

No. 161, Original

In the Supreme Court of the United States

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

**NEBRASKA'S REPLY IN SUPPORT OF MOTION
FOR LEAVE TO FILE BILL OF COMPLAINT**

MICHAEL T. HILGERS
Attorney General of Nebraska
CODY S. BARNETT
Solicitor General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record

NEBRASKA DEPARTMENT
OF JUSTICE
1445 K Street, Room 2115
Lincoln, Nebraska 68508
(402) 471-2683
justin.lavene@nebraska.gov

THOMAS R. WILMOTH
DONALD G. BLANKENAU
KENNON G. MEYER
Special Assistant
Attorneys General
BLANKENAU WILMOTH
JARECKE LLP
2900 South 70th Street
Suite 150
Lincoln, Nebraska 68506
Counsel for State of Nebraska

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INTRODUCTION

Nebraska is suffering immediate, concrete injuries from Colorado's violations of the South Platte River Compact. The injuries—from the loss of water under Article IV to the obstruction of canal construction under Article VI—can be remedied only by this Court exercising its original and exclusive jurisdiction. Colorado seeks further delay, but its arguments wither under the plain force of Nebraska's allegations.

Nebraska's Bill of Complaint outlines numerous harms Nebraska is suffering today. Those include Colorado allowing thousands of users to take water without authority. Colorado doesn't deny Nebraska regularly receives less water than the Compact calls for, or that Colorado relies on augmentation to justify unlawful junior diversions during the irrigation season. Instead, Colorado leans on its byzantine water laws to try to dodge this Court's review. But the system itself causes many harms Nebraska seeks to redress.

Colorado also contends the conflict over the Perkins County Canal is premature. The briefing, however, shows immediate, concrete, and threshold disputes over the size, scope, and location of the Canal. Each involves basic Compact interpretation—legal questions only this Court can resolve. Colorado would put Nebraska in a legal catch-22; Nebraska wouldn't construct the Canal without resolving these disputes, but Colorado insists Nebraska wait to resolve these disputes until the Canal is complete. Neither this Court's precedents nor the Compact requires this absurdity.

Colorado’s assertion that it remains ready and willing to listen is a smokescreen. Colorado’s leading public officials have made their position quite clear: nothing short of this Court’s intervention will resolve the dispute. Nebraska’s motion should be granted.

ARGUMENT

I. Nebraska Properly Pled Undisputed Facts that Establish Colorado’s violations of Article IV.

Nebraska has pled key facts—facts Colorado did not dispute—establishing Colorado’s violations. Nebraska alleged Colorado denies Nebraska water due the state under Article IV of the Compact. Bill of Compl. ¶¶ 2–3, 31–43, 84–89. Colorado tries to recast Nebraska’s Article IV claims as “ancillary” to its “core concern” about the Canal. Colorado’s Response in Opposition to Nebraska’s Motion for Leave to File Bill of Complaint (“Opp.”) at 8, 12. Colorado is wrong. Nebraska alleges Colorado has overconsumed up to 1.3 million acre-feet of Nebraska’s irrigation water. Bill of Compl. ¶ 3, 85. There is nothing “speculative and premature” about that staggering amount. Opp. at 11.

Nebraska asserts a simple cause of action: Colorado’s water administration system does not comply with the Compact, and Colorado is violating the Compact and injuring Nebraska. In support, Nebraska pled:

- Colorado has permitted thousands of uses not authorized under the Compact. Bill of Compl. ¶¶ 33, 84.

- These uses are junior to Nebraska’s 1897 irrigation right but are allowed to continue based on augmentation plans that violate the Compact. Bill of Compl. ¶¶ 35–37, 84.
- Much of Colorado’s overuse occurred long before *any* effort was made to offset the adverse impacts of groundwater pumping Colorado today acknowledges impacts the River. Bill of Compl. ¶¶ 31, 34-6. *Contra* Opp. at 8, 25–26.
- Colorado’s unlawful uses have stolen up to 1.3 million acre-feet of water from Nebraska. Bill of Compl. ¶¶ 3, 85.
- These unlawful uses caused one of Article IV’s principal beneficiaries to discontinue water service to its users in 2022 and suffer extended periods of surface water deficiency. Bill of Compl. ¶ 86.
- Colorado’s overuse makes it harder for Nebraska to comply with legal and policy mandates concerning balanced water management. Bill of Compl. ¶ 87.

So Nebraska *has* “reached an informed conclusion that Colorado is violating its irrigation season obligations[.]” *Contra* Opp. at 29. The resultant injury is not “merely feared as liable to occur at some indefinite time in the future.” *Florida v. Georgia*, 585

U.S. 803, 818 (2018).¹ It has happened, is happening, and will continue to happen absent this Court’s intervention. Nebraska pled precisely the type of ongoing violation and resulting harm that historically led this Court to grant relief in favor of the injured downstream state. *Kansas v. Colorado*, 514 U.S. 673 (1995); *Texas v. New Mexico*, 482 U.S. 124 (1987). See also *Texas v. New Mexico*, Orig. No. 141, State of Colorado’s Response to United States’s Motion for Judgment on the Pleadings.” (Special Master’s Docket No. 209) at 3 (“[T]o the extent a signatory State asserts injury because of a violation of a compact, *it has standing and has stated a claim.*”) (emphasis added)).

Nothing about Colorado’s water administration system insulates the State from liability. The Compact requires Colorado to shut off junior irrigators if flows fall below 120 cfs at the Interstate Station, and Nebraska alleged that “flows at the Interstate Station frequently fall below 120 cfs during the irrigation season.” Bill of Compl. ¶ 33. Colorado does not deny that fact or that its junior users are allowed to continue diverting. Rather, Colorado asserts it somehow makes Nebraska whole anyway. Opp. at 8, 26–27.

That ignores Nebraska’s allegation that Colorado’s byzantine water administration system *itself* violates the plain “self-executing” language of Article VIII. Bill of Compl. ¶¶ 30, 42–43, 89. See also *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 72 (Colo. 2003) (“We disagree with the trial court’s conclusion

¹ Notably, Florida was granted leave to file on allegations far less concrete than Nebraska’s. *Compare Id.* at 810.

that the compact is self-executing[.]”). Colorado wants to write off Article VIII as “superfluous.” Opp. at 34. But it is a fundamental element of the Compact’s bargained-for exchange whereby Nebraska obtained ease of accounting and enforcement in exchange for surrendering other rights under the prior appropriation doctrine.² And Colorado ignores Nebraska’s allegation that irrigation season flows fall below required levels *because of* the complex system. Bill of Compl. ¶¶ 84–87. *Contra* Opp. at 24.

Colorado’s response lays bare its true belief that Nebraska isn’t entitled to any water. Opp. at 21 n.13, 23–24. Colorado implies that it could drain the Lower Section of the South Platte River through its administration of the Upper Section, and Nebraska would have no recourse. However, the Compact was designed to guarantee water for Nebraska. As Colorado’s lead Compact negotiator explained:

[The flow at the interstate line] is permanent. It will improve with time. Each new structure in Colorado will tend to further equalize the flow of the stream at the interstate line ... and there is every assurance of a gradual and cumulative increase as the full effect of increased irrigation becomes manifest in the form of ever-increasing return flow from the lands served.

Carpenter Report at 14.

² See [Report](#) of Delph E. Carpenter, Commissioner for Colorado (Jan. 7, 1925) (“Carpenter Report”) at 21 (“[The Compact] affords a permanent solution. Its provisions are simple In due course of time and with improvement of flow at the interstate line, it will become self-executing.”)

Colorado's system does not comply with the Compact's terms. Colorado has robbed Nebraska of irrigation water to which it is entitled. Colorado has made clear its intent to keep doing so, and it will continue to do so unless and until its unlawful diversions are stopped. Nebraska has a real concrete injury worthy of this Court's resolution, and Colorado's sleight of hand cannot change that.

II. Nebraska's Properly Plead, Undisputed Allegations Establish that Perkins County Canal Issues are Ripe.

Nebraska's claims under Articles IV and VIII alone warrant this Court's review. Its claims under Article VI are also ripe. Nebraska needs resolution of key issues to build the Canal. Its differences with Colorado stem from Compact interpretation; they are "purely legal." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). Additional delay only rewards Colorado's bad faith and "would impose a substantial hardship on" Nebraska. *Id.* at 167–68.

A. The dispute is over Compact interpretations.

This dispute centers on how to interpret key provisions in the Compact—not the "pros and cons of building the canal[.]" Opp. at 22. Nebraska just needs the Court to decide who is right about these "purely legal" issues. *SBA List*, 567 U.S. at 167. They include at least the following:

- Nebraska contends it may move the diversion closer to the state line to minimize impacts on Colorado landowners; Colorado insists otherwise.

Compare Bill of Compl. ¶ 77 *with* Opp. at 14.

- Nebraska maintains the Canal must be designed to carry more than 500 cfs to accommodate “net future flows” and “surplus” water as defined in the Compact; Colorado claims 500 cfs is a maximum design capacity. *Compare* Bill of Compl. ¶¶ 77, 79–80 *with* Opp. at 14–15.
- Nebraska asserts the right to divert “surplus” water and all “net future flows” except those expressly reserved to Colorado; Colorado contends the Court cannot even address the interpretation of the terms. *Compare* Bill of Compl. ¶ 80 *with* Opp. at 19–20 & n.12.
- Nebraska alleges Colorado has already exceeded its 35,000-acre foot reservation; Colorado says the fact is unknowable and that Colorado is unconstrained until the Canal is built anyway. *Compare* Bill of Compl. ¶¶ 26, 80–81 *with* Opp. at 22 n.14.
- Nebraska alleges Colorado is manipulating water administration to reduce return flows on which the Compact is based; Colorado claims Nebraska has “no remedy” for this. *Compare* Bill of Comp. ¶¶ 72, 82 *with* Opp. at 20.
- Nebraska maintains federal district court is the proper venue for

condemnation proceedings; Colorado insists Nebraska subject itself to Colorado courts. *Compare* Bill of Compl. ¶ 78 *with* Opp. at 17–18.

Despite these clear and present conflicts, Colorado argues it is not actively interfering with Nebraska’s efforts to build the Canal, so this Court should not intervene. Opp. at 13 (citing *Arizona v. California*, 283 U.S. 423 (1931)). In *Arizona*, however, the Court explained it was “*conceded* that the continued use of ... water already appropriated in Arizona is not now threatened” and “[t]here is *no allegation* that at the present time the enjoyment of these rights is being interfered with in any way.” 283 U.S. at 460–61 (emphasis added). In stark contrast, Nebraska alleges Colorado (individually and by and through its proxies and political subdivisions) is presently impeding Nebraska’s right to construct the Canal. Bill of Compl. ¶¶ 58–76, 90–91. Colorado is preventing Nebraska from exercising its rights *today*. By contesting every material aspect of Article VI and overtly declaring its intent to litigate the same, Colorado is interfering with Nebraska’s right. Bill of Comp. ¶¶ 65, 67.

Thus, Nebraska seeks a declaration of the relative rights of the parties under Article VI based on questions of pure Compact interpretation. In such instances, “the question in each case is whether the facts alleged, *under all the circumstances*, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Md. Casualty Co. v. Pac. Coal & Oil Co.*,

312 U.S. 270, 273 (1941) (emphasis added). This is such a case.

B. Nebraska’s plans are concrete.

Colorado contends Nebraska has taken only “preliminary steps” to build the Canal and that the project is in its “very early stages.” Opp. at 6, 7. Not true. Nebraska has spent millions of dollars on designs, permitting, legal and consulting fees, right-of-way investigations, and infrastructure engineering for the Canal. Bill of Compl. ¶¶ 55, 57. The design is substantially developed, and all major engineering decisions have been made. Nebraska has already acquired 80 acres in Colorado to facilitate Canal construction.

While Nebraska is under no obligation to provide advanced plans to Colorado, Nebraska did so. Bill of Compl. ¶¶ 50–51, 53. Ultimately, in February 2025, Nebraska handed Colorado a proposed alignment, diversion details, and canal cross sections. Colorado also can stay abreast of updates simply by visiting the dedicated project website.³ Colorado knows enough about the Canal to object to its every element, thus making the States’ dispute ripe today.

Yet Colorado suggests this case would not be ripe until Nebraska could hand over the final design. That’s wrong both legally and prudentially. Legally, Nebraska is engaged in a permitting process under Section 404 of the Clean Water Act for the diversion works. 33 U.S.C. § 1344. This involves compliance

³ <https://dnr.nebraska.gov/perkins-county-canal>

with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, which, in turn, prevents premature foreclosure of reasonable alternatives. Thus, Nebraska cannot provide Colorado with *final* plans it demands. And prudentially, Nebraska repeatedly explained why it should be cautious in prematurely releasing final plans. Nebraska does not want to adversely impact neighboring property values—including on lands *in Colorado*—by releasing public drafts.

The status of the design plan does not bear on the terms in the Compact. It’s the other way around. The States disagree on the meaning of key terms that dictate the Canal’s design and operation. That is why this case is ripe today.

C. Nebraska tried to negotiate.

Nebraska made every effort to honor this Court’s “preference” that States “settle their controversies by ‘mutual accommodation and agreement.’” *Arizona v. California*, 373 U.S. 546, 564 (1963) (quoting *Colorado v. Kansas*, 320 U.S. 383, 392 (1943)). Bill of Compl. ¶¶ 50–51, 53, 58, 76–83. Colorado stonewalled that effort. Its assertion that it “remains willing to continue discussions with Nebraska about the canal and other concerns regarding the Compact” is little more than an attempt to manipulate this Court’s docket. Opp. at 6 n.5.

The parties met six times throughout 2023, three times in early 2024, and four times in 2025. Bill of Compl. ¶ 51. The meetings included scores of lawyers, engineers, and policymakers, and were undertaken at great expense. Nebraska cannot keep trying to negotiate with a state that refuses to take it

seriously. Colorado has dismissed Nebraska’s Canal efforts as a “political stunt” and a “boondoggle.” Bill of Compl. at ¶ 59. Joint Press Conference of Governor Polis and Attorney General Weiser (October 15, 2025). Just last month, Colorado’s Attorney General claimed he lacked “even the beginnings of an idea of what a negotiated solution could look like because *we haven’t gotten far enough to try to understand* what even options are there.” Town Hall, Julesburg, Colorado (September 8, 2025) (emphasis added). If Colorado doesn’t know what a negotiated solution looks like after three years, it doesn’t want to.

D. There are no alternative forums.

Only this Court can settle the dispute. Colorado’s proposed alternatives are neither competent nor satisfactory. First, Colorado argues Nebraska should initiate condemnation proceedings in a state or lower federal court. Opp. 16–18. That ignores the scope of Nebraska’s claims. Fundamentally, “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.” Opp. at 11 (citing *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam) (emphasis added)).⁴ Initiating condemnation proceedings will not resolve Nebraska’s claims under Articles IV or VIII. Nor will it properly address disputes over the Canal’s design, construction, and operation. See Bill of Compl.

⁴ In *Arizona v. New Mexico*, the impact of the tax at issue was on utilities who had already initiated suit in a lower state court to vindicate their rights. In contrast, the conflicts here are directly between two States and involve issues of Compact interpretation that affect the States’ rights directly.

¶¶ 77–82. Colorado also ignores the fact that all the disputes are between two sovereign states, implicating this Court’s original and exclusive Article III power.

Colorado next suggests an administrative permitting process might resolve the dispute. Opp. 15–16. But the U.S. Army Corps of Engineers (“Corps”) has no jurisdiction over Nebraska’s claims arising under Article IV or VIII. The Corps is responsible solely for ensuring construction in waters of the United States complies with the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The Corps cannot resolve the legal disputes presented in Nebraska’s Bill of Complaint.

Colorado finally suggests the Platte River Recovery Implementation Program (“PRRIP”) could resolve the disputes. Opp. 30–31. But PRRIP—a voluntary, cooperative endeavor—lacks jurisdiction over Nebraska’s claims and cannot resolve any dispute about the Canal. As recognized in Colorado’s own PRRIP water management plan, PRRIP “is not intended, and should not be construed, to amend or modify the South Platte River Compact or any interstate decree, or to waive any rights thereunder.”⁵ Thus, PRRIP cannot interpret or administer the Compact.

E. Further delay harms Nebraska and rewards Colorado.

Colorado does not want resolution because delay defers a reckoning. Simply put, Colorado relies on the continued availability of Nebraska’s Article VI

⁵ PRRIP, Attachment 5, Section 9, *Colorado’s Plan for Future Depletions* (Oct. 24, 2006).

(non-irrigation season) water to support augmentation programs that Colorado uses (unsuccessfully) to comply with Article IV. Without those non-irrigation season supplies, Colorado's house of cards will collapse. Junior irrigators will be forced to shut down throughout portions of the South Platte Basin.

So Colorado actively disputes every element of the Compact that bears on Canal design, construction, and operation—all the while maintaining “Nebraska currently has no legal right to demand that water from Colorado” and can obtain such right “only if it builds a canal[.]” Opp. at 1, 4. Until these conflicts are resolved, Nebraska cannot reasonably build the Canal and thus cannot demand the water owed it. Nebraska should not be forced to expend more than \$620 million in public funds by constructing the Canal only to find out after the fact that Colorado disputes the way it was done and will not provide the water the Canal was designed to carry.

Nebraska's inability to access water due it under Article VI—and Colorado's ongoing consumption of that very same water—represents a substantial hardship to all Nebraskans today.

CONCLUSION

For these reasons, the State of Nebraska respectfully requests that the Court grant the Motion for Leave to File Bill of Complaint.

Respectfully submitted,

MICHAEL T. HILGERS

Attorney General of Nebraska

CODY S. BARNETT

Solicitor General

JUSTIN D. LAVENE

Assistant Attorney General

Counsel of Record

NEBRASKA DEPARTMENT OF JUSTICE

1445 K Street, Room 2115

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Tel.: (402) 471-2683

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General

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2900 South 70th Street, Suite 150

Lincoln, Nebraska 68506

Counsel for State of Nebraska