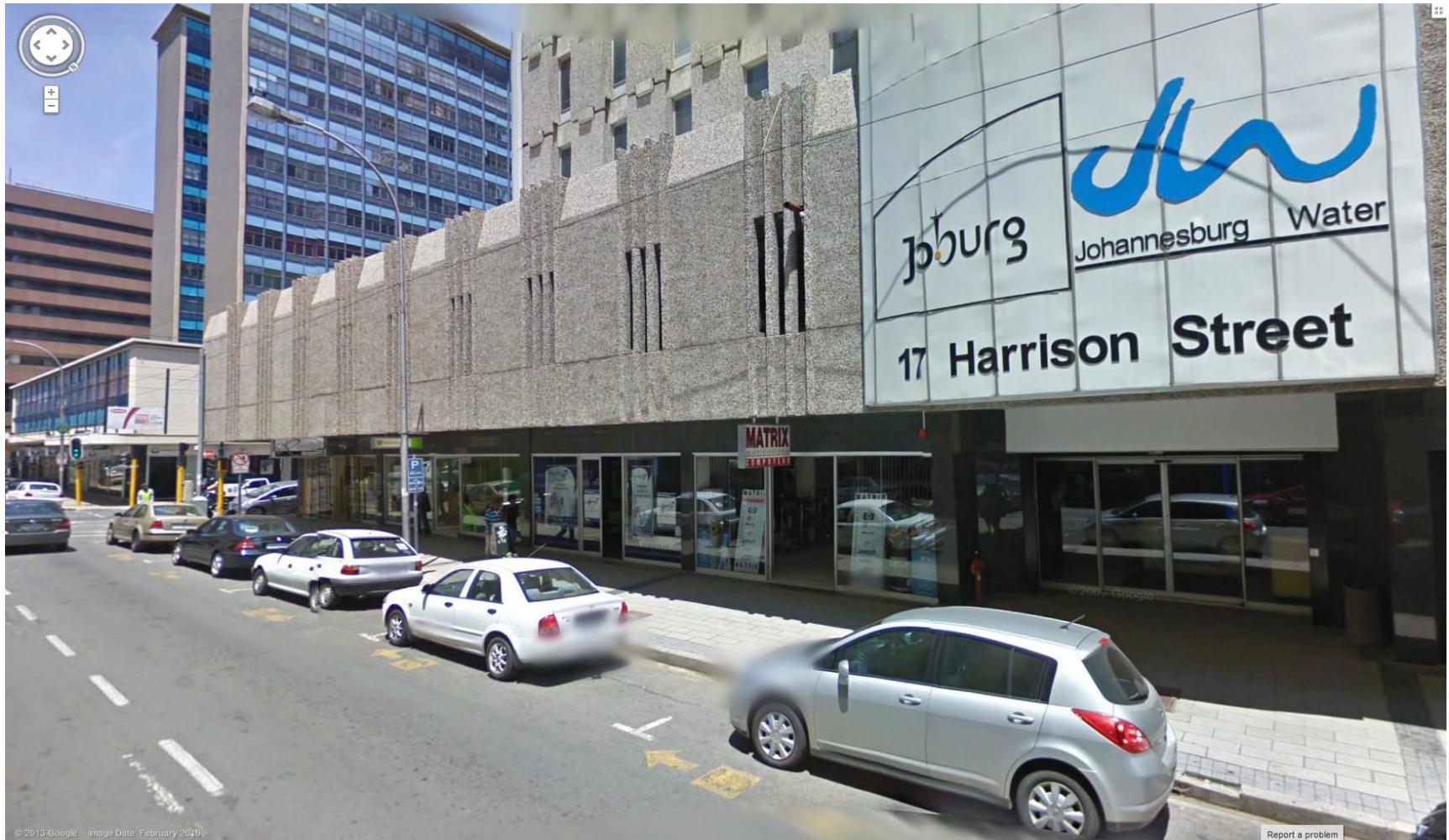


## §27 of the South African Constitution: Where to Now?

David Takacs, University of California Hastings College of the Law



Johurg

a world class African city

Providing Water.  
Providing Life.

  
Johannesburg Water

GRAFFITI

BY 89 ZL GP

# Human Right to Water

28 July 2010: UN General Assembly votes to declare a human right to water:

“The right to safe and clean drinking water and sanitation [is] a human right that is essential for the full enjoyment of life and all human rights.”

# South Africa Constitution Bill of Rights

## **§27 Health care, food, water and social security.-**

- (1) Everyone has the right to have access to –
- (a) health care services, including reproductive health care
  - **(b) sufficient food and water**; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, **within its available resources**, to achieve the **progressive realisation** of each of these rights.

# Thesis Statement:

Through a series of remarkable policy documents and laws, South Africa has formulated a visionary, holistic approach to the human right to water – and to water security -- for present and future generations. This is a “uniquely South African” approach to the Public Trust Doctrine that marries equity to ecology to fulfill the human right to water. The challenge remains to implement this vision.

# On the human right to safe, clean water, South Africa

- Got it right...

# On the human right to safe, clean water, South Africa

- Got it right...
- Then, got it wrong...

# On the human right to safe, clean water, South Africa

- Got it right...
- Then, got it wrong...
- Now, (maybe) on track to get it right again

# In South Africa...

- Post-apartheid, in 1994,
  - 10 million South Africans had no access to safe, clean water;
  - 20 million lacked basic sanitation

# Water: The Resource Problem

- Few rivers

# Water: The Resource Problem

- Few rivers
- No mountain snow pack

# Water: The Resource Problem

- Few rivers
- No mountain snow pack
- Low annual rainfall -- less than world average

# Water: The Resource Problem

- Few rivers
- No mountain snow pack
- Low annual rainfall -- less than world average
- 92% evaporates before reaching river or stream

# Water: The Resource Problem

- Few rivers
- No mountain snow pack
- Low annual rainfall -- less than world average
- 92% evaporates before reaching river or stream
- Seasonal variability

# Water: The Resource Problem

- Few rivers
- No mountain snow pack
- Low annual rainfall -- less than world average
- 92% evaporates before reaching river or stream
- Seasonal variability
- Droughts
  - exacerbated by climate change

# Water: The Resource Problem

- Few rivers
- No mountain snow pack
- Low annual rainfall -- less than world average
- 92% evaporates before reaching river or stream
- Seasonal variability
- Droughts exacerbated by climate change
- **Apartheid: Human settlements around mineral deposits or in distant former “homelands”**
  - mismatch water sources to population centers
  - Water rights linked to land ownership

# Water: The Resource Problem

- Few rivers
- No mountain snow pack
- Low annual rainfall -- less than world average
- 92% evaporates before reaching river or stream
- Seasonal variability
- Droughts exacerbated by climate change
- Apartheid: Human settlements around mineral deposits or in distant former “homelands”
  - mismatch water source to population densities
  - Water rights have been linked to land ownership
- Irrigated agriculture uses more than half of all water

# Water as an Economic Commodity

- 1992 International Conference on Water and the Environment, “Dublin Principles” on Water Sector Reform:

**“[m]anaging water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.”**

# Water as an Economic Commodity

- International Financial Institutions provide continued loans contingent on reforms:
  - Fiscal austerity
  - Reduced spending on public projects and services
  - Free markets and globalization: Access to domestic markets by foreign interests
  - Privatization of state owned businesses

# Two Kinds of Rights

- International Covenant on Civil and Political Rights: *Immediate* realisation: Refrain from interfering with individual freedoms

# Two Kinds of Rights

- International Covenant on Civil and Political Rights: *Immediate* realisation: Refrain from interfering with individual freedoms
- International Covenant on Economic Social and Cultural Rights: *Progressive* realisation: Take steps within available resources to respect, protect and fulfill the right

# South Africa Constitution Bill of Rights

## **§27 Health care, food, water and social security.-**

- (1) Everyone has the right to have access to –
- (a) health care services, including reproductive health care
  - **(b) sufficient food and water**; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, **within its available resources**, to achieve the **progressive realisation** of each of these rights.

# Three Early Documents on the Right to Water

- White Paper on a National Water Policy for South Africa (1997)
- National Environmental Management Act (1998)
- National Water Act (1998)

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 1: Water provision will be governed by the Public Trust Doctrine**

- In Roman law (on which South African law is based) rivers were seen as being **resources which belonged to the nation as a whole** and were available for common use by all citizens, but which were **controlled by the state in the public interest**. These principles fitted in well with **African customary law which saw water as a common good used in the interest of the community**. The recognition of Government's role as custodian of the **'public trust'** in managing, protecting and determining the proper use of South Africa's water resources . . . is a central part of the new approach to water management. As such it will be the **foundation of the new water law**. The main idea of the public trust is that the **national Government has a duty to regulate water use for the benefit of all South Africans...** (1997 White Paper)

# Public Trust Doctrine

- Some of Earth's riches should never be sequestered for private use;

# Public Trust Doctrine

- Some of Earth's riches should never be sequestered for private use;
- These resources must remain for public's beneficial use;

# Public Trust Doctrine

- Some of Earth's riches should never be sequestered for private use;
- These resources must remain for public's beneficial use;
- These resources must be stewarded sustainably by those in power.

# Public Trust Doctrine

- Some of Earth's riches should never be sequestered for private use;
- These resources must remain for public's beneficial use;
- These resources must be stewarded sustainably by those in power.
- The public has the right to demand its trust resources are stewarded sustainably

How will South Africa fulfill its Public Trust Responsibilities  
and fulfill citizens' right to water?

- **Principle 1: Water provision will be governed by the Public Trust Doctrine**
  - “the idea of water as a public good will be redeveloped into a doctrine of public trust which is uniquely South African . . . .”

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- Principle 2: Water Provision will be governed **by fair and equitable access**, with special attention to the needs of the most indigent
- **“duty to regulate water use for the benefit of all South Africans**, in a way which takes into account the nature of water resources and the need to make sure that there is **fair access** to these resources. The central part of this is to make sure that these scarce resources are **beneficially used** in the public interest.” (1997 White Paper)

# How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 3: Water will be allocated both to fulfill basic human needs, as well as basic environmental requirements**
  - “The national Government is committed to carry out its public trust obligations in a way which:
    - guarantees access to sufficient water for basic domestic needs;
    - makes sure that the requirements of the environment are met; (1997 White Paper)
  - **Fulfill public trust by maintaining a *reserve* that fulfills human needs and protects aquatic ecosystems** (1998 National Water Act)
  - **“Where the needs of the Environmental Reserve cannot be met because of existing developments, provision must be made for active intervention to protect the water resources.”** (1997 White Paper on Water Policy)

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 4: Reallocation of existing water rights is possible**
  - “In allocating water resources in the public interest, **the Government cannot be bound by past decisions** which may be inappropriate in the light of current knowledge or inconsistent with current needs. This is particularly so in South Africa **where the apartheid past has resulted in inefficient and inequitable water use** which violates the Government's public trust duty to ensure that water is used beneficially in the public interest. **The national Government will have the power, in its capacity as public trustee, to reconsider previous allocation decisions.**” (1997 White Paper)

How will South Africa fulfill its Public Trust Responsibilities  
and fulfill citizens' right to water?

- **Principle 5: The right to water isn't an absolute right that everyone can claim immediately**

- State will fulfill the right progressively, according to its available resources

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 6: Water will be limited**
  - **25 liters/person or 6000 liters/household/month within 200 meters of a house** (1998 National Water Act, and Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measure to Conserve Water promulgated in Government Gazette Notice No. R. 509 (GN R509 in GG 22355 of 8 June 2001 )

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 7: The government will not provide unlimited *free* water**
  - “Water use **charges** will be used as a means of encouraging reduction in waste, and provision is made for incentives for effective and efficient water use. Non-payment of water use charges will attract penalties, including the possible restriction of suspension of water supply...”  
(1998 National Water Act)

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 8: The government may subcontract water delivery to external service providers**
  - Empowers local municipalities to enter into service delivery agreements with **external service providers**
  - Obliges municipalities to **regulate**, monitor, and assess the providers.
  - **Municipalities remain responsible for providing the service** (Local Govt. Municipal Systems Act 2000)

1. Water governed by Public Trust Doctrine
2. Fair and equitable access in the public interest
3. The Reserve
4. Reallocation of existing rights
5. Progressive fulfillment
6. Limited water
7. Limited *free* water
8. Private providers possible w/government supervision

## Constitutional Court of South Africa: 3 cases on “progressive realisation” of Economic/Social/Cultural rights



*The Gov't. of the Republic of South  
Africa v. Irene Grootboom (2000)*



# *The Gov't. of the Republic of South Africa v. Irene Grootboom (2000)*

¶193

The case shows the desperation of thousands of people living in deplorable conditions throughout the country **The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health care, sufficient food and water and social security to those unable to support themselves and their dependents.** The state must also foster conditions to enable citizens to gain access to land on an equitable basis. **Those in need have a corresponding right to demand that this be done.**

# *The Gov't. of the Republic of South Africa v. Irene Grootboom (2000)*

¶94 “I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution (§27(2)) which expressly provides **that the state is not obliged to go beyond available resources or to realize these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them.** This is an obligation that courts can, and in appropriate circumstances, must enforce.”

# *The Gov't. of the Republic of South Africa v. Irene Grootboom (2000)*

- Words in the Constitution mean what they say
- Environmental and any other “economic, social, or cultural” rights are to be filled progressively, according to the means of the government
  - But in this case, government wasn’t doing enough to fulfill those rights

# *Minister of Health v. Treatment Action Campaign (2002)*

- Medicine that prevents HIV from being transmitted from mother to child not made more widely available
- Government “policy fails to meet constitutional standards because it excludes those who could reasonably be included...That does not mean that everyone can immediately claim access to such treatment...Every effort must, however, be made to do so as soon as reasonably possible.”

# Draft White Paper on Water Services (2002)

“right to a free basic water supply is not an absolute right . . . abuse of the right to free basic water can result in the restriction and/or disconnection of the water supply, provided fair and equitable procedures are followed and special arrangements for indigent persons are made.”

# Mazibuko v. City of Johannesburg (2008)



Lindiwe Mazibuko,

# Mazibuko v. City of Johannesburg

**Communal  
tap  
(standpost)  
for drinking  
water in  
Soweto,  
South  
Africa**



# Mazibuko v. City of Johannesburg



Pre-paid water  
meter

CLASS B  
1500l/h  
HOR  
P300  
14BAR  
SA 1320

CLASS B  
1500l/h  
HOR  
P300  
14BAR  
SA 1320

m<sup>3</sup>

equinox

# Mazibuko v. City of Johannesburg



A pre-paid electronic key must be inserted into the tap in order for the water to flow.



# Mazibuko v. City of Johannesburg



Mazibuko et al. v. City of Johannesburg et al. **High Court** of SA  
(Witwatersrand) 30 April 2008

- The decision of the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd to limit free basic water supply to 25 litres per person per day or 6 kilolitres per household per month is reviewed and **set aside**.
  - It appears that the respondents are able to provide 50 litres per person per day without restraining its capacity on water and its financial resources.

Mazibuko et al. v. City of Johannesburg et al. **High Court** of SA  
(Witwatersrand) 30 April 2008

- The prepayment water system used in Phiri Township is declared unconstitutional and unlawful.
  - To argue, as the respondents do, that the applicants will not be able to afford water on credit and therefore it is “good” for applicants to go on prepayment meters is patronising. That patronization sustained apartheid: its foundational basis was discrimination based on colour and decisions taken on behalf of the majority of the people of the country as “big brother felt it was good for them”. This is subtle discrimination solely on the basis of colour. Discrimination based on colour is impermissible in the terms of the Constitution. It is outlawed. It is unlawful.
  - Discrimination on the basis of sex is outlawed. It is unconstitutional and unlawful.

Mazibuko v. City of Johannesburg 2010 (4) SA 1: The **Constitutional Court** weighs in on the Right to water

“...ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.”

Mazibuko v. City of Johannesburg 2010 (4) SA 1: The **Constitutional Court** weighs in on the Right to water

–it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather **it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.**

Mazibuko v. City of Johannesburg 2010 (4) SA 1: The Constitutional Court weighs in on the Right to water

—Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. **If government takes no steps to realise the rights**, the courts will require government to take steps. **If government's adopted measures are unreasonable**, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness....Finally, the obligation of progressive realisation **imposes a duty upon government continually to review its policies** to ensure that the achievement of the right is progressively realised.

Mazibuko v. City of Johannesburg 2010 (4) SA 1: The Constitutional Court weighs in on the Right to water<sup>1</sup>

- After careful consideration of the issues, this judgment finds that the City's Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services.
- The installation of pre-paid meters in Phiri is found to be lawful.

# Is it possible...

....that the court here (and elsewhere) applied the wrong facts to the wrong rules?

What is “reasonable” when the government must progressively realise the right to water “to the maximum of its available resources?”

# Facts?

- Micro/techno solutions



# Facts?

- Micro/techno solutions
- **Equity solutions**
  - **Cross tariffs appropriately priced, particularly for water gluttons?**

# Facts?

- Nuts and bolts/microsolutions
- **Equity solutions**
  - Cross tariffs appropriately priced, particularly for water gluttons?
  - **Water meters with disconnection advanced notice?**

# Facts?

- Nuts and bolts/microsolutions
- **Equity solutions**
  - Cross tariffs appropriately priced, particularly for water gluttons?
  - 60,000 business users of water appropriately charged?
  - **Reallocation of water rights?**
    - Irrigated agriculture's 60% of water use: Well allocated?

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 4: Reallocation of existing water rights is possible**

- “In allocating water resources in the public interest, **the Government cannot be bound by past decisions** which may be inappropriate in the light of current knowledge or inconsistent with current needs. This is particularly so in South Africa **where the apartheid past has resulted in inefficient and inequitable water use** which violates the Government's public trust duty to ensure that water is used beneficially in the public interest. **The national Government will have the power, in its capacity as public trustee, to reconsider previous allocation decisions.”**  
(1997 White Paper)

# Facts?

- Nuts and bolts/microsolutions
- Equity solutions
- **Water as ecological infrastructure**

# Water as Ecological Infrastructure

“Water is a precious resource in South Africa and is fundamental to our quality of life...**healthy water ecosystems are imperative to sustain the water resource, which, in turn, provide the goods and services on which communities depend.** This **indivisibility of water** is a cornerstone of the National Water Policy, to the extent that water ecosystems are not seen as users of water in competition with other users, but as the base from which the resource is derived, without which, growth and development cannot be sustainable.” -- National Water Resource Strategy 2, 2013



# Law?

- **Progressive Realisation of an Economic, Social, Cultural Right?**
  - How much “progress” is progressive?
  - What are “available resources?”
  - Rule out a minimum core?

# Law?

- Progressive Realisation of an Economic, Social, Cultural Right?
  - How much “progress” is progressive?
  - What are “available resources?”
  - Rule out a minimum core?
- **Public Trust Doctrine**

# Law?

- Progressive Realisation of an Economic, Social, Cultural Right?
  - How much “progress” is progressive?
  - What are “available resources?”
  - Rule out a minimum core?
- Public Trust Doctrine
- **The Reserve?** ...The “reserve” disappears in all three *Mazibuko* decisions.

How will South Africa fulfill its Public Trust Responsibilities and fulfill citizens' right to water?

- **Principle 3: Water will be allocated both to fulfill basic human needs, as well as basic environmental requirements**
  - “The national Government is committed to carry out its public trust obligations in a way which:
    - guarantees access to sufficient water for basic domestic needs;
    - makes sure that the requirements of the environment are met; (1997 White Paper)
  - **Fulfill public trust by maintaining a *reserve* that fulfills human needs and protects aquatic ecosystems** (1998 National Water Act)

# Law?

- Progressive Realisation of an Economic, Social, Cultural Right?
  - Rule out a minimum core?
  - How much “progress” is progressive?
  - What counts as “maximum of its available resources?”
- Public Trust Doctrine
- The Reserve?

# South Africa getting the right to water right again?

- 2013 National Water Resource Strategy
- 2014 Strategic Infrastructure Project 19:  
Ecological Infrastructure for Water Security

# National Water Resource Strategy

*Water for an Equitable and Sustainable Future*

June  
2013  
Second  
Edition



**water affairs**

Department:  
Water Affairs  
REPUBLIC OF SOUTH AFRICA

## 2013 National Water Resource Strategy

- Micro/Techno Solutions: Many
- Equity Solutions: Ch. 6
  - “Equitable access to water, or to the benefits derived from using water, is critical to transformation in the water sector...Little substantive progress on the NWA pillar of equity has been achieved since its promulgation, that is, redress of allocations for productive economic use.”

# National Water Resource Strategy 2

- Micro Solutions: Many
- Equity Solutions: Ch. 6
  - “special attention must be given to the needs of those who were historically denied access to water.”
    - Water Allocation Reform, particularly for black and women users
    - Compulsory Licensing: “all the water uses in an area are reviewed and water is reallocated....Allocations are still largely in the hands of the previously advantaged.”

# NWRS2: The “indivisibility of water”

“Water is a precious resource in South Africa and is fundamental to our quality of life. An adequate water supply of suitable quantity and quality makes a major contribution to economic and social development. To achieve this, healthy water ecosystems are imperative to sustain the water resource, which, in turn, provide the goods and services on which communities depend. **This indivisibility of water is a cornerstone of the National Water Policy, to the extent that water ecosystems are not seen as users of water in competition with other users, but as the base from which the resource is derived, without which, growth and development cannot be sustainable.**”

# National Water Resource Strategy 2

**Marrying Equity to Ecology in the name of the  
Public Trust: The “indivisibility of water”**

# National Water Resource Strategy 2

Marrying Equity to Ecology in the name of the Public Trust: The “indivisibility of water””

**“In line with the Constitution and the National Water Act, the highest allocation priority is afforded to water for purposes of the Reserve.”**

# National Water Resource Strategy 2

Marrying Equity to Ecology in the name of the Public Trust: The “indivisibility of water””

“In line with the Constitution and the National Water Act, the highest allocation priority is afforded to water for purposes of the Reserve.”

**“The first objective is to ensure that sufficient quantities of raw water are available to provide for the basic water needs of people.”**

# National Water Resource Strategy 2

Marrying Equity to Ecology in the name of the Public Trust: The “indivisibility of water””

“In line with the Constitution and the National Water Act, the highest allocation priority is afforded to water for purposes of the Reserve.”

“The first objective is to ensure that sufficient quantities of raw water are available to provide for the basic water needs of people.

**“The second objective is ensuring sufficient water of an appropriate quality to sustain healthy ecosystems.”**



## SIP 19: Ecological Infrastructure for Water Security

*An overview of a proposed Strategic Integrated Project (SIP) aimed at improving South Africa's water resources and other environmental goods and services through the conservation, protection, restoration, rehabilitation and/or maintenance of key ecological infrastructure*

Final Draft for Submission to the Presidential Infrastructure Coordinating Commission

Revision 6.1, Friday 31 October 2014



## 2014 Strategic Infrastructure Project 19: Ecological Infrastructure for Water Security

- **“The current components of SIP 19 comprise over 140 short-, medium- and long-term projects/interventions implementing over 360 activities valued at over R2 billion.”**

2014 Strategic Infrastructure Project 19: Ecological Infrastructure for Water  
Security

**“In essence, the sound ecological infrastructure that underpins healthy watersheds does much the same work as a water treatment plant and other built water quality infrastructure, but without the expensive equipment and associated operating costs and with added benefits like protection of wildlife habitats and carbon sequestration.”**

## 2014 Strategic Infrastructure Project 19: Ecological Infrastructure for Water Security

- **“Watershed-related ecological infrastructure can filter out water pollution, regulate stream flows, recharge aquifers, and absorb flooding. These benefits are collectively known as ‘watershed services,’ and society can't do without them.”**

**Dedicating water to the Reserve and protecting that source doesn't compete with human uses; in fact, it is the only way to sustain growing human need: This is the "indivisibility of water"**

## 2014 Strategic Infrastructure Project 19: Ecological Infrastructure for Water Security

Dedicating water to the Reserve and protecting that source doesn't compete with human uses; in fact, it is the only way to sustain growing human need: This is the "indivisibility of water"

**Failure to do so is to squander the Public Trust Resource, and failure to "progressively realise" the right to water to the "maximum of available resources"**

# Neil Macleod, Head of eThekweni Municipality's Water & Sanitation Unit

“...engineering solutions to water security cannot solve all the problems...There are limits to what we can build, but nature builds things that naturally rehabilitate. We need to give nature a chance to work for us. Through management and restoration of ecological infrastructure in the catchment we will enhance the efficiency of the engineering investments and deliver the benefits to our citizens.” --

<http://urbanearth.co.za/articles/umgeni-ecological-infrastructure-partnership-launched>

# To Conclude...

- After getting §27's guarantee of the right to water right, and then getting it wrong, South Africa may be getting it right again

# To Conclude...

- After getting §27's guarantee of the right to water right, and then getting it wrong, South Africa may be getting it right again
- **Building the bike as you're riding it (and before anyone else is building it)**

# To Conclude...

- After getting §27's guarantee of the right to water right, and then getting it wrong, South Africa may be getting it right again
- Building the bike as you're riding it (and before anyone else is building it)
- **A “uniquely South African” approach to the Public Trust Doctrine**
- **Equity and ecology not in conflict: Necessarily intertwined**

# Thesis Statement:

Through a series of remarkable policy documents and laws, South Africa has formulated a visionary, holistic approach to the human right to water – and to water security -- for present and future generations. This is a “uniquely South African” approach to the Public Trust Doctrine that marries equity to ecology to fulfill the human right to water. **The challenge remains to implement this vision.**