NO. 22O161

In the
Supreme Court of the United States

NEBRASKA,

Plaintiff,

v.

COLORADO,

Defendant.

Original Action

REPLY TO NEBRASKA'S RESPONSE TO MOTION FOR PARTIAL DISMISSAL OF NEBRASKA'S BILL OF COMPLAINT

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INTRODUCTION

Article VIII is a straightforward provision affirming that Colorado has the authority to administer Nebraska's right under the South Platte River Compact, Pub. L. No. 69-37, 44 Stat. 195 (1926) ("Compact"). Article VIII does not include the words "self-executing," nor does it include language directing how Colorado should regulate its own water users to ensure Compact compliance. Rather Article VIII is a representation of authority; it assures Nebraska that Colorado needs no further action by its legislature to enforce the Compact's core obligation to administer water for another state.

The plain language of the disputed provision of Article VIII contains a single duty to "make deliveries of water at the Interstate station . . . without necessity of enactment of special statutes." Compact Art. VIII. Yet in Nebraska's Response in Opposition to Colorado's Motion for Partial Dismissal of Nebraska's Bill of Complaint ("Resp."), it interprets Article VIII to impose two additional duties on Colorado that the text does not include or support: a duty to provide an accounting of those deliveries and a duty to refrain from adopting rules or statutes to regulate its own water users with the goal, among others, of assuring that groundwater pumping does not injure senior rights, including Nebraska's. Because there is no text in Article VIII that supports either of the duties, Nebraska's Article VIII claim should be dismissed.

Federal Rule of Civil Procedure 12(b)(6) authorizes courts to dismiss claims at the pleading stage on two grounds: if the plaintiff has failed to state a cognizable legal claim or if the plaintiff has failed to allege

facts that plausibly support a legal claim. Nebraska's Article VIII claim fails the first prong. The Court does not have to look beyond the pleadings to determine whether Article VIII restricts Colorado from enacting statutes or rules to administer water rights or includes the broad accounting obligation that Nebraska asserts. The Court can use the ordinary tools of interpretation, which begin with review of the Compact's plain text but may include other legal sources.

Nebraska expresses concern that if its Article VIII claim is dismissed, it will not be able to pursue its complaints about Colorado's regulation of groundwater pumping and the alleged impacts on Nebraska's Compact rights. Yet, as Nebraska makes clear, its factual allegations about Colorado's system of groundwater administration relate to its claim under Article IV (which provides Nebraska its irrigation season water right). If the Court dismisses Nebraska's Article VIII claim, its Article IV allegations will remain in the case and be subject to the burdens of production and proof in later stages of this proceeding.

ARGUMENT

I. Nebraska misstates the obligation in Article VIII.

Nebraska and Colorado agree on one thing, which is that the plain text of Article VIII states that Colorado has a duty 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." Compact Art. VIII. There, the agreement ends. Article VIII's unambiguous text represents that Colorado has the legal authority to comply with the

Compact and administer Nebraska's Compact right without waiting for the General Assembly to enact additional enabling legislation. It does not establish a substantive restriction on the administrative means by which Colorado performs its obligations. Instead, as Colorado has explained in previous filings, this provision was included because at the time of the Compact, Colorado statutes only authorized administration for in-state users.[1] *See* Resp. to Mot. for Leave at 34; Mot. for Partial Dismissal at 11.

Nebraska, however, reads much more into Article VIII than exists in the text. Nebraska insists that Article VIII includes a "self-executing mandate," Resp. at 2, 4. But the word "self-executing" does not appear in Article VIII. Further, Nebraska urges an elaborate meaning of "self-executing" that goes well beyond even this departure from Article VIII's plain language. Nebraska has variously described Article VIII as requiring: "simplified accounting and objective enforceability," Br. in Support of Pet. to File Compl. at 7; "real time" verification of compliance with Colorado's Article IV duty, *Id.* at 13; Resp. at 1, 7; and an obligation to have a system of groundwater administration that is not too "complex," *see* Compl. ¶¶ 30, 42, 89.

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[1] The statute that expressly grants the State Engineer authority to administer compacts was not enacted until 1969. *See* C.R.S. § 37-80-104. At the time of the Compact, there was no analogous provision. Instead, Colorado statutes contained a provision directing the State Engineer "to perform all duties imposed upon him by law." Colo. Comp. Laws. § 1808 (1921). Article VIII was consistent with that legislative backdrop. By imposing a "duty" on the State Engineer, Article VIII triggered his authority and obligation to ensure compact compliance under Sec. 1808.

In short, Nebraska urges interpretations of Article VIII that go well beyond its plain language. First, it would like Article VIII to include an accounting provision or its equivalent. Some interstate compacts do include accounting provisions. *See*, *e.g.*, Red River Compact of 1978, Pub. L. No. 96-564 § 2.11, 94 Stat. 3305 (1980); Rio Grande Compact, Pub. L. No. 76-96 Art. XII, 53 Stat. 785 (1939); Amended Costilla Creek Compact, Pub. L. No. 88-198 Art. VIII, 77 Stat. 350 (1963); Arkansas River Compact, Pub. L. No. 81-82 Art. VIII, 63 Stat. 145 (1949). And other compacts establish commissions that perform functions that may include accounting under certain circumstances. *See*, *e.g.*, Upper Colorado River Basin Compact of 1948, Pub. L. No. 81-37 Art. VIII, 63 Stat. 31 (1949); Rio Grande Compact Art. XII; Amended Costilla Creek Compact Art. VIII. But the South Platte Compact contains no accounting provision, does not establish a commission, and instead leaves it to the states to take the internal steps necessary to comply with the Compact.[2]

Second, Nebraska focuses on the words "special statutes" and claims that Colorado cannot avail itself of any intrastate water administration rules or laws

[2] In the absence of auditing provisions, states typically work together to resolve concerns or uncertainty over compact administration. *See* Resp. to Mot. for Leave at 8–9 (describing discussions between Nebraska and Colorado engineers about Colorado's augmentation plans) and at 30–31 (describing a mechanism within the Platte River Recovery Implementation Program for Nebraska to raise concerns about augmentation plans). As described further below, any alleged deficiency in Colorado's augmentation plans can be addressed through Nebraska's claim under Article IV of the Compact.

that implement the priority system that includes Nebraska's Compact right. This suggestion has no support. The Compact says nothing about all the steps a state will need to take to comply—such as measuring flows, adjudicating water rights, assigning priority dates, accepting senior water calls, and curtailing water rights. Colorado, like Nebraska, regulates its water through rules and statutes, and has for decades. *Compare* C.R.S. §§ 37-80-101 to -92-602 *and* 2 C.C.R. §§ 402-4:1 to 402-17:17.12 *with* N.R.S. §§ 46-201 to -2130 *and* N.R.S. §§ 46-601 to -807 *and* 457 N.A.C. §§ 1-001 to 24-002 (current version available at https://dwee.nebraska.gov).

Notably, Nebraska does not cite to any particular Colorado statute as the "special statute" that offends the Compact. Nebraska implies that Colorado's incorporation of groundwater wells into the priority system for surface water is the regulation that runs afoul of the Compact. But there is simply no restraint in Article VIII on Colorado's authority to regulate groundwater, let alone a prohibition on the constructive approach of integrating ground and surface water administration.

Nebraska devotes a section of its brief to *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003). Resp. at 8–13. But that case only undermines Nebraska's position about Article VIII. In *Bijou*, the Colorado Supreme Court was tasked, in part, with determining whether the Colorado State Engineer had the power to promulgate rules to assist compliance with the

South Platte River Compact. 69 P.3d at 69–71.[3] In making this determination, the Court applied a Colorado statute that allows the State Engineer to engage in rulemaking to assist with interstate compact compliance only when the compact itself does not provide adequate direction. *See id.*; *see also* C.R.S. § 37-80-104 (allowing the State Engineer to make intrastate water rules for the purpose of complying with interstate water compacts "[i]n those cases where the compact is deficient in establishing standards for administration within Colorado to provide for meeting its terms").

The *Bijou* Court mentions Art. VIII, but only to support the State Engineer's power by noting that the Compact itself allows (as opposed to requires) the State Engineer to comply with the Compact without the necessity of special statutes. 69 P.3d at 68. Indeed, in contrast to Nebraska's characterization of *Bijou*, the Court recognized that the Compact is not "self-executing"—meaning that it does not provide sufficient direction on *how* to administer the Compact and, accordingly, the State Engineer has authority to engage in rule making. *Id.* at 70. The Court does not suggest that Article VIII or any other provision of the Compact precludes such rulemaking, nor does the Court say that rulemaking or water administration statutes must be simple and uncomplicated. On the contrary, after recognizing that the Compact did not direct incorporation of groundwater into surface water regulation, the Court determined that the State Engineer

[3] The State Engineer in *Bijou* was not asking for a statute, "special" or otherwise, from the General Assembly of the State of Colorado. Instead, he was asking for the ability to promulgate administrative rules himself.

could develop rules to handle this. *Id.* at 70.[4] Nebraska's reliance on *Bijou* to support its interpretation of Art. VIII is, at best, misguided.

In short, Article VIII does not include a duty to provide real-time accounting. It also imposes no obligation on Colorado to refrain from adopting rules and procedures, complex or otherwise, to administer groundwater, including for the purpose of maintaining Compact compliance. Nebraska has failed to state a cognizable claim that Colorado is violating any duty under Article VIII.

II. The Court does not have to look to extrinsic evidence to rule on Colorado's motion for partial dismissal.

Parties can fail to state a claim under Federal Rule of Civil Procedure 12(b)(6) in two ways. First, a party can fail to allege a cognizable legal claim. Second, a party can fail to allege facts that sufficiently support a cognizable claim. *See Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989); *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988) (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984)). In either case, Rule 12(b)(6) serves the important function of dismissing groundless claims early in the proceedings to spare the parties "needless discovery and factfinding." *Neitzke*, 490 U.S. at 326–27.

[4] The *Bijou* Court also described the process for water court approval of augmentation plans without expressing any concerns that this statutorily mandated approach raised questions about Compact compliance. *See* 69 P.3d at 60–61, 64.

Here, Nebraska has stated no cognizable legal theory that Colorado has breached any duty owed to Nebraska under Article VIII. Nebraska's claim should therefore be dismissed under the first prong of Rule 12(b)(6). Nebraska argues that dismissal under Rule 12(b)(6) is inappropriate because Colorado relies on "factual matters and evidence outside the Bill of Complaint" to support its motion. Resp. at 19. But this is not the case. Colorado's argument is purely legal. The question of whether Article VIII imposes a duty to provide real-time accounting or to ensure lack of complexity in water administration can be answered by the Compact's text. As discussed above, the unambiguous text of Article VIII includes no such duties. *See Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) (holding that a compact's express terms are "the best indication of the intent of the parties").

Article VIII's plain meaning is clear, but if there is any uncertainty, the Court can use normal interpretive tools without resorting to materials outside the pleadings. *See UTTO Inc., v. Metrotech Corp.*, 119 F.4th 984, 993 (Fed. Cir. 2024) (holding that interpretation of legal standards "is proper and routine in ruling on a motion [to dismiss] under Rule 12(b)(6)"). In the context of interstate compacts, a core interpretive principle is that compact terms should be read in light of the assumption that states do not readily concede their sovereign authority. *See Herrmann*, 569 U.S. at 632. Here, this principle supports Colorado's straightforward explanation for Article VIII's language, which is akin to an assurance or representation that Colorado has the legal authority to comply with the Compact without needing special enabling statutes. This

duty to comply persists even when hydrologic conditions or means of diversion change and does not prohibit Colorado from using lawful administrative mechanisms to adapt to those changed conditions.

If the Court accepted Nebraska's interpretation of Article VIII, it would convert an assurance that Colorado possesses sufficient authority to comply with the Compact into a permanent restriction on Colorado's legislative and regulatory authority over its own resources. This would run directly counter to the "background notion that a State does not easily cede its sovereignty" when entering into compacts. *Herrmann*, 569 U.S. at 631.

The Court does not have to look to extrinsic evidence to conclude that Article VIII does not require real-time accounting or a restraint on intrastate regulation. Therefore, there is no reason to delay consideration of Colorado's motion to dismiss Nebraska's Article VIII claim. Further, as required by Rule 12(b)(6), the Court can assume that Nebraska's factual allegations concerning Colorado's regulation of groundwater are true for the purpose of ruling on Colorado's Motion. Those allegations simply do not state a claim for relief under Article VIII.

III. Nebraska's allegations about Colorado's system of groundwater administration relate solely to Article IV.

Much of Nebraska's response confirms that Article VIII does not provide any legal duty that fits Nebraska's complaints about Colorado's groundwater administration. Instead, Article IV is the correct vehicle for addressing Nebraska's concerns.

Article IV establishes Nebraska's priority for certain water during the irrigation season. Nebraska believes Colorado is violating this Article IV right through its groundwater administration. Throughout Nebraska's response, it cannot articulate the supposed duty under Article VIII without immediately linking it to Nebraska's allegations under Article IV. *See* Resp. at 1–2, 3, 6, 7–8. Nebraska's concern cannot be that Colorado regulates groundwater at all (as all western states do). Rather, Nebraska's worry is that Colorado's groundwater regulation does not sufficiently protect Nebraska's Article IV rights. *See e.g.*, Resp. at 6 (alleging that Colorado's handling of groundwater regulation does not comply with various portions of Article IV, including the timing and location of where the flow is measured).

Nebraska insists that its Article VIII claim cannot be disentangled from its Article IV claim, because "Article VIII ensures Nebraska can verify compliance with Article IV." Resp. at 8. But, as discussed above, nothing on the face of Article VIII suggests that Nebraska has an audit right or that Colorado's water regulations must lack complexity.

The Court can address Nebraska's concerns about whether Colorado's groundwater administration adequately protects Nebraska's irrigation season rights through consideration of Nebraska's Article IV claim. Nebraska's fears that it will be unable to obtain information from Colorado about how it administers groundwater are unfounded. All those allegations, by Nebraska's own admission, relate to their claim under Article IV. Precisely because those allegations do not support a claim under Article VIII, they will remain in

the litigation and be subject to the burdens of production and proof at later stages of this proceeding.

CONCLUSION

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

Respectfully submitted,

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