

No. 161, Original

In the Supreme Court of the United States

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the motion for leave to file a bill of complaint should be granted, limited to Nebraska's claim that Colorado has violated Article IV of the South Platte River Compact, ch. 46, 44 Stat. 195 (Compact). The motion should be denied in all other respects.

INTRODUCTION

Approved by Congress in 1926, the South Platte River Compact allocates the South Platte's waters between Colorado and Nebraska. During irrigation season (April 1 to October 15), Article IV of the Compact grants Nebraska priority over certain Colorado users to 120 cubic feet per second (cfs) of the river's waters. During non-irrigation season (the rest of the year), Article VI allows Nebraska to obtain a right to the South Platte's waters by building the Perkins County Canal—

a project Nebraska has long contemplated but only recently begun pursuing in earnest. In Article VIII, the Compact obligates Colorado officials to deliver water to Nebraska “without necessity of enactment of special statutes for such purposes.” Nebraska seeks leave to file a bill of complaint alleging that Colorado has violated Articles IV, VI, and VIII. In the view of the United States, those claims warrant distinct dispositions.

The Court should grant leave to file Nebraska’s Article IV claim and refer that claim to a special master. Nebraska alleges that Colorado has deprived it of water by permitting lower-priority users to take water out of turn without ensuring the water’s timely replacement. A claim that one State has deprived another of water to which it is entitled under an interstate compact is a quintessential case for this Court’s original jurisdiction. And because Nebraska’s challenge is purely factual, that claim is best addressed by a special master in the first instance.

The Court should deny leave to file Nebraska’s Article VIII claim. Nebraska reads Article VIII as mandating that compliance mechanisms be “simple,” and it alleges that Colorado has violated that requirement. Compl. ¶ 89. But Article VIII imposes no such requirement; it merely authorizes Colorado officials to enforce the Compact without action by the Colorado legislature. Because Nebraska’s Article VIII claim is facially meritless, it should not be permitted to proceed further.

The Court should also deny leave to file Nebraska’s Article VI claim. Nebraska alleges that Colorado has “obstruct[ed]” its efforts to build the Perkins County Canal. Compl. ¶ 90. But the complaint identifies no obstruction; instead, it points to innocuous criticisms and promises to defend Colorado landowners that do not

plausibly injure Nebraska, much less violate the Compact. Nebraska also identifies a litany of potential legal issues surrounding the canal's construction over which the States disagree. While Nebraska need not build the canal to test its legality, most of the issues Nebraska identifies are unripe given that Nebraska has just begun the process to obtain a required permit from the U.S. Army Corp of Engineers, and any construction is years away. To the extent the identified issues are ripe, other threshold barriers counsel against this Court's review.

STATEMENT

1. The South Platte River originates in the foothills of the Rockies and winds 380 miles across eastern Colorado before entering Nebraska. See Br. in Opp. 3. Both States consider the river a critical source of water. Compl. ¶¶ 1, 11; Br. in Opp. 3. The two States have long sparred over the river and, in 1923, signed an interstate compact to govern future appropriations, which Congress approved in 1926. Compl. ¶¶ 11, 13-15, 17.

The Compact allocates water using priority dates with different rights during irrigation season (April 1 to October 15) and non-irrigation season (October 15 to April 1). See Art. IV, ¶ 2, Art. VI, ¶ 2(b). Under the priority system, a water user may generally take all water to which he is entitled before any user with a later-in-time, more-junior priority receives a drop. *Montana v. Wyoming*, 563 U.S. 368, 375-377 (2011); see Compl. ¶ 12; Br. in Opp. 4 n.1. The Compact gauges the States' compliance at an interstate measuring station in Julesburg, Colorado. See Art. II. The Compact divides the Colorado portion of the river into an "upper" and "lower" section at the western boundary of Washington County, Colorado, with Colorado enjoying unrestricted use of the upper section and Nebraska having priority over

some Colorado users on the lower section. Art. I, ¶¶ 3-4; see Compact Art. IV, ¶ 2, Art. VI, ¶ 2.

During irrigation season, Article IV effectively assigns Nebraska a priority date of June 14, 1897, for 120 cfs over lower-section users in Colorado. Compact Art. IV, ¶ 2. Colorado “shall not permit diversions from the lower section of the river” by users junior to Nebraska “to an extent that will diminish the [mean daily] flow of the river at the interstate station” below 120 cfs. *Ibid.* The Compact permits “minor or compensating irregularities and fluctuations.” Art. IV, ¶ 5. But any deficiency “occasioned by neglect, error, or failure in the performance of duty by the Colorado water officials * * * shall be made up” within 72 hours. *Ibid.*

During non-irrigation season, Nebraska has no initial right to the South Platte’s waters. Compact Art. IV, ¶ 1. But under Article VI, Nebraska may obtain such a right by building a canal, which the parties call the Perkins County Canal, that “may commence on the south bank of [the] river at a point southwesterly from the town of Ovid, Colorado.” Nebraska may exercise eminent domain in Colorado to build and operate the canal. Compact Art. VI, ¶ 1.

Once the canal is built, Colorado users on the upper section retain their priority over Nebraska. Compact Art. VI, ¶ 2. But Nebraska may divert the “net future flow of the lower section” during non-irrigation season with a priority date of December 17, 1921. *Ibid.* Nebraska’s right is subject to two “reservations, limitations, and conditions.” *Ibid.* First, Colorado may set aside an additional 35,000 acre-feet from the lower section during non-irrigation season to use during irrigation season. Compact Art. VI, ¶ 2(a). Second, Nebraska may divert 500 cfs on the “express condition” that doing

so “shall not constitute the basis for any claim to water” from the upper section or prior appropriations from the lower section. Compact Art. VI, ¶ 2(b).

Separately, Article VIII of the Compact vests Colorado officials with the “duty” to distribute waters “without necessity of enactment of special statutes for such purposes” by the Colorado legislature.

2. Nebraska has sought this Court’s leave to file a bill of complaint alleging that Colorado has violated Articles IV, VI, and VIII of the Compact.

Nebraska’s Article IV and VIII claims challenge Colorado’s use of “augmentation plans,” which allow junior users to pump groundwater out of priority if they provide replacement water—for example, by using porous recharge ponds that permit at least an equivalent amount of water to seep back into the river in time to prevent the infringement of senior users’ rights. Compl. ¶¶ 36, 40 (citation omitted); see *Coors Brewing Co. v. City of Golden*, 420 P.3d 977, 983-984 (Colo. 2018). Nebraska alleges that those plans, in operation, violate Article IV because they allow users junior to Nebraska to take water out of priority. See Compl. ¶ 84. Specifically, Nebraska alleges that Colorado has allowed junior users to continue diverting water, “including in the Lower Section,” when irrigation-season flows at the measuring station fall below 120 cfs. Compl. ¶ 33; see Compl. ¶ 84. And Nebraska alleges that Colorado officials have failed to make up shortfalls within 72 hours as Article IV requires. Compl. ¶ 41. Nebraska estimates that those diversions have cost Nebraska 1.3 million acre-feet of water to the detriment of its farmers. Compl. ¶¶ 85-86.

Nebraska alleges that the same conduct violates Article VIII on the theory that Article VIII requires that

the Compact be “self-executing” in the sense that compliance is “easily measurable and subject to objective verification.” Compl. ¶¶ 30, 42, 89. Nebraska contends that Colorado’s augmentation plans are too “complex” to satisfy that requirement. Compl. ¶ 42.

Separately, Nebraska alleges that Colorado has violated Article VI by “obstruct[ing]” Nebraska’s efforts to build the Perkins County Canal. Compl. ¶ 90. As evidence of obstruction, Nebraska points to various statements by Colorado officials and private parties opposing the canal. Compl. ¶¶ 58-60, 63-71. Nebraska also alleges that Colorado is expediting new water uses “to build future equities” if Nebraska builds the canal. Compl. ¶ 90. And Nebraska identifies various legal issues involving Article VI on which the States disagree, including the canal’s size, location, and capacity. Compl. ¶¶ 76-83.

3. Because aspects of the Perkins County Canal project would involve the discharge of dredged or filled materials into the waters of the United States, the project requires a permit from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act of 1977, 33 U.S.C. 1344. In February 2026, after filing its proposed bill of complaint in this Court, Nebraska applied for a Section 404 permit. Nebraska Dep’t of Water, Energy, & Env’t, *Section 404 Clean Water Act Permit Application* (Feb. 13, 2026) (Section 404 Application).¹ Nebraska proposes a canal that would begin near Ovid,

¹ https://publibrary.sec.usace.army.mil/api/download?id=1516bb23-8384-4fbc-f108-c78d43322959&filename=NWO-2023-00518_Section_404_Permit_Application.pdf. The Section 404 Application is not consecutively paginated. We use the PDF’s pagination.

Colorado with an apparent capacity of 1000 cfs. *Id.* at 18, 61-64, 68, 71.²

The Army Corps has held five public meetings about Nebraska’s application and solicited comments from the public. U.S. Army Corps of Eng’rs, Omaha Dist., *Environmental Impact Statement – Perkins County Canal Project*, <https://perma.cc/U72Y-37M9> (Army Corps EIS Overview). Among the commenters was Colorado’s Department of Natural Resources. See Letter from Dan Gibbs, Executive Director, Colorado Dep’t of Natural Res., to U.S. Army Corps of Eng’rs, Omaha Dist. Regulatory Div. (Apr. 6, 2026).³ Colorado has urged the Corps to consider alternatives to building the canal. *Id.* at 14-16. And it has asked the Corps not to “resolv[e] or weigh[] in on potential disputes concerning interpretation of the South Platte River Compact.” *Id.* at 36.

The Army Corps is currently considering the public comments and estimates that it will publish a draft environmental impact statement in February 2027 and a final environmental impact statement and record of its decision in February 2028. Army Corps EIS Overview. If the Corps adheres to that schedule and grants the permit, Nebraska anticipates beginning construction in 2028 and completing the canal in 2032. Section 404 Application 34.

² Nebraska’s application describes some segments of the canal as carrying a maximum of 1000 cfs and others as carrying a maximum of 500 cfs. Compare, *e.g.*, Section 404 Application 61, with *id.* at 62. Based on the dimensions listed in Nebraska’s application, the Army Corps estimates that all proposed segments could likely accommodate 1000 cfs.

³ https://dnr.colorado.gov/sites/dnr/files/documents/2026-4-6%20CODNR%20Perkins%20404%20Scoping%20Comments%20-%20Permit%20Application%20No.%20NWO-2023-00518_1.pdf.

DISCUSSION

Nebraska seeks leave to bring claims in this Court alleging violations of Articles IV, VI, and VIII of the South Platte River Compact. In its Article IV claim, Nebraska alleges that Colorado has deprived Nebraska of water to which it is entitled under an interstate compact—a classic case for the Court’s original jurisdiction but a purely factual one best addressed first by a special master. Nebraska’s other claims do not warrant an exercise of original jurisdiction. Nebraska’s Article VIII claim rests on an untenable reading of the Compact that should be rejected. And every aspect of Nebraska’s Article VI claim either does not present a justiciable case or controversy or faces other threshold barriers. The Court should grant the motion for leave to file as to Nebraska’s Article IV claim and deny it in all other respects. Cf. *Idaho v. Oregon*, 429 U.S. 163, 164 (1976) (per curiam) (granting leave to file in part); *New York v. Illinois*, 274 U.S. 488, 490 (1927) (striking portion of complaint).

I. THE COURT SHOULD GRANT LEAVE TO FILE NEBRASKA’S ARTICLE IV CLAIM AND REFER THAT CLAIM TO A SPECIAL MASTER

This Court has original and exclusive jurisdiction over cases or controversies between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). The Court has determined that its exercise of original jurisdiction is “obligatory only in appropriate cases.” *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (citation omitted). In deciding whether to grant leave to file a complaint invoking its exclusive original jurisdiction, the Court examines “the nature of the interest of the complaining State,” focusing on the “seriousness and dignity of the claim.” *Id.* at 77 (citations omitted). The Court also con-

siders “the availability of an alternative forum in which the issue tendered can be resolved.” *Ibid.* When weighing those considerations, the Court has “substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court.” *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). Under those standards, Nebraska’s Article IV claim presents a controversy warranting an exercise of original jurisdiction.

A. Nebraska alleges that Colorado has denied Nebraska the share of the South Platte’s waters to which it is entitled under the Compact. That claim implicates two subject matters that are prototypical on this Court’s original docket: interstate water disputes and disputes over the meaning of an interstate compact. See *South Carolina v. North Carolina*, 558 U.S. 256, 289 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (“A dispute between States over rights to water fits th[e] bill [for original jurisdiction].”); *Texas v. New Mexico*, 462 U.S. at 567 (“There is no doubt that this Court’s [original] jurisdiction * * * extends to a suit by one State to enforce its compact with another State or to declare rights under a compact.”). The Court therefore regularly hears original cases involving allegations, like Nebraska’s, that one State is violating an interstate compact by depriving another State of its share of an interstate river. See, e.g., *Kansas v. Nebraska*, 574 U.S. 445, 450-451 (2015); *Montana v. Wyoming*, 563 U.S. 368, 372-373 (2011); *Kansas v. Colorado*, 514 U.S. 673, 679-680 (1995); *Oklahoma v. New Mexico*, 501 U.S. 221, 227-228 (1991); *Texas v. New Mexico*, 462 U.S. at 562.

Nebraska’s complaint plausibly alleges such a claim with respect to Article IV. Nebraska alleges that Colorado has permitted new groundwater uses in the lower

section that diminish flows to Nebraska during irrigation season. Compl. ¶ 33. And Nebraska alleges that Colorado has violated Article IV both by failing to curtail those junior uses when interstate flows fall below 120 cfs and by failing to cure shortfalls within 72 hours. Compl. ¶¶ 41, 84. Those allegations state a plausible claim of sufficient “seriousness and dignity” to warrant an exercise of this Court’s original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. at 77 (citation omitted).

Colorado dismisses (Br. in Opp. 23) Nebraska’s allegations as “nascent and undeveloped.” Colorado asserts (*id.* at 28) that Nebraska has alleged only that interstate flows sometimes fall below 120 cfs, not that such shortfalls are attributable to the junior users in the lower section over whom Nebraska has priority. And Colorado contends (*id.* at 29) that “Nebraska has not yet reached an informed conclusion that Colorado is violating” Article IV.

Colorado’s responses reflect an unduly parsimonious reading of the complaint. Nebraska squarely alleges a causal link between Colorado’s actions and low water flows. Nebraska alleges that “Colorado has authorized thousands of surface water and surface-water-depleting, hydrologically connected groundwater diversions.” Compl. ¶ 33. It alleges that “flows at the Interstate Station frequently fall below 120 cfs during the irrigation season” “[*d*]ue to these new diversions.” *Ibid.* (emphasis added); see Compl. ¶ 39 (“Colorado continues to allow junior appropriators to divert South Platte River water out of priority.”). Nebraska also pinpoints diversions to “the Lower Section.” Compl. ¶ 33. And Nebraska alleges that, even when flows at the interstate station fall below 120 cfs, “Colorado has nevertheless allowed junior water users to divert water destined for

Nebraska. That violates Article IV of the Compact.” Compl. ¶ 84.

Colorado also disputes Nebraska’s allegations. Colorado touts (Br. in Opp. 27-28) its “rigorous and conservative approach” to augmentation plans, which, Colorado says, relies on “sophisticated computer models” and is “significantly more demanding than Nebraska’s own augmentation requirements.” But that response just litigates the merits—namely, whether Colorado’s augmentation plans operate as intended to protect downstream users like Nebraska. The States’ unsurprising disagreement on that key factual question is a reason to permit this plausible claim to proceed past the pleading stage, not to deny Nebraska’s motion to file.

B. There is no alternative forum in which the two States’ dispute about Article IV can be definitively resolved. This Court has exclusive jurisdiction over controversies between States. 28 U.S.C. 1251(a); *Mississippi v. Louisiana*, 506 U.S. at 77-78. Nebraska and Colorado are the only parties to the Compact. And because Nebraska’s allegations target Colorado’s own actions, there is no other defendant whom Nebraska could sue and no other forum that could resolve this dispute.

Colorado suggests (Br. in Opp. 30-31) that Nebraska’s claim could be resolved under the Platte River Recovery Implementation Program—a cooperative agreement between Nebraska, Colorado, Wyoming, and the United States to protect endangered and threatened species along the central Platte River in Nebraska. See *Platte River Recovery Implementation Program Cooperative Agreement 1* (Oct. 24, 2006), <https://perma.cc/2XXA-HCSC>. But Nebraska’s claims go well beyond the scope of that program. And the program agreement simply obligates the parties to “at-

tempt[] * * * to resolve” any concerns about program activity “within the context of the Program” before filing suit. *Id.* at 3. The agreement offers no formal dispute-resolution mechanism and no alternative forum “where the issues tendered may be litigated[] and where appropriate relief may be had.” *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (citation omitted).

C. Upon granting leave to file a complaint, the Court often directs the defendant to file an answer and then refers the matter to a special master. See, e.g., *Arkansas v. Delaware*, 580 U.S. 808 (2016), and 581 U.S. 901 (2017); *Delaware v. Pennsylvania*, 580 U.S. 808 (2016), and 581 U.S. 901 (2017); *Mississippi v. Tennessee*, 576 U.S. 1052, and 577 U.S. 981 (2015); *New Jersey v. New York*, 511 U.S. 1080, and 513 U.S. 924 (1994); *Nebraska v. Wyoming*, 479 U.S. 1051, and 483 U.S. 1002 (1987); *Texas v. New Mexico*, 421 U.S. 927, and 423 U.S. 942 (1975). That procedure would be appropriate here.

In alleging violations of Article IV, Nebraska raises a purely factual challenge about whether Colorado’s augmentation plans operate as intended. Such plans (and their equivalents) are common water-management tools west of the Mississippi, including in Nebraska. 1 Amy K. Kelley & Jesse J. Richardson, Jr., *Waters and Water Rights* § 14.04(c)(3) (3d ed. 2026); Neb. Rev. Stat. §§ 46-709(8), 46-715(3)(e) (2026); see Br. in Opp. 28-29 & n.20. Nebraska therefore does not appear to contend that the Compact prohibits Colorado from using augmentation plans in general. Instead, Nebraska challenges whether Colorado’s plans are, in fact, returning water to the river as needed to meet Colorado’s obligations. Nebraska criticizes Colorado’s reliance on “unverified assumptions” without “real-time reporting or on-the-ground physical verification.” Compl. ¶¶ 37, 41.

And Nebraska alleges that Colorado’s plans are “divert[ing] water rightfully due to Nebraska under the Compact.” Compl. ¶ 42.

That factual dispute is best addressed in the first instance by a special master. In original actions, the Court “has always been liberal in allowing full development of the facts,” *United States v. Texas*, 339 U.S. 707, 715 (1950), and its “general[.]” practice is to appoint a special master “if factual issues appear,” Stephen M. Shapiro et al., *Supreme Court Practice* § 10.11, at 10-39 (11th ed. 2019). Because Nebraska raises weighty, but factual, questions about Colorado’s Article IV compliance, the Court should grant the motion as to that claim and refer it to a special master.

II. THE COURT SHOULD DENY LEAVE TO FILE NEBRASKA’S ARTICLE VIII CLAIM, WHICH FAILS TO STATE A CLAIM

Nebraska also alleges that Colorado’s augmentation plans violate Article VIII because they are too “complex” and not “subject to objective verification,” and thus purportedly prevent the Compact from being “self-executing.” Compl. ¶¶ 30, 42. The Court should decline to exercise original jurisdiction over that claim because it fails to allege a plausible violation of the Compact. Cf. *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam) (denying leave to file claim that failed on the merits).

Article VIII provides that Colorado officials have the “duty” to fulfill the Compact “without necessity of enactment of special statutes for such purposes by the General Assembly of the State of Colorado.” Nothing in that text supports Nebraska’s view that Article VIII requires that Compact compliance “be easily measurable,” “subject to objective verification,” and “simple.” Compl. ¶¶ 30, 89. Article VIII simply makes the Com-

pact “self-executing” in the sense that Colorado did not need to enact additional legislation to implement its terms. Cf. *Medellín v. Texas*, 552 U.S. 491, 505 (2008) (describing self-executing treaties). Article VIII is a grant of authority to Colorado officials; it does not impose any limitations on how Colorado complies with its obligations to deliver flows at the interstate station.

The Court should therefore deny leave to file Nebraska’s Article VIII claim. The claim rests on an implausible reading of the Compact that may be rejected without further briefing. But permitting the claim to proceed could needlessly complicate proceedings before the special master. In the alternative, the Court could permit Nebraska to file the claim but invite Colorado to file a motion to dismiss. Cf., e.g., *Texas v. New Mexico*, 571 U.S. 1173 (2014); *New Hampshire v. Maine*, 530 U.S. 1272 (2000).

III. THE COURT SHOULD DENY LEAVE TO FILE NEBRASKA’S ARTICLE VI CLAIM, WHICH DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY OR FACES OTHER THRESHOLD BARRIERS

Nebraska separately alleges that Colorado has violated Article VI by impeding Nebraska’s efforts to build the Perkins County Canal. That dispute over the terms of an interstate compact aligns with the kinds of disputes that this Court typically resolves on its original docket. But every aspect of Nebraska’s Article VI claim either fails to present a case or controversy within this Court’s Article III jurisdiction or faces another threshold barrier. Although the Court could grant Nebraska leave to file that claim, invite Colorado to file a motion to dismiss, and address the threshold issues at that juncture, the simpler course would be to deny leave to file at this time.

A. This Court routinely denies leave to file a bill of complaint when the proposed complaint does not present a case or controversy under Article III. The Court may deny leave to file when the defendant State has not “inflicted any injury upon the plaintiff State[,],” as required for Article III standing. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam); see, e.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (denying leave to file “for lack of standing under Article III”); *Massachusetts v. Missouri*, 308 U.S. 1, 17 (1939) (denying leave to file because there was no “controversy in the constitutional sense”); *Alabama v. United States*, 373 U.S. 545, 545 (1963) (per curiam) (denying leave to file because the “alleged adverse general effects” of the defendants’ actions “afford[ed] no basis for the granting of any relief”); see also *Texas v. California*, 141 S. Ct. 1469, 1470 n.1 (2021) (Alito, J., dissenting from denial of leave to file complaint) (noting the Court’s history of denying leave to file “for lack of standing and on account of other justiciability defects”). And the Court may deny leave to file when “the possibility of a ripe controversy * * * appears too remote.” *United States v. Nevada*, 412 U.S. 534, 540 (1973) (per curiam). But the Court need not determine conclusively that a claim is not justiciable to decline to exercise its original jurisdiction. “[D]oubt[s]” about “threshold barriers” can suffice. *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (per curiam).

In the complaint, Nebraska frames its Article VI claim as challenging “Colorado’s obstruction of Nebraska’s efforts to construct the canal.” Compl. ¶ 90. But Nebraska does not point to any actual obstruction—such as the refusal to issue a required permit or the erection of physical barriers to construction. Instead,

Nebraska points to statements such as the Colorado Governor’s spokesperson calling the canal a “boondoggle” and the Colorado Attorney General noting that the canal would “raise some significant legal issues.” Compl. ¶¶ 59, 63. Nebraska does not explain how it is injured by such statements, much less how they violate the Compact.

Nebraska does identify some statements contemplating future litigation over the canal. “[T]he threat of suit” can, in certain circumstances, create an actual or imminent injury sufficient for Article III standing. *Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1056 (9th Cir. 2008), cert. denied, 557 U.S. 903 (2009); see *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 98-99 (2013) (rejecting “sweeping” approach to standing, where the defendant “need not even have threatened to sue”). But in none of the cited statements did anyone with decision-making authority threaten to sue Nebraska. Colorado’s State Engineer stated that the State is “ready to defend our water users.” Compl. ¶ 64. And the Attorney General “pledged to defend Colorado landowners if Nebraska moves forward with condemnation.” Compl. ¶ 67. Those purely defensive statements do not identify a “threatened injury” that is “‘imminent’” and “‘certainly impending’” or “‘substantial[ly]’” likely to occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citations omitted).⁴

Nebraska further alleges that Colorado is “preparing to fight a proxy war,” citing statements by local of-

⁴ Nebraska cites one statement from a Colorado state representative threatening to “take you to the Supreme Court and fight this one out.” Compl. ¶ 60. But that legislator lacked the authority to act on behalf of Colorado and was opining only on what would happen “[i]f I had my way.” *Ibid.*

officials and “nonstate actors” that oppose the canal. Compl. ¶ 91. But Nebraska does not plausibly allege that Colorado controls those third parties; Nebraska offers only the “bare assertion” of a conspiracy. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Regardless, the private actors largely repeat some state officials’ pledges to mount a “defense” in land-condemnation actions. Compl. ¶ 71; see Compl. ¶¶ 67, 70. At worst, some local officials have promised to take actions “under the Compact” to protect Colorado users’ water rights and have considered amending local regulations to make construction “very uncomfortable” for Nebraska. Compl. ¶¶ 68-69. To the extent those future actions would injure Nebraska, Nebraska does not plausibly allege that they are imminent or violate the Compact.

Nebraska also accuses Colorado of “racing to develop water supplies * * * in an obvious effort to build future equities in its favor.” Compl. ¶ 90. While Nebraska avers that those actions “violate[] Article VI,” Nebraska appears to recognize that it “is incapable of enforcing its entitlements” under Article VI until the canal is actually built. *Ibid.* The Compact unambiguously grants Colorado “the full and uninterrupted use and benefit” of the South Platte’s waters “except as otherwise provided by Article VI.” Art. IV, ¶ 1. Article VI, in turn, is conditioned on Nebraska’s construction of the canal. Colorado’s present-day efforts to develop the South Platte do not establish a plausible Compact violation, particularly given Colorado’s promise to “curtail” the rights of Colorado users once the canal is built. Br. in Opp. 22 n.14.

B. In its reply brief, Nebraska frames its Article VI claim as one involving “‘purely legal’ issues” over “how to interpret key provisions in the Compact.” Reply Br.

6 (citation omitted); see Compl. ¶¶ 76-82. A dispute over the meaning of a contract can present an Article III case or controversy. See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 133-134 (2007). For example, a party need not “drop the wrecking ball first and test” its contract rights later; it can often file a declaratory-judgment action before starting a construction project. *Id.* at 133. But here, where any construction is years away and contingent on the outcome of a federal permitting process, each issue Nebraska raises is either unripe or subject to other threshold barriers.

Maximum canal flow. The parties dispute the amount of water Nebraska would be entitled to divert via the canal. Article VI grants Nebraska the “net future flows” from the lower section, which Nebraska interprets to mean all water remaining after accounting for senior Colorado users and the additional 35,000 acre-feet that Article VI reserves for Colorado. Compl. ¶ 80. Relying on a “limitation[.]” on the Article VI right, Compact Art. VI, ¶ 2, Colorado insists that Nebraska’s non-irrigation-season right would be strictly capped at 500 cfs. Br. in Opp. 14.

That disagreement is not ripe. Whether Nebraska will ever ask Colorado for more than 500 cfs is “dependent on ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Trump v. New York*, 592 U.S. 125, 131 (2020) (per curiam) (citation omitted). To start, Nebraska must actually build the canal. To do that, it must obtain a permit from the Army Corps under the Clean Water Act, see 33 U.S.C. 1344. When Nebraska sought leave to file its bill of complaint, it had not applied for a permit. It has now done so, but a final decision from the Corps is nearly two years away, at best. See p. 7, *supra*. And “[s]uccess” in

obtaining a permit is “far from guaranteed,” given the agency’s significant discretion. *Sackett v. EPA*, 598 U.S. 651, 661 (2023).

Even if the Army Corps issues the permit without significant amendments and Nebraska funds and builds the canal, there is little certainty that the water available to Nebraska will approach, let alone exceed, 500 cfs. Nebraska’s own estimate of the South Platte’s “[r]easonably [f]oreseeable [f]uture” flows shows mean daily water flows at the state line that will never exceed 300 cfs during non-irrigation season. Section 404 Application 39. While the canal might allow Nebraska to claim water that is currently going to junior Colorado users, “severe drought” has also taken its toll on the South Platte in recent decades. *Id.* at 37. It is therefore speculative whether there will ever be more than 500 cfs available for Nebraska to divert via the canal.

Maximum canal capacity. Relatedly, the States appear to dispute the canal’s maximum capacity under the Compact. Nebraska claims that it may build a canal large enough to handle all “net future flows,” as Nebraska understands that term. Compl. ¶ 77. Consistent with that view, Nebraska’s permit application proposes a canal with an apparent capacity of 1000 cfs. See p. 7 n.2, *supra*. Colorado, by contrast, appears to view the asserted 500-cfs limit on Nebraska’s Article VI right as also capping the canal’s capacity at 500 cfs, see Br. in Opp. 14-15, although Colorado says that it is “open to resuming discussions with Nebraska to better understand its position on this issue,” *id.* at 15 n.7.

That dispute is not ripe for many of the same reasons as the parties’ dispute over the maximum canal flows. Whether there will ever be more than 500 cfs to flow through the canal is uncertain, rendering the debate

about the canal's maximum physical capacity largely academic. And the Army Corps could deny a permit altogether or request changes to the canal's design that might bear on its capacity. That is not to suggest that the Corps will resolve the meaning of the Compact. But the Corps will consider whether there are any "practicable alternative[s]" to Nebraska's proposal that "would have less adverse impact on the aquatic ecosystem." 40 C.F.R. 230.10(a). If such changes alter the canal's design to an extent that would satisfy Colorado, there would be no need for this Court's decision.

To be sure, this Court's articulation of the Compact's requirements might inform the Army Corps' review by narrowing the range of permissible options. But whenever any project requires approval or consideration by multiple authorities, each body's process might narrow the issues before the other or moot the case entirely. Yet someone still has to go first. When faced with such a gastonette, this Court usually seeks to have the last word, not the first. Cf. *Mississippi v. Louisiana*, 506 U.S. at 77 (exploring "the availability of an alternative forum" before exercising original jurisdiction); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to be a court "of first view").

Canal location. The States also disagree about the canal's starting point. Colorado says the canal must intersect the river near Ovid, Colorado, as mentioned in the Compact. Br. in Opp. 14. Nebraska believes that the canal may start anywhere that would be less burdensome for Colorado landowners. Compl. ¶ 77; Reply Br. 6-7. But Nebraska's Section 404 application uses the Ovid location that everyone agrees is proper. Section 404 Application 15. There is no reason for this

Court to opine on the permissibility of unspecified locations that Nebraska is not pursuing.

Forum for eminent-domain proceedings. The parties also disagree about the proper forum (federal or state court) for any eminent-domain proceedings associated with the canal's construction. Compl. ¶¶ 25, 78; Br. in Opp. 17. It is debatable whether that dispute is ripe given that Nebraska has never sought to exercise its eminent-domain power under the Compact and has acquired only a single parcel by purchase. See Compl. ¶ 52. But this Court need not address the forum question as an original matter because the eminent-domain proceedings themselves would provide an alternative forum for resolving that issue. If Nebraska files a condemnation action in federal district court, consistent with its view of the proper forum (see Compl. ¶ 78), the defendant landowner or Colorado as intervenor may challenge the court's jurisdiction and argue that such an action must be brought in Colorado state court. The parties can then litigate that issue through the federal court system, with this Court's review on certiorari, if necessary.

35,000-acre-foot diversion. Under Article VI, Colorado enjoys a superior right to divert and store 35,000 acre-feet of water from the lower section during non-irrigation season for use during irrigation season. Compact Art. VI, ¶ 2(a). Nebraska asserts that Colorado has already violated that limit. Compl. ¶ 81; Reply Br. 7. But the 35,000-acre-foot limit is conditioned on the canal's construction. See Compact Art. VI, ¶ 2(a). Unless and until Nebraska builds the canal, Colorado enjoys the "full and uninterrupted use and benefit" of the lower section during non-irrigation season. Compact Art. IV,

¶ 1. Nebraska therefore does not plausibly allege a violation of the 35,000-acre-foot limit.

Junior calls from the lower section. Nebraska alleges that Colorado is refusing to allow junior Colorado users in the lower section to request water from the upper section—requests that might bring more water downstream that could ultimately benefit Nebraska. Compl. ¶¶ 72, 82; Reply Br. 7. But Nebraska points to no Compact provision that governs how Colorado allocates the South Platte’s waters among Colorado users within Colorado. Nebraska has priority over Colorado users only in the lower section, not the upper section. See Compact Art. IV, ¶ 2, Art. VI, ¶ 2. That scheme creates the obvious risk that Colorado could deny water to its lower-section users, which could, in turn, limit the water available to Nebraska. But Nebraska’s dissatisfaction with the bargain it struck does not support an exercise of this Court’s original jurisdiction.

CONCLUSION

The motion for leave to file a bill of complaint should be granted, limited to Nebraska's claim that Colorado has violated Article IV of the Compact. The motion should be denied in all other respects.

Respectfully submitted.

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