No. 161, Original

In the Supreme Court of the United States

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

NEBRASKA'S ANSWER TO COLORADO'S COUNTERCLAIMS

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ANSWER TO COLORADO'S COUNTERCLAIMS

Nebraska answers each of Colorado's counterclaim allegations, setting forth each allegation followed by Nebraska's response to that allegation:

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.

ANSWER: Nebraska admits that Nebraska and Colorado are parties to the South Platte River Compact ("Compact"). Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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

ANSWER: Denied.

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.

ANSWER: Denied.

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.

ANSWER: Nebraska admits that Colorado is a sovereign state in the United States of America and presently is represented by General Weiser. Nebraska is without information sufficient to admit or deny the balance of the allegations contained in Paragraph 4.

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

ANSWER: Admitted.

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).

ANSWER: Nebraska admits that this Court has original and exclusive jurisdiction to resolve serious disputes between two sovereign states that are properly presented for adjudication.

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.

ANSWER: Nebraska admits that the South Platte River originates in Colorado and flows northeast into Nebraska. Nebraska is without information sufficient to admit or deny the balance of the allegations contained in Paragraph 7.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning. The remainder of these allegations constitute legal conclusions, to which no response is required.

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

ANSWER: Denied.

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.

ANSWER: Because Colorado has failed to identify the subject wells, Nebraska is without information

sufficient to admit or deny the allegations contained in this paragraph.

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.

ANSWER: Denied. Nebraska states that it administers water rights in compliance with the Compact and applicable Nebraska law, which speak for themselves.

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

ANSWER: Denied.

15. During the irrigation season, this also causes damage to Colorado insofar as the decrease in streamflow 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.

ANSWER: Denied.

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.

ANSWER: Denied.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the

Compact's meaning.

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.

ANSWER: Nebraska is without information sufficient to admit or deny the specific allegation that Colorado curtailed users on 88 days in 2021. Nebraska affirmatively alleges that Colorado's actions were insufficient to comply with the Compact and protect Nebraska from injury because Colorado allows junior water users to continue diverting under so-called augmentation plans that fail to ensure Compact compliance.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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

ANSWER: Denied.

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.

ANSWER: Because Colorado has failed to identify the subject wells, Nebraska is without information sufficient to admit or deny the allegations contained in this paragraph.

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.

ANSWER: Denied. Nebraska states that it administers water rights in compliance with the Compact and applicable Nebraska law. Nebraska further states that Colorado's characterization of Nebraska's publicly available documents is inaccurate and incomplete.

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

ANSWER: Denied.

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.

ANSWER: Denied.

First Claim for Relief: Lodgepole Creek

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

ANSWER: No response is required. To the extent a response is required, Nebraska incorporates by reference its responses to the foregoing paragraphs.

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.

ANSWER: Nebraska states that the Compact generally speaks for itself and that additional evidence as may be adduced at trial could bear on the Compact's meaning.

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

ANSWER: Denied.

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.

ANSWER: Denied.

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.

ANSWER: No response is required. To the extent a response is required, Nebraska incorporates by reference its responses to the foregoing paragraphs.

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.

ANSWER: Denied.

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.

ANSWER: Denied.

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.

ANSWER: Denied.

ANSWER TO COLORADO'S PRAYER FOR RELIEF: Nebraska denies that Colorado is entitled to any relief on its counterclaims. Nebraska denies all allegations not expressly admitted.

AFFIRMATIVE DEFENSES

Nebraska's affirmative defenses to Colorado's counterclaims include the following. Nebraska 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:

Colorado's counterclaims fail to state a claim upon which relief can be granted. Colorado's allegations as pled fail to establish that Nebraska has taken or interfered with waters apportioned exclusively to Colorado. Speculative, remote, unquantified, or de minimis effects do not support the relief Colorado seeks. Colorado's claims that Nebraska's well pumping violates the Compact are legally insufficient.

II. Setoff and recoupment:

Colorado's claims and requested remedies are

barred or limited to the extent they fail to account for recharge, return flows, delayed accretions, imported water, augmentation, conservation measures, or other actions that maintain or increase flows available at or below the point of division.

Any damages alleged by Colorado must be reduced or eliminated by reason of the far greater damages Colorado has caused to Nebraska through Colorado's own violations of the Compact, including but not limited to Colorado's violations of Articles IV, VI, and VIII, as set forth in Nebraska's Bill of Complaint.

III. Unclean hands:

Colorado comes to this Court with unclean hands. Colorado has for decades authorized thousands of out-of-priority diversions, augmentation plans of dubious physical and legal efficacy, and systematic non-irrigation season water development—all in violation of the Compact. Colorado cannot now seek relief against Nebraska for alleged impacts to streamflow while Colorado itself is responsible for far greater depletions and diversions in breach of its Compact obligations.

IV. Estoppel:

Colorado is estopped from asserting its counterclaims. Colorado has long accepted Nebraska's water administration practices, including any well pumping near Lodgepole Creek and the South Platte River. Despite this knowledge, Colorado took no action to raise concerns, and instead, pursued an aggressive

course of expanded water development within Colorado that has caused far greater harm to the Compact's apportionment scheme.

V. Waiver:

Colorado has waived any right to bring these counterclaims by its long-standing acquiescence in Nebraska's water administration practices and its failure to timely assert any claims regarding Nebraska's groundwater use.

VI. Failure to mitigate:

To the extent Colorado has suffered any damages, which Nebraska denies, Colorado has failed to mitigate those damages by, among other things, continuing to authorize out-of-priority diversions and augmentation plans that deplete the very flows Colorado claims are diminished by Nebraska's water use.

PRAYER FOR RELIEF

Nebraska respectfully requests that the Court:

1. Enter judgment in favor of Nebraska and against Colorado on Colorado's counterclaims;

2. Dismiss Colorado's counterclaims with prejudice;

3. Deny Colorado's requests for declaratory, injunctive, monetary, accounting, and other relief;

4. Declare that Colorado has not established that Nebraska violated the Compact through groundwater withdrawals;

5. Award Nebraska its recoverable costs; and

6. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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