

No. 220161

In the
Supreme Court of the United States

NEBRASKA,

Plaintiff,

v.

COLORADO,

Defendant.

Original Action

**COLORADO'S ANSWER TO NEBRASKA'S BILL
OF COMPLAINT AND COLORADO'S
COUNTERCLAIM COMPLAINT AGAINST
NEBRASKA**

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ANSWER

Colorado's Preliminary Statement:

Like every western state, Nebraska wants more water. Under the South Platte River Compact Nebraska has a right to more water during the non-irrigation season, 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. Colorado has not interfered in Nebraska's nascent efforts to pursue a canal.

Nebraska also seeks more water during the irrigation season. But Nebraska has no right to a fixed amount of water. Instead, it has a priority for some water over some Colorado water users—a place in line to water when and if available. Particularly during this prolonged drought, water is not always available. This is no fault of Colorado, which has an effective and accurate water administration system that protects both senior users within Colorado, and the rights of downstream states like Nebraska.

Indeed, as explained in Colorado's counterclaims, Colorado's system of water administration is more protective of senior water users than is Nebraska's. Nebraska allows out-of-priority well pumping on the South Platte and its tributaries without the careful replacement of water required by Colorado's system.

In short, Colorado is not in breach of any provision of the South Platte River Compact and it not liable to

Nebraska for any of the claims in the Bill of Complaint; if anything, Nebraska owes Colorado for the water that Nebraska has wrongfully taken.

Colorado answers Nebraska's Bill of Complaint, setting forth each of Nebraska's allegations followed by Colorado's response:

1. Water from the South Platte River is one of Nebraska's most valuable resources. To ensure access to this resource in perpetuity, Nebraska entered into an agreement over a century ago with Colorado: The South Platte River Compact. Pub. L. No. 69-37, 44 Stat. 195 (1926) (signed April 27, 1923) (the "Compact"). A copy of the Compact is attached as an Appendix to this Bill of Complaint.

ANSWER: Colorado is without information sufficient to admit or deny the value of South Platte River water to Nebraska, or the motivations for Nebraska to enter into the South Platte River Compact ("Compact"). Colorado further states that the Compact speaks for itself, and no term of the Compact guarantees Nebraska water. Instead, it grants Nebraska a priority over some water users, during some times of the year, to some flows when and if available. Colorado admits that the Appendix to the Bill and Complaint is a true and correct copy of the Compact.

2. Colorado has breached that Compact, and its actions threaten to drastically curtail Nebraska's access to water from the South Platte River. These breaches have harmed Nebraska and pose a significant, ongoing threat to Nebraska, from its agricultural economy to the water security of its major population centers. Indeed, Nebraska's Western Irrigation District, a major beneficiary of rights granted under the

Compact, was recently forced to shut off the majority of its surface water irrigation due to lack of supply from the South Platte River.

ANSWER: Denied.

3. Colorado threatens Nebraska's water supply of South Platte River water in at least two ways. First, Colorado allows unlawful water diversions that have deprived Nebraska of as much as 1.3 million acre-feet of water—more than ten times what D.C. Water pumps for its 700,000 Washington, D.C.-based residents in an entire year. Second, Colorado is blocking Nebraska's efforts to construct a canal contemplated by the Compact—the Perkins County Canal (or the South Divide Canal)—while simultaneously arguing that Nebraska cannot access certain water without completion of the canal.

ANSWER: Denied.

4. To this day, Colorado and Nebraska are at an impasse in Nebraska's attempts to resolve conflicts between the parties about the key terms of the Compact.

ANSWER: Denied.

5. This Court has original and exclusive jurisdiction pursuant to Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1251(a) because the litigants in this controversy are two sovereign states: Plaintiff State of Nebraska and Defendant State of Colorado.

ANSWER: Colorado admits that this Court has original and exclusive jurisdiction to resolve serious disputes between two sovereign states that are ripe for adjudication. As explained in Colorado's Response in Opposition to Nebraska's Motion for Leave to File Bill

of Complaint, Nebraska's claims are not ripe for this Court's consideration. Further, as explained in Colorado's Motion for Partial Dismissal of Nebraska's Bill of Complaint, portions of Nebraska's claims fail to state a claim upon which relief can be granted.

6. This case presents significant issues that only this Court can resolve. Among other things, this case involves an exceptional provision in the Compact that allows one State (Nebraska) to exercise eminent domain in another State (Colorado). Only this Court can competently resolve the parameters of how a State can properly exercise this right when the Compact itself offers no guidance.

ANSWER: Colorado denies the allegations contained in Paragraph 6 except as explained in Colorado's response to Paragraph 5. Colorado also states that Colorado state court is the appropriate venue for eminent domain proceedings.

7. This case also raises questions about the proper forum for such an unusual eminent domain action; enforcement of Nebraska's water rights against Colorado's overuse; and the ability of Nebraska to realize its contractual right to construct the Perkins County Canal without interference from Colorado.

ANSWER: Denied.

8. There is no alternative forum capable of fully resolving the claims Nebraska asserts against Colorado, which are of such seriousness and dignity as to justify the exercise of the Court's jurisdiction.

ANSWER: As explained in Colorado's Response in Opposition to Nebraska's Motion for Leave to File Bill of Complaint, Nebraska's claims are not ripe for

this Court's consideration. Further, as explained in Colorado's Motion for Partial Dismissal of Nebraska's Bill of Complaint, portions of Nebraska's claims fail to state a claim upon which relief can be granted.

9. The South Platte River is a significant interstate river arising in Colorado and flowing over 400 miles easterly into Nebraska before joining the North Platte River to form the Platte River near North Platte, Nebraska.

ANSWER: Colorado admits the South Platte River is an interstate river that arises in Colorado and often flows as described in Paragraph 9. Colorado states that the South Platte River can, at times, have a dry riverbed in some sections but may contain flow further downstream because of water released from storage, intentionally created augmentation supplies, or accretions from the aquifer which may include return flows from irrigation.

10. The South Platte River is a major source of water for Nebraska. Its flows support irrigation of Nebraska's breadbasket, and the Platte River supplies domestic, municipal, and industrial water for Nebraska's major industries and metropolitan areas in central and eastern portions of the State.

ANSWER: Colorado is without information sufficient to admit or deny the allegations contained in Paragraph 10.

11. Both Nebraska and Colorado use the South Platte River. But as early as 1880—before the Compact was negotiated—Colorado overappropriated the River. Demand often exceeded supply, and the River frequently ran dry at the Colorado/Nebraska border.

ANSWER: Colorado admits to the allegations stated in the first sentence of Paragraph 11. Colorado denies the balance of the allegations contained in Paragraph 11, except to state that water development in the Upper Section of the South Platte River typically results in more consistent flows in the Lower Section.

12. Initially, both Nebraska and Colorado followed the “prior appropriation” doctrine to administer the appropriation of surface water within each state. Under this doctrine, water rights are administered based on when a user first applied a particular quantity of water to a beneficial use, such as irrigation. Earlier (“senior”) appropriations are given priority over subsequent (“junior”) appropriations.

ANSWER: Colorado admits that it follows the prior appropriation doctrine and that the final sentence of Paragraph 12 provides a reasonable high-level summary of the relative priorities under that doctrine. Colorado states that Nebraska followed the common law doctrine of riparian rights until 1895. Today, Nebraska recognizes and administers both riparian and appropriative water rights. Colorado is without information sufficient to admit or deny the balance of the allegations in Paragraph 12.

13. During this pre-Compact period, Nebraska attempted to assert the prior appropriation doctrine across state lines. In 1916, Nebraska’s Western Irrigation District sued junior South Platte River water users and water administrators in Colorado, seeking to apply the prior appropriation doctrine across the state line. The District originally sought entitlement to 180 cubic feet per second (“cfs”) of water for its irrigation season demands.

ANSWER: Colorado is without information sufficient to admit or deny the allegation contained in the first sentence of Paragraph 13. Responding to the second and third sentences of Paragraph 13, Colorado states that Western Irrigation District's complaint is the best evidence of its contents. Except as stated, Colorado denies the allegations contained in the second and third sentences of Paragraph 13.

14. That lawsuit was stayed pending this Court's disposition of a similar case, *Wyoming v. Colorado*, 259 U.S. 419 (1922), which addressed whether one state can assert prior appropriation against users in another state. This Court held that States can apply the doctrine across state lines. *Id.* at 470. *See also Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498 (1922). Nebraska's then-Attorney General claimed that he would use this Court's decision to enforce Nebraska's priority rights to South Platte River water against junior right holders throughout Colorado's Front Range region, which draws on water from the South Platte.

ANSWER: Colorado states that documents referenced in the first three sentences are the best evidence of their contents. To the extent an answer is required, Colorado denies the allegations in the first three sentences of Paragraph 14. Colorado is without information sufficient to admit or deny the allegation contained in the final sentence of Paragraph 14.

15. The Court's *Wyoming* decision, and the Western Irrigation District litigation, led Nebraska and Colorado to commence negotiations on a compact that would allocate the waters of the South Platte River. Colorado wanted to continue to use River water for several existing irrigation projects and retain the right

to develop more. Nebraska wanted assurances that Colorado's irrigation projects would not deplete water rightfully due Nebraska and that the material benefits of "return flow" created by Colorado irrigation would accrue to Nebraska downstream. Return flow is comprised of water that is diverted for one or more uses, but is not entirely consumed. This unused portion of the water "returns" to the river and is available for subsequent diversion downstream.

ANSWER: Colorado states that discussions about a compact between Colorado and Nebraska commenced after the initiation of the Western Irrigation District litigation but prior to the issuance of the Court's decision in *Wyoming v. Colorado*. Except as stated, Colorado denies the allegations contained in Paragraph 15.

16. As part of the discussions between the states, Colorado conducted hydrologic investigations that assured Nebraska that, with the support of return flows created by Colorado irrigators, total flows entering Nebraska would provide at least 120 cfs of irrigation season flows and at least 500 cfs of nonirrigation season flows to Nebraska. Colorado further represented that these flows would be more reliable than strict application of the prior appropriation doctrine across state lines, as would be permitted under *Wyoming v. Colorado*. Partially in reliance on these representations, Nebraska agreed to enter into a compact with Colorado.

ANSWER: Denied.

17. Accordingly, in 1923, Nebraska and Colorado agreed to apportion the South Platte River's waters by entering into the Compact. Although the United

States had no federal projects in the Basin and was not a party to the Compact, Congress approved it in 1926—the second interstate river compact to be congressionally approved. *See* U.S. Const. art. I, § 10, cl. 3. Like all interstate river compacts, it is based on the South Platte Basin’s “peculiar” conditions. *See* South Platte River Compact, Article IX.

ANSWER: Colorado admits that Nebraska and Colorado agreed to apportion the South Platte River’s waters by the Compact and that the United States Congress approved it in 1926. Colorado states that the Compact speaks for itself, and otherwise denies the allegations contained in Paragraph 17.

18. One of these peculiar conditions, and a fundamental underpinning of the Compact, was the promise that return flows from expanded irrigation uses in Colorado would produce a permanent, increasing, and reliable water supply for downstream Nebraska water users. According to Colorado’s then-Compact Commissioner: “The increase of flow at the state line will ultimately remove all necessity for regulation.” South Platte River Compact: Report of Delph E. Carpenter, Commissioner for Colorado (Jan. 7, 1925).

ANSWER: Colorado admits that the South Platte River, like many rivers, benefits from return flows. Both agricultural and domestic water uses return a portion of the water to the river, which may then be available for use downstream. Colorado admits that the cited material accurately quotes a small portion of one of Delph Carpenter’s reports. Colorado denies the balance of the allegations contained in Paragraph 18.

19. Accordingly, the parties agreed that Nebraska would be better off using water supported by ever-increasing return flows in the South Platte Basin projected to result from that arrangement. Nebraska generally agreed to the continuation of then-existing Colorado water uses and limited additional development in the Lower Section of the River, in exchange for the guarantee of resulting return flows. As defined in Article I of the Compact, “[t]he term ‘lower section’ means that part of the South Platte River in the State of Colorado between the west boundary of Washington County and the intersection of said river with the boundary line common to the signatory States.”

ANSWER: Colorado states that the Compact speaks for itself and it represents a compromise between two sovereigns after extensive negotiation. Colorado further states that nothing in the Compact guarantees any flows to Nebraska. Instead, it grants Nebraska a priority over some water users, during some times of the year, to some flows when and if available. Colorado denies the balance of the allegations contained in Paragraph 19.

20. In exchange, Nebraska waived its right to claim priority over some junior water users along the South Platte River in Colorado. Its waiver was premised on Colorado complying “with the provisions of [the] compact and the delivery of water in accordance with its terms[.]”

ANSWER: Colorado states that the Compact speaks for itself and it represents a compromise between two sovereigns after extensive negotiation. Colorado further states that nothing in the Compact guarantees any flows to Nebraska. Instead, it grants

Nebraska a priority over some water users, during some times of the year, to some flows when and if available. Colorado denies the balance of the allegations contained in Paragraph 20.

21. The Compact requires Nebraska and Colorado to mutually maintain an “Interstate Station” near Julesburg, Colorado, to “ascertain[] and record[] the amount of water flowing in [the South Platte River] from Colorado into Nebraska[.]” See South Platte River Compact, Articles I & II. Further, the Compact divides each year into an irrigation season and a nonirrigation season. During the irrigation season (April 1 through October 15), if water flows at the Interstate Station fall below 120 cfs, Article IV requires Colorado to prohibit water diversions from the Lower Section for appropriations with priority dates after June 14, 1897.

ANSWER: Colorado states that the Compact speaks for itself.

22. Further, where any flow deficiency “may have been occasioned by neglect, error, or failure” by Colorado, the Compact gives Colorado 72 hours to cure that deficiency to ensure Nebraska is not materially injured by it.

ANSWER: Colorado states that the Compact speaks for itself.

23. While Article IV specifies Colorado’s duty to curtail junior irrigation season uses, Article VI protects the water supply that Nebraska relies on throughout the year. Article VI authorizes Nebraska to construct a canal starting in Colorado to divert and

carry water, primarily in the nonirrigation season (October 15 to April 1), for use in Nebraska. Article VI provides the:

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. ... Any surplus waters of the river, which otherwise would flow past the interstate station during such period of any year after supplying all present and future diversions by Colorado, may be diverted by such a canal[.]

Notably, the Compact does not provide specific design criteria for the diversion or canal.

ANSWER: Colorado states that the Compact speaks for itself. Colorado denies the balance of allegations contained in Paragraph 23.

24. To effectuate the canal's construction, Article VI gives Nebraska the right to acquire lands suitable for the canal system through purchase, prescription, or eminent domain, and such rights of way, easements or lands as may be necessary for the construction, maintenance, and operation of the canal, including within Colorado.

ANSWER: Colorado states that the Compact speaks for itself. Colorado denies the balance of allegations contained in Paragraph 24.

25. As explained further below, Nebraska has attempted to acquire land through arms-length negotiations with various Colorado landowners, but has met little success. The exercise of eminent domain is now required, but the Compact does not specify a forum for eminent domain proceedings. Nebraska asserts that the federal courts, and proceedings under Federal Rule of Civil Procedure 71.1, are the proper forum. On information and belief, Colorado maintains that any such action must be undertaken in its state court system, particularly its Water Courts—which did not exist when the States entered the Compact in 1923, and which Colorado maintains must somehow re-validate Nebraska’s existing Compact right.

ANSWER: On information and belief, Colorado states that, in January 2025, Nebraska sent or delivered letters to some Colorado landowners threatening condemnation but offering price terms for a voluntary sale. On information and belief, Nebraska later withdrew those requests. Colorado denies the balance of the allegations contained in Paragraph 25.

26. To protect the supply for Nebraska’s canal, Article VI effectively caps Colorado’s nonirrigation season uses in the River’s Lower Section to senior uses plus a 35,000 acre-feet storage reservation to Colorado for development in the Lower Section—but only after Nebraska’s rights are fully exercised. Once these Colorado demands are fulfilled, Nebraska is entitled to the remaining “net future flows” as referenced in Article VI.

ANSWER: Colorado states that the Compact speaks for itself. Colorado denies the balance of allegations contained in Paragraph 26.

27. As set forth in Article VI, the Compact negotiators intended that future water supplies in the Lower Section would generally be available to Nebraska at the State line and would not be intercepted before reaching Nebraska users.

ANSWER: Colorado states that the Compact speaks for itself. Colorado denies the balance of allegations contained in Paragraph 27.

28. As stated in the South Platte River Compact: Report of Delph E. Carpenter, Colorado's then-Compact Commissioner, dated January 7, 1925:

The flow of return and seepage waters coming back to the river from irrigation of Colorado lands, has resulted in a constant supply at the interstate line. This flow is increasing and will soon be sufficient to care for the full demands of Nebraska as determined by the compact . . . principally by reason of the fact that most of said waters return to the river below the available points of diversion by Colorado constructors.

ANSWER: Colorado admits that the cited material accurately quotes a portion of a letter Delph Carpenter sent to the Governor of Colorado.

29. Unlike later interstate compacts, the Compact did not create a Compact Commission or other adjudicative body that can address questions arising between the parties and resolve intractable disputes. As such, there is no interstate forum to which Nebraska's concerns may be presented or through which they may be resolved. This Court is Nebraska's only available forum in which to obtain timely and meaningful relief.

ANSWER: Colorado admits that the South Platte Compact does not establish a Compact Commission. Colorado admits that this Court has original and exclusive jurisdiction to resolve serious disputes between two sovereign states that are ripe for adjudication. As explained in Colorado’s Response in Opposition to Nebraska’s Motion for Leave to File Bill of Complaint, Nebraska’s claims are not ripe for this Court’s consideration. Further, as explained in Colorado’s Motion for Partial Dismissal of Nebraska’s Bill of Complaint, portions of Nebraska’s claims fail to state a claim upon which relief can be granted.

30. Finally, Article VIII of the Compact requires that Article IV’s water administration scheme be self-executing and not require additional legislation by Colorado to implement. This system was designed to be easily measurable and subject to objective verification. Nebraska is not obligated to accept a bare representation that Colorado has complied with its obligations or be forced to weed through layers of technocratic explanations of how compliance is being achieved. Instead, Article VIII provides “it shall be the duty of the officials of the State of Colorado ... 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.”

ANSWER: Denied.

31. Almost immediately after signing the Compact, Colorado began authorizing water uses never contemplated by the compacting parties.

ANSWER: Denied.

32. For example, during the Compact negotiations and for about a decade afterward, both States gave direct irrigation uses priority over water storage rights, even senior ones. That changed when Colorado's law was altered to allow for irrigation season diversions for storage. *People ex rel. Park Reservoir Co. v. Hinderlider*, 57 P.2d 894, 895 (Colo. 1936). This change effectively removed water from the River otherwise available to Nebraska during the irrigation season.

ANSWER: Colorado states that in *Park Reservoir*, the Colorado Supreme Court found that water administration officials had misapplied Colorado law. The court's *Park Reservoir* opinion did not alter Colorado law. Colorado denies the balance of the allegations in Paragraph 32.

33. More profoundly, Colorado has authorized thousands of surface water and surface-water-depleting, hydrologically connected groundwater diversions in the South Platte River Basin within Colorado, including the rapid expansion of the use of high-capacity groundwater irrigation wells. Due to these new diversions, flows at the Interstate Station frequently fall below 120 cfs during the irrigation season. Despite Article IV's requirement that Colorado prohibit such uses, Colorado users continued to divert water upstream, including in the Lower Section.

ANSWER: Denied.

34. Before 1969, groundwater uses in Colorado did not follow the prior appropriation doctrine, meaning that newer, junior groundwater users could use as much water as they desired without considering their impact on older, senior surface water rights. This

caused conflict between senior surface water users and junior groundwater users whose use was drawing water from the River. Colorado decided that curtailing all junior groundwater users in Colorado would render inaccessible vast amounts of groundwater and limit economic development in Colorado.

ANSWER: Colorado states that it has developed a scientifically sound system to ensure that impacts to streams caused by groundwater diversions are adequately replaced so that the net impact is that there is no decrease in the water available to senior water users. Colorado denies the balance of the allegations contained in Paragraph 34.

35. To address the impact of groundwater uses on River flows, and to facilitate maximum utilization of water supplies in Colorado—including on the South Platte River upstream of the State line—Colorado enacted extensive legislative reforms in 1969 that incorporated groundwater uses into its intrastate water administration scheme. This legislation made it “the policy of [Colorado] to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all the waters of [Colorado].” Colo. Rev. Stat. § 37-92-102.

ANSWER: Colorado states that it has developed a scientifically sound system to ensure that impacts to streams caused by groundwater diversions are adequately replaced so that the net impact is that there is no decrease in the water available to senior water users. This benefits both senior water users within Colorado and states like Nebraska who have

apportionments pursuant to a compact. Colorado denies the balance of the allegations contained in Paragraph 35.

36. Among other things, these legislative reforms authorized “augmentation plans”—“detailed, court-approved plans that allow a water user to divert water ‘out of priority’ ... as long as adequate replacement water is put into the affected stream system in order to increase the supply of water available for beneficial use.” Lain Strawn, *The Last GASP: The Conflict Over Management of Replacement Water in the South Platte River Basin*, 75 U. Colo. L. Rev. 597, 599 n.14 (2004). They are designed to increase the supply of water available for use—in Colorado.

ANSWER: Colorado states that it has developed a scientifically sound system to ensure that impacts to streams caused by groundwater diversions are adequately replaced so that the net impact is that there is no decrease in the water available to senior water users and downstream states with apportionments pursuant to a compact. Colorado denies the balance of the allegations contained in Paragraph 36.

37. But Colorado water administrators were not content to wait for the State courts. Seizing on the policy to maximize use, they embraced legally and physically dubious theories for water administration and authorized junior appropriators to “offset” hydrologic impacts and theoretically make whole senior appropriators who could otherwise call for the juniors to be shut off. These offsets relied on various types of replacement water supplies, were approved administratively (rather than judicially), and relied entirely on

unverified assumptions about the timing of when replacement water would actually arrive at the senior user's point of diversion.

ANSWER: Denied.

38. The Colorado Supreme Court subsequently found many of these offset mechanisms (so-called substitute water supply plans) unlawful. *See Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001). The court held that Colorado administrators lacked the authority to approve such mechanisms. Such approval could only come from Colorado's Water Courts in the form of formal augmentation plans.

ANSWER: Colorado admits that the Colorado Supreme Court held that "[a] person desiring to divert out of priority through the device of an augmentation plan must file an application with the water court for approval." *Empire Lodge*, 39 P.3d at 1153. Colorado denies the balance of the allegations contained in paragraph 38.

39. Whether approval comes from a state administrator or through the state judiciary, for Nebraska, the end result is the same: Colorado continues to allow junior appropriators to divert South Platte River water out of priority. Today, junior Colorado users can take water before senior Colorado users through judicially approved augmentation plans that take various forms.

ANSWER: Colorado states that it has developed a scientifically sound system to ensure that impacts to streams caused by groundwater diversions are adequately replaced so that the net impact is that there is no decrease in the water available to senior water us-

ers and downstream states with apportionments pursuant to a compact. Colorado denies the balance of the allegations contained in Paragraph 39.

40. Colorado's water administration system, including its augmentation plans, have harmed and will continue to harm Nebraska. For example, many augmentation projects in Colorado Water District 64 within the Lower Section allow junior well owners to pump water out of priority during the irrigation season, provided they pump or divert additional water during the nonirrigation season and apply it to recharge ponds. A recharge pond is a man-made waterbody designed to allow water to infiltrate into the ground, replenishing the aquifer below. This method assumes that water will percolate back into the water table and make its way to the South Platte River in time to make whole downstream senior users.

ANSWER: Colorado denies that its use of augmentation plans is harming Nebraska's Compact rights. The plans replace water in sufficient amounts and at the proper time so that the net impact is that there is no decrease in the water available to senior water users. Colorado admits that recharge ponds are designed to allow water to infiltrate into the aquifer and thereby augment flows of the river. Colorado denies the balance of the allegations contained in Paragraph 40.

41. But this assumption is just that—an assumption, with no real-time reporting or on-the-ground physical verification to back it up. Yet these projects in the South Platte Basin are regularly approved by Water Courts, even though they do not comply with basic Compact requirements, such as Article IV's

measurement point (the Interstate Station) or the requirement that any shortage of Nebraska's irrigation-season right be made up by delivery of additional flow at the Interstate Station within 72 hours. Ultimately, the State Engineer, as the chief state water official designated under the Compact, must ensure Nebraska gets its water and that Colorado's critical interstate delivery obligations are fulfilled. What is very clear is that the State Engineer cannot ensure that augmentation water reaches the Interstate Station on the precise day on which it is supposed to.

ANSWER: Denied.

42. These augmentation plans not only divert water rightfully due to Nebraska under the Compact, but they have also created such a complex scheme that water administration is no longer self-executing, as Article VIII of the Compact requires.

ANSWER: Denied.

43. Even the Colorado Supreme Court has found that the byzantine nature of Colorado's water administration system precludes the Compact from being self-executing. *Simpson v. Bijou Irrigation Dist.*, 69 P.3d 50, 55 (Colo. 2003) ("We find that as a result of changed conditions that have occurred since the compact was created, the South Platte River Compact is deficient in establishing standards for administration within Colorado.").

ANSWER: Denied.

44. Not only has Colorado breached Articles IV and VIII of the Compact, but it has also breached Article VI. As reviewed above, Article VI ensures Nebraska additional water during the nonirrigation

season and provides Nebraska the right to build a canal to capture this water. But, for decades, Colorado's efforts to maximize its water uses (including through augmentation efforts invalidated by its own Supreme Court), have relied largely on diversions during the nonirrigation season.

ANSWER: Denied.

45. In addition, over the last decade, Colorado has made clear that it will develop multiple projects that will consume the very water Colorado previously promised to make available for the Perkins County Canal. In 2016, for example, Colorado's Legislature adopted H.B. 12-1256, 70th Gen. Assemb., 2nd Reg. Sess. (Colo. 2016), *South Platte Water Storage Study*, directing Colorado agencies to determine the amount of flow leaving Colorado in "excess" of Nebraska's Article IV entitlement. The Legislature did so under the presumption that, since Nebraska had not built a canal pursuant to Article VI, all water in excess of Nebraska's 120 cfs entitlement under Article IV would be available for capture and use in Colorado. The bill's accompanying fiscal note explained plainly: "Excess water to Nebraska estimate. [Colorado Water Conservation Board] staff will use existing data to estimate the volume of water delivered to Nebraska in excess of the amounts required under the South Platte River compact for each of the previous 20 years." The Colorado Water Conservation Board was created in the late 1930s and provides policy direction to Colorado officials and others regarding water issues ranging from water supply planning and water project Financing to protection of Colorado's interstate Compact rights.

ANSWER: Colorado states that in Colorado, as in Nebraska, the legislature has passed legislation encouraging the beneficial use of all waters available to the state. Colorado states that the General Assembly passed H.B. 16-1256, 70th Gen. Assemb., 2nd Reg. Sess. (Colo. 2016); that H.B. 16-1256 is the best evidence of its contents; that H.B. 16-1256 authorized a study; that a study dated June 18, 2018, was published under this authorization; that said study is the best evidence of its contents. Colorado denies the balance of the allegations contained in Paragraph 45.

46. In 2017, as a result of H.B. 12-1256, Colorado published the South Platte Storage Study (“the Study”). The Study concluded that about 400,000 acre-feet/year of “excess flows” are leaving Colorado—roughly 90% of the average flow at the state line. In 2022, the Colorado Legislature introduced a bill (S.B. 22-126, 73rd Gen. Assemb., 2nd Reg. Sess. (Colo. 2016)) to prioritize projects that will increase the beneficial consumptive use of Colorado’s undeveloped compact-entitled waters, with a specific priority for projects that increase or improve water storage in the South Platte River Basin. The Colorado Senate unanimously passed the bill, indicating an accelerating effort to utilize that block of “excess flows” to support municipal growth along Colorado’s Front Range region.

ANSWER: Responding to the first and second sentences of paragraph 46, Colorado states that the General Assembly passed H.B. 16-1256; that H.B. 16-1256 authorized a study; that a study dated June 18, 2018, was published under this authorization; that said study is the best evidence of its contents. Except

as stated, Colorado denies the allegations in the first and second sentences of paragraph 46. Except for the 2016 date, Colorado admits the allegations contained in the third sentence of paragraph 46. Responding to the fourth sentence of paragraph 46, Colorado states that an amended version of S.B. 22-126 passed unanimously out of the full Senate but died before a House committee. Except as stated, Colorado denies the allegations contained in the fourth sentence of Paragraph 46.

47. In addition to the Legislature, other Colorado entities are taking action to capture this water, too. Three entities—the Lower South Platte Water Conservancy District, the Parker Water and Sanitation District, and Castle Rock Water—are collaborating on the Platte Valley Water Partnership. This scheme aims to capture nonirrigation season and peak irrigation season flows, in part by pumping tens of thousands of acre-feet each year from a diversion just upstream of the Lower Section boundary back upstream for storage in the Reuter-Hess Reservoir in Douglas County, Colorado, for use by Front Range communities. Proponents claim this project will capture “excess” water that would otherwise leave Colorado and flow into Nebraska, which Colorado erroneously views as wasted.

ANSWER: Colorado states that pending water rights applications filed by the Lower South Platte Water Conservancy District, the Parker Water and Sanitation District, and Castle Rock Water are the best evidence of their contents. Except as stated, Colorado denies the allegations in Paragraph 47.

48. Nebraska and its citizens have long sought to build the canal contemplated in Article VI. Farmers initially began digging the canal in earnest in 1894 but could not complete the project after running short of funds. Additional efforts have been undertaken over the past 100 years but have run into issues with underfunding and the extraordinary scale of the project. It became increasingly clear that a material public investment would be required to complete the project.

ANSWER: Colorado admits that Nebraska considered building the canal in 1894; in the 1920s, concurrent with the drafting and signing of the Compact; and in the 1980s, when the Bureau of Reclamation issued a feasibility study. On information and belief, Nebraska has historically made little progress on the canal. On information and belief, among the reasons for the lack of progress are the significant expense, questions about the limited utility of the canal given water availability and the conditions imposed upon Nebraska's right by the Compact, and the failure of applicants to comply with Nebraska environmental laws.

49. Colorado's actions in the early 2000s instilled Nebraska with a renewed sense of urgency. In 2002, after the Colorado Supreme Court decided *Empire Lodge*, augmentation activities increased, taking more and more of the nonirrigation season supplies that form the basis of Nebraska's Article VI canal right. This, in turn, facilitated more and more irrigation season diversions by junior irrigators who were purportedly offsetting their irrigation season impacts by diverting and augmenting in the nonirrigation season.

This vicious cycle—which is still happening today—results in less and less water making its way to Nebraska year-round.

ANSWER: Denied.

50. Partly in response to Colorado’s open and notorious plan to consume all the remaining water in the South Platte River Basin, in January 2022 Nebraska’s governor announced plans to build the Perkins County Canal, as contemplated in Article VI of the Compact, to secure Nebraska’s Article VI rights. That summer, Nebraska sent Colorado a general outline of its plans and initiated a dialogue designed to identify concerns Colorado might have in an effort to minimize conflicts. Nebraska even provided Colorado with background and summary information concerning the canal.

ANSWER: Colorado lacks information sufficient to admit or deny Nebraska’s motivations for revisiting the canal. Colorado admits that Nebraska engaged with Colorado to discuss Nebraska’s plans for a canal, at a high level. Colorado denies the balance of the allegations contained in Paragraph 50.

51. The States’ legal and technical representatives communicated no fewer than ten times between October 2022 and June 2025 to identify relevant issues and areas of potential agreement or concern.

ANSWER: Admitted.

52. In the fall of 2022, Nebraska sent letters to Colorado landowners in the vicinity of the potential canal route, inviting them to a public meeting to learn about Nebraska’s goals and objectives. Nebraska officials explained at that meeting that Nebraska was interested in acquiring options to purchase lands along

the canal route. Numerous attendees participated, and some expressed interest in optioning Nebraska the right to acquire an interest in their lands. Ultimately, only one purchase materialized from these discussions.

ANSWER: Colorado lacks information sufficient to admit or deny the allegations contained in Paragraph 52.

53. In November 2022, Colorado’s State Engineer acknowledged before the Colorado Water Conservation Board, “We continue to have dialogue with the Nebraska officials and they are being constructive about trying to tell us what they are doing and giving us more detail.” And in October 2023, Nebraska provided Colorado with a water availability analysis attempting to garner a common understanding of the probable water supply for the canal. Nebraska never received any response to that analysis.

ANSWER: Colorado admits that Colorado’s State Engineer made the quoted statement. Colorado admits that, in October 2023, Nebraska provided Colorado with a summary of various water availability assumptions as part of a confidential discussion. Colorado denies the final sentence of Paragraph 53.

54. Nebraska also submitted a written request to Colorado, asking that Colorado recognize and administer Nebraska’s Article VI right, in the hopes it might be honored without the burden and expense of constructing a canal partially through and over Colorado lands. But Colorado refused, explaining that “[b]ecause Nebraska has not constructed the Perkins County Canal, there is no basis for Colorado to administer junior water appropriations[.]” Colorado made

clear it will not recognize any Nebraska right to water under Article VI unless the canal is built.

ANSWER: Colorado admits that Nebraska asked Colorado to grant it a right to water in the non-irrigation season without having to build a canal and that Colorado declined.

55. In 2022, the Nebraska Legislature created the Perkins County Canal Project Fund and appropriated initial funding in the amount of \$53.5 million to contract with an independent firm to study and begin designing the canal. See LB 1012 (2022); Neb. Rev. Stat. § 61-305. In December 2022, the study was released, finding that the canal would provide significant benefits to Nebraska’s water users that would exceed the project costs, but that such benefits would only accrue under the Compact if the canal were built. The study also provided a preliminary water supply analysis and potential infrastructure sizing and location information.

ANSWER: Colorado admits that Nebraska conducted a study of the canal. Colorado denies that the study provided accurate or reliable findings.

56. Nebraska’s right to build the canal is absolute and is in no way dependent on Colorado’s present views about the canal or Colorado’s future water supply needs.

ANSWER: The Compact defines Nebraska’s right to build a canal, including limits on the canal’s use. Colorado has acknowledged the canal right subject to the limitations in the Compact and has not interfered with Nebraska’s efforts.

57. In 2023, the Nebraska Legislature approved additional funding—\$574.5 million—for the canal’s construction. See LB 818 & 531 (2023); Neb. Rev. Stat. § 61-305. Nebraska has retained legal, technical, and engineering experts, and canal design and permitting is well underway. To date, Nebraska has acquired a limited amount of Colorado land through voluntary purchase, has reached a 30% design status on the canal, is nearing 60% status, and continues to address related legal, regulatory, and permitting issues.

ANSWER: Colorado lacks information sufficient to admit or deny the allegations contained in Paragraph 57.

58. Despite Nebraska’s best efforts to secure co-operation, Colorado has stonewalled and opposed Nebraska at every step.

ANSWER: Denied.

59. In official statements, a spokesperson for the Colorado Governor initially dismissed Nebraska’s plan to expend hundreds of millions of dollars on the canal, declaring it a “boondoggle” and a “political stunt” that would never proceed. During a Colorado Senate Agriculture and Natural Resources Committee hearing, the then-Assistant Director of Water Policy at Colorado’s Department of Natural Resources accused Nebraska of attempting to “weaponize” Colorado’s water planning documents by simply citing them as justifications for the extraordinary downstream investment.

ANSWER: Colorado admits that Colorado state employees used the four words quoted in Paragraph

59 as part of a longer set of comments about the proposed canal. Colorado denies the balance of the allegations contained in Paragraph 59.

60. One State Representative made Colorado's position clear: "It's all Colorado's water. If I had my way ... I would go and say, you know what downriver states, we no longer want to even honor the interstate compacts that we wrote in the 1800s. ... So we'll take you to the Supreme Court and fight this one out."

ANSWER: Colorado lacks information sufficient to admit or deny the allegations contained in Paragraph 60. Colorado further states that statements by one of Colorado's State Representatives do not represent the state of Colorado's position.

61. Despite this rhetoric, by April 2022, Colorado officials, while cautious, appeared prepared to live by the Compact's terms. As the former State Engineer explained: "We're not going to obstruct Nebraska from taking water they're legally entitled to." He added, "It's not my objective to try and stop [the canal]." Colorado water users in the Lower Section, such as the North Sterling Irrigation District, which encompasses over 40,000 acres, and the Lower South Platte Water Conservancy District, which facilitates and supports water supply development projects or programs dependent on the South Platte River (e.g., the Julesburg Recharge Project, South Platte Water Related Activities Program, District 64 Reservoir Company, Northeast Colorado Water Cooperative, Platte Valley Water Partnership, and South Platte Regional Opportunities Water Group), begrudgingly have acknowledged that Nebraska is entitled to build the canal, even if they think it imprudent.

ANSWER: Colorado admits that its State Engineer has acknowledged a Compact right to build a canal. Colorado lacks information sufficient to admit or deny the allegations with respect to the North Sterling Irrigation District. Colorado denies the balance of the allegations contained in Paragraph 61.

62. Moreover, throughout the States' discussions, Colorado officials regularly and publicly conceded that Nebraska had the right to proceed with the canal. For example, in May 2023, the former State Engineer explained before the Colorado Groundwater Commission, "So we are of course being watchful, all the while recognizing that there is a Compact provision that allows construction of [the canal], and of course, if it's done according to the Compact, then that can move ahead—that's the key."

ANSWER: Colorado admits that the quoted language from Colorado's former State Engineer is accurate.

63. As plans for the canal began to crystallize, Colorado's tenor changed from tacit acceptance to opposition. Colorado's Attorney General told the Colorado Water Conservation Board in January 2024:

Nebraska is heating up. As Dan noted we have our eyes on this challenging and also novel situation. We don't believe there's ever been a case in American history where one state has sought to exercise the power of eminent domain in another state. That is going to raise some significant legal issues. We are preparing for them. We're prepared to engage on the ground to let people know what rights they have.

ANSWER: Colorado admits that the Attorney General said the language quoted in Paragraph 63 as part of a set of longer remarks about the proposed canal. Colorado denies the characterization of those remarks.

64. Then, on January 27, 2025, Colorado's new State Engineer told the Colorado Water Conservation Board:

So there's a lot of uncertainty on what a condemnation process might look like in another state ... it could be long and costly ... we are ready to defend our water users in Colorado and I think that's one message I want to make sure people understand is that we are engaged, that we are ready to defend our water users.

ANSWER: Admitted.

65. That was followed on January 28, 2025, by a letter from the Colorado Attorney General to the Sedgwick County Commissioners, stating:

Nebraska's pursuit of the Perkins Canal Project is a matter that the Colorado Department of Law/Attorney General's Office is closely engaged with—and opposed to. I have visited multiple times with the Nebraska attorney general to reinforce Colorado's legal position. And I conveyed that not only will this project provide little to no benefit to Nebraska—but also that if Nebraska continues down this path, the State of Colorado is prepared to defend its rights under the South Platte River Compact. My commitment to defending these rights includes going to court if necessary—

an outcome that is near certain if Nebraska follows through on its threat to use condemnation proceedings to compel the sale of land owned by Coloradans.

ANSWER: Admitted.

66. Colorado's Attorney General made the same points on social media:

We are in a new chapter with our brewing dispute with Nebraska over its plans to build a canal in Colorado. I had hoped it would never come to this, but as it happens, we're no longer in the hypothetical, 'what might they do, I hope they don't do this' world. We've moved into 'they're really doing this' and we are ready to respond in court.

ANSWER: Admitted.

67. And as recently as June 16, 2025, Colorado's Attorney General explained during a campaign event in Fort Morgan, Colorado, that his office has pledged to defend Colorado landowners if Nebraska moves forward with condemnation, and that a legal disagreement exists over whether condemnation proceedings would fall under state or federal jurisdiction. According to him, that issue "may get litigated up to the U.S. Supreme Court before any construction would ever start."

ANSWER: Colorado lacks information sufficient to admit or deny the accuracy of the quote contained in Paragraph 67. Colorado admits that it will hold Nebraska to its rights under the Compact.

68. Colorado has also deployed many proxy actors to oppose the canal's construction. For example,

in July 2024, John Altenhofen, the South Platte Project Manager for Northern Water, told a crowd at the Upper South Platte Watershed Association: “Nebraska, you’ve woken up a giant here. You put in the Perkins, in the winter we’re going to dry it up at the state line because we can under the Compact and we’ll be trying to recover some of the recharge they’re shutting down.”

ANSWER: Colorado lacks information sufficient to admit or deny the accuracy of the quote contained in Paragraph 68. Colorado denies Nebraska’s allegation that Colorado has deployed private parties to be “proxy” actors for the state. Colorado denies the balance of the allegations contained in paragraph 68.

69. Similarly, on March 18, 2025, Sedgwick County Commissioner Ron Berges explained the county would be working to update local regulations so they could be used to stall and obstruct the canal’s construction. He explained: “We [Sedgwick County] plan to use [a local attorney’s] office’s expertise in the 1041s so we can really substantially strengthen and bolster our 1041 regulations to make this a very uncomfortable thing for Nebraska.” The “1041 regulations” refer to Colorado state statutes that purport to allow local governments to identify, designate, and regulate activities of statewide interest through a local permitting process and exert control over particular development projects, even where the development project has statewide impacts.

ANSWER: Colorado lacks information sufficient to admit or deny the accuracy of the quote contained in Paragraph 69. Colorado denies Nebraska’s allegation that private parties are “proxy” actors for the

state. Colorado denies the balance of the allegations contained in Paragraph 69.

70. Also in March 2025, Jon Altenhofen of Northern Water explained:

I mean, our goal really down here is to stop the Perkins and stay irrigating ag in Northeast Colorado. ... We're here to save Northeast Colorado by first stopping the Perkins, which they have so many roadblocks. I'm not a lawyer but the first lawsuit might be condemnation. The second lawsuit may be over a [Clean Water Act permit] ... We go to court whether it's condemnation, whether it'd be over the [permit], I'm ready for a fight over a Compact lawsuit.

ANSWER: Colorado lacks information sufficient to admit or deny the accuracy of the quote contained in Paragraph 70. Colorado denies Nebraska's allegation that private parties are "proxy" actors for the state.

71. Additionally, private actors have formed a group called the South Platte Water Alliance. According to the General Manager of the Lower South Platte Water Conservation District: "This is really a conglomeration of District 64 water users and landowners coming together to kind of form an organization to help, you know, in that [condemnation] fight, in that defense I guess if you will[.]" The Lower South Platte Water Conservation District itself has paid dues to be a member of the Alliance.

ANSWER: Colorado lacks information sufficient to admit or deny the accuracy of the quote contained

in Paragraph 71. Colorado denies Nebraska’s allegation that private parties are “proxy” actors for the state.

72. Finally, in addition to the proxy actors and private actors, Colorado’s own state agency tasked with administering water rights in Colorado, the Division of Water Resources, has been utilizing administrative practices on the South Platte River unforeseen by the compacting parties, effectively punishing Nebraska for exercising its Compact rights. Namely, the agency is preventing users in the Lower Section from calling out users in the Upper Section unless the Lower Section calling right is senior to the pertinent Compact administrative date, i.e. December 17, 1921, for nonirrigation season and June 14, 1897, for irrigation season. This has the effect of depriving Nebraska of water it is entitled to under the Compact.

ANSWER: Denied.

73. Recognizing that Colorado was digging in for a fight—and with canal designs reaching a critical point—Nebraska nevertheless persisted. Because the diversion works and first section of the canal are to be constructed entirely within Sedgwick County in Colorado, on January 17, 2025, Nebraska sent letters to six local landowners in that county, notifying them that Nebraska anticipates placing the canal’s diversion structure on their land. Nebraska offered to pay them 115% of fair market value if they entered voluntary agreements to sell their land. Nebraska also informed the landowners that it intended to exercise its power of eminent domain under the Compact, but only if the parties failed to reach amicable terms.

ANSWER: Other than as explained in Colorado's response to Paragraph 25, Colorado lacks information sufficient to admit or deny the balance of the allegations contained in Paragraph 73.

74. To this day, Colorado has refused to provide any written, substantive feedback to any data or analyses Nebraska has provided in response to Colorado's requests for information concerning the canal and the assumptions upon which Nebraska has relied to determine its future water supply. Colorado has verbally insisted that the canal commence at a point southwesterly of Ovid, Colorado, and be designed in accordance with antiquated construction standards to ensure leakage.

ANSWER: Denied. Colorado has stated that any canal Nebraska builds must be consistent with the requirements of the Compact.

75. It appears Colorado is gearing up for a protracted legal battle to be fought directly and by proxy through its water users and constituents, even though they all are bound by the Compact and all conflicting state laws are subordinate to it. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

ANSWER: Denied.

76. At this point, the States are at an impasse with regard to the canal, unable to resolve differences concerning the canal's design and its operation, as well as the water supplies available to be diverted into the canal under Article VI. Among other things, the States appear to disagree on.

ANSWER: As explained in Colorado's Response in Opposition to Nebraska's Motion for Leave to File Bill of Complaint, Nebraska's claims are not ripe for this Court's consideration. Further, as explained in Colorado's Motion for Partial Dismissal of Nebraska's Bill of Complaint, portions of Nebraska's claims fail to state a claim upon which relief can be granted.

77. *The size and location of the canal.* Nebraska asserts the canal necessarily may be sized to carry surplus waters and net future flows in accordance with the Compact, and this means it may exceed 500 cfs capacity. Nebraska further asserts there is no record evidence that the Compact's reference to the canal's commencement point was meant to preclude other locations that would be less burdensome on Colorado landowners, provided the canal could still function as intended.

ANSWER: Colorado admits that Nebraska has made assertions about the scope of the water right granted by the Compact, but denies the implication that these assertions are consistent with the Compact. Colorado denies Nebraska's allegation about the location of the canal's commencement point, and further states Nebraska has not been consistent about its own assertion. For example, it has asked the Army Corps of Engineers to permit a canal that begins southwest of Ovid, the location referenced in the Compact. Colorado denies the balance of the allegations contained in Paragraph 77.

78. *The proper venue for eminent domain proceedings.* Nebraska asserts that the federal courts, and proceedings under Federal Rule of Civil Procedure 71.1, are the proper forum.

ANSWER: Colorado admits that Nebraska states that it believes federal court is the proper venue for eminent domain actions related to the canal. As described in Colorado's Response in Opposition to Nebraska's Motion for Leave to File Bill of Complaint, Colorado asserts that Colorado state court is the appropriate venue for eminent domain proceedings.

79. *The timing and scale of diversions allowed.* Nebraska asserts that it may divert any and all surplus water and available net future flow, and therefore there is no upper limit on the amount of water that may be physically diverted.

ANSWER: Colorado admits that Nebraska states that it believes it can divert water in excess of the limitations outlined in the Compact. With respect to the balance of the allegations contained in Paragraph 79, Colorado states that the Compact speaks for itself.

80. *The proper definition and division of "net future flows" between the States.* Nebraska asserts that once the canal is built, Nebraska is entitled to demand all water flowing in the Lower Section, except that needed to meet Colorado uses predating December 17, 1921, and Colorado's reserved 35,000 acre-foot storage right.

ANSWER: Colorado admits that Nebraska states that it believes that it can divert water in excess of the limitations outlined in the Compact. With respect to the balance of the allegations contained in Paragraph 80, Colorado states that the Compact speaks for itself.

81. *The extent to which Colorado has exceeded 35,000 acre-feet of additional storage for use in the Lower Section.* Nebraska asserts Colorado has already

exceeded and continues to divert additional storage in violation of this limited reservation.

ANSWER: Denied.

82. *The proper administration of water uses within Colorado for Nebraska's Compact entitlements.* Nebraska asserts that Colorado must honor senior calls from Colorado users in the Lower Section against those juniors in the Upper Section, including whenever Nebraska makes a valid call on the River. This maintains return flows, ensures water continues to enter the River's Lower Section so Nebraska can access its nonirrigation season water via the Perkins County Canal and maximizes flows at the Interstate Station during the irrigation season.

ANSWER: Colorado states that the Compact speaks for itself. Colorado denies the balance of the allegations contained in Paragraph 83.

83. On information and belief, Colorado disagrees with all of Nebraska's assertions on these issues.

ANSWER: Colorado lacks information sufficient to understand the contours of Nebraska's purported beliefs about its Compact rights, but admits that Colorado disagrees with many of Nebraska's assertions because they appear to be incorrect.

84. Colorado allows diversions that should be curtailed when flows at the Interstate Station fall below 120 cfs. In the past ten years alone, flows have fallen below 120 cfs at the Interstate Station during the irrigation season hundreds of times. Colorado has nevertheless allowed junior water users to divert water destined for Nebraska. That violates Article IV of the Compact.

ANSWER: Denied.

85. As a result of these actions, Nebraska has been deprived of up to 1,300,000 acre-feet of water owed it during the irrigation season, with the exact amount to be proved at trial. Irrigation season flows in the South Platte River will continue to decline, and Nebraska will continue to be deprived of the full benefits of the Compact, unless Colorado is stopped.

ANSWER: Denied.

86. As a result of Colorado's actions, Nebraska farmers have been unable to regularly provide South Platte surface water to their lands and have suffered lower crop production and even crop failures. In 2022, for the first time in almost 50 years, the Western Irrigation District was forced to completely shut down surface water irrigation operations for the majority of its service area due to a lack of water supply. The Western Irrigation District and other Nebraska water users have been forced to pivot to alternative supplies, when and where available, including finite supplies of groundwater, as well as surface water stored in projects on the North Platte River and the mainstem Platte River.

ANSWER: Denied.

87. When South Platte River water is taken from Nebraska, it makes compliance with Nebraska's water management objectives more difficult. These objectives, embodied in State law, generally require water uses in the South Platte River Basin and portions of the mainstem Platte River Basin to be maintained at 1997 levels through regulated allowances of surface water and groundwater uses. *See, e.g., Neb. Rev. Stat. §§ 46-713–720; In the Matter of the Platte River Basin*

upstream of the Kearney Canal Diversion, the North Platte River Basin, and the South Platte River Basin, Order Designating Overappropriated River Basins, Subbasins, Or Reaches, And Describing Hydrologically Connected Geographic Area (Sept. 15, 2004). Thus, it is not possible simply to move all uses to a groundwater supply as surface water supplies diminish.

ANSWER: The allegations contained in paragraph 87 are legal conclusions to which no response is required. To the extent an answer is required, Colorado denies the allegations contained in Paragraph 87.

88. Nebraska has formally and repeatedly expressed its concerns to Colorado and has made numerous attempts to obtain an explanation concerning Colorado's water administration protocols and why Colorado believes these protocols comply with the Compact. Those requests have been outright ignored or met with bare compliance assertions. Colorado's unlawful practices persist and will continue to harm Nebraska unless and until abated by this Court.

ANSWER: Denied.

89. Article VIII was meant to be self-executing. Colorado, however, has allowed so many diversions of water outside the Compact's simple scheme that even the Colorado Supreme Court found Compact compliance is no longer self-executing. The Colorado system of water administration violates Article VIII's express command.

ANSWER: Denied.

90. Colorado insists that Nebraska has no right to nonirrigation season water unless it builds the Perkins County Canal, yet Colorado is frustrating and interfering with Nebraska's efforts to build that canal. Colorado's obstruction of Nebraska's efforts to construct the canal is preventing Nebraska from accessing water to which it would be entitled if the canal were in place today. Without the canal, Nebraska is incapable of enforcing its entitlements against junior Colorado water users—the very entitlements Nebraska entered the Compact to protect. Meanwhile, Colorado is racing to develop water supplies that would be available to divert into the canal in an obvious effort to build future equities in its favor—at the expense of Nebraska's water security. That violates Article VI of the Compact.

ANSWER: Colorado admits that Nebraska has no right to non-irrigation season water unless it builds a canal that complies with Article VI of the Compact. Colorado denies the balance of the allegations contained in Paragraph 90.

91. Colorado has also mobilized a network of political subdivisions and nonstate actors to identify and create additional barriers to the canal's construction. Not only is Colorado actively opposing the canal, but it is preparing to fight a proxy war through a myriad of water users and related interest groups.

ANSWER: Denied.

92. In sum, Colorado is violating multiple provisions of the Compact, and Colorado's actions are causing substantial and irreparable injury to Nebraska. Absent protection from this Court, Nebraska's farmers

will continue to be deprived of irrigation water. Nebraska's cities and industries that rely on water from the Platte River system will have less water available for use. Fish and wildlife, including federally protected species, will have less water available, which is essential to their continued survival. Moreover, all existing water supplies will be subjected to greater uncertainty, as Nebraska cannot ensure the continuation of nonirrigation season flows across the state line unless and until the canal is timely completed.

ANSWER: Denied.

93. Nebraska has no adequate remedy for Colorado's past, present, continuing, and future violations of the Compact except by invoking this Court's original jurisdiction.

ANSWER: Denied.

94. Nebraska files this suit only after exhausting good-faith efforts to resolve its disputes with Colorado, with those efforts playing out over a period of nearly three full years.

ANSWER: Denied.

ANSWER TO NEBRASKA'S PRAYER FOR RELIEF: Colorado denies that Nebraska is entitled to any relief.

Colorado denies all allegations not expressly admitted.

AFFIRMATIVE DEFENSES

Colorado's affirmative defenses to Nebraska's Bill of Complaint include the following. Colorado reserves the right to add defenses, or to amend or withdraw any of these defenses:

I. Failure to state a claim upon which relief can be granted:

As explained in Colorado's Motion for Partial Dismissal of Nebraska's Bill of Complaint, a portion of Nebraska's claims fail to state a claim upon which relief can be granted.

II. Waiver, collateral estoppel, consent, equitable estoppel, and assumption of risk; reliance upon Nebraska's prior consent and actions:

Each of these six affirmative defenses precludes Nebraska's assertions that well pumping is impermissible, that well pumping cannot be offset by replacement plans such as Colorado's augmentation plans, and/or that Colorado's replacement plans are either not permitted by the Compact or are insufficient.

Nebraska itself allows well pumping on the South Platte. Nebraska itself makes use of a type of replacement plan on the South Platte for a portion of well pumping. Further, Nebraska has endorsed and relied upon Colorado's use of South Platte well pumping and replacement plans in other forums, such as in the Platte River Recovery Implementation Program ("Program"), to which Colorado, Nebraska, Wyoming, and the United States Department of the Interior are signatories.

As just one example, the Program documents acknowledge the assumption that “court approved augmentation plans will not result in increased consumptive use in Colorado.” Indeed, through the Program, Nebraska relies upon the efficacy of Colorado’s well pumping and replacement plans for Endangered Species Act compliance for Nebraska water projects in both the North Platte and South Platte basins. Further, as explained more fully below regarding Nebraska’s failure to exhaust, Nebraska waived its right to bring any concerns about the efficacy of Colorado’s augmentation plans to this Court without first attempting to resolve them through the Program.

III. Failure to exhaust other remedies and/or failure of conditions precedent – irrigation season claims:

In the Platte River Recovery Implementation Program, Nebraska agreed to bring any conflicts regarding Program-approved activities to the Program prior to filing a lawsuit, including before initiating interstate compact litigation:

[I]f a signatory has concerns that a Program-approved activity is being implemented or operated in violation of an interstate water compact or decree with another signatory, attempts will be made within the context of the Program to resolve such concerns before any compact or decree enforcement action relating to that concern is taken before the United States Supreme Court or other appropriate judicial body.

Platte River Recovery Implementation Program, *Co-operative Agreement* (2006) at Art. II § I.

Program-approved activities in Colorado include the same well pumping and replacement plans Nebraska complains of in its Bill of Complaint. Nebraska has accepted and never questioned Colorado's use of well pumping and replacement plans in the Program. Indeed, as recently as June 12, 2024, May 6, 2025, and May 5, 2026, Nebraska did not object to Colorado's presentations to the Program Governance Committee or Water Action Committee on its depletions plan, which relies extensively on well pumping and replacement plans.

IV. Failure of condition precedent – non-irrigation season claims:

Nebraska's rights to any water during the non-irrigation season arise only after it builds the Perkins County canal outlined in the Compact. To the extent Nebraska claims that Colorado has breached the Compact through development that Nebraska (incorrectly) speculates will later impede Colorado's ability to honor Nebraska's non-irrigation season rights, those claims are precluded because those rights have not yet vested. Nebraska has not, and might not ever, build the canal required as a condition precedent to any non-irrigation season rights under the Compact.

V. Setoff, unclean hands, failure to mitigate, contributory negligence, and frustration of performance:

Any damage award to Nebraska must be reduced or eliminated because of Nebraska's liability to Colorado under the Compact, and/or because of Nebraska's own actions contributing to the damages Nebraska claims. These actions are also an affirmative defense

to liability to Nebraska's claims regarding irrigation-season flows.

For example, Nebraska has been violating its obligation to preserve the last two miles of Lodgepole Creek within Nebraska for Colorado's use, as required by Article III of the Compact. Nebraska has also engaged in well pumping that reduces South Platte flows within Colorado. These and other actions cause damage to Colorado, both in the form of reduced flows and in the form of requiring additional curtailment of Colorado water users.

Similarly, Nebraska has engaged in well pumping that reduces flows in the stretch of the river within Nebraska before the diversion works of the Western Canal. These actions also contribute to any reduced flows to Nebraska at the Western Canal.

VI. Laches:

Nebraska's claims are barred by Nebraska's unreasonable delay, lack of diligence, and the prejudice resulting from that unreasonable delay or lack of diligence. Nebraska has known and accepted for over 100 years that in most years there are extended periods of less than 120 cfs at the diversion works of the Western Canal during the irrigation season. Nebraska understood that (1) Colorado's obligation under the Compact is only to curtail users junior to Nebraska, and only if that curtailment would increase the flows towards or to 120 cfs, and (2) that hydrology often causes flows to decrease below 120 cfs even as Colorado appropriately administers the Compact. After over 100 years of this shared understanding, Nebraska is precluded from claiming damages simply because the flow sometimes decreases below 120 cfs. Nebraska's own use of well

pumping and replacement plans, and its actions and consent in the context of the Platte River Recovery Implementation Program (“Program”) discussed in greater detail in II and III above, are also relevant to the doctrine of Laches.

This is particularly true for years and decades in the past. Because Nebraska unreasonably delayed asserting its claims, and because Colorado will be harmed for its reliance on Nebraska’s delay, Nebraska’s claims are barred, in whole or in part, by the doctrine of laches.

COUNTERCLAIMS

For its counterclaims against the State of Nebraska, the State of Colorado alleges as follows:

Introduction

1. Nebraska and Colorado are parties to the South Platte River Compact, which outlines the relative rights and responsibilities of the two states with respect to the South Platte River and to Lodgepole Creek, a tributary to the South Platte River.

2. Nebraska has violated the Compact through improperly depleting the flow of the portions of Lodgepole Creek reserved for Colorado.

3. Nebraska has also violated the Compact through its depletion of portions of the South Platte River within Colorado. These depletions are contrary to the Compact's apportionment of water.

Parties, Jurisdiction, and Venue

4. Counterclaim Plaintiff, the State of Colorado is a sovereign state in the United States of America. Colorado is represented by Philip J. Weiser, the Attorney General of Colorado. The Attorney General acts as the chief legal representative of the state and is authorized by Colo Rev. Stat. § 24-31-101 to pursue this action.

5. Counterclaim Defendant is the State of Nebraska, a sovereign state in the United States of America.

6. This Court has original jurisdiction over this matter pursuant to Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1251(a).

Factual Allegations

7. 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.

8. The South Platte River Compact defines the States' rights and responsibilities with respect to the river and to Lodgepole Creek, a tributary to the South Platte River.

A. Lodgepole Creek.

9. With respect to Lodgepole Creek, the Compact divides the tributary two miles north of the Colorado–Nebraska state line. Compact Art. III, § 1.

10. While Nebraska has the right to use the portion of the tributary above that dividing point, the Compact provides to Colorado the “exclusive use and benefit” of the portion of the tributary at and below that division. Compact Art. III, § 2. In other words, Colorado has the exclusive right to use and benefit from the water in the two miles of Lodgepole Creek within Nebraska.

11. Contrary to that exclusive reservation, Nebraska has been diverting water hydrologically connected to the two-mile stretch of the tributary apportioned to Colorado.

12. There are at least 30 wells categorized as active irrigation wells adjacent to Lodgepole Creek within two miles of the state line. Nebraska considers the source of water for these wells to be “hydrologically connected surface and ground water.” These wells irrigate thousands of acres of crops north of Colorado's

border, depleting the flow of Lodgepole Creek in the stretch reserved for Colorado's use.

13. It does not appear that Nebraska is adequately replacing the water removed by these wells. From Nebraska's publicly available documents, it appears that Nebraska allocates irrigation-well users an amount of water, but, for most wells, imposes no requirement to provide any replacement water to the stream to offset depletions caused by well pumping.

14. This results in damage to Colorado in the form of less water available for beneficial use in Colorado.

15. During the irrigation season, this also causes damage to Colorado insofar as the decrease in stream-flow tributary to the South Platte caused by Nebraska's well pumping results in greater curtailment of Colorado water users to comply with Article IV of the Compact, as discussed below.

B. Water in the Lower Section within Colorado, flows at the Western Canal, and curtailment.

16. Nebraska's well pumping in other areas near the South Platte River is in excess of the waters apportioned to it by the Compact and causes damage to Colorado through depleting flows in portions of the South Platte River within Colorado.

17. During the non-irrigation season, unless and until Nebraska builds the Perkins County canal, Colorado has "the full and uninterrupted use and benefit of the waters of the river flowing within the boundaries of the State." Compact Art. IV, § 1.

18. During the irrigation season, defined as April 1 through October 15, Nebraska does have some rights

with respect to the Lower Section of the South Platte River within Colorado.

19. Specifically, during the irrigation season, Nebraska has a June 14, 1897, priority date in the Lower Section of the river in Colorado for 120 cubic feet per second (“cfs”). Art. IV, § 2.

20. This 120 cfs includes the measurement at the Interstate Station (a gauge near the border of Colorado and Nebraska near Julesburg, Colorado), plus all incremental flows entering the river between the Interstate Station and the head of the Western Canal in Nebraska (together, “Flows”). Compact Art. I, §§ 5 & 6.

21. When the Flows fall below 120 cfs, Colorado must curtail Colorado water users in the Lower Section with priority dates junior to June 14, 1897, to the extent that curtailment will improve Flows towards or to 120 cfs, and to the extent Nebraska can put the water to beneficial use. Compact Art. IV, §§ 2 & 3.

22. For example, in 2021, Colorado curtailed Colorado water users junior to Nebraska on 88 days during the Irrigation Season because of Colorado’s obligation under Article IV of the Compact.

23. Subject to Nebraska’s enumerated rights, during the irrigation season Colorado is entitled to the “full and uninterrupted use and benefit of the waters of the river which hereafter may flow within the boundaries of [Colorado].” Compact Art. IV, § 7.

24. But well pumping in Nebraska appears to be reducing the water in the river within Colorado.

25. There are wells in Nebraska that are close enough to Colorado that they pump water hydrologically connected to the portion of the South Platte that flows through Colorado. For example, there are at least 19 active irrigation wells in Nebraska, just north of Julesburg Colorado and less than three miles from the South Platte River within Colorado. These wells irrigate thousands of acres of crops north of Colorado's border, depleting the flow of the South Platte River in Colorado.

26. It does not appear that Nebraska is adequately replacing the water removed by these wells. From Nebraska's publicly available documents, it appears that Nebraska allocates irrigation-well users an amount of water, but, for most wells, imposes no requirement to provide any replacement water to the stream to offset depletions caused by well pumping.

27. This results in damage to Colorado in the form of less water available for beneficial use in Colorado.

28. During the irrigation season, this also causes damage to Colorado insofar as the decrease in South Platte streamflow due to Nebraska well pumping results in greater curtailment of Colorado water users to comply with Article IV of the Compact.

First Claim for Relief: Lodgepole Creek

29. Colorado incorporates by reference the foregoing paragraphs of this Counterclaim Complaint as if set forth herein.

30. The Compact reserves for Colorado the exclusive right to use and benefit from the portion of Lodgepole Creek in the two miles within Nebraska north of the Nebraska–Colorado border.

31. Nebraska and its water users are depleting the portion of the tributary reserved for Colorado.

32. This is a breach of the Compact and is causing Colorado damages, including in the form of decreased streamflow in and from the tributary.

Second Claim for Relief: Impacts on South Platte Water Within Colorado

33. Colorado incorporates by reference the foregoing paragraphs of this Counterclaim Complaint as if set forth herein.

34. As described above, Nebraska water users are pumping water near the South Platte River such that it is causing a decrease in South Platte streamflow in Colorado.

35. This is in violation of the Compact, which reserves to Colorado the full use of the river within Colorado, except for as required in the irrigation season to administer Nebraska’s 120 cfs June 14, 1897, priority in the Lower Section.

36. This breach of the Compact is causing Colorado damages. Among other impacts, pumping causes less water to flow in the South Platte River in Colorado and, during the irrigation season, this pumping results in Colorado curtailing Colorado water users to a greater extent than Colorado would need to curtail them absent Nebraska’s well pumping.

Prayer for Relief

WHEREFORE, Colorado prays that this Court:

- i. Award Colorado damages caused by Nebraska's actions.
- ii. As appropriate, award Colorado, as specific performance, the water Nebraska has withheld from Colorado through Nebraska's actions.
- iii. Declare that Nebraska may not engage in surface diversions or well pumping that impacts waters flowing at or below the point of division of Lodgepole Creek.
- iv. Declare that Nebraska may not engage in surface diversions or well pumping that impacts the South Platte or its tributaries within Colorado.
- v. Declare that Nebraska may not engage in surface diversions or well pumping that diminish irrigation season flows either at the Interstate Station, or the diversion works of the Western Irrigation District Canal in Nebraska, below a mean flow of 120 cfs.
- vi. Enjoin Nebraska, its agencies, and its water users from engaging in any surface diversions or well pumping that impacts the streamflow in the last two miles of Lodgepole Creek, and/or any portion of the South Platte within Colorado and/or in the reach of the river between Colorado and the diversion works of the Western Canal in Nebraska.
- vii. Award Colorado pre- and post-judgement interest and its reasonable fees, costs, and expenses.
- viii. Grant other such relief as this Court deems appropriate, just, and proper.

Respectfully submitted,

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