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PARCHED RIGHTS, THIRSTY LANDS: IMPROVING PAIUTE WATER RIGHTS WITH A PROACTIVE STATE SOLUTION

Hailey Russell¹

I. INTRODUCTION

“For me, I know how to survive without electricity or running water, and I don’t think the rest of America knows how. Welcome to our plight. Welcome to our situation. Welcome to that world and our reality.” – Alastair Lee Bitsóí, Diné Navajo freelance writer.²

Bitsóí’s experience is not an uncommon one across Native American tribes in the United States. From depending on often unreliable water trucks to bring water for drinking and sanitation, to no access to clean water, these tribes continue to face water rights struggles.³ While it may be hard to imagine places within the United States that lack access to water, the relationship between the federal

1 Hailey Russell is a student at Brigham Young University majoring in English. She would like to thank her editor, McKenna Schmidt. McKenna is a senior at Brigham Young University majoring in Journalism.

2 Sydnee Gonzalez, *‘Welcome to our plight’: Exploring tribal communities and water rights*, Deseret News (Feb. 9, 2024), <https://www.deseret.com/utah/2023/4/20/23691062/exploring-tribal-communities-water-rights/>.

3 Michael Sakas, *Historically excluded from Colorado River policy, tribes want a say in how the dwindling resource is used. Access to clean water is a start*, Colorado Public Radio (Feb. 26, 2024), <https://www.cpr.org/2021/12/07/tribes-historically-excluded-colorado-river-policy-use-want-say-clean-water-access/>

government and Native American tribes has presented challenges in regards to water rights. There are 574 federally recognized tribes⁴ in the United States today and more than 200 unrecognized.⁵ Both federally recognized and unrecognized tribes face various struggles in their attempts to gain access to drinkable, usable water. The Paiute tribe in southern Utah (PITU) is small, contributing to a tense relationship with federal and state governments and a lack of representation in this struggle for secure water rights. While legislation exists to protect and uphold tribal water rights, the weaknesses in this legal framework can make attaining physical access to water difficult for the Paiute Tribe of Utah.

The Winters Doctrine—a landmark legislation—has played a pivotal role in securing water rights for Native American tribes, providing a framework for legal battles and negotiations. This paper explores the successes and shortcomings of the Winters Doctrine, focusing on its impact on the PITU. While the doctrine has enabled significant achievements, especially through acts like the Ute Water Compact and the Shivwits Water Rights Settlement Act of 2000, challenges persist, emphasizing the need for a comprehensive solution. This review delves into the shortcomings of the doctrine—particularly concerning the distinction between physical rights to use water and the theoretical right to a water source, and presents a case study involving the Navajo Nation. Additionally, it highlights the exclusivity of the Winters Doctrine to federally recognized tribes, leaving unacknowledged tribes vulnerable. The subsequent examination of the doctrine of prior appropriation reveals its complexities and challenges, especially in cases like the Paiute Indian Tribe of Utah, emphasizing the need for a nuanced approach. Finally, the paper scrutinizes the current state of wet water rights for the PITU, revealing disparities among bands and underscoring the urgent need for a comprehensive solution.

4 *Federally recognized Indian Tribes and resources for Native Americans*, USAGov (Feb. 9, 2024), <https://www.usa.gov/tribes>.

5 Eilis O'Neill, *Unrecognized Tribes Struggle Without Federal Aid During Pandemic* (Feb. 9 2024), <https://www.npr.org/2021/04/17/988123599/unrecognized-tribes-struggle-without-federal-aide-during-pandemic>.

II. BACKGROUND

Over the course of the past 150 years, due to drought and other causes, the amount of water available to the Paiute tribe has changed. These variations have been a result of changing legal decisions and the federal recognition of individual tribes. When first settling in Southern Utah in 1000 A.D., the various Paiute bands had unrestricted access to the neighboring water sources. However, in the mid-1800s, more people moved to the Southern Utah area, congesting the area and making access to water difficult due to disputes between European homesteaders and the Paiutes. Starting in 1891, official reservations were established for the PITU bands, and, with the support of President Woodrow Wilson, the PITU reservation spanned 26,880 acres. Unfortunately, in 1954, under President Eisenhower, the PITU lost federal recognition and federally protected water access. With this termination policy, nearly half of the PITU members died due to a lack of basic health resources. It was not until 1980 that the PITU regained federal recognition, but the tribe received only 4,770 acres of land—a fraction of their original land allotment. This loss of land resulted in a loss of natural water resources that the Paiutes once had access to.⁶

In the state of Utah, water rights are defined as the “right to divert and beneficially use water.”⁷ These rights are characterized by specific elements, including: defined nature and extent of beneficial use (the basis, measure, and limit of a water right), a priority date, specified quantity of water allowed for diversion, designated point of diversion and water source, and a specified place of beneficial use.⁸ When it comes to water allocation, Utah and other Western states adhere to the doctrine of prior appropriation. This means

6 *History: The Paiutes*, Utah American Indian Digital Archive (Feb. 26 2024), <https://utahindians.org/archives/paiutes/history.html>.

7 Utah Admin. Code § 655-3-2 (2024).

8 *The Winters Doctrine: The Foundation of Tribal Water Rights*, Inter Tribal Council of Arizona (Jan. 30 2024), <https://itcaonline.com/programs/tribal-leaders-water-policy-council/the-winters-doctrine-the-foundation-of-tribal-water-rights/>.

the first person to use or divert water for a beneficial purpose can acquire individual rights to the water source.⁹ However, the situation becomes more complicated for the Paiute tribe of Utah. The PITU includes five bands, or groups, of Paiutes that span across the southern part of Utah.¹⁰ Although this tribe has historical documentation dating back to 1100-1200 A.D. in Southern Utah, they were not federally recognized until 1980. Consequently, their access to water over the years has been uncertain. As water sources in Southern Utah have dried up, it has been increasingly difficult for Native American tribes to receive clear guidelines for the frequency and amount of water they are legally allowed to draw. This raises important questions about the Paiute tribe's right to claim prior appropriation. Did their claim to each band's respective water source begin when they first began drawing water, or did it start when the government assigned an arbitrary date to recognize their existence as a tribe? With water resources constantly fluctuating and the looming threat of drought, it becomes crucial to consider how these tribes will access the water they desperately need for their survival.

In addition to the complex legal landscape surrounding Native American tribes' water rights, it is essential to recognize the socio-economic and cultural implications of these changing water levels. The availability of water directly affects the livelihood and well-being of the members of these tribes. Access to water is not just about survival but also about maintaining their cultural practices and traditions that have been intertwined with water for centuries. The ability to fish, hunt, gather medicinal plants, and perform sacred ceremonies all depend on a reliable and sustainable water supply. Without secure and guaranteed water rights, these tribes face immense challenges in preserving their way of life and passing down their

9 *Prior Appropriation Doctrine*, Legal Information Institute (Feb. 10, 2024), https://www.law.cornell.edu/wex/prior_appropriation_doctrine.

10 Paiute Indian Tribe of Utah, Paiute Indian Tribe of Utah (Feb. 26, 2024), <https://pitu.gov/>.

cultural heritage to future generations.¹¹ Additionally, threats to necessary natural resources could force tribal members to relocate to cities or other areas with access to water. In 2022, the Newtok, Napakiak, and Quinault tribes were given funding from the Biden administration to relocate.¹² While the consideration of the Biden administration is notable, could relocation due to climate change and natural disaster damage be prevented?

Furthermore, the impact of climate change on water resources adds another layer of complexity to the issue.¹³ As water resources diminish, the threat of drought becomes more pronounced. This exacerbates the already precarious situation of tribes that have historically faced challenges in accessing water. The need for comprehensive and equitable solutions that address both the legal and environmental aspects of water allocation becomes even more urgent. Without these rights, tribes are forced to resort to buying water from other municipal counties nearby (which can be incredibly expensive) and gives no guarantee that they will always be able to have water, especially in times of drought.¹⁴

11 April Eagan, *Heritage and Health: A Political-Economic Analysis of the Foodways of the Paiute Indian Tribe of Utah and the Bishop Paiute Tribe*, Portland State University (2013).

12 *The Indigenous World 2023: United States of America*, International Work Group for Indigenous Affairs (Feb. 26, 2024), <https://www.iwgia.org/en/usa/>.

13 *Southwest*, U.S. Climate Resilience Toolkit (Feb. 8, 2024), <https://toolkit.climate.gov/regions/southwest>.

14 Email from Keiti Jake, PITU Environmental Manager (Jan. 16, 2024), kjake@ptu.gov.

A. Legal Definitions

“Water right”	A “water right” is “the right to use surface water, ground water, or other resources” ¹⁵
“Prior appropriation”	“Prior appropriation” is the allocation system used by the Western United States, which gives water rights based on “timing of use, place of use, and purpose of use. It allows for diverting water from its source to fulfill water rights and determines who gets water during times of shortage.” ¹⁶
“Paper water”	When you have gone through the process to receive a water right, you receive “paper water,” which is the “legal claim to a specific allocation of water for beneficial use.” ¹⁷
“Wet water”	“Wet water” is the “actual, physical amount of water that is allocated for use in a given year based on your water right. However, during times of shortage, some water rights may not be fulfilled.” ¹⁸

B. Legislation

Winters v. United States

One key legal decision that has shaped these rights is the 1908 agreement known as *Winters v. United States*. In 1888, the Fort Belknap reservation was created, but the agreement that reserved the land for the reservation neglected to mention anything about their

15 *Western Water Law: Understanding the Doctrine of Prior Appropriation*, University of Nevada (Feb. 10, 2024), <https://extension.unr.edu/publication.aspx>.

16 *See id.*

17 *See id.*

18 *See id.*

water rights.¹⁹ Western settlers began building dams and reservoirs on the Milk River, preventing the Fort Belknap reservation from receiving the water they needed for agricultural and other endeavors.²⁰ The decision in *Winters v. United States* asserted that federally recognized Native American tribes have the right to draw enough water to sustain themselves in the same way they have access to other natural resources on their reserved land. However, since this federal decision, the availability of water resources for many tribes has decreased. Over the last five years, there has been a difference of as much as 20 inches of precipitation across the state of Utah.²¹ As a result, these tribes have had to turn to their respective state governments for representation and clarification on their ability to access the necessary quantities of water needed for their survival and livelihoods. Unfortunately, the term “self-sufficiency” in the agreement is vague. This creates a loophole that allows federal and state governments to either withhold additional water allocation or deny assistance in clarifying these water rights, which unfortunately does not violate constitutional rights.

Arizona v. Navajo Nation

An ongoing example of this complex situation is the 2023 Supreme Court decision in the case of *Arizona v. Navajo Nation*.²² The Navajo Nation sought a clearer understanding of their water rights due to the diminishing water supply in the Colorado River Basin in recent years. Initially, Navajo Nation filed a complaint to the U.S. District Court for the District of Arizona, to which their request was denied. The Supreme Court agreed to listen to the case; however, the Supreme Court upheld the previous decision to refrain from organizing new allocation plans for Navajo Nation, effectively leaving the tribe without secure future water rights. Justice Kavanaugh led

19 *Winters v. United States*, 207 U.S. 564 (1908)

20 Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 *BYU L. Rev.* 639 (2013).

21 *Precipitation Graphs*, Utah Department of Natural Resources, (Feb. 7, 2024), <https://water.utah.gov/precipitationgraphs/>.

22 *Arizona v. Navajo Nation*, 599 U.S. 5-7, 9-10 (2023).

the majority opinion, stating that although the 1868 treaty reserved “necessary” water for Navajo Nation, the United States felt no obligation to “take affirmative steps to secure water for the tribe.”²³ This particular decision sheds light on the federal government’s apparent and problematic lack of interest in establishing plans or taking action to ensure the survival of this tribe.

Navajo Utah Water Rights Settlement

A positive example of state government involvement is found within the 2020 *Navajo Utah Water Rights Settlement*.²⁴ This legislation provided much-needed water resources to the Utah portion of Navajo Nation (where almost half of the population previously lacked indoor plumbing).²⁵ Not only did this agreement allocate previously promised and desperately-needed water, but it also saved the tribe and Utah taxpayers from the costly legal proceeding fees. The *Navajo Utah Water Rights Settlement* granted specific water allocation quantities and also authorized funding for water infrastructure within the Utah portion of Navajo Nation. This bill is an ideal example of a state-driven commitment to resolve tribal water rights in a fair, preventative, and cost-effective manner.

Ute Water Compact

The *Ute Water Compact of 1990* is another example of positive involvement from the Utah state government to secure water rights for a Utah-based tribe. This agreement resolves any controversies regarding the allocation and use of water by the Ute Indian tribe.²⁶ The Ute Water Compact outlines the allocation of water rights to the

23 *Arizona v. Navajo Nation*, SCOTUSblog (Feb. 8, 2024), <https://www.scotusblog.com/case-files/cases/arizona-v-navajo-nation/>.

24 Navajo Utah Water Rights Settlement Act of 2019, H.R. 133, 116th Cong. § 1207 (2020).

25 Kris Neset et al., Effective Partnering to Increase Access to Water on the Navajo Nation, *The Military Engineer* 62-66 (2022).

26 Utah Code § 73-21-101 (2018).

Ute tribe as well as quantities and priority dates.²⁷ This thorough document brings clarity for the current and future water rights of this tribe. This document guarantees the allocated water is granted in perpetuity and held in trust, meaning these water rights are intended to last indefinitely, regardless of changing natural resources.²⁸ The Ute Water Compact is another positive example of the steps the Utah state government can make to secure the water rights for its tribes.

III. PROOF OF CLAIM

A. Successes of the Winters Doctrine

The successes of the Winters Doctrine for Native American tribes are important to note, because they demonstrate the federal government's attempt to support the livelihood of Native American tribes. This legislation provides the framework for Native American tribes to lobby for their water rights, and secures water rights for many of these Native American peoples. Under the Winters Doctrine, legal decisions such as the Ute Water Compact were enacted, giving actual water rights and government-funded water programs to the Ute Indian Tribe of Utah. Since this 2018 decision, the Ute tribe has been able to “resolve [its] claims over the quantification, distribution, and use of all waters claimed. The Compact apportions, confirms, and recognizes the rights of the Tribe to the waters apportioned to UT from the Colorado River System.”²⁹ Even in a time of low water levels in the Colorado River Basin, the Utah state government deemed it important to allocate these necessary water rights to the Ute tribe.

Another success of the Winters Doctrine among the Native American tribes in Utah is found within the Shivwits Water Rights Settlement Act of 2000. This act gave 4,000 acre-feet per year to the

27 *See id.*

28 *See id.*

29 *Ute Indian Water Compact*, The Open University (Feb. 7, 2024), <https://core.ac.uk/display/78931193>.

band of 30 Shivwits Paiute tribe members.³⁰ Most of the water from this decision comes from the St. George Water Reuse Project and the Santa Clara Project – both of these projects utilize treated water from water treatment facilities, which conserve water and redirect it to meet the dire needs of the Shivwits band.³¹ This agreement is a model example of using the available water resources in ways that benefit all users of water in Southern Utah areas. Without the Winters Doctrine in place, these vital water agreements would not have been possible. Even though these benefits exist, there are many loopholes in the Winters Doctrine that allow the government to unfairly restrict water rights.

B. Shortcomings of the Winters Doctrine

The Winters Doctrine has been the first step in securing water rights for tribal lands; however, there are areas in which it falls short. First of all, while it does dictate that every federally recognized tribe receive water rights, it does not necessarily translate into physical access to usable water. Herein lies the difference between “paper water rights” and “wet water rights,” meaning there is a difference between having theoretical, government-approved rights to water and having *physical* access to water. Unfortunately, even if a tribe has paper water rights, there are loopholes in the Winters Doctrine that can prioritize city or municipal use of water over tribal water rights, even if that tribe has an early prior appropriation date. According to the doctrine of prior appropriation, drought can block the most recent water users from having their water rights fulfilled. Having water access blocked could result in anything from rationing water to eliminating water for agricultural purposes, to forcing

30 *Shivwits Band History*, Shivwits Band of Paiutes (Feb. 11, 2024), <https://shivwits.org/shivwits-band-history/>.

31 *Completion of Shivwits Band Water Rights Settlement Act*, U.S. Department of the Interior Indian Affairs (Feb. 8, 2024), <https://www.bia.gov/as-ia/opa/online-press-release/secretary-norton-announces-completion-shivwits-band-water-rights>.

these more recent water users to find water elsewhere.³² The nuance of the water issue extends much farther than water rights and access alone considering much of the set apart water is either unclean or unfit for the needs of said tribes, and the designated water source experiences major fluctuations in water levels (thus impacting the amount of available water to draw).³³ All of those issues aside, the language in the Winters Doctrine is vague enough that a deciding government body can choose to remain uninvolved if it serves their agenda, further limiting or nullifying the water rights of deserving Native Americans.

For example, the recent June 2023 case *Arizona v. Navajo Nation* ended with a majority decision to ignore the pleas of Navajo Nation to reevaluate their need for water as the Colorado River Basin continues to dry up. This decision states that although Navajo Nation retains water rights through the Winters decision, the federal government has “no obligation to secure or even identify the water needed for the reservation.”³⁴ It seems only natural to question how Navajo Nation would possibly be able to draw any water if the government felt it had no obligation to even identify the water source for this tribe to draw from. Thus, it is clear that while the Winters Doctrine opens some doors for water rights, it also allows the government and other agencies to maintain their control over the actual water drawn by these tribes.

The other major shortcoming of the Winters Doctrine is it only gives water rights to federally recognized tribes. If a tribe is federally recognized, they have a stronger foundation to protect their land and territory rights even if they do not have strong legal representation. Federal recognition allows a Native American tribe to exercise

32 Western Water Law *supra* note 15

33 *After no clean drinking water for 4 years, this Native American tribe wants more than sympathy*, NPR in Kansas City (Feb. 26, 2024), <https://www.kcur.org/2023-10-19/native-american-communities-struggle-water-access>.

34 *Supreme Court: U.S. Not Responsible For Water Rights; Navajo Nation Still Battling For Water*, Native American Rights Fund (Feb. 10, 2024), <https://narf.org/scotus-az-v-navajo-amicus/>.

freedom in religious, cultural, and agricultural practices.³⁵ In the case of the PITU, (despite inhabiting Southern Utah for over 800 years) this tribe has only been federally recognized as of 1980. Until 1980, the Paiute bands were able to draw water, but there was no legislation that formally recognized these water rights, meaning the government could have revoked their water rights or instituted unfair regulations at any time. While this did not happen, this hypothetical presents a clear weakness in the Winters doctrine as the sole way by which tribes can secure their water rights. The Winters doctrine certainly provides a framework for unrecognized tribes to become federally recognized, but this process could take years, leading to years of underrepresentation and lack of access to vital resources before coming to fruition.

1. Prior Appropriation

The doctrine of prior appropriation designates the earliest users of a water source as having the highest priority to continue their use of said water.³⁶ If someone happens to be one of the oldest water users, they may retain priority drawing during times of water shortages.³⁷ While this doctrine of water allocation is simple in theory, it has proven to be messy in practice. In the case of the PITU, this has certainly held true. The bands of the PITU have long inhabited Southern Utah, dating as far back as 1100 A.D.³⁸ However, with tensions between this tribe and the settlers who came later, it took until 1980 for this tribe to be federally recognized.³⁹ Even then, it took until 1984 for a statute to be enacted that guaranteed water rights

35 *How Can mctlaw's Indian Law Team Help Your Tribe Become Federally Recognized (Obtain Federal Acknowledgment)*, mctlaw (Feb. 26 2024), <https://www.mctlaw.com/indian-law/federal-recognition/>.

36 Prior Appropriation Doctrine *supra* note 9

37 Kat Ruane, *How Do Water Rights Work in the West*, Food and Water Watch (Feb. 8, 2024), <https://www.foodandwaterwatch.org/2023/08/07/how-do-water-rights-work-in-the-west/>.

38 Paiute Indian Tribe of Utah, 98 U.S.C. § 11 (1984).

39 *Paiute Indian Tribe of Utah: History*, Paiute Indian Tribe of Utah (Feb. 26, 2024), <https://pitu.gov/our-history/>.

for the land that was set apart for the Paiute tribe.⁴⁰ Clearly, it is possible to get a permit that outlines prior appropriation rights, but in the case of the PITU, it took almost 900 years to secure their priority drawing.⁴¹ Whether this reflects a disinterested attitude from the federal and state governments or the PITU's lack of representation delayed this rightful recognition, 900 years is a problematic span of time. Even now, as aforementioned, the Winters Doctrine allows the federal government to rescind these priority rights at any point during times of drought or other water shortages.⁴²

The political issues surrounding the doctrine of prior appropriation are many and convoluted. The first prior appropriation water users were the gold miners in the Sierra Nevada Mountains during the Gold Rush. These miners, followed by the homesteaders, pioneers, and farmers that first lived in and settled in the West, are the individuals who established the allocation system of prior appropriation.⁴³ As these geographical areas grew in population, more water rights were appropriated, and the long, chronological list of water users was created. Understandably, some of the most recent prior appropriation water users are cities and towns. This creates a conflict of interest for the state governments, because, with growing city populations, it is tempting to divert water from early prior appropriation users to supplement the growing needs of these cities. The Indian Peaks band of the PITU is currently experiencing a run on their water via the Pine Valley Water Supply Project proposal, which proposes a pipeline that would divert billions of gallons of water from this area to the growing urban areas in Cedar City.⁴⁴ This would dangerously decrease the Indian Peaks band's access to

40 *See id.*

41 *See id.*

42 Winters v. United States *super* note 19

43 *Prior Appropriation and Water in the West*, Waterkeeper Alliance (Feb. 26, 2024), <https://waterkeeper.org/news/prior-appropriation-and-water-in-the-west/>.

44 Leia Larsen, *In the Pine Valley pipeline debate, a small tribe's right to water remains largely ignored* (Mar. 5, 2024), <https://www.sltrib.com/news/environment/2023/10/16/pine-valley-pipeline-debate-small/>.

water. This proposal comes after years of municipalities in Cedar City overdrawing water from the Cedar Valley aquifers, despite the fact that the Pine Valley water system is already prone to drying up due to the continuing threat of drought.^{45,46} This attitude of overriding the prior appropriation status of the Indian Peaks and Cedar bands of the PITU reveals the danger this tribe faces when it comes to maintaining their water rights and prior appropriation status.

Many Western state governments could be interested in re-allocating water from these prior appropriation farms to satisfy the needs of growing urban developments. However, the doctrine of prior appropriation blocks them from doing so unless new settlements are reached and monetary reparations are made. This might lead state governments to seek other incentives or loopholes to divert water from prior appropriation farms. Thus, the issue of prior appropriation and potentially moving to a new system of water allocation is clearly a multifaceted, complicated issue that has blocked the progress of securing water rights for these tribes.

2. The Current State of “Wet Water Rights” in the PITU

Today, the respective bands of the PITU each have reserved water sources for their needs. The Shivwits band has the most prescriptive wet water rights of any of the PITU bands, likely due to the fact that it maintains a population of over 300 members—the highest population of any PITU band.⁴⁷ The Shivwits Water Rights Settlement Act of 2000 designates that the tribe’s members “shall have the right in perpetuity to divert, pump, impound, use, and reuse a total of 4,000 acre-feet of water annually from the Virgin River and Santa

45 Claire Carlson, *Utah landowners and tribes fight a plan to pump rural city water to Cedar City*, Utah Public Radio (Feb. 10, 2024), <https://www.upr.org/utah-news/2022-11-15/utah-landowners-and-tribes-fight-a-plan-to-pump-rural-water-to-cedar-city>.

46 *Drought Conditions for Beaver County*, National Integrated Drought Information System (Feb. 8, 2024), <https://www.drought.gov/states/utah/county/Beaver>.

47 History: The Paiutes *supra* note 6

Clara River systems.⁴⁸ This includes 1,900 acre-feet from the Santa Clara River basin with an 1890 priority date, 2,000 acre-feet from the St. George Water Reuse Project with first priority claim, and 100 acre-feet from the groundwater system with a 1916 priority date.⁴⁹ Not only does this act clearly quantify the amount of water and the priority of drawing it, but it also designates government funding from the state to put into water treatment facilities and water safety education programs for the benefit of the Shivwits band. The most beneficial part of this agreement is that the Shivwits band maintains these water rights “in perpetuity,” which means that they are guaranteed these water drawing rights no matter the state of the Virgin and Santa Clara Rivers.⁵⁰ This act fulfills the wet water rights the Paiute tribe is entitled to according to the tenets of prior appropriation, especially due to their long residency in Southern Utah.

Unfortunately, none of the other bands of the PITU have received similar settlements.⁵¹ As the water sources of these Southern Utah bands are diminishing, how will these Paiute members maintain access to water for their livelihood and survival? These bands, due to their smaller size, are often underrepresented and do not have the strong voice necessary to effectively advocate for their water rights. The Paiute bands need to have a prior appropriation date that accurately reflects the longevity of their residency in Southern Utah. When President Eisenhower terminated federal supervision of the Paiute tribe in 1952, the PITU lost its federally appointed rights to resources, even when President Carter restored the PITU in 1980, many of those rights were lost in the process.⁵² Despite the reversal of this decision, the Paiute tribe only retains a prior appropriation

48 Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act § 106-263 (2000).

49 *See id.*

50 *See id.*

51 Josh LaMore, *Survival of the Southern Paiute*, National Park Service (Feb. 26, 2024), <https://www.nps.gov/articles/survival-of-the-southern-paiute.htm>.

52 Paiute Indian Tribe of *Utah supra* note 39

date of 1980 which significantly impacts their access to water and ability to farm, and even exist, without government intervention.

C. Proposed Solution

The best, most effective solution to meet the water needs of the Paiute Tribe of Utah centers around the willingness of the Utah state government, and in particular, the Utah Division of Water Rights, to be proactive in creating settlements for every Paiute band in the state of Utah. The best solution to secure the wet water rights for this tribe is a state-appointed plan that details the quantity, frequency, and perpetuity of wet water rights for each PITU band.⁵³

1. Quantity, Frequency, and Perpetuity

The quantity of water available to each band should center on the band's population and the viability of the water source the band is proximate to. The frequency of drawing should also correspond with these respective statistics. Similar to the Shivwits Water Rights Settlement Act of 2000, these water rights should exist in perpetuity and should maintain priority status according to the tenets of prior appropriation doctrine.⁵⁴ This plan should include conditions that state the reparations that would be made in case the doctrine of prior appropriation shifts or changes in the future. If prior appropriation privileges are revoked, reparations such as financial supplements or stimuli could be beneficial, but a plan for water allocation is vital regardless. Thus, a specific water allocation plan for the PITU transcends prior appropriation and its questionable future as the water regulation method for the Western states.

2. Institution of Infrastructure that Supports the Logistics of PITU Water Rights

Additionally, this state-appointed plan should include useful water infrastructure investments to support these wet water rights.

53 Utah Admin. Code 655-3-2 (2016).

54 Shivwits Band Water Rights *supra* note 31

This should depend on the needs and current status of each band but could cover funding for the institution of water treatment plants, water sanitation education programs, and the creation of jobs to support the economy of these PITU bands. The Bipartisan Infrastructure Law provides a model for supporting water infrastructure, delivering \$50 billion to the Environmental Protection Agency to improve the quality of drinking water, wastewater management, and vital stormwater preparation plans.⁵⁵ While this law does not support the Paiute tribe or any other Native American tribes with its funding, it makes the vital statement that investment in water infrastructure is much more than spending money for people to have clean water. Investing in infrastructure specialized for the PITU would not only address the issue of unclean water and lack of water, it would also stimulate the economy in these small tribal bands, supporting their livelihood.

3. Emergency Plan in Case of Drought or Other Natural Disasters

In the case of drought, this state-appointed plan or settlement must address the logistics of each band's ability to draw water from their respective water source, and how (if at all) the quantity of water drawn would change due to natural disasters or drought. These quantities should be separated into the categories of: drinking water, agricultural water needs, and water for sanitation purposes.⁵⁶ For the clarity of the government and the PITU, (and to avoid any future legal battles) it is necessary for clear quantities or ratios to be described within this plan. In the unlikely case of a water source drying completely, it would be the responsibility of the Utah Division of Water Rights to guarantee access to groundwater via a pipeline or through government-created wells.

55 *Water Infrastructure Investments*, United States Environmental Protection Agency (Feb. 7, 2024), <https://www.epa.gov/infrastructure/water-infrastructure-investments>.

56 *Emergency Preparedness: Division of Drinking Water*, Utah Department of Environmental Quality (Feb. 10, 2024), <https://deq.utah.gov/drinking-water/emergency-preparedness-drinking-water>.

D. Objections and Potential Pushback

Those in favor of dissolving prior appropriation water rights might object to the claim that the Paiute bands are entitled to priority water allocation, especially when drought is presently not the most pressing legal issue. It might seem frivolous to take preemptive steps to secure water allocation rights now, but according to the Utah Division of Water Resources, Southern Utah water reservoirs in 2021 and 2022 were at or below 55% of capacity, where it stayed until 2023.⁵⁷ Further, 2020 was the driest calendar year Utah has experienced since 1895, with total rainfall in the state reaching a mere 7.24 inches.⁵⁸ From this, it is clear the water sources the Southern Utah bands have access to are volatile and fluctuating. Even though the threat of danger is currently low, it is inevitable that at some point in the future water levels will dip dangerously low once again. After only a few low water level years, the agricultural endeavors of the Paiute bands could be at risk, as the chemical composition of their soil could become uninhabitable.⁵⁹ This would likely force many of the Paiute people out of their homes into the city. For those who stay in the reservation, a drought would mean cutting down their water supply to only the essentials, meaning drinking water and running water for sanitation.

Many may question the necessity of the state government's involvement in creating a water allocation plan in case of drought. Tribal governments and state governments will often cooperate on things like education and law enforcement, but the rights that these reservations have are secured by treaties enacted in the past. These treaties dictate the rights these tribes have to natural resources,

57 *2022 Drought Declaration*, Utah Department of Natural Resources (Feb. 8, 2024), <https://water.utah.gov/water-data/drought/drought-declaration/>.

58 Carter Williams, *Utah on pace for a top-5 water year. How is the rest of the West faring?*, KSL.com (Feb 11, 2024), <https://www.ksl.com/article/50618350/utah-on-pace-for-a-top-5-water-year-how-is-the-rest-of-the-west-faring>.

59 *How Drought Affects Soil Health*, Iowa State University (Feb. 10, 2024), <https://crops.extension.iastate.edu/cropnews/2017/08/how-drought-affects-soil-health>.

which includes access to water. Thus, any question regarding natural resources is directed to the state government's Office of Indian Affairs as well as their division of water rights. Because the PITU is made up of small bands, it marks itself as one of the smallest tribes in Utah. With this small size comes a drastic lack of representation and resources, making their negotiation for future water rights lower on their list of priorities. Despite their size, the PITU and its respective bands have every right to secure their water rights just as the Ute Water Compact and the Investment and Infrastructure Job Act secured allocation rights to the Ute tribe and the Utah portion of Navajo Nation. The Paiutes currently lack the large numbers to receive the attention and consideration of the Utah State Division of Water Rights.

The Ute tribe and Utah portion of Navajo Nation have signaled they are deserving of water rights because Utah recognizes their ability to contribute to Utah's industry.⁶⁰ It is important to prioritize these tribes and communities based on their size, population, and their individual economies. These large tribes certainly deserve these water rights but so does the small Paiute tribe. However, it is worth questioning whether the Paiute tribe deserves any less water security than a similarly-sized, industry-less town in Utah. For example, the town of Dammeron Valley has a population of 912 as of 2022 and has no contributory industry.⁶¹ However, this community has received adequate and comprehensive water rights allocation both currently, and in perpetuity. The General Plan for the Dammeron Valley community outlines the current water rights status of this small community, which is both secure and unthreatened, and yet it explicitly asserts that "the Washington County Water Conservancy District would be able to provide supplementary water to the valley at some future time, should it be necessary to obtain supplementary water for the existing community, or to supply water for additional

60 *Commercial & Industrial Development*, Navajo Nation Division of Economic Development (Feb. 8, 2024), <https://navajoeconomy.org/commercial-industrial-development/>

61 Utah Cities by Population, Utah Demographics by Cubic (Feb. 11 2024), https://www.utah-demographics.com/cities_by_population.

land in the Dammeron Valley area.”⁶² This very clear and prescriptive document is the exact solution that the PITU desperately needs. In addition, this plan raises questions regarding the fairness and the need to ensure equal access to water resources for all communities, regardless of their larger-scale economic contributions to the state of Utah.

IV. CONCLUSION

In conclusion, the successes of the Winters Doctrine in securing water rights for Native American tribes—as evidenced by the Ute Water Compact and Shivwits Water Rights Settlement Act—are commendable. However, its shortcomings, such as the ambiguity in language and the limitation to federally recognized tribes, are apparent. The case of the Paiute Tribe of Utah exemplifies the challenges faced, with prior appropriation adding further complexity to water allocation. To address these issues, a proposed solution emphasizes the importance of a state-appointed plan detailing the quantity, frequency, and perpetuity of wet water rights for each PITU band. This plan, inclusive of infrastructure support and emergency provisions, aims to navigate objections and potential pushback. Despite prevailing challenges, it is crucial for the Utah state government, particularly the Utah Division of Water Rights, to proactively engage in settlements for all Paiute bands, ensuring equitable water rights and securing the future of these tribal communities.

62 *The General Plan For The Community of Dammeron Valley 2010-2011*, The Washington County Planning Department (Feb. 10, 2024), <https://www.washco.utah.gov/wp-content/uploads/cdev/pdf/cgp/community-dammeron-valley.pdf>.