

No. 220161

In the
Supreme Court of the United States

NEBRASKA,

Plaintiff,

v.

COLORADO,

Defendant.

On Motion for Leave to
File a Bill of Complaint

**RESPONSE IN OPPOSITION TO NEBRASKA'S
MOTION FOR LEAVE TO FILE BILL OF
COMPLAINT**

PHILIP J. WEISER
Attorney General

SARAH KRAKOFF
Deputy Solicitor General
Counsel of Record

Office of Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Sarah.Krakoff@coag.gov
(720) 508-6000

SCOTT STEINBRECHER
Deputy Attorney
General

ANDREA WANG
Deputy Solicitor General

CHAD M. WALLACE
Second Assistant Attorney
General

W. CORY HALLER
Assistant Solicitor General

ROBERT KORTUM HARRIS
Assistant Attorney General

Counsel for Defendant

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INTRODUCTION

Like every western state, Nebraska wants more water. Under the South Platte River Compact Nebraska has a right to more water during certain times of year, but only if it builds a canal that originates in Colorado. After more than a century, Nebraska still has not built the canal, and for good reasons. The project poses significant technical and financial risks and may, in the end, yield insufficient water to make it worthwhile. To avoid these risks, Nebraska first requested additional water without having to satisfy the Compact requirement to build the canal. Colorado rightfully declined. Nebraska now seeks myriad advisory opinions from this Court to aid its assessment of the value of pursuing the canal. This is not the role of the Court.

Colorado acknowledges Nebraska's right to build a canal. But Nebraska has only just begun to plan and permit its project. Numerous steps lie ahead during which Nebraska, and others who might be affected by the project, will identify, refine, and resolve potential issues. For example, the Army Corps of Engineers must permit the project and will be required to consider alternatives to whatever Nebraska proposes. Those alternatives might include variations to the size, location, and operation of the canal—the very issues Nebraska asks this Court to consider. Rather than weighing in now, the Court should wait until any of these concerns ripen into legal disputes.

Nebraska also asks the Court to preemptively decide which court—state or federal—is the proper venue in which to file any actions to condemn lands in Colorado. Recently, Nebraska withdrew its initial

steps toward condemning land in Colorado. If Nebraska ever revives those efforts, it can file lower court actions, and those courts will consider the contested issues at stake in condemnation proceedings. This Court can then choose to review any significant federal issues that may arise.

In addition to its canal claim, Nebraska asks the Court to weigh in on a hunch that Colorado might not be meeting its already existing Compact obligations during the irrigation season. But Nebraska raised this secondary concern only after it began to confront the hard questions surrounding whether to pursue its canal right. And like its canal claims, Nebraska seeks advisory opinions from the Court before it has developed underlying facts, identified an actual problem, or engaged in earnest discussions with Colorado about how to address any such concerns.

Nebraska claims that Colorado authorizes water uses that harm Nebraska during the irrigation season. But Nebraska alleges few, if any, facts to support this bare assertion. Before seeking this Court's involvement, Nebraska should analyze the extensive information and court-approved plans Colorado relies on to avoid any irrigation season deficiencies to Nebraska. Nebraska also needs to develop facts that would tie any such alleged deficiencies to harm to Nebraska water users. Developing those facts may, or may not, reveal an issue between the States. If any serious issues arise, the States might be able to resolve them through discussions. If they cannot, and any of these hypothetical disagreements raise legal questions and a real case or controversy emerges, then the Court would be

in a position—at the proper time and in the proper procedural posture—to resolve the dispute.

Nebraska’s claims are unripe and premature. This Court should deny Nebraska’s Motion for Leave to File its Bill of Complaint.

STATEMENT OF THE CASE

I. The South Platte River Compact.

The South Platte River originates in Colorado and supplies water for the State’s biggest cities and some of its most productive agricultural lands. The river starts in the Rocky Mountains and winds roughly 380 miles northeast into Nebraska. The South Platte River Compact defines the States’ rights and responsibilities with respect to the river. Within Colorado’s stretch of the South Platte, the Compact divides the river into two sections, the Upper Section and the Lower Section. South Platte River Compact, Pub. L. No. 69-37, Art. I, §§ 3–4, 44 Stat. 195, 196 (1926) (signed April 27, 1923) (“Compact”).

The Compact apportions to Colorado the full and exclusive use of the Upper Section. *See* Compact Art. IV, §§ 1, 6, 7; Art. VI, § 2(a). The Compact does, however, provide Nebraska with specified rights regarding the Lower Section. Those rights vary by season.

A. Irrigation season rights.

During the irrigation season, defined as April 1 through October 15, Nebraska has a priority for 120

cubic feet per second (“cfs”).¹ Compact Art. IV, § 2. Importantly, Nebraska is not guaranteed a fixed amount of water. If it is not available from shutting off, or “curtailing,” junior water users, Colorado is under no obligation to find water elsewhere. In addition, Colorado must limit the diversions of water by junior water users in the Lower Section only when allowing the junior diversions would diminish the flow at the Interstate Station² below 120 cfs or lower. *Id.*

B. Non-irrigation season rights.

While South Platte water flows into Nebraska during the non-irrigation season, Nebraska currently has no legal right to demand that water from Colorado. Compact Art. IV, § 1. The Compact allows Nebraska to obtain a right to divert water during the non-irrigation season if it builds a canal. Specifically, Nebraska may build a canal to divert 500 cfs of water, which it may only use for irrigation. The canal has a more junior priority than Nebraska’s irrigation season rights. The canal’s priority is December 17, 1921. The Compact describes the canal’s starting location as be-

¹ The priority system in water rights works as follows. When there is not enough water in the river to satisfy everyone’s water rights, water first goes to those who have had their water rights the longest. Water users with priority dates earlier in time are “senior,” water users with priority dates later in time are “junior.” The Compact gives Nebraska an irrigation season priority in the Lower Section of the river of June 14, 1897.

² Flow at the Interstate Station is defined under the Compact to include the water added to the river between the Interstate Station itself and the Western Canal in Nebraska. Compact Art. I, § 6.

ing southwest of Ovid, Colorado, which is roughly thirteen river miles upstream from the Colorado–Nebraska border. Compact Art. VI. The Compact, and the parties, refer to this potential canal as the “Perkins County Canal.”

II. Efforts related to the Perkins County Canal.

For a century, the States had little cause for discussion regarding the Perkins County Canal. According to Nebraska, insufficient funding and the scale of the project caused Nebraskans to abandon the few attempts they made to pursue the canal. Proposed Bill of Complaint (“Proposed Compl.”) ¶ 48. The first effort started in 1894, before the States entered the Compact. *Id.*

It was over eighty years before Nebraska returned to the idea of building the canal. In the 1980s, Nebraska sought a feasibility study from the Bureau of Reclamation,³ but nothing came of it. Four decades later in 2022, against the backdrop of long-term drought, Nebraska again started exploring the concept of a canal. In 2023, the Nebraska Legislature appropriated money for its design and construction. Proposed Compl. ¶¶ 55, 57.

Even after this renewed interest in the canal, Nebraska hesitated to commit to construction. This makes sense. The non-irrigation season right is limited and subject to several conditions. Compact Art. VI, § 2. And the process to design, permit, and

³ See U.S. Dep’t of the Interior, Bureau of Reclamation, Perkins County Canal Project Technical Feasibility Study (Oct. 5, 1982), <https://coag.gov/app/uploads/2025/10/USBR-EngStudyonSouthDivideCanal.pdf>.

build the canal will be lengthy and expensive. Further, because the canal can only be used to divert water for irrigation, it may have limited overall utility. Accordingly, Nebraska has searched for alternatives.

First, in a December 2022 letter to the Colorado State Engineer,⁴ Nebraska requested the delivery of non-irrigation season rights without having to satisfy the Compact requirement to build a canal. Colorado denied this request based on the plain language of the Compact.

Second, Nebraska sought to negotiate an alternative to the specific Article VI Compact requirements. A series of interstate discussions was underway as of earlier this summer, with a meeting scheduled for August 6, 2025.⁵ Nebraska filed the proposed action with this Court on July 16, 2025.

During the two-plus years since Nebraska appropriated funding for the design and construction of the canal, Nebraska has taken only preliminary steps to plan it.

⁴ The Colorado State Engineer is the state official charged with administering water rights in Colorado, including ensuring Colorado meets its obligations under interstate water compacts.

⁵ Colorado cancelled the August 6, 2025, meeting to focus on responding to Nebraska's unexpected filing in this Court. However, Colorado remains willing to continue discussions with Nebraska about the canal and other concerns regarding the Compact.

A. Nebraska briefly engaged with Colorado landowners to purchase or condemn land.

On January 17, 2025, Nebraska sent letters to a few⁶ landowners with property near the origin of the proposed canal. It offered to purchase the land and threatened condemnation if Nebraska did not receive a response by April 17, 2025. The demand deadline passed without further action by Nebraska. It never filed any condemnation actions and has since withdrawn the offers to purchase and notices of condemnation.

B. Nebraska recently started the federal permitting process.

Nebraska recently engaged with the United States Army Corps of Engineers (“Army Corps”) to obtain a permit for the Perkins County Canal under section 404(b) of the Clean Water Act, 33 U.S.C. § 1344. This process remains in the very early stages. On August 13, 2025, Nebraska selected a contractor to conduct the extensive environmental review required by the permitting process. The Army Corps held its first virtual information session on October 1, 2025, and otherwise has not begun the formal scoping process or selected cooperating agencies.

⁶ Colorado estimates that Nebraska will need to use land from roughly thirty Colorado landowners to build the canal. Colorado understands that Nebraska contacted six landowners with offers to purchase or condemn. Nebraska states that it has purchased one parcel. Proposed Compl. ¶ 52.

It is unclear how long the 404(b) permitting process will take. According to Nebraska’s proposed timeline, the environmental review and permitting process will not be complete until December 2028, and that assumes no unforeseen delays.

III. Ancillary concerns regarding irrigation season flows.

Nebraska and Colorado have, for many years, authorized groundwater pumping through wells. As explained further in Part III.B of the Argument, groundwater and surface flows are connected. To protect senior surface water users from being harmed by junior wells, Colorado requires replacement of groundwater uses. Colorado is conservative in its approach. Its replacement plans, known as augmentation plans, require that the effects of groundwater use do not impact the availability of water to senior users. Colo. Rev. Stat. § 37-92-305(8)(c). This often results in the delivery of more replacement water than required.

In recent years, as dry conditions prevailed throughout the South Platte basin, Nebraska water users asked their state officials to scrutinize irrigation season flows at the Colorado–Nebraska state line. On April 3, 2023, Nebraska sent a letter to Colorado that noted hardships faced by its South Platte irrigators during the severe drought of 2022. The letter posed general questions regarding the steps Colorado takes to honor Nebraska’s irrigation season rights. Among other questions, Nebraska asked how Colorado ensures that water users junior to Nebraska adequately replace water they remove from the river via groundwater pumping. Colorado asked for specific examples

of Nebraska’s concerns so the engineers could work through them in more detail.

More than a year after its initial inquiry and many months after Colorado asked for more details, Nebraska provided examples of selected individual augmentation plans about which it had concerns. Colorado responded in a November 25, 2024, letter after several email exchanges on related issues. On February 28, 2025, Nebraska sent another letter, this one asking about timing of the delivery of replacement water under the augmentation plans, but with no additional questions about the amount of replacement water.

The parties had some, albeit limited, discussions about Nebraska’s apparent concerns with irrigation season flows in their meetings regarding the Perkins County Canal. Colorado was surprised when Nebraska filed the current action three weeks before the next scheduled meeting.

ARGUMENT

I. The Court reserves its original jurisdiction for serious disputes that are ripe for adjudication.

This Court has long maintained that its original jurisdiction “should be invoked sparingly.” *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976) (per curiam) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). The Court does not take on the weighty obligation of acting as a trier of fact “save when the necessity [is] absolute.” *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). The Court therefore construes 25 U.S.C. § 1251(a)(1) and U.S. Const. Article III, Section 2, Clause 2 to afford the Court discretion to exercise its

extraordinary powers “only in appropriate cases.” *City of Milwaukee*, 406 U.S. at 93. Even in matters between states involving interstate compacts, the Court makes “case-by-case judgments as to the practical necessity of an original forum . . . for particular disputes within our constitutional original jurisdiction.” *See Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

To assess whether a case meets the Court’s exacting standards for accepting jurisdiction, the Court considers two factors. *See Arizona v. New Mexico*, 425 U.S. at 796–97 (quoting *City of Milwaukee*, 406 U.S. at 93–94).

First, the Court weighs the nature of the complaining State’s interest and “the seriousness and dignity of the claim.” *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citation modified). The bar for the complaining State is high; it must allege a “‘threatened invasion of rights’ . . . ‘of serious magnitude.’” *Maryland v. Louisiana*, 451 U.S. 725, 736 n.11 (1981) (quoting *New York v. New Jersey*, 256 U.S. 296, 309 (1921)). The State seeking to invoke the Court’s jurisdiction must also allege facts sufficient to show that its harm is substantial and concrete, not “‘something merely feared as liable to occur at some indefinite time in the future.’” *Florida v. Georgia*, 585 U.S. 803, 818 (2018) (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)). Further, to allege a claim that is ultimately worthy of relief, the complaining State must state facts sufficient to show a significant injury: “[I]t should be clear that [the complaining state] has not merely some technical right, but also a right with a corresponding benefit.” *Kansas v. Colorado*, 206 U.S. 46, 109 (1907). The Court’s rigorous approach applies

equally to compact disputes between states: “If authorized representatives of the compacting States have reached an agreement . . . recourse to this Court when one State has second thoughts is hardly ‘necessary for the State’s protection.’” *Texas v. New Mexico*, 462 U.S. at 570–71 (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939)).

Second, the Court considers the availability of alternative forums. *Mississippi v. Louisiana*, 506 U.S. at 77; *City of Milwaukee*, 406 U.S. at 93–94. If factual or legal issues can first be addressed by lower courts, the Court stays its hand to avoid what otherwise would be a premature and burdensome commitment of resources. *See Arizona v. New Mexico*, 425 U.S. at 796–97. The alternative forum does not have to be one in which the States are opposing parties. Rather, the question is whether an alternative forum is available and competent to resolve the same legal issues that form the basis of the State’s alleged claims. *See id.* (denying original jurisdiction where private parties raised the same constitutional issues in a state court proceeding).

Nebraska’s proposed complaint fails on both counts. Nebraska’s claimed violations rely on speculative and premature allegations that lack connection to any cognizable injury to Nebraska. To the extent any legal issues arise in the future, there are alternative forums to resolve them. While it is possible that someday Nebraska and Colorado will have a dispute over the Compact that warrants this Court’s engagement, that day has not yet arrived.

II. There is no dispute about the canal appropriate for this Court’s consideration.

Nebraska’s core concern about the South Platte River relates to the Perkins County Canal. Nebraska’s sporadic and inconsistent efforts to pursue the canal yield the impression that it is, at best, deeply ambivalent about building it. Even after dedicating money to the project three years ago, Nebraska asked Colorado to waive the Compact’s requirements to build the canal and proposed deviations from the Compact’s specifications about location. And only very recently did Nebraska begin the permitting process for the canal. Yet Nebraska asks this Court to weigh in on a number of hypothetical questions that might come up during or after its planning and construction of the canal.

This is far from the type of serious or dignified controversy that merits the Court’s consideration. As discussed below, most of Nebraska’s concerns are speculative and will develop, if at all, years from now. Any concerns that might arise sooner—such as the design of the canal and proper venue for condemning land—can and should be addressed by other forums.

A. There is nothing for Colorado to interfere with.

Nebraska and Colorado agree that Nebraska has a right to build the Perkins County Canal and a right to condemn land in Colorado when and as appropriate to build that canal. While Nebraska makes conclusory accusations that Colorado has been “interfering” with Nebraska’s effort to build the canal, none of the allegations in the proposed complaint support that conclusion.

Nebraska complains about posturing from third parties and political representatives but ultimately admits that Colorado has acknowledged Nebraska’s canal right. Proposed Compl. ¶ 61. As noted by some Colorado officials, Colorado stands by to protect its citizens in the event Nebraska overreaches in any proceedings related to the canal. Holding Nebraska to the contours of the rights prescribed by the Compact is not “interference.”

More relevant to the question currently before the Court, to date, there has been nothing for Colorado to interfere with. As detailed above, Nebraska has made very little progress in designing and permitting the canal and has not attempted any condemnation proceedings.

In short, there is no “interference” for this Court to police. *See Arizona v. California*, 283 U.S. 423, 463 (1931) (dismissing Arizona’s claim of interference with state water administration where Arizona lacked any specific allegations of physical acts impeding the exercise of its rights).

B. Details about the canal design are undeveloped and not ripe for this Court’s consideration.

Nebraska points to a potential disagreement “on information and belief” regarding the size and location of the canal. Proposed Compl. ¶¶ 77 and 83. These undeveloped issues are not serious or imminent enough to warrant the Court’s attention. *See Texas v. New Mexico*, 462 U.S. at 575 (cautioning states that disputes are often “more likely to be wisely solved by co-

operative study and by conference . . . than by proceedings in any court however constituted” (quoting *New York v. New Jersey*, 256 U.S. at 313)).

On the location of the canal, the Compact describes the canal as commencing on the south bank of the river “at a point southwesterly from the town of Ovid, Colorado,” and specifies that it “may run thence easterly through Colorado along or near the line of survey of the formerly proposed Perkins County Canal.” Compact Art. VI. While Nebraska implies that it should be able to build the canal closer to the Nebraska border, Proposed Compl. ¶ 77, this does not appear to be a serious argument under the plain language of the Compact. Moreover, Nebraska’s historical effort to build the canal was from Ovid, and its more recent efforts to study, analyze, design, condemn land for, and permit the canal have used the Ovid location.

On the size of the canal, Nebraska asserts in the proposed complaint that it might need a canal that can carry more than 500 cfs. Proposed Compl. ¶ 77. But the Compact, among other limitations, expressly limits Nebraska’s potential right to 500 cfs:

[S]aid proposed canal shall be entitled to divert five hundred cubic feet of water per second of time from the flow of the river in the lower section.

Compact Art. VI, § 2(b).⁷

⁷ Colorado is not clear about how Nebraska would support its proposed interpretation, including what purpose Nebraska will

Colorado and Nebraska have engaged in only minimal discussions on these points and others relating to canal design.⁸ And there is an alternate forum and process ongoing—the federal permitting process—that will explore those very details.

As discussed above, Nebraska has recently engaged with the Army Corps to obtain a permit for the canal under section 404(b) of the Clean Water Act. Colorado does not yet know what size canal Nebraska will seek to permit or how it will be built. If it is a canal with a 500 cfs capacity, there will be no reason to resolve whether the Compact allows a larger canal. Regardless of what Nebraska includes in the proposed design, during the permit review process, the Army Corps will consider alternative configurations for the canal and its potential impacts. *See* 42 U.S.C. § 4322. Variables may include its size, capacity, and route, as well as the specific location, methods of construction, and type of diversion dam. The Corps will also consider conditions that minimize and mitigate potential losses of aquatic resources. *See* Section 404(b)(1) Guidelines, 40 C.F.R. pt. 230. This is a factually intensive review, and considers engineering, water quality, and other factors.

ascribe to the 500 cfs limitation in subsection 2(b). Colorado remains open to resuming discussions with Nebraska to better understand its position on this issue and others.

⁸ Most of Colorado and Nebraska's discussions on various aspects of the canal were in the context of confidential discussions. It is not appropriate for Nebraska to portray these discussions as final legal positions ready for this Court's consideration.

This Court should not take the extraordinary step of exercising its original jurisdiction to consider various design aspects of the canal until it has been refined in the nascent 404(b) permitting process. *Cf. Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 503 (1971) (declining to “commit this Court’s resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis”).

C. A trial court can address any uncertainty about the condemnation procedure.

Through the Compact, Colorado “grants” to Nebraska certain rights to acquire property, including by “exercise of eminent domain.” Compact Art. VI, § 1. Nebraska and Colorado appear to have different views about which court system—state or federal—should hear Nebraska’s condemnation actions, if it needs to file any to acquire land for the canal.

Colorado granted Nebraska the well-established Colorado state right of condemnation for water delivery facilities, such as canals.⁹ Colorado itself has no federal right of condemnation so could not grant such

⁹ The Colorado Constitution provides five exceptions to the prohibition on the taking of private property for public or private use without the property owner’s consent, four of which relate to water facilities. *Bd. of Cnty. Comm’rs v. Park Cnty. Sportsmen’s Ranch, L.L.P.*, 45 P.3d 693, 711 (Colo. 2002). Relevant here is the exception contained in Article II, section 14 (taking of private property for “reservoirs, drains, flumes or ditches on or across the lands of others”).

a right to Nebraska and therefore granted a right governed by state law. Nonetheless, Nebraska asserts that the proper court to consider any condemnation action is federal district court. Proposed Compl. ¶ 78. In contrast, Colorado believes that Colorado state district court is the appropriate venue for such an action.¹⁰

As mentioned above, Nebraska has not filed any condemnation actions and withdrew the offers to purchase and notices of condemnation it had sent to Colorado property owners earlier this year. If Nebraska ever reaches the point that it needs to condemn lands in Colorado, the lower court where Nebraska files its condemnation complaint can decide if it has jurisdiction to hear the dispute.

If Nebraska files in Colorado state court, there will be no dispute over whether that court is the correct venue. If Nebraska files in federal district court, Nebraska and the Colorado property owners can raise the jurisdictional issue with that court. If either Nebraska or the property owner appeals that decision, the matter can proceed through the normal appellate

¹⁰ Federal Rule of Civil Procedure 71.1(k) provides procedures for eminent domain actions governed by state law but is not a source of federal jurisdiction over such actions. The only basis for federal jurisdiction here would be diversity of citizenship, and the State of Nebraska is not a citizen for that purpose. “There is no question that a State is not a ‘citizen’ for purposes of the diversity jurisdiction.” *Moor v. Alameda County*, 411 U.S. 693, 717 (1973). As such, the Colorado district court in the county in which the property is located is the appropriate venue. *See* Colo. Rev. Stat. § 38-1-102. Nebraska incorrectly states that Colorado believes that condemnation must proceed in Colorado Water Courts. *See* Proposed Compl. ¶ 25.

process before this Court determines whether it wishes to address the issue.

The availability of an alternate forum militates against this Court exercising its jurisdiction now, given that lower federal courts can address the same legal issue if it is ever raised. *See Arizona v. New Mexico*, 425 U.S. at 796 (declining to exercise original jurisdiction when a pending district court action involving some, but not all, of the parties to the proposed action would address the same legal issues the state sought to raise in its proposed complaint).

D. Speculation about disputes that may arise about the operation of the canal does not establish a controversy warranting the Court's involvement.

Finally, Nebraska complains about disputes it predicts will arise if Nebraska ever builds the canal. Nebraska predicts (1) there will be a disagreement over the amount of water to which the Compact entitles Nebraska in the non-irrigation season, and (2) that Colorado's plans for future development could prevent Colorado from honoring Nebraska's canal rights, if Nebraska ever perfects those rights. Proposed Compl. ¶¶ 46–47, 79–82. Neither speculative concern is ready for this Court's consideration.

1. The amount of water Nebraska could be entitled to if it builds the canal is not ripe for consideration.

If Nebraska builds the canal, then during the non-irrigation season,¹¹ Nebraska is entitled to the “net future flow” that “may remain” in the Lower Section subject to several limitations. Compact Art. VI, § 2. Subsections (a) and (b) define the limitations to this potential right. The plain language of the Compact makes clear that the canal will entitle Nebraska to a place in line, with a priority date of December 17, 1921, to divert up to 500 cfs, from the Lower Section:

[S]aid proposed canal shall be entitled to divert five hundred cubic feet of water per second of time from the flow of the river in the lower section, as of priority of appropriation of date December 17, 1921, only between the 15th day of October of any year and the 1st day of April of the next succeeding year.

Compact Art. VI, § 2(b). There are limits in addition to the priority date. The Compact creates a carve out for future (post-December 17, 1921) Colorado appropriators to “store, use, and to have in storage” an additional 35,000 acre-feet. Compact Art. VI, § 2(a).

Nebraska asks the Court to define “net future flow” more broadly. Proposed Compl. ¶ 80. But any question regarding the interpretation of the Compact’s

¹¹ If Nebraska builds the canal, it may also use the canal to divert some “surplus” water during the irrigation season. Compact Art. VI, § 3. Specifically, any water over 120 cfs that would have flowed past the Interstate Station during the irrigation season “after supplying all present and future diversions by Colorado.” Compact Art. VI § 3.

several limitations on Nebraska’s non-irrigation season right will only become ripe when and if Nebraska builds the canal.

2. Colorado’s plans for future development do not present an issue that is ripe for this Court’s consideration.

The second concern Nebraska expresses is Colorado’s supposed “open and notorious plan” to develop the South Platte River. *See* Proposed Compl. ¶ 50.

Colorado disagrees with the premise that developing its own legal entitlements could result in any Compact violation. Even if it could, allegations of potential future harm are insufficient to invoke this Court’s extraordinary jurisdiction.

The most obvious bar to Nebraska bringing this claim now is that it currently has no non-irrigation season rights. Without the canal, Colorado has “full and uninterrupted use and benefit of the river” during the non-irrigation season. Compact Art. IV § 1.¹²

Further, if Nebraska’s concerns include any Upper Section plans for development, it has no remedy under the Compact. Colorado has the right to fully develop the Upper Section *See* Compact Art. VI, § 2(b) (the right to 500 cfs is subject to “all present and future appropriations in the upper section”); Compact Art. VI, § 3 (the ability to divert surplus flows is also

¹² It should go without saying that building a canal is also a prerequisite to Nebraska’s ability to divert through the canal any surplus irrigation season flows that would otherwise cross into Nebraska at the state line. *See* Compact Art. VI, § 3; *supra* note 11.

subject to “all present and future diversions” by Colorado in both the Upper and Lower Sections).

Perhaps acknowledging its inability to directly limit Upper Section development, Nebraska asks for an advisory opinion on how it might do so indirectly by relying on Colorado water users in the Lower Section to call water down from the Upper Section. Proposed Compl. ¶ 82. Yet Nebraska has no standing to influence how or whether Lower Section Colorado water users might exercise any rights they have. *See Maryland v. Louisiana*, 451 U.S. at 736 n.11 (discussing that to justify this Court’s intervention, a state must allege a “threatened invasion of rights” (quoting *New York v. New Jersey*, 256 U.S. at 309)). Even if Nebraska could get over this hurdle, it is highly uncertain that Nebraska’s theory of Colorado water rights administration would result in any additional water to Nebraska.¹³ *See Florida v. Georgia*, 585 U.S. at 818 (discussing how a State must also allege facts sufficient to show that its harm is substantial and concrete, not “something merely feared as liable to occur at some indefinite time in the future” (quoting *Connecticut v. Massachusetts*, 282 U.S. at 674)).

Finally, any other potential future harms are simply too uncertain for the Court to consider now.

¹³ Water from the Upper Section that could be rightfully demanded by Colorado water users in the Lower Section would be used only to satisfy Lower Section rights and would not flow across the state line or be available for diversion by Nebraska’s canal. Further, the circumstances in which Colorado Lower Section water users themselves would benefit from such a demand are very rare. For both reasons, the likelihood of any incidental benefit to Nebraska in this hypothetical circumstance is vanishingly small.

Any impacts in the Lower Section from Colorado development, regardless of where it occurs, are hypothetical. Like Nebraska’s canal project, many of the projects are in early planning phases and may not be built or might be substantially modified before they are complete.¹⁴ The impact of those projects on the canal won’t be known until after they—and the canal—are complete and operating. Such “assumed potential invasions,” fail to state a claim. *See Arizona v. California*, 283 U.S. at 462 (dismissing Arizona’s claims that the federal government, under the authority of the Boulder Canyon Project Act, violated Arizona’s semi-sovereign rights to appropriate water when the government had not taken any actions to interfere with Arizona’s future appropriations).

In essence, Nebraska appears to seek an advisory opinion to inform Nebraska’s assessment of the pros and cons of building the canal. That is not an appropriate request to this Court. *See F.D.A. v. All. for Hippocratic Med.*, 602 U.S. 367, 378 (2024) (“[F]ederal courts do not issue advisory opinions about the law.”); *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007) (“[N]o justiciable ‘controversy’ exists when parties . . . ask for an advisory opinion.”).

¹⁴ With respect to Nebraska’s claims that Colorado water users are already storing and using water beyond the 35,000 acre-feet carve out, Proposed Compl. ¶ 81, that can be properly addressed when and if Nebraska builds the canal. Only then is Colorado’s non-irrigation season use limited. And if that day arrives, Colorado will curtail rights as required under the Compact.

III. Nebraska's nascent and undeveloped concerns about irrigation season flows are not ready for this Court's consideration.

Nebraska also asks this Court to determine whether Colorado is meeting its obligations during the irrigation season. As discussed below, the Court should decline this request for three reasons. First, to the extent Nebraska alleges that Colorado water users in the Upper Section are impermissibly reducing flows at the Interstate Station, Nebraska has no right to interfere with Colorado uses in the Upper Section. Second, Nebraska appears to allege that Colorado violates the Compact any time flow at the Interstate Station drops below 120 cfs. But the Compact does not guarantee Nebraska 120 cfs. Instead, it provides Nebraska a place in line to receive water up to that rate, when and if available. Third, Nebraska itself has not concluded whether Colorado is impermissibly reducing flows during the irrigation season, and there are other forums to explore Nebraska's speculation on the efficacy of Colorado's augmentation plans. Like its claim about the canal, Nebraska's claim regarding irrigation-season flows is not ready for this Court's consideration.

A. Irrigation season obligations.

Unlike the non-irrigation season rights, which require Nebraska to first build the Perkins County Canal, Nebraska has a fully perfected right to water in the Lower Section during the irrigation season. That right is defined as follows:

Between the 1st day of April and the 15th day of October of each year Colorado *shall not permit diversions* from the lower section of the

river to supply Colorado appropriations having adjudicated dates of priority subsequent to the 14th day of June, 1897, *to an extent that will diminish the flow of the river at the interstate station* on any day below a mean flow of one hundred and twenty cubic feet of water per second of time, except as limited in paragraph 3 of this article.

Compact Art. IV, § 2 (emphasis added). This right has an important feature that is not addressed in Nebraska's motion and proposed complaint. Article IV of the Compact does not guarantee Nebraska 120 cfs. Instead, it provides Nebraska a place in line to receive water up to that rate, when and if available. This is a common concept in water law, including Colorado water law. See Colo. Const., art. XVI, § 6 (priority of appropriation).

Importantly, if there is not enough water available from curtailing Lower Section junior water users to reach that 120 cfs flow rate, Colorado is under no obligation to find water elsewhere. Therefore, simply alleging that flows sometimes drop below 120 cfs does not, on its own, suffice to allege a Compact violation. Similarly, adding up the shortages when the Interstate Station flows fall below 120 cfs¹⁵ is not sufficient to allege a Compact violation or a causal connection between Colorado's actions and any injury.

¹⁵ Colorado assumes that Nebraska's statement that it has "been deprived of up to 1,300,000 acre-feet of water," Proposed Compl. ¶ 85, is derived by totaling the amount of water less than 120 cfs whenever the gauged flow at the Interstate Station falls below that number. If there is another methodology, Nebraska fails to provide it.

B. Groundwater pumping and the use of augmentation plans.

Nebraska points to Colorado's augmentation plans as the core of its concern. Although Nebraska implies they are a novel and untested concept unique to Colorado, that is not accurate. As explained here, they are an established and well-tested feature of water administration in the South Platte River Basin, including in Nebraska.

1. Groundwater pumping.

In the 20th Century, technical advances made groundwater pumping more accessible throughout the American West. Both Nebraska and Colorado took advantage of this technology and continue to use wells near the South Platte and its tributaries.¹⁶

Pumping groundwater from wells can reduce flows in the river.¹⁷ But those flow reductions are not

¹⁶ Contrary to Nebraska's claim that Colorado "unilaterally" altered South Platte River hydrology, Nebraska's Brief in Support of Motion for Leave to File Bill of Complaint ("Neb. Br.") at 6 n.1, Nebraska has extensively developed the groundwater resources of the South Platte River and its tributaries. For example, Nebraska allows extensive groundwater pumping near Lodgepole Creek, a tributary to the South Platte River which is apportioned under the Compact at Article III.

¹⁷ The riverbed of the South Platte is porous. The water flowing in the river can be affected not just by additions to and diversions from the river, but also by what occurs in soils and groundwater surrounding the river. Precipitation, runoff from irrigation, and water stored in ponds all filter through the ground to form an underground reservoir, known as the alluvial aquifer. Water from the alluvial aquifer can percolate back into the river, replenishing its flows. The alluvial aquifer also provides a year-round

immediate. Because there is a delay between groundwater withdrawals and effects on the river, Colorado adopted methods of administration to ensure groundwater pumping could be accounted for in a manner that protects senior water users. State water administrators only permit groundwater diversions when the impacts to the surface water are replaced in the time and amount necessary to avoid injury to other water users. Colo. Rev. Stat. § 37-92-305(8)(c). That replacement occurs, most commonly, under an augmentation plan.

2. Colorado’s augmentation plans.

Simply put, an augmentation plan is a plan to add water to the river. This can be achieved in various ways—including by storing water in porous ponds that ultimately replenish the river.¹⁸ To determine how much temporarily stored water will infiltrate into the ground and reach the river, and the timing of that recharge, engineers use algorithms and computer models, which consider various inputs including distance

water supply. In other words, even when the river itself is dry, there is often groundwater that can be pumped.

¹⁸ In the South Platte River basin in Colorado, a common type of augmentation is for junior rights holders to store water in surface pools, known as recharge basins, when senior users are not calling for water to satisfy their rights. *See* Colo. State Univ., HB12-1278 Study of the South Platte River Alluvial Aquifer at 57 (2013), <https://coag.gov/app/uploads/2025/10/HB1278-Final-Report.pdf>. Recharge water seeps into the alluvial aquifer and replaces the impacts of junior diversions. *Id.* Multiple factors, including means of replacement and conservative approaches to augmentation plan assumptions, result in plans regularly providing water in excess of what is needed to meet actual demands.

to the river, gradient, and the porosity of the soil through which the water must travel.

Colorado has adopted a rigorous and conservative approach to approval and administration of augmentation plans. Under Colorado law, permanent augmentation plans must be approved by water courts. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 55 n.2 (Colo. 2003). In approving those plans, water courts often weigh testimony from competing experts who rely on sophisticated computer models to predict the timing, amount, and location of replacement water necessary to prevent any injury. If water users prove through the water court process that their augmentation plans avoid injury to other water users, they may divert even when junior users would otherwise be curtailed to assure sufficient flows to senior users. *Id.*; Colo. Rev. Stat. § 37-92-305(5), (8). The Colorado State Engineer administers augmentation plans through mandated metering, gaging, administrative accounting, and by issuing orders. *See* Colo. Rev. Stat. § 37-92-502.

C. Nebraska’s allegations about augmentation plans are insufficient to warrant this Court’s consideration.

With this background, Colorado now explains why Nebraska’s suspicions about the efficacy, timing, and complexity of augmentation plans are not sufficient to justify this Court’s consideration.

1. Nebraska’s allegations regarding Colorado’s augmentation plans do not support a breach or an injury.

Nebraska’s proposed claim regarding irrigation season flows fails to allege a cognizable injury. First,

Nebraska does not identify where the groundwater pumping is occurring. This is important because Nebraska has no right to interfere with Colorado uses in the Upper Section. The Compact apportions to Colorado the full and exclusive use of the Upper Section. *See* Compact Art. IV, §§ 1, 6, 7; Art. VI, § 2(a).

Second, Nebraska does not actually allege that augmentation plans are failing; rather it implies they must be failing because flows at the state line sometimes fall below 120 cfs during the irrigation season. *See* Proposed Compl. ¶¶ 84–85. But, as noted above, Nebraska is not guaranteed 120 cfs. *See supra* Part III.A.

Much of Nebraska’s proposed complaint seizes on a time before 2003 when Colorado water users¹⁹ complained that there was not enough judicial oversight of augmentation plans approved solely by the State Engineer. But since 2003, the State Engineer can only approve temporary replacement plans, which become permanent after they are subjected to the water court process described above. *See* Colo. Rev. Stat. § 37-92-308(5) (allowing State Engineer to approve plans for up to five years under specified conditions). In any event, both before 2003 and now, Colorado’s oversight and implementation of augmentation plans are significantly more demanding than Nebraska’s own augmentation requirements.²⁰ Colorado points

¹⁹ As far as Colorado is aware, this is the first time Nebraska has expressed concerns about the process that was in place before 2003 that was the subject of litigation by Colorado water users.

²⁰ Nebraska’s natural resource districts must develop groundwater management plans that include, among other elements,

out this discrepancy not to criticize Nebraska’s system, but to suggest that Nebraska’s lengthy discussion about Colorado’s history with augmentation plans is a distraction and does not present a serious concern about Colorado’s methodologies.

Ultimately, Nebraska has not yet reached an informed conclusion that Colorado is violating its irrigation season obligations, much less that Nebraska has suffered any injury due to Colorado’s augmentation plans. The most Nebraska asserts is that it does not want to accept Colorado’s “bare representation” that they function as intended. Proposed Compl. ¶ 30. Nebraska complains that Colorado has been slow to respond to Nebraska’s efforts to gain additional information. But that is not a fair characterization. In addition to the few letters exchanged in these nascent discussions, there have been phone calls, emails, and meetings.²¹ And Nebraska itself has done little to

“[p]roposed water conservation and supply augmentation programs.” Neb. Rev. Stat. § 46-709(8). To this end, the South Platte Natural Resource District (“SPNRD”) pursues conjunctive use of surface and alluvial groundwater to “allow[] water users to wisely store water during periods of surplus and, in a managed fashion, withdraw that stored water in times of shortage, overall increasing the available supply through time.” SPNRD, *Integrated Management Plan* 12, 25–26, 30–31 (2019), <https://coag.gov/app/uploads/2025/10/SPNRD-IMP-2019.pdf>. Unlike Colorado’s approach however, Nebraska does not preemptively require augmentation plans to completely offset injuries to senior users.

²¹ For example, although Nebraska alleged that Colorado left Nebraska’s April 3, 2023, letter unanswered, Neb. Br. at 13, the then Colorado State Engineer spoke with Nebraska’s then Department of Natural Resources director after receiving the letter and suggested a path forward for working through this issue.

speed up the conversation. Regardless of why Nebraska does not feel informed about this issue, the fact remains that it has not presented a dispute ready for this Court’s consideration. *Cf. Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1028–29 (1983) (Idaho failed to establish cognizable injury where it did not prove that Oregon and Washington had engaged in a pattern of mismanagement of the Columbia River fishery or a substantial likelihood that they would mismanage it in the future); *Florida v. Georgia*, 585 U.S. at 818 (noting that a state “will not be granted [relief] against something merely feared as liable to occur at some indefinite time in the future” (quoting *Connecticut v. Massachusetts*, 282 U.S. at 674)) (alterations in original).

2. There are other forums available to vet and refine this issue before the Court considers it.

There are other avenues for Nebraska to test its stated uneasiness that Colorado’s augmentation plans are not adequately replacing the water junior users pump from the ground.

Nebraska, Colorado, Wyoming, and the United States Department of the Interior are parties to a 2006 cooperative agreement establishing the Platte River Recovery Implementation Program (the “Program”) for the recovery of threatened and endangered species in central Nebraska. As part of the Program, each of the three States and the federal government agreed to mitigate water depletions that impact listed species. Colorado’s water contributions, approximately 13,000 acre-feet per year on average, are accomplished through the same decreed augmentation plans that

Nebraska now questions.²² Nebraska consented to the use of those plans as part of the Program.

In its proposed complaint, Nebraska acknowledges the relationship between the Program and the augmentation plans. *See* Proposed Compl. ¶ 92; Neb. Br. at 3, 21. By questioning the plans for the first time in this lawsuit, Nebraska disregards its written commitment to seek to resolve conflicts regarding Program-approved activities within the context of the Program before bringing related Compact claims to this Court. Platte River Recovery Implementation Prog., Cooperative Agreement, Pt. II.I, Avoidance of Future Litigation (Oct. 24, 2006), <https://coag.gov/app/uploads/2025/10/PRRIP-Cooperative-Agreement.pdf>.

In addition to resuming the nascent conversations with Colorado about the general efficacy of augmentation plans, Nebraska can and should raise its specific concerns about augmentation plans related to the Program within the context of the Program. As this Court has observed, disputes between states are “more likely to be wisely solved” through communication and “co-operative study” than through litigation. *Texas v. New Mexico*, 462 U.S. at 575 (quoting *New York v. New Jersey*, 256 U.S. at 313).

²² Likewise, Program documents specifically state the assumption that “court approved augmentation plans will not result in increased consumptive use in Colorado.” Platte River Recovery Implementation Prog., Colorado’s Plan for Future Depletions, Attachment 5, § 9, at 1 n.3 (revised Sept. 14, 2021), https://coag.gov/app/uploads/2025/10/PRRIP-Full-Program-Documents-Updated-9_14_2021.pdf.

3. Allegations relating to timing do not save the deficiencies of the proposed complaint.

Nebraska also complains that even if augmentation plans work, Colorado’s use of them technically violates the Compact due to the timing of the replacement water. Nebraska is imprecise about its concerns but appears to argue that augmentation plans must provide the replacement water within 72 hours. Proposed Compl. ¶ 41; Neb. Br. at 12.

The only provision of the Compact that references a 72-hour requirement is Article IV, section 5. That section recognizes and allows for unavoidable deviations in the flow rate at the state line. Compact Art. IV, § 5. That provision describes when the Colorado State Engineer must deliver additional water to Nebraska within 72 hours to make up for certain occasions when the flows deviate from what is required under Article IV, section 2. *Id.* Those circumstances are when the Colorado State Engineer is at fault for the flow deviation (i.e. “by neglect, error, or failure in the performance of duty”). *Id.* If low flows are caused by conditions outside of the State Engineer’s control such as climate, or by water uses in the Upper Section or uses in the Lower Section that are senior to Nebraska’s rights—there is no Compact obligation to conjure additional water to boost flows.

There are at least three problems with Nebraska’s argument that augmentation plans must work on a 72-hour timeline. First, as explained above in Section III.C.1., Nebraska is still unsure whether the amount of replacement water generated by augmentation plans is insufficient, and thus there are no allegations

of “neglect or error” needed to trigger the 72-hour requirement.

Second, in the context of augmentation plans, Nebraska would need additional allegations to establish a timing problem. The effects of removing water from the ground are not felt immediately by downstream water users. Accordingly, the 72-hour clock would not start when the water is pumped from the well but when the depletions eventually reach the river and then reduce the mean daily flows at the Interstate Station.

Third, even if Colorado had a stricter timing requirement and Nebraska could identify a start time for the 72-hour clock for groundwater diversions, Nebraska does not allege an actual injury. Colorado’s conservative augmentation plan system replaces depletions to Nebraska.

4. The Compact does not require “simple” accounting and Colorado has the requisite authority to administer the Compact.

Nebraska also complains that Colorado’s administration of augmentation plans is too complicated and therefore at odds with Article VIII of the Compact. *See, e.g.,* Neb. Br. at 7 (stating that Article VIII requires “simplified accounting and objective enforceability”). But Article VIII’s directive does not include instructions about accounting methods, simplified or otherwise. Instead, it requires Colorado to be able to administer Nebraska’s rights under the Compact “without necessity of enactment of special statutes.” Compact Art. VIII.

At the time of the Compact, the states' use of their semisovereign powers to settle interstate water disputes through compacts was novel. Daniel Tyler, *Delphus Emory Carpenter & the Colorado River Compact of 1922*, 1 U. Denv. Water L. Rev. 228, 240 (1998). Colorado's statutes governing intrastate water rights administration had not yet caught up with this innovation. Article VIII was intended to fill this gap and confirm that Colorado could administer the Compact rights granted to Nebraska. Accordingly, the Compact ensures that state officials can take all actions necessary to comply with the Compact (i.e., administer Nebraska's Compact rights) without additional legislative action. Compact Art. VIII. This provision has since been rendered largely superfluous, acting as a backstop to the State Engineer's express statutory authority to administer the South Platte in compliance with the Compact. *See* Colo. Rev. Stat. §§ 37-80-102(1)(k); 37-80-503(7).

Nebraska suggests that a Colorado Supreme Court decision supports Nebraska's claim that Colorado cannot comply with the Compact. *See* Proposed Compl. ¶ 43 (citing *Bijou*, 69 P.3d at 55). But *Bijou* simply held that the State Engineer could exercise his statutory authority to promulgate rules for the South Platte River basin while also complying with Colorado law. Contrary to Nebraska's assertion, *Bijou* is clear that the State Engineer has the obligation and the requisite authority to enforce the Compact. *See Bijou*, 69 P.3d at 68–69, 72.

Nebraska's claim boils down to an argument that the State Engineer has no authority to modify South

Platte River water administration to adjust to changing times and hydrology while still complying with the Compact. This is not a serious claim. As explained above, both Nebraska and Colorado (and many western states) have, over the years and by necessity, modified their approaches to groundwater regulation to adapt to changed circumstances. If anything, Colorado is better situated to administer Nebraska's Compact rights than it was when the Compact was executed. Article VIII does not preclude these necessary and appropriate adaptations.

Finally, as with Nebraska's other allegations related to irrigation season flows, Nebraska fails to allege any cognizable injury caused by the supposed procedural violation.

CONCLUSION

This Court should deny Nebraska's motion for leave to file a bill of complaint.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

SCOTT STEINBRECHER
Deputy Attorney General

SARAH KRAKOFF
Deputy Solicitor General
Counsel of Record

ANDREA WANG
Deputy Solicitor General

CHAD M. WALLACE
Second Assistant Attorney
General

Office of the Colorado
Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Sarah.Krakoff@coag.gov
(720) 508-6000

W. CORY HALLER
Assistant Solicitor
General

ROBERT KORTUM HARRIS
Assistant Attorney
General

Counsel for Defendant

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