No. 161 Original

In the Supreme Court of the United States

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

NEBRASKA'S RESPONSE IN OPPOSITION TO COLORADO'S MOTION FOR PARTIAL DISMISSAL OF NEBRASKA'S BILL OF COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

LEGAL STANDARD 2

ARGUMENT 3

I. Nebraska's Claim Is Well Pleaded. 3

II. Colorado Attempts to Minimize the Gravity of Nebraska's Claim by Mischaracterizing the Duty Imposed by Article VIII. 4

III. Nebraska's Claims Under Articles IV and VIII Should Not Be Separated. 7

IV. Colorado's Supreme Court Has Concluded Colorado Cannot Comply With Article IV Without Its "Special Statutes." 8

V. Colorado's Interpretation of Article VIII Makes No Sense. 14

VI. Dismissal is Inappropriate at This Stage. 16

a. Colorado's Own Motion Demonstrates Dismissal Is Inappropriate. 16

b. If Facts Outside the Pleadings Are Considered, the Motion Must Be Converted to a Motion for Summary Judgment. 18

VII. Alternatively, Nebraska Should Be Granted Leave to Amend. 21

CONCLUSION..... 21

TABLE OF AUTHORITIES

Page

Cases

Alabama v. *North Carolina*,
560 U.S. 330 (2010) 2

Ashcroft v. *Iqbal*,
556 U.S. 662 (2009) 2, 3

Bell Atl. Corp. v. *Twombly*,
550 U.S. 544 (2007) 3, 4, 18, 19

Berk v. *Choy*,
607 U.S. 187 (2026) 19

Emigrant Residential LLC v. *Pinti*,
37 F.4th 717 (1st Cir. 2022) 20

Foman v. *Davis*,
371 U.S. 178 (1962) 21

Hernández v. *Blanche*,
181 F.4th 149 (1st Cir. 2026) 20

Jenkins v. *McKeithen*,
395 U.S. 411 (1969) 2-3

Kansas v. *Nebraska*,
530 U.S. 1272 (2000) 4

Medellín v. *Texas*,
552 U.S. 491 (2008) 13

Montana v. *Wyoming*,
562 U.S. 958 (2010) 4

Nalco Co. v. *Chem-Mod, LLC*,
883 F.3d 1337 (Fed. Cir. 2018) 19

Reid v. *New Hampshire*,
56 F.3d 332 (1st Cir. 1995) 20

Republic of Marshall Islands v. *United States*,
865 F.3d 1187 (9th Cir. 2017) 13

Simpson v. *Bijou Irrigation Co.*,
69 P.3d 50 (Colo. 2003) 1, 9, 10, 14

Tarrant Reg'l Water Dist. v. *Herrmann*,
569 U.S. 614 (2013) 3, 17

Texas v. *New Mexico*,
583 U.S. 913 (2017) 4

Wayne Land & Min. Grp. LLC v.
Del. River Basin Comm'n,
894 F.3d 509 (3d Cir. 2018) 3

Statutes and Other Authorities

Colo. Rev. Stat. § 37-61-101 (2025) 15

Pub. L. No. 69-37, 44 Stat. 195 (1926) 5

South Platte River Compact

Article III 15

Article IV 1-3, 6-11, 13, 14

Article VI 14

Article VIII 1-5, 7-9, 11, 13-18, 20

Fed. R. Civ. P. 8(e) 3

Fed. R. Civ. P. 12(b)(6) 2, 19

Fed. R. Civ. P. 12(c) 19

Fed. R. Civ. P. 12(d) 19

Fed. R. Civ. P. 15(a) 21

Fed. R. Civ. P. 56 19

Fed. R. Civ. P. 56(d) 19, 20

Sup. Ct. R. 17.2 2

Delphus Emory Carpenter & the Colorado River Compact of 1922, 1 U. Denv. Water L. Rev. 228 (1998) 17

Opening Br. of the State Engineer, *Simpson* v. *Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003) (No. 02SA377) 10-12

Reply Br. of GASP, *Simpson* v. *Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003) (No. 02SA377) 12

Reply Br. of the State Engineer, *Simpson* v. *Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003) (No. 02SA377) 12

INTRODUCTION

Colorado asks this Court to dismiss one of three claims the Court permitted Nebraska to file just four months ago. Article VIII of the South Platte River Compact requires Colorado to comply with its Article IV Compact obligations without need for additional state legislative actions. Whether Colorado can do so is largely a question of fact, not a pure legal question as Colorado presupposes. Accordingly, the dispute should not be resolved on Colorado's motion.

As the Colorado Supreme Court held, the proliferation of groundwater wells in Colorado has disrupted the South Platte River's hydrology so profoundly that Colorado cannot comply with Article IV without additional state laws and regulations. See *Simpson* v. *Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003). The facts adduced at trial will show that in attempting to comply with Article IV—while still accommodating groundwater pumping never contemplated in 1923—Colorado has contorted its water administration to such a degree that the Compact is no longer self-executing as demanded by Article VIII.

Indeed, Colorado's Compact compliance efforts are so opaque that Nebraska cannot simply place a priority Compact call and ensure it receives the benefit of priority administration required by Article IV. Because such a call now triggers a host of internal machinations known only to Colorado, Nebraska cannot verify Colorado's compliance in real time. This

unilateral reformation of Article VIII's self-executing mandate is directly linked to Nebraska's Article IV claim. Both arise from Colorado's reliance on augmentation plans and require scrutiny of whether Colorado's water administration system delivers water to Nebraska as required by the Compact in a manner that can be verified without resorting to litigation. Dismissing the Article VIII claim would preclude a complete presentation of Nebraska's case.

In any event, Colorado's motion depends on a contested legal interpretation of Article VIII supported by a one-sided presentation of historical and administrative facts that extend well beyond the allegations contained in the pleadings. The Court should deny the motion and allow the parties to develop the record before a special master. Alternatively, the motion should be treated as one for summary judgment and Nebraska should be allowed to develop and present its counterevidence. Should the Court truly find Nebraska's claim wanting, Nebraska should be granted leave to amend and cure.

LEGAL STANDARD

Although the Federal Rules of Civil Procedure do not strictly govern an original action, they may serve as useful guides. Sup. Ct. R. 17.2; *Alabama* v. *North Carolina*, 560 U.S. 330, 344 (2010). Under the principles applicable to a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court assumes the well-pleaded factual allegations in a complaint are true and construes the complaint in the plaintiff's favor. *Ashcroft* v. *Iqbal,* 556 U.S. 662, 679 (2009); *Jenkins* v.

McKeithen, 395 U.S. 411, 421 (1969). A complaint need not contain detailed factual allegations but merely sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft*, 556 U.S. at 678.

A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft*, 556 U.S. at 678. Moreover, under Fed. R. Civ. P. 8(e), pleadings must be construed so as to do justice.

A congressionally approved interstate compact is federal law and is interpreted under principles of contract law. *Wayne Land & Min. Grp. LLC* v. *Del. River Basin Comm'n*, 894 F.3d 509, 527 (3d Cir. 2018). The analysis begins with the Compact's express terms because those terms provide the best indication of the parties' intent. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013). Where the text is ambiguous, consideration of other interpretive tools may be necessary, making a merits determination at the pleading stage premature. *Id.* at 630–31.

ARGUMENT

I. Nebraska's Claim Is Well Pleaded.

Nebraska's Bill of Complaint ("Compl.") alleges Article VIII imposes a substantive "duty" upon Colorado and its officials to comply with Article IV without the "necessity" of resorting to extra-Compact measures. Compl. ¶ 30. *Contra* Mot. to Dismiss at 2

("Nothing in the text of Article VIII imposes any limitations on how Colorado complies with its obligations under the Compact."). Nebraska further alleges that the duty owed it has been breached by Colorado's actions—specifically, ignoring Article VIII's self-executing mandate by resorting exclusively to state laws for compliance—and that Nebraska has been harmed as a result. Compl. ¶¶ 42, 84–89. These allegations are well pleaded. When accepted as true, as they must be at this preliminary stage, they state a claim to relief that is plausible on its face. See *Bell Atl. Corp.,* 550 U.S. at 570. See also *Texas* v. *New Mexico*, 583 U.S. 913 (2017) (motion to dismiss denied); *Montana* v. *Wyoming*, 562 U.S. 958 (2010) (same); *Kansas* v. *Nebraska*, 530 U.S. 1272 (2000) (same). Nothing more is required.

II. Colorado Attempts to Minimize the Gravity of Nebraska's Claim by Mischaracterizing the Duty Imposed by Article VIII.

Colorado contends that Nebraska's claim amounts to a complaint about "complexity," stating that "[t]he legal duty supposedly breached—a duty not to do anything too complicated—simply does not exist." Mot. to Dismiss at 2, 3, 6, 9, 10, 12. To support its argument, Colorado artistically cites Article VIII, saying it simply "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.'" Mot. to Dismiss at 5.

Article VIII reads in its entirety:

> Whenever any official of either State is designated herein to perform any duty under this contract, such designation shall be interpreted to include the state official or officials upon whom the duties now performed by such official may hereafter devolve, and *it shall be the duty* of the officials of the State of Colorado charged with the duty of the distribution of the waters of the South Platte River for irrigation purposes *to make deliveries of water at the interstate station in compliance with this compact without necessity of enactment of special statutes* for such purposes by the General Assembly of the State of Colorado.

Pub. L. No. 69-37, 44 Stat. 195 (1926) (emphasis added). The provision imposes an express "duty" on Colorado to be able to comply without "special statutes." The language does not confer discretionary authority.[1]

[1] The Solicitor General made the same error in suggesting the Court should not even entertain Nebraska's Article VIII claim. U.S. Br. at 14 ("Article VIII is a grant of authority to Colorado officials; it does not impose any limitations on how Colorado complies with its obligations to deliver flows at the interstate station."). The express imposition of a "duty" is the literal opposite of a grant of authority that may, or may not, be exercised.

Colorado certainly could implement complementary legislation to facilitate water administration in the South Platte basin. But, Nebraska's point—as affirmed by the Colorado Supreme Court—is that Colorado today *cannot* comply with Article IV without its "special statutes" and Colorado is wholly reliant on them. Colorado can no longer meet its obligations under Article IV without such extra-Compact measures, and they fail to implement the Compact's basic priority scheme. What Colorado claims is a legal interpretation is actually dependent on underlying facts: Does Colorado meet its Compact duties, or has its decision to insulate groundwater users from Article IV's full force precluded Colorado from doing so?

Indeed, Article IV prohibits Colorado from allowing junior users to deplete the South Platte River "to an extent that will diminish the flow of the river at the interstate station on any day below a mean flow of one hundred and twenty cubic feet of water per second of time…" Article I makes clear: "The term 'flow of the river' at the interstate station means the *measured flow of the river at said station*[.]" See Compl. at 2a (emphasis added). Colorado's laws and policies ignore this time and location mandate. Rather, they focus on offsetting out-of-priority depletions to the River where they might occur and how they affect specific Colorado parties before the Colorado water court, without reference to the Interstate Station and without relation to the 72-hour window set forth in Article IV.

Colorado's violation of its duty to comply without resort to extra-Compact measures injures Nebraska. Colorado's labyrinthine efforts to protect its groundwater users and maximize its overall consumption render it impossible for Nebraska to verify Colorado's compliance with Article IV in real time at the Interstate Station. As a result, Nebraska has been forced into this litigation to vindicate its rights. Strict application of the *duty* established in Article VIII is needed to restore the form and function of the Compact and to protect Nebraska from abuse.

III. Nebraska's Claims Under Articles IV and VIII Should Not Be Separated.

Nebraska's Article IV and Article VIII claims both challenge Colorado's water administration on the South Platte River as violating the Compact. The United States, in its amicus brief, expressly acknowledged this overlap, noting that "Nebraska's Article IV and VIII claims challenge Colorado's use of 'augmentation plans.'" U.S. Br. at 5. Indeed, the Solicitor General's own description of the factual record necessary to resolve the Article IV claim tracks the very concerns that animate the Article VIII claim when he stated that the Article IV "factual dispute is best addressed in the first instance by a special master." U.S. Br. at 13. The same is true of Article VIII.

Suggesting Nebraska's Article VIII claim can be dismissed at this juncture without any development of its Article IV claim fundamentally misconstrues how

the two Articles interrelate. As written, Article VIII ensures Nebraska can verify compliance with Article IV without having to decipher Colorado's rules and regulations or rely on assurances from its upstream administrator that they are being applied in a way that respects Article IV's priority scheme. If a special master finds Colorado's augmentation system is couched in state legislation, regulations, and water court decrees that rely on assumptions without adequate physical verification, or worse, pure horse trading between Colorado parties[2], that finding will bear directly on whether Article VIII's self-executing mandate is still being observed. As explained next, Colorado's motion inexplicably and entirely ignores the findings of its own highest court concerning this very issue.

IV. Colorado's Supreme Court Has Concluded Colorado Cannot Comply With Article IV Without Its "Special Statutes."

The Colorado Supreme Court has expressly acknowledged that changed conditions and extensive groundwater development on the South Platte River

[2] In most augmentation plan cases in Water Districts 1 and 64 in Colorado, key issues involving the depleting effects of various activities, as well as the efficacy of mitigation efforts to offset those impacts, are derived via settlement between and among the litigants, not exclusively by the State Engineer or other non-partisan technical advisors. So long as the only injured parties from these negotiations are Nebraskans, the negotiated resolution can be completely untethered from science and reality. For this reason, Nebraska maintains these plans are not scientifically sound in all respects but often reflect the stamina and funding priorities of the litigants, among other things.

have rendered it impossible for Colorado to comply with the Compact through simple priority administration as contemplated in Article VIII. As the Colorado Supreme Court held in *Simpson*,

> [I]t is an extremely complex matter to determine when and to what extent curtailment or augmentation must occur to ensure adequate delivery at the state line. Neither the impact of groundwater depletions nor the resultant lag effects, however, were a concern when Article IV of the compact was written. Consideration of these factors convinces us that compliance with the terms of the South Platte River Compact requires additional intrastate water administration beyond the simple priority administration provided for in Article IV of the compact.
>
> 69 P.3d at 70.

In that case, the court assessed the validity of the Colorado State Engineer's proposed South Platte basin rules, which gave the State Engineer authorities with which to regulate out-of-priority groundwater depletions in an attempt to comply with the Compact and avoid injury to senior water users. In determining whether the State Engineer exceeded his authority by promulgating these rules, the court carefully analyzed Article VIII. It held that "compliance with the terms of the South Platte River Compact requires additional intrastate water administration beyond the simple

priority administration provided for in Article IV of the compact." *Id*. The court rejected the trial court's conclusion that the Compact is self-executing and instead held that "due to increased well pumping and the advent of maximum utilization of the waters of the state, simple priority administration as provided for in the compact is insufficient to ensure compact compliance." *Id*. at 72.

In fact, the State Engineer himself took the position that he could not administer water rights inside Colorado for purposes of Compact compliance without resorting to new rules and regulations because groundwater pumping was adversely affecting the South Platte system in a manner not contemplated by the Compact. The Compact's simple priority administration no longer sufficed. Instead, Colorado's compliance came to depend on an extra-Compact body of state law, including statutes that authorize administration, State Engineer regulations that implement such administration, and water court decrees approving augmentation plans. As Colorado's motion itself demonstrates, that multilayered administrative system continues to govern Colorado's compliance today. See Mot. to Dismiss at 8.

In the State Engineer's brief submitted in *Simpson* in support of his inability to administer in compliance with the Compact, he took the position that "written rules are desirable to give both Nebraska and affected well users more certainty about how wells will be administered for Compact purposes." Opening Br. of the State Engineer at 5, *Simpson*, 69 P.3d 50 (Colo.

2003) (No. 02SA377). In furtherance of his defense of the need for regulations to implement the Compact, the State Engineer argued,

> The trial court dismissed the importance of compact administration, stating that "[t]he South Platte Compact requirement is administered as an 1897 priority and thus, no regulations other than those set forth in the statutes are necessary to administer the waters of the basin…The trial court's decision is in error for several reasons. First, to assume that compact rules are not "necessary" is not the same as determining that the State Engineer was without authority to enact them…
>
> More importantly, the trial court's ruling is not consistent with the compact. In 1923, Delph Carpenter, the father of interstate water compacts, negotiated the South Platte River Compact ("Compact") for Colorado…Article IV.2 requires Colorado to curtail diversions in the Lower Section of the river…Article VIII states that it shall be the duty of the State Engineer "to make deliveries of water at the Interstate Station in compliance with this Compact without necessity of enactment of special statu[t]es for such purposes by the General Assembly of the State of Colorado." The Compact does not regulate or even mention ground water

> diversions…Further, the Compact does not specify any means by which the State Engineer is to achieve compliance…
>
> The water court's simplistic 'administration in priority' approach will not ensure that well depletions in the non-compact-call winter season will not affect the stream during the compact call season.

Id. at 21–23.

In support of the State Engineer, the Groundwater Appropriators of the South Platte River Basin, Inc. ("GASP"), a once-prominent northeast Colorado local organization that facilitated large-scale augmentation plan coverage for groundwater users in the South Platte basin, submitted a brief expressly acknowledging that priority administration alone is insufficient to protect Nebraska's interests under the Compact. The brief stated, "Because the Compact did not contemplate ground water development and because priority administration within Colorado is not sufficient to protect Nebraska's interest under the Compact, the Proposed Rules are necessary to administer ground water diversions within Colorado to enable Colorado to meet its commitments under the Compact." Reply Br. of GASP at 4, *Simpson*, 69 P.3d 50 (No. 02SA377). Notably, the State Engineer explicitly adopted GASP's arguments regarding the Compact in his brief. Reply Br. of the State Engineer at 2 n.1, *Simpson*, 69 P.3d 50 (No. 02SA377).

Simply put, the State Engineer acknowledged that the Compact was effectively no longer self-executing due to Colorado's internal decisions, and the Colorado Supreme Court agreed. Today, as laid bare in Colorado's motion to dismiss, instead of being able to rely on the simple terms of measurement and delivery set forth in Article IV (e.g., 120 cfs flow of the river at the Interstate Station), Nebraska has absolutely no way of independently assessing whether Colorado is in compliance with the Compact. Under the express terms of Articles IV and VIII, when flows fall below 120 cfs, Nebraska should be able to identify all junior users in Colorado and verify that they have all been curtailed and *measure* the increase in streamflow resulting from the delivery of that water. That assumption no longer holds. Instead, various junior users who would otherwise be curtailed if Article VIII were in force are nevertheless permitted to continue diverting water out of priority under augmentation plans that Nebraska maintains are unlawful and, as will be shown at trial, whose effectiveness Nebraska has no independent means of verifying or measuring.

For a contract or agreement to be self-executing, it must be legally effective and operative immediately by its own terms, without requiring subsequent legislation, judicial authorization, or affirmative action by another party to carry it into effect. See *Medellín* v. *Texas*, 552 U.S. 491 (2008); *Republic of Marshall Islands* v. *United States*, 865 F.3d 1187 (9th Cir. 2017). There is no question in this case as to the nature of this Compact: it is supposed to be self-executing by its express terms. However, Colorado

has created a scenario in which the Compact is no longer enforceable as written because Colorado cannot respond to a Compact call without resorting to its Byzantine water administration scheme. The priority administration contemplated under Article IV (and presumably Article VI) in the Compact is today insufficient. If the *Simpson* proceedings were not enough, Colorado's Answer to Nebraska's Article IV claims makes this plain. See Colorado's Answer to Nebraska's Bill of Complaint ¶¶ 39–40. See also Response In Opposition To Nebraska's Motion For Leave To File Bill Of Complaint at 25–27.

V. Colorado's Interpretation of Article VIII Makes No Sense.

Colorado claims Article VIII was simply intended to confer additional authority on Colorado state officials to be certain they could enforce Compact terms and resolve some ill-defined ambiguity on this point. See Mot. to Dismiss at 11. Colorado's interpretation of Article VIII is untenable as a matter of law and logic.

First, it was well understood that the Compact would be adopted by both states' legislatures and approved by Congress. Once a compact is approved by Congress, it becomes a federal law, which overrides contrary state law. These basic constitutional principles of federal supremacy were well understood in 1923. There would have been no reason to "clarify" the states' powers to abide by their federally sanctioned promises, as Colorado suggests.

Second, there is no reason that Article VIII would impose a comparable duty vis-à-vis Nebraska's water administration under the Compact. When viewed in context, only Colorado has an obligation to deliver water to any point along the River (e.g., the Interstate Station). Nebraska's obligation under Article III, for example, is merely to refrain from interference with the right granted to Colorado therein. Assuming *arguendo* that Colorado is correct about *its* need for added authority, why would Colorado not insist it be applied also to Nebraska officials? Surely, Colorado officials would have demanded complementary language be inserted into the Compact if there was any real doubt that Nebraska could carry out its obligations.

Third, if Colorado needed to affirm its state-based authority to implement obligations under an interstate river compact, then why does the Colorado River Compact not contain language comparable to Article VIII? That compact was signed mere months before by the very same person, Delph Carpenter, who signed the South Platte River Compact on Colorado's behalf. See Colo. Rev. Stat. § 37-61-101 (2025). Indeed, there is no evidence that Carpenter harbored any such concern.

And if the purpose of Article VIII truly was to confer additional authority in the face of an ambiguity, why did the provision not simply state that Colorado officials were authorized to administer the Compact? Colorado invokes the presumption that States retain sovereignty when an interstate compact

is silent. See Mot. to Dismiss at 10. But Article VIII is not silent on the relevant subject. It expressly imposes a duty on Colorado officials to make deliveries in compliance with the Compact and expressly addresses the need for special statutes. A presumption applicable to silence cannot displace an express obligation.

Finally, under Colorado's theory, Nebraska would always be subjected to the whims of Colorado legislators who may presumably alter or amend the statutes on which Colorado relies at any time without regard to the impact on Nebraska users. The entire purpose of entering an interstate compact is to avoid that level of uncertainty and to crystallize the states' relative rights with the blessing of Congress. It would be counterintuitive for the parties to enter into a legally binding interstate compact if the rights contracted for could later be modified by one state's legislative action. Yet that is effectively what has occurred in this case.

VI. Dismissal is Inappropriate at This Stage.

a. Colorado's Own Motion Demonstrates Dismissal Is Inappropriate.

Colorado asserts Article VIII is a "straightforward provision;" however, Colorado's motion ignores its plain language. See Mot. to Dismiss at 2, 11. The motion relies on disputed historical circumstances and alleged facts outside of the Complaint to argue that Article VIII addressed only a perceived gap in

Colorado officials' state-law authority at the time the Compact was approved. Colorado cites a law review article that details the life of Delph Carpenter and his role in developing the Colorado River Compact of 1922. See Mot. to Dismiss at 11.[3] This article is proffered to show Carpenter's thinking in developing Article VIII. However, Nebraska will demonstrate at trial that the key language in Article VIII was not even of Carpenter's creation.

Regardless, no amount of evidence can eliminate Article VIII's express terms that Colorado officials have a duty to make deliveries in compliance with the Compact. *Tarrant Reg'l Water Dist.*, 569 U.S. at 628. Nor does it justify resolving a contested question of

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[3] Notably, the cited article cuts against Colorado's position. Note 45 therein makes clear that Carpenter was well aware of the preemptive effect of congressionally approved compacts rendering *additional* state authority superfluous:

> Writing to Ray Lyman Wilbur, Acting Chairman of the Federal Power Commission in 1930, Carpenter stated, "the rights of a permittee or licensee to the use of water can be no greater than the rights of the state in which his project is located and the rights of his state, with respect to those of other states, always are subject to future definition by interstate compact or by decision of the Supreme Court in a case between the interested states." Letter from Delphus E. Carpenter to Ray Lyman Wilbur, Acting Chairman of the Federal Power Commission (July 19, 1930).

Delphus Emory Carpenter & the Colorado River Compact of 1922, 1 U. Denv. Water L. Rev. 228, 238-39 (1998).

compact meaning against Nebraska at the pleading stage.

At the motion-to-dismiss stage, the Court must accept all factual allegations in the complaint as true. *Bell Atl. Corp.*, 550 U.S. at 555–56. Here, Colorado asks the Court to assess Colorado's own factual allegations outside of the complaint, which is inappropriate at this juncture. Article VIII's express language supports—or at minimum does not foreclose—Nebraska's claim that Colorado's administrative system must be capable of carrying out and demonstrating compliance with the required deliveries. Further, Nebraska pleads a number of factual allegations in the Bill of Complaint that strike at the heart of the historical issues presented by Article VIII interpretation, including Compact-era litigation directly pertaining to the use of prior appropriation in the South Platte basin as well as contemporaneous return flow studies demonstrating expected protections for Nebraska in the Lower Section, all of which led to the foundation upon which the Compact was built. See Compl. ¶¶ 13–16. The claim therefore should proceed so the parties can develop the historical record before the special master.

b. If Facts Outside the Pleadings Are Considered, the Motion Must Be Converted to a Motion for Summary Judgment.

Resolving factual disputes or competing interpretations of terms and evidence is inappropriate

in the Rule 12(b)(6) context. *Nalco Co.* v. *Chem-Mod, LLC*, 883 F.3d 1337, 1349 (Fed. Cir. 2018). When evaluating whether a plaintiff has stated a claim, the Court cannot consider matters outside the pleadings. *Berk* v. *Choy*, 607 U.S. 187, 193 (2026). The Court instead asks only whether the complaint's factual allegations, if taken as true, state a claim to relief that is plausible on its face. *Bell Atl. Corp.*, 550 U.S. at 570. A complaint that satisfies this standard "may proceed even if it strikes a savvy judge that actual proof of [the] facts is improbable[.]" *Id.* at 556.

Fed. R. Civ. P. 12(d) provides: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." This provision helps ensure that parties are not unfairly prejudiced by the consideration of evidence without an opportunity for discovery. Accordingly, if Colorado continues to rely on factual matters and evidence outside the Bill of Complaint to support its motion, this Court should convert the motion to one for summary judgment under Rule 56.

If indeed this conversion is made, Nebraska would ask that this Court defer adjudication of any pending summary judgment motion under Fed. R. Civ. P. 56(d) to allow for development of a full evidentiary record and an opportunity to present pertinent materials in support of its position. Under this rule, the Court may allow a nonmovant time to take discovery in order to fully respond to a motion for summary judgment.

Because this rule is designed to protect litigants who justifiably need additional time to respond to a motion for summary judgment in an effective manner, courts should "construe motions that invoke the rule generously, holding parties to the rule's spirit rather than its letter." *Emigrant Residential LLC* v. *Pinti*, 37 F.4th 717, 724 (1st Cir. 2022). Rule 56(d) is a "safety valve for claimants genuinely in need of further time to marshal 'facts, essential to justify [their] opposition …to a summary judgment motion.'" *Hernández* v. *Blanche*, 181 F.4th 149, 159 (1st Cir. 2026) (quoting *Reid* v. *New Hampshire*, 56 F.3d 332, 341 (1st Cir. 1995)). The critical inquiry in the Rule 56(d) analysis is whether the party in opposition to summary judgment has had a "full and fair opportunity to conduct discovery needed to mount an effective opposition to a summary judgment motion." *Hernández*, 181 F.4th at 159 (quoting *Emigrant Residential LLC*, 37 F.4th at 724).

Nebraska requires additional time to respond if the motion to dismiss is converted to one for summary judgment due to the fact that the genuine disputes upon which the parties' interpretations of Article VIII rest are based on detailed historical and factual evidence that will need to be developed further by both parties. Some of the documents upon which Nebraska may need to rely to justify its opposition to a summary judgment motion will need to be obtained from Colorado through the discovery process.

VII. Alternatively, Nebraska Should Be Granted Leave to Amend.

If the Court finds any of Nebraska's allegations require greater specificity, dismissal with prejudice is unwarranted. Fed. R. Civ. P. 15(a) directs courts to freely grant leave to amend when justice requires. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). If the underlying facts relied upon by a plaintiff "may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits" absent undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice, or futility. *Id*. Because none of those fatal factors apply here, Nebraska should be allowed to amend the Bill of Complaint to provide additional allegations in order to address any deficiency identified by the Court.

CONCLUSION

The Court should deny Colorado's Motion for Partial Dismissal, or, in the alternative, grant Nebraska leave to amend its Bill of Complaint.

Respectfully submitted,

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