

No. 220161

In the
Supreme Court of the United States

NEBRASKA,

Plaintiff,

v.

COLORADO,

Defendant.

Original Action

**MOTION FOR PARTIAL DISMISSAL OF
NEBRASKA’S BILL OF COMPLAINT**

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**MOTION FOR PARTIAL DISMISSAL OF
NEBRASKA’S BILL OF COMPLAINT**

The State of Colorado, by its Attorney General, Philip J. Weiser, files this Motion for Partial Dismissal of Nebraska’s Bill of Complaint. Nebraska has failed to state a claim that Colorado is in violation of Article VIII of the South Platte River Compact, Pub. L. No. 69-37, 44 Stat. 195 (1926) (signed April 27, 1923) (“Compact”). Colorado therefore respectfully requests that the Court dismiss Nebraska’s Article VIII claim for reasons set out more fully in the accompanying brief.

**BRIEF IN SUPPORT OF MOTION FOR
PARTIAL DISMISSAL OF NEBRASKA’S BILL
OF COMPLAINT**

INTRODUCTION

In this original action, Nebraska sued Colorado alleging violations of the South Platte River Compact. This Motion seeks to dismiss Nebraska’s claim that Colorado’s system for authorizing water uses during the irrigation season is too complex and therefore violates the Compact. Nebraska asserts that Article VIII of the Compact prohibits complex approaches to water administration.

Even assuming Nebraska’s factual allegations about the complexity of Colorado’s system are true, they fail to state a legal claim. Nothing in the text of Article VIII imposes any limitations on how Colorado complies with its obligations under the Compact. Rather, Article VIII is a straightforward provision that confirms Colorado’s authority to administer the Compact without the need for action by the Colorado legislature.

Because Article VIII of the Compact does not impose the legal duty that Nebraska claims Colorado has breached, standard principles of pleading and compact interpretation require dismissal of that claim.

STATEMENT OF THE CASE

I. Procedural history.

Nebraska filed its Motion for Leave to File Bill of Complaint on July 16, 2025. In Nebraska’s Bill of Complaint (“Compl.”), it states three claims. First, Nebraska asserts that Colorado is violating Nebraska’s irrigation season rights by failing to deliver certain

flows to Nebraska (Article IV claim). Second, Nebraska complains that Colorado's system for administering water uses to meet those flows is too complex (Article VIII claim). Nebraska's third claim is that Colorado is frustrating Nebraska's compact right to build a canal, which is a prerequisite for any non-irrigation season rights (Article VI claim).

Colorado filed its Response in Opposition on October 15, 2025, arguing that Nebraska's claims were not ripe or lacked the requisite seriousness and dignity to warrant the Court's original jurisdiction. On May 20, 2026, the Solicitor General filed an amicus brief for the United States, recommending that the Court deny leave to file Nebraska's claims under Article VIII and Article VI of the Compact, but grant leave to file its Article IV claim. In the alternative, the Solicitor General recommended that if the Court granted Nebraska leave to file the Article VIII and Article VI claims, it could invite Colorado to file a motion to dismiss those claims. U.S. Br. On June 29, 2026, the Court granted Nebraska's Motion for Leave to File Bill of Complaint.

Colorado now seeks dismissal of Nebraska's claim under Article VIII of the Compact.¹

II. 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 across eastern Colorado before entering Ne-

¹ Colorado may file dispositive motions on some or all of the remaining claims later in the proceedings.

braska. The South Platte River Compact defines Nebraska's and Colorado's rights and responsibilities with respect to the river.

A. Apportionment of water in Articles IV and VI.

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). In the Lower Section, the Compact grants to Nebraska specified rights to divert water. These rights vary by season.

In the non-irrigation season, Nebraska has a conditional right to water that it can perfect only if it builds a canal referred to in the Compact as the Perkins County Canal. Compact Art. VI. If Nebraska does not build the Perkins County Canal, it has no Compact right to water during the non-irrigation season.

During the irrigation season, defined as April 1 through October 15, Nebraska has a vested right based on the priority system. Under the priority system, water users who have had their rights longer (seniors) can prevent water users with more recently acquired rights (juniors) from taking water when there is not enough in the river to satisfy everyone's rights. *See Montana v. Wyoming*, 563 U.S. 368, 375–77 (2011).

Article IV assigns to Nebraska a priority date of June 14, 1897, for 120 cubic feet per second ("cfs") of

water. Compact Art. IV, § 2. If the flows near the Compact measuring point² fall below 120 cfs, Colorado must curtail junior Colorado water users in the Lower Section to the extent curtailment will increase flows toward 120 cfs and Nebraska can put the water to beneficial use. Compact Art. IV, §§ 2–3.

B. Legal authority to carry out Compact duties in Article VIII.

In addition to the provisions allocating water between the States, the Compact includes a term ensuring that officials of either State have the authority necessary to carry out the Compact’s requirements.

First, to prevent gaps in the States’ ability to carry out their obligations, the Compact directs that when a State designates its official to perform Compact duties, that official’s status is automatically conferred on others who may subsequently carry out those duties. Compact Art. VIII.

Second, the Compact confirms the Colorado official has the authority to “make deliveries of water . . . in compliance with this compact without necessity of enactment of special statutes for such purposes by the General Assembly of the State of Colorado.” Compact Art. VIII. In other words, it ensures that Colorado can honor its irrigation-season obligations as soon as the Compact is approved, rather than needing additional laws from the Colorado legislature.

² The Compact defines flow at the measuring point to include the water added to the river between that point itself and the Western Canal in Nebraska. Compact Art. I, §§ 5–6.

III. Nebraska's claims under the Compact.

Nebraska's Complaint asserts three claims under the Compact. Nebraska's first two claims relate to its irrigation season rights.

First, Nebraska complains that Colorado is improperly allowing Colorado water users who are junior to Nebraska's priority date to divert water when flows fall below 120 cfs. Nebraska claims that Colorado's system for allowing junior users to replace that water, which requires court-approved plans known as augmentation plans, does not adequately protect Nebraska's rights. This is Nebraska's claim under Article IV.

Second, Nebraska claims that Colorado's use of augmentation plans is too "complex," and therefore violates Article VIII. *See* Compl. ¶¶ 30, 42, 89. Colorado seeks to dismiss the Article VIII claim through this Motion.

Nebraska's third claim, which is not relevant to the current Motion, relates to the canal that it must build as a pre-condition to any rights during the non-irrigation season. In that claim, Nebraska alleges that Colorado has been "frustrating" Nebraska's nascent efforts to pursue the canal. Compl. ¶¶ 90–94.

To provide context for Nebraska's Article VIII claim, it is helpful to describe in more detail Nebraska's complaints about Colorado's system of water administration.

Nebraska centers its irrigation season complaints on Colorado's authorization of groundwater pumping.³ See Compl. ¶¶ 33, 40, 41. In short, Nebraska alleges that Colorado allows rights holders junior to Nebraska to remove water from the river through groundwater pumping without adequately replacing it. This, Nebraska asserts, results in a violation of Colorado's Article IV obligation to curtail junior users when flows at the interstate station drop below 120 cfs. And it is Colorado's system of allowing replacement water that Nebraska complains is too complex to comply with Article VIII.

A. Colorado's regulation of 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.

Pumping groundwater from wells can reduce flows in the river. But those flow reductions are not 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 permit groundwater diversions only when impacts on surface water are replaced in the time and

³ Groundwater pumping is a mechanical process allowing for extraction of water from underground. It involves drilling into an aquifer, which is a geological layer containing useable groundwater, and pumping the water to the surface.

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.

B. Colorado’s augmentation plans.

An augmentation plan is a plan to add water to the river. This can be achieved in various ways—including by storing water in ponds that ultimately replenish the river. To determine how much water stored in such ponds will filter through the ground and reach the river, and the timing of that recharge, engineers use algorithms and computer models. The models consider various factors including distance to the river, gradient, and soil porosity.

Colorado has adopted a scientifically sound 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). When reviewing 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 that their augmentation plans avoid injury to other water users, they may divert because the net effect is the same as if there was no out-of-priority diversion. *Id.*; Colo. Rev. Stat. § 37-92-305(5), (8). The Colorado State Engineer administers augmentation plans through mandated metering, gauging, administrative accounting, and by issuing orders. *See* Colo. Rev. Stat. § 37-92-502. These augmentation plans protect both senior water users within Colorado and downstream states with apportionments pursuant to a compact.

C. Nebraska’s concerns about Colorado’s system.

Nebraska nonetheless alleges that Colorado is allowing “junior appropriators to divert South Platte River water out of priority,” in violation of Article IV of the Compact. Compl. ¶ 39. Nebraska does not trust that Colorado’s augmentation plans work, even when those plans are approved by Colorado water courts. Compl. ¶¶ 40, 41. Nebraska further asserts that Colorado’s approach, which entails authorizing augmentation plans only when they have been approved through the rigorous process described above, creates a “complex scheme” that violates Article VIII of the Compact. Compl. ¶ 42.

ARGUMENT

I. Legal standards.

Colorado files this partial motion to dismiss based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. While the Court is not bound by the Federal Rules of Civil Procedure in original actions, they may provide guidance for the Court’s determinations. *See* Sup. Ct. R. 17.2.

Rule (12)(b)(6) authorizes courts to dismiss claims when it is apparent on the face of the complaint that there is no viable legal claim. “This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding.” *Neitzke v. Williams*, 490 U.S. 319, 326–327 (1989). The Court should grant Colorado’s motion if Nebraska’s allegations do not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To state a plausible claim, Nebraska must do more than recite conclusory allegations that mirror its legal claims. *See Twombly*, 550 U.S. at 557. The Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

The Court’s goal in interpreting interstate compacts is to discern the intent of the drafters. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). Compacts are agreements between parties, and the Court therefore looks to contract law principles to guide interpretation. *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013). As in contract law, the compact’s express terms are “the best indication of the intent of the parties.” *Id.*

The claim that is the subject of this Motion is based on an unambiguous Compact provision where the express terms govern. If other interpretive tools are needed, the Court adheres to the principle that interstate compacts are solemn agreements among co-sovereigns. Accordingly, if an interstate compact is silent on a matter, the Court presumes the States intended to retain and protect their sovereignty except to the extent that they expressly agreed otherwise. *Herrmann*, 569 U.S. at 632.

II. Nebraska fails to state a claim for breach of Article VIII.

Nebraska’s claim that Colorado has breached Article VIII because it uses “complex” augmentation plans fails as a matter of law because the Compact

does not prohibit the use of technically detailed or complex water administration.

The text of Article VIII is straightforward. It provides that Colorado officials have the “duty” to carry out obligations under the Compact “without necessity of enactment of special statutes for such purposes by the General Assembly of the State of Colorado.” Compact Art. VIII. Nothing in the text of Article VIII suggests that it guides or constrains *how* Colorado administers water rights, let alone that its system must be simple and lack complexity.

Rather, Article VIII serves an entirely different purpose. At the time of the Compact, the states’ use of their semi-sovereign powers to settle interstate water disputes through compacts was novel. *See* 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 had not yet caught up with this innovation, and therefore it was unclear whether Colorado officials had authority under state law to administer an out-of-state water right. Article VIII filled this gap and confirmed that Colorado could administer the Compact rights granted to Nebraska. The language in Article VIII both recognizes and assures that state officials can take all actions necessary to comply with the Compact (i.e., administer Nebraska’s Compact rights) without additional legislative action. In short, Article VIII confirms state officials charged with duties under the Compact have the legal authority to carry out those obligations.

Nebraska, however, asserts that Article VIII requires Colorado’s system of water administration to be

“self-executing,” (Compl. ¶¶ 30, 42, 89), “simple,” (Compl. ¶ 89), “easily measurable,” and “subject to objective verification,” (Compl. ¶ 30). But these requirements are not found in Article VIII. As the United States explained in its brief urging the Court to reject this claim, “nothing in that text supports Nebraska’s view” of Article VIII, which “does not impose any limitations on how Colorado complies with its obligations [under the Compact].” U.S. Br. at 13–14.

Therefore, even assuming Nebraska’s allegations about the complexity of Colorado’s system of ground-water administration are true, they fail to state a legal claim. As courts have explained, dismissal under Rule 12(b)(6) “can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988) (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984)). Here, Nebraska’s claim fails on the first prong; it has no cognizable legal theory. The legal duty supposedly breached—a duty not to do anything too complicated—simply does not exist. See *Pub. Int. Legal Found., Inc. v. Wolfe*, No. 24-3258, 2026 WL 2425386, at *3 (7th Cir. Aug. 19, 2026) (affirming district court’s dismissal on the grounds that a “claim that lacks the support of a cognizable legal theory cannot proceed”). It is the function of Rule 12(b)(6) to prune this type of claim early in the proceedings to spare the parties “needless discovery and factfinding.” *Neitzke*, 490 U.S. at 326–27.

CONCLUSION

For the foregoing reasons, the Court should dismiss Nebraska's claim that Colorado is in violation of Article VIII of the Compact.

Respectfully submitted,

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