

No. __, Original

In the Supreme Court of the United States

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

**BRIEF IN SUPPORT OF MOTION FOR
LEAVE TO FILE BILL OF COMPLAINT**

MICHAEL T. HILGERS
Attorney General of Nebraska
CODY S. BARNETT
Solicitor General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record

NEBRASKA DEPARTMENT
OF JUSTICE
1445 K Street, Room 2115
Lincoln, Nebraska 68508
(402) 471-2683
justin.lavene@nebraska.gov

THOMAS R. WILMOTH
DONALD G. BLANKENAU
KENNON G. MEYER
Special Assistant
Attorneys General
BLANKENAU WILMOTH
JARECKE LLP
2900 South 70th Street
Suite 150
Lincoln, Nebraska 68506

*Counsel for State of
Nebraska*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
I. The South Platte River Basin	2
II. Summary of the Compact.....	6
III. Colorado's Actions Following Compact Ratification	9
A. Colorado has failed to comply with Article IV of the Compact and has ignored Article VIII's obligations	9
B. Colorado has actively opposed Nebraska's right to build a canal and access water reserved to Nebraska under Article VI	14
ARGUMENT	18
I. The Seriousness and Dignity of Nebraska's Claims Warrant Exercise of the Court's Jurisdiction.....	19
II. Nebraska Has No Alternative Forum	21
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page
Cases	
<i>Hinderlider v.</i> <i>La Plata River & Cherry Creek Ditch Co.</i> , 304 U.S. 92 (1938)	20
<i>Kansas v. Colorado</i> , 514 U.S. 673 (1995).....	18
<i>Mississippi v. Louisiana</i> , 506 U.S. 73 (1992)	18-19, 20
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945).....	21
<i>New York v. New Jersey</i> , 598 U.S. 218 (2023).....	4
<i>Oklahoma & Texas v. New Mexico</i> , 501 U.S. 221 (1991).....	18
<i>Petty v. Tennessee-Missouri Bridge Comm’n</i> , 359 U.S. 275 (1959).....	20
<i>Simpson v. Bijou Irrigation District</i> <i>(In re Proposed Amended Rules)</i> , 69 P.3d 50 (2003)	9, 10, 12, 14
<i>South Carolina v. North Carolina</i> , 558 U.S. 256 (2010).....	2
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983).....	18
<i>Texas v. New Mexico</i> , 482 U.S. 124 (1987).....	22
<i>Virginia v. West Virginia</i> , 206 U.S. 290 (1907).....	18

<i>West Virginia ex rel. Dyer v. Sims</i> , 341 U.S. 22 (1951)	20, 22
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922).....	4
<i>Wyoming v. Oklahoma</i> , 502 U.S. 437 (1992).....	22
Constitutional Provisions	
U.S. Const. art. I § 10	4
Statutes	
Colo. Rev. Stat. § 37-92-102	10
Compact	
Compact, Art. I	6
Compact, Art. II	7
Compact, Art. IV	7, 8, 9, 11-15
Compact, Art. VI	8, 11, 14, 16, 17
Compact, Art. VIII	7, 9, 13, 14
South Platte River Compact, Pub. L. No. 69-37, 44 Stat. 195 (1926) (signed April 27, 1923)	1, 4-9, 11, 13, 14, 16, 18, 20
Other Authorities	
First Biennial Report of Nebraska's State Board of Irrigation (1895–96)	5
H.B. 12-1256, 70 th Gen. Assemb., 2 nd Reg. Sess. (Colo. 2016)	17

Lain Strawn, <i>The Last GASP: The Conflict Over Management of Replacement Water in the South Platte River Basin</i> , 75 U. Colo. L. Rev. 597 (2004).....	9, 10
Peter H. Sand, <i>Mesopotamia 2550 B.C.: The Earliest Boundary Water Treaty</i> , 5 Glob. J. Arch. & Anthropol., 4 (2018)	19
Ron Matthews & Vlado Vivoda, ‘Water Wars’: <i>strategic implications of the grand Ethiopian Renaissance Dam</i> , 23 Conflict, Security & Development 333 (2024).....	19
Stephen M. Shapiro et al., <i>Supreme Court Practice</i> (11th ed. 2019)	21
South Platte Basin Implementation Plan Volume 1 (January 2022)	16, 17
South Platte River Compact: Report of Delph E. Carpenter, Commissioner for Colorado (January 7, 1925).....	5-6

INTRODUCTION

Water from the South Platte River is one of the most valuable resources available to the State of Nebraska. Nebraska shares this River with Colorado, and fights about its use led Nebraska over a century ago to compact with Colorado to govern appropriation of the River's waters. Nebraska surrendered many claims it had over parts of the River in exchange for promises from Colorado not to appropriate water in ways that would diminish downstream flows to Nebraska, but that Colorado water developments would, in fact, increase flows at the State line.

Colorado has not honored its commitments and has, in several ways, actively breached the Compact. Specifically, Colorado has allowed water diversions that the Compact expressly prohibits, resulting in less downstream water flows for Nebraskans. Colorado is also frustrating Nebraska's efforts to construct a canal, specifically authorized in the Compact, that would give Nebraska access to waters reserved to the State under the Compact.

Colorado's violations have caused—and, left unchecked, will continue to cause—direct, immediate, grave, and irreparable injury to Nebraska and its citizens by preventing Nebraska from receiving the water it is owed under the Compact. For the first time in over 50 years, at least one Nebraska irrigation district was forced to shut down the majority of its surface water irrigation due to lack of water supply. Absent intervention, these harms will only get worse.

Nebraska tried to settle its issues in good faith with Colorado. Those efforts have been unsuccessful.

Only this Court can resolve the dispute. This case presents precisely the type of “weighty controvers[y]” between sovereigns that led both the Framers and Congress to grant this Court the original jurisdiction within which it falls. *See South Carolina v. North Carolina*, 558 U.S. 256, 277 (2010) (Roberts, C.J., concurring and dissenting in part). The Court should grant Nebraska leave to file its bill of complaint.

STATEMENT OF THE CASE

I. The South Platte River Basin

The South Platte River is an interstate river with a drainage area of some 24,300 square miles across portions of Nebraska and Colorado. The South Platte rises in the Rocky Mountains surrounding South Park, Colorado. The general course of the river is in an easterly direction through South Park to Lake George, thence northerly through Platte Canyon, emerging on the plains about twenty miles south of downtown Denver. From this point, the River flows northward through Denver. At the mouth of the Cache la Poudre River, the South Platte River turns and flows eastward, crossing the border of Colorado and into Nebraska.

From the State line, the River flows easterly some ninety miles to its junction with the North Platte River near North Platte, Nebraska. Their union forms the Platte River. The Platte River flows easterly

across the length of Nebraska, providing essential water for irrigation to farmers and ranchers, and necessary flows for municipal, industrial, and recreational uses. The flows of the Platte River are also an essential habitat for fish and wildlife, including various threatened and endangered species. In this regard, the waters of the South Platte River provide an essential supply of water for the Platte River Recovery Implementation Program, a multi-state and federal cooperative effort designed to protect river-dependent species and critical flyways for endangered whooping cranes.

Irrigation in the South Platte River Basin developed primarily in the late 1800s until the natural stream flow during the irrigation season was often used up. Reservoirs were then constructed as part of an integrated water management system to store water and supplement that natural stream flow. Nonetheless, reports indicated that the South Platte River would often run dry upstream of the State line. By the late 1880s, Nebraska officials expressed concerns to Colorado officials that the South Platte River was running dry due to diversions by Colorado irrigators.

To respond to this water crisis, in the 1890s, Nebraska water users developed plans for the “Perkins County Canal” to divert flows from the South Platte River in Colorado into Nebraska. Before the Canal was constructed, however, litigation erupted between Nebraska’s Western Irrigation District and water users in Colorado. Nebraska’s Western

Irrigation District sued numerous large Colorado appropriators and Colorado state water officials in federal court over decreased flows in the South Platte River.

The plaintiff originally sought entitlement to 180 cubic feet per second (“cfs”) for its irrigation season demands. The lawsuit was stayed pending this Court’s decision in a similar case, *Wyoming v. Colorado*, 259 U.S. 419 (1922). There, this Court held that States could apply the prior appropriation doctrine across state lines. *Id.* at 470. Nebraska’s then-Attorney General stated that he would use this Court’s decision to enforce Nebraska’s priority rights on the South Platte River.

This litigation, and a desire to avoid future conflicts, led Nebraska and Colorado to commence compact negotiations to equitably divide the waters of the South Platte River. *Compare, e.g., New York v. New Jersey*, 598 U.S. 218, 220 (2023) (“Under Article I, § 10, of the Constitution, each State possesses the sovereign authority to enter into a compact with another State, subject to Congress’s approval.”).

During negotiations, Nebraska and Colorado relied heavily on a concept known as “return flow.” When water is diverted, stored, and applied to land for irrigation, it generates return flows that infiltrate into the soil and gradually make their way back to the River at a later point in time. The basics were well known by the 1890s and studied extensively by hydrologists in the Platte Basin. For example, as

noted in the First Biennial Report of Nebraska's State Board of Irrigation (1895-96):

Those who have the knowledge and experience ... seem to be unanimously of the opinion that, with the increase of irrigation in [the North Platte River] valley, the flow in the latter part of the season will be greatly and materially increased by the seepage or return of waters which have been once applied in irrigation, but have been absorbed by the soil, to drain away again and form springs.

Two studies authored in the early part of the twentieth century discussed the importance of return flows and seepage resulting from extensive irrigation along the South Platte River in Colorado. One of those seepage investigations, led by Colorado Assistant State Engineer R.G. Hosea, formed the hydrologic predicate for the South Platte River Compact. A second study, by Ralph Parshall, supported Hosea's study and likewise emphasized the importance of return flows and seepage to the continued health of the South Platte River. Those negotiating the Compact relied on the premise that these return flows would increase over time, thus satisfying all of Nebraska's future needs. As Colorado's lead negotiator explained: "The flow of return and seepage waters ... has resulted in a constant supply at the interstate line [and] is increasing and will soon be sufficient to care for the full demands of Nebraska." South Platte River Compact: Report of Delph E.

Carpenter, Commissioner for Colorado (January 7, 1925).

Thus, although native flows of the South Platte River in Colorado may have been substantially overappropriated by 1890, the States agreed that return flows were and would continue to create a far more stable and reliable water supply downstream in Nebraska. With that understanding, and in reliance upon Colorado's assurances that the continued addition of irrigated lands in Colorado would create increasing return flows, the States agreed that the supply would satisfy both Nebraska's irrigation and nonirrigation season needs including those demands associated with the Perkins County Canal. Accordingly, the States entered into the Compact in 1923, and Congress ratified it in 1926.¹

II. Summary of the Compact

The Compact initially divides the South Platte Basin in Colorado into an Upper and Lower Section. It then establishes the "Interstate Station" to measure river flows to ensure that Nebraska's Compact entitlements are met. *See* Compact Art. I. The Interstate Station is currently located at Julesburg, Colorado, just prior to the River's entry into Nebraska

¹ Colorado cannot claim that the parties simply misunderstood the Basin's hydrology leading to a mutual mistake of fact. To the contrary, Colorado unilaterally and affirmatively changed the Basin's hydrology and the corresponding foundation of the Compact. Those changes, at Colorado's hand, have harmed Nebraska and form the basis of this action.

and just upstream of Western Irrigation District's diversion. *See Compact Art. II.*

Article IV of the Compact establishes Nebraska's primary right to water during the irrigation season (April 1 through October 15). Article IV requires Colorado to curtail certain water uses when the river flow at the Interstate Station measures less than 120 cubic feet per second ("cfs") of water. The provision states:

Between the 1st day of April and the 15th day of October of each year Colorado shall not permit diversions from the lower section of the river to supply Colorado appropriations having adjudicated dates of priority subsequent to the 14th day of June, 1897, 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, [subject to requirements of beneficial use].

Article IV's demands are straightforward. And those demands are augmented by Article VIII, which requires simplified accounting and objective enforceability of Nebraska's irrigation season right. This section provides:

[I]t 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.

Where Article IV protects Nebraska's needs during the irrigation season, Article VI protects water needs during the nonirrigation season. Article VI permits Nebraska to make a diversion of the River's waters through the construction of a cross-state canal. Specifically, Article VI provides:

It is the desire of Nebraska to permit its citizens to cause a canal to be constructed and operated for the diversion of water from the South Platte River within Colorado for irrigation of lands in Nebraska; that said canal may commence on the south bank of said river at a point southwesterly from the town of Ovid, Colorado, and may run thence easterly through Colorado along or near the line of survey of the formerly proposed Perkins County Canal (sometimes known as the South Divide Canal) and into Nebraska, and that said project shall be permitted to divert waters of the river as hereinafter provided.

Article VI specifies that the canal can divert 500 cfs during the nonirrigation season and any "surplus" flows during the irrigation season. Further, the

Compact allocates to Nebraska “net future flows” after accommodating: (1) certain Colorado appropriators, and (2) a limited reservation of 35,000 acre-feet of water for Colorado.

In other words, the Perkins County Canal can capture at least 500 cfs during the nonirrigation season along with Nebraska’s net future flow and unlimited amounts of “surplus” water during the irrigation season.

III. Colorado’s Actions Following Compact Ratification

A. Colorado has failed to comply with Article IV of the Compact and has ignored Article VIII’s obligations.

Shortly after Congress ratified the Compact, “improved technology and access to affordable electricity made it possible for hundreds of farmers living within Colorado’s river basins to drill wells to irrigate their crops.” Lain Strawn, *The Last GASP: The Conflict Over Management of Replacement Water in the South Platte River Basin*, 75 U. Colo. L. Rev. 597, 605 (2004). The proliferation of wells had “a twofold impact on the surface flow of the South Platte River[.]” *Simpson v. Bijou Irrigation District (In re Proposed Amended Rules)*, 69 P.3d 50, 70 (Colo. 2003). “First, increased pumping ... reduced the surface flows of the river.” *Ibid.* “Second, the lag effect caused

by groundwater pumping makes estimation of when surface flows will arrive at the state line considerably more difficult.” *Ibid.*

To address these issues, Colorado enacted extensive legislative reforms in 1969 that incorporated groundwater uses into its intrastate water administration scheme. These reforms 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. To that end, the 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.” Strawn, *supra*, at 599 n.14.

Colorado administrators did not want to wait on court approval, so they started permitting “new water users to divert water out of priority right away while they wait for court approval of their augmentation plans.” *Id.* at 600. Administrators approved these “substitute supply plans” so “liberally” that they “effectively turn[ed] a stopgap measure into a means of indefinitely evading the adjudicatory process mandated by ... statute.” *Id.* at 601.

In the early 2000s, Colorado experienced several years of drought. The proliferation of substitute

supply plans compounded the ensuing water scarcity, which led some Colorado water users to sue. The Colorado Supreme Court held the supply plans were illegal; the 1969 legislative reforms contemplated augmentation plans.

Regardless of how Colorado might seek to justify its desire to maximize water use within its borders, the reality remains: As soon as the ink dried on the Compact, Colorado started increasingly diverting water from the South Platte River in excess of what the Compact permitted. Groundwater diversions gradually intercepted more and more of the return flows on which the Compact's water supply is founded. So whether through substitute supply plans or judicially approved augmentation plans, Colorado has been taking water rightfully due Nebraska under Article IV of the Compact.²

To keep its pumps flowing, Colorado sought, and Congress approved, a massive transbasin diversion project that became the Colorado-Big Thompson Project ("C-BT"). This project was designed to provide a supplemental supply of water for the South Platte River, which was facing shortages due to growing depletions in Colorado's portion of the Basin. Congress intended that return flows generated by the C-BT

² Moreover, the diversions made for augmentation purposes take place largely during the nonirrigation season. Each and every one of these projects will be junior to the Perkins County Canal and subject to a Compact call under Article VI. Colorado has built itself a house of cards, and it is now doing everything in its power to keep it erect, including opposing Nebraska's efforts to build the canal.

would replace depletions of native South Platte River water.

Further complicating the issue, Colorado's current Compact compliance efforts are a "black box." While the Colorado Water Courts are responsible for approving intrastate water rights and authorizing out-of-priority diversions based on augmentation plans, the State Engineer is responsible for ensuring interstate Compact compliance. The State Engineer, however, has no power to approve or modify augmentation plans without Water Court approval. The Water Court has no ongoing administrative enforcement authority and acts only in response to actions initiated by aggrieved Colorado water users. Simply put, no single entity has the power and authority to ensure that all aspects of Colorado water uses are compliant with the Compact.

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. *See Simpson*, 69 P.3d at 69. 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 arrive to make whole senior Nebraska water users. In many cases, augmentation plans are based on a monthly time step, which bears no relation to Article IV's mandate to ensure that any deviations from the 120 cfs mandate are corrected within 72 hours. Moreover, augmentation reporting is done in arrears. As a result,

Colorado cannot demonstrate the hydrologic impact of any particular augmentation plan in real time as Article VIII's self-executing language requires.

This became uniquely evident in 2022, which saw over one hundred days of flow at the Interstate Station below 120 cfs. The lack of available irrigation water from the South Platte River at Nebraska's Western Irrigation District diversion led to substantial crop failures. For the first time in almost 50 years, the District was even forced to completely shut down operations for the majority of its service area due to the lack of water supply. Given the opacity of the Colorado water administration process—and hoping to avoid a repeat of 2022—Nebraska in 2023 made a written request for specific, but routine, information from Colorado regarding Compact compliance efforts. Colorado failed to provide *any* response to Nebraska's written request. Nebraska followed up with a subsequent request to Colorado in the spring of 2024. Colorado responded to this request only in late November—months after the irrigation season had already ended—and simply dismissed Nebraska's concerns as misguided. Colorado concluded with a tautological response: "Because there has not been a diminution in the state line flows in the river subject to Article IV, Colorado has not needed to take any enforcement actions."

Over this same period, Nebraska officials requested to meet with Colorado officials to discuss Compact issues. While representatives from both states met numerous times, Colorado failed to provide

the information necessary to verify compliance with Article IV of the Compact.

Even the Colorado Supreme Court agreed that Colorado's byzantine water scheme makes compliance with the Compact virtually impossible. As early as 2003, the Court opined that "intrastate water administration [is] beyond the simple priority administration provided for in Article IV of the compact," so Colorado needed to do more "in establishing standards for administration within Colorado." *Simpson*, 69 P.3d at 70. That's far afield from the simple compliance scheme the States agreed to in Article VIII of the Compact.

B. Colorado has actively opposed Nebraska's right to build a canal and access water reserved to Nebraska under Article VI.

In addition to diverting water in excess of what Article IV authorizes, Colorado has actively frustrated Nebraska's rights under Article VI of the Compact. Article VI expressly reserves nonirrigation season water to Nebraska, to be accessed through a canal that the Compact authorizes Nebraska to build across state lines.

Since January 2022, Nebraska has been actively pursuing development of the Perkins County Canal. The Legislature has authorized the Nebraska Department of Water, Energy, and Environment to take all actions necessary to build and manage the canal and has appropriated more than \$600 million for the task.

Nebraska is moving expeditiously through the design, permitting, and property acquisition phase so it may break ground in 2026 and complete the canal by 2032.

Indeed, since the Nebraska Legislature authorized and funded the canal project, Nebraska has purchased one large parcel of land in Colorado near the canal route and is actively pursuing the acquisition of additional lands through which the canal and reservoir system will be located. Nebraska has engaged engineering, legal, and other technical professionals. Nebraska is actively engaged in multiple permitting processes with local, state, and federal permitting authorities to ensure the project meets all legal and regulatory requirements. Countless hours of strategic planning meetings at all levels have been and will continue to be spent in the coming months to pursue the canal as expeditiously as possible.

Meanwhile, Colorado continues to ramp up its own diversions and related water uses during the nonirrigation season without restriction. Colorado is essentially racing to develop as much of the water supply “in excess of” Nebraska’s Article IV right as possible. According to Colorado’s own State Water Plan, the South Platte and Denver Metro Basins are projected to grow from approximately 3.8 million people in the year 2015 to about 6 million people by the year 2050. This is driving Colorado to address a projected annual water supply shortfall of roughly 200,000 acre-feet per year for municipal and industrial uses and over 400,000 acre-feet per year for agricultural

uses in the South Platte Basin. South Platte Basin Implementation Plan Volume 1, Tables 2 and 3, Pages 46–52 (January 2022). To put this in perspective, the forecasted 600,000 acre-foot shortage is twice the size of Nevada’s *entire* Colorado River allocation as established in the Colorado River Compact.

Colorado has historically turned to water supplies from the Colorado River Basin (e.g., C-BT) to meet demands by transferring water from that basin to the South Platte River. Those sources of water are becoming increasingly scarce, so Colorado’s Legislature has been supporting efforts to determine what can be done to ensure no “excess” South Platte River water passes into Nebraska. Since the Perkins County Canal has yet to be built, Colorado considers Nebraska’s Article VI water ripe for the taking. But Article VI reserves this water to Nebraska, not Colorado. The canal project is thus critical to Nebraska’s Compact enforcement efforts and the only way that Nebraska can ensure water adequately flows across the state line during nonirrigation season. Indeed, Nebraska already has observed a roughly 45% reduction in nonirrigation season flows over the last 20 years, and without the canal in place, Colorado will reduce the River flows crossing into Nebraska by approximately 90%.

More recently, in January 2022, Colorado released updated Basin Implementation Plan documents, including a Volume 1 document for the South Platte Basin. The report listed 282 total projects, including 81 being implemented and 17 that were already

completed, that “will further progress toward achieving basin goals and meeting future water needs.” South Platte Basin Implementation Plan, Volume 1 at 76 (January 2022). The estimated costs for project implementation totaled over \$9.8 billion. *Id.* at 3. Several projects included in the H.B. 12-1256, 70th Gen. Assemb., 2nd Reg. Sess. (Colo. 2016) study, including Fremont Butte Reservoir, a proposed 70,000 acre-foot reservoir, also appear in the project list.

Colorado knows that Nebraska’s pursuit of water reserved to it under Article VI will require Colorado to comply with additional administrative demands during the nonirrigation season, which would curtail Colorado water rights in the lower South Platte River developed after December 17, 1921. Therefore, Nebraska’s construction of a canal will impact existing Colorado water rights, providing additional water supplies to Nebraska, while also limiting newer Colorado water rights from further eroding flows into Nebraska.

Unsurprisingly, Colorado has no interest in accommodating Nebraska’s need for speed. Since 2022, Colorado has refused to meaningfully engage Nebraska, instead consistently feigning ignorance, demanding more and different types of information, neglecting to apply adequate resources to analyze data sets and water availability scenarios, and refusing to articulate positions on issues critical to design and operation of the canal beyond those that would most obviously delay implementation of the project.

On January 28, 2025, the Colorado Attorney General wrote a letter to the Sedgwick County (where the canal must begin) Commissioners making clear,

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.

The States are at an impasse. The only hope of moving forward and determining the rights and obligations under the Compact is judicial resolution.

ARGUMENT

The Court’s original jurisdiction “extends to a suit by one State to enforce its compact with another State or to declare rights under a compact.” *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (citing *Virginia v. West Virginia*, 206 U.S. 290, 317–19 (1907)); see also *Kansas v. Colorado*, 514 U.S. 673 (1995); *Oklahoma & Texas v. New Mexico*, 501 U.S. 221 (1991). The Court examines two factors in deciding whether to grant leave to file a complaint in an original action. First, the Court considers the “nature of the interest of the complaining State,” with a focus on the “seriousness and dignity of the claim.” *Mississippi v. Louisiana*,

506 U.S. 73, 77 (1992) (citations omitted). Second, the Court assesses “the availability of an alternative forum in which the issue tendered can be resolved.” *Ibid.* (citations omitted).

Nebraska satisfies both factors. First, its claims against Colorado implicate sovereign interests of the utmost “seriousness and dignity”—and ones this Court has regularly considered in original jurisdiction cases. Throughout history, numerous countries have gone to war over both water rights and treaty violations. *E.g.*, Peter H. Sand, *Mesopotamia 2550 B.C.: The Earliest Boundary Water Treaty*, 5 Glob. J. Arch. & Anthropol., 4 (2018); Ron Matthews & Vlado Vivoda, ‘Water Wars’: strategic implications of the grand Ethiopian Renaissance Dam, 23 Conflict, Security & Development 333, 337 (2024) (“The only matter that could take Egypt to war again is water.”). Nebraska’s dispute with Colorado is of a piece.

Second, there is no available alternative forum for resolving this dispute. Nebraska tried negotiating with Colorado in good faith. Colorado refused. Only this Court can settle the disagreement between these two sovereigns.

I. The Seriousness and Dignity of Nebraska’s Claims Warrant Exercise of the Court’s Jurisdiction

The seriousness and dignity of Nebraska’s claims weigh heavily in favor of the Court’s exercise of jurisdiction. “The model case for invocation of this Court’s original jurisdiction is a dispute between

States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.” *Mississippi*, 506 U.S. at 77 (cleaned up). When the States ratified the Constitution, they surrendered their sovereign right to resolve disputes between each other by force, instead agreeing to resolve differences through compact or by submitting to this Court’s original jurisdiction. *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 279 n. 5 (1959).

Nebraska and Colorado entered into a compact over a century ago to equitably distribute the South Platte River’s waters. An interstate compact endorsed by congressional consent “adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations.” *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951). It takes that “part of the general right of sovereignty”—namely, “to establish and fix the disputed boundaries,” including interstate waters—and subjects it to the “sole limitation” of congressional consent. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-7 (1938).

Treaty violations classically gave rise to war between sovereigns. This case is of a piece. Nebraska and Colorado compacted over the South Platte River as part of “their original inherent sovereignty.” *Id* at 107. Colorado has now breached its obligations under the Compact. It is knowingly and intentionally depriving Nebraska of its lawful share of the water of an interstate stream. Such a breach implicates sovereign prerogatives that fall squarely within the

traditional scope of this Court’s original jurisdiction. Stephen M. Shapiro et al., *Supreme Court Practice* ch. 10-2, at 10-7, 10-9 (11th ed. 2019) (noting that this Court has “most frequently” exercised its original jurisdiction to consider disputes “sounding in sovereignty and property” and “to construe and enforce an interstate compact”).

Moreover, this dispute has considerable impact on both States; Compact enforcement is the only way Nebraska can protect itself, and such enforcement will reshape how Colorado uses water in the South Platte River Basin. Water is of the most vital importance to Nebraska’s future—behind its people, water is the most important natural resource for Nebraska’s future. The River is the original and primary source of water for Nebraska’s Western Irrigation District, and an important source of water for other Nebraska irrigators and water users. Nebraska industries (including public power districts and downstream irrigation districts) and municipalities rely on this water supply. Further, South Platte River water is a fundamental source of supply for the Platte River Recovery Implementation Program, a multi-State and federal partnership that protects threatened and endangered species in critical portions of central Nebraska. Consequently, the “gravity and importance of [this] case are apparent,” and call for the exercise of the Court’s original jurisdiction. *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945).

II. Nebraska Has No Alternative Forum

This Court is the only forum that can remedy the harms Nebraska is suffering from Colorado’s

breaches. No alternative body can provide the “full relief” that Nebraska seeks. *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992). The Constitution specifically envisions this Court as the forum to resolve the States’ differences.

The solution to an impasse between two States party to a compact is judicial resolution of such disputes. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (cleaned up). “By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them, and this power includes the capacity to provide one State a remedy for the breach of another.” *Ibid.* As this Court has consistently explained, “the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the ‘federal common law’ governing interstate controversies, is the function and duty of the Supreme Court of the Nation.” *Dyer*, 341 U.S. at 28 (cleaned up). The cases where this Court has exercised its original jurisdiction to resolve the interpretation and application of an interstate compact are legion.

The claims in Nebraska’s Bill of Complaint arise from the States’ disagreements over the rights and obligations under an interstate compact. Nebraska alleges that Colorado has diverted water rightfully belonging to Nebraska under the Compact’s terms. Moreover, Nebraska further alleges that Colorado has stymied Nebraska’s access to other water rightfully allocated to it under the Compact by interfering with Nebraska’s ability to build a canal specifically

contemplated by the Compact. Nebraska seeks to enforce the Compact's terms and require Colorado to honor the commitments it made over a century ago.

Not only does Nebraska seek to enforce the Compact, but it wants to do so in a way that strikes at the States' core sovereign interests. For instance, to build the canal, the Compact expressly gives Nebraska the right to pursue eminent domain over lands *in Colorado*. How to exercise that right—and what venue is the most appropriate to do so—implicates sovereign interests best resolved by this Court.

Nebraska has tried to resolve its concerns without judicial intervention, but to no avail. And unlike some other interstate compacts, the Compact here did not create a Compact Commission or other adjudicative body that can address such questions and resolve intractable disputes. So 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.

CONCLUSION

For these reasons, the State of Nebraska respectfully requests that the Court grant the Motion for Leave to File Bill of Complaint.

Respectfully submitted,

MICHAEL T. HILGERS
Attorney General of Nebraska
CODY S. BARNETT
Solicitor General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record
NEBRASKA DEPARTMENT OF
JUSTICE
1445 K Street, Room 2115
Lincoln, Nebraska 68508
(402) 471-2683
justin.lavene@nebraska.gov

THOMAS R. WILMOTH
DONALD G. BLANKENAU
KENNON G. MEYER
Special Assistant Attorneys
General
BLANKENAU WILMOTH
JARECKE LLP
2900 South 70th Street, Suite 150
Lincoln, Nebraska 68506

Counsel for State of Nebraska