



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

March 8, 2013

RE: Preliminary Order Creating Water District No. 29-O, Bannock Creek Drainage

Dear Water Right Holder,

Enclosed please find a copy of the Preliminary Order regarding the above referenced matter. This order creates a new water district for administration of surface and ground water rights in the Bannock Creek Drainage as shown on the map in Attachment A of the Preliminary Order. The records of the Idaho Department of Water Resources (Department or IDWR) show that you own or have an interest in one or more water rights that are diverted from the Snake River within the new water district.

Also enclosed is an informational sheet that explains options for responding to preliminary orders. Please note that any party subject to the order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

The Department will send a separate notice to water users specifying a date, time and location of the first annual meeting of the water district. The Department anticipates holding the meeting in American Falls in about 30 days. The water users present at the meeting must consider election of a watermaster, selection of an advisory committee and adoption of a budget. IDWR will organize a steering committee of representative water users within the district to assist with preparation for the annual meeting. IDWR is considering scheduling one steering committee meeting prior to the annual meeting. If you are interested in participating in the steering committee, please contact Tim Luke, IDWR, at 208-287-4959 or by e-mail at tim.luke@idwr.idaho.gov.

Please contact this office or the IDWR regional office in Idaho Falls (208-525-7161) if you have any questions concerning the attached order.

Sincerely,

Tim Luke
Water Compliance Bureau

Enclosures: *Preliminary Order*
Responding to Preliminary Orders issued by IDWR

c: IDWR Eastern Region Office

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE CREATION OF)
THE BANOCK CREEK DRAINAGE)
WATER DISTRICT, ADMINISTRATIVE)
BASIN NO. 29)
_____)

**PRELIMINARY ORDER CREATING
WATER DISTRICT 29-O**

The Director ("Director") of the Idaho Department of Water Resources ("Department") is required by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Idaho Code § 42-604 provides the Director with discretion in determining how these mandatory water districts shall be structured, allowing the Director to create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources. *Id.* Based upon the record in this matter, the Department finds, concludes and orders as follows:

FINDINGS OF FACT

1. On December 19, 2012, the Snake River Basin Adjudication ("SRBA") District Court issued an order authorizing the Director to distribute water pursuant to chapter 6, title 42, Idaho Code, in accordance with the Director's Reports and partial decrees that have superseded the Director's Reports within the Bannock Creek Drainage in Department Administrative Basin No. 29 ("Basin 29"). The District Court's order found that "interim administration ... is reasonably necessary to efficiently administer water rights and to protect senior water rights."

2. On December 19, 2012, the Department conducted a public information meeting in American Falls, Idaho regarding the potential creation of a water district to administer water rights in the Bannock Creek Drainage.

3. On January 28, 2013, the Director signed a notice proposing to create a water district pursuant to the provisions of Idaho Code § 42-604. The notice was sent by regular U.S. Mail on January 29, 2013, to each holder of a water right in the Bannock Creek Drainage area except ground water domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), and ground water rights within Water District 120 overlying the Eastern Snake Plain Aquifer ("ESPA").¹ The hearing notice described the district proposed to be established, the reasons therefore, and the time and place for a hearing to be held on February 12, 2013 concerning creation of the proposed water district. The notice also provided a time period within which written comments on the proposed action would be accepted.

4. The Director's notice mailed to water right holders on January 29, 2012 proposed creation of a water district in the Bannock Creek Drainage as shown on the map in Attachment A of this

¹ Ground water rights within the ESPA are included in Water District No. 120, except Tribal and Fort Hall Project ground water rights, and ground water domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

order. The notice indicated that the administration of the Shoshone-Bannock Tribes (“Tribes” or “Tribal”) and Fort Hall Project water rights located within the boundaries of the proposed water district will occur as provided in the *1990 Fort Hall Indian Water Rights Agreement* (“Fort Hall Agreement”) and as decreed by the SRBA District Court in its *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* dated August 2, 1995 (“Consent Decree”).

5. The Director’s notice further explained that creation of the water district is necessary in order to properly administer water rights within the Bannock Creek Drainage and to facilitate the measurement and reporting of water diversions.

6. The Director’s notice also proposed that upon creation of a water district, a meeting of the holders of water rights in the district will be held in 2013 for the purpose of electing a watermaster and advisory committee.

7. On February 12, 2013, commencing at approximately 2:30 p.m. at the American Falls Public Library, American Falls, Idaho, Tim Luke, the Department Water Compliance Bureau Chief and hearing officer in this matter, conducted a public hearing concerning the proposed water district creation. Approximately 26 people attended the hearing.

8. The hearing officer initiated the meeting by explaining the hearing process. The hearing officer also provided a brief presentation that described the proposed district area, the features and operation of a water district, the reasons for creation of the district, and the rights and uses proposed to be included in the district. Reasons given for creation of the water district by the Department included the following:

- Administer and deliver water rights as necessary in accordance with the prior appropriation doctrine as established by Idaho law;
- Measure, record and monitor water diversions as necessary in order to deliver priority water rights and to assure that diversions do not exceed authorized water right diversion limits; and
- Facilitate management of water rights. Water district operations and procedures provide a means to assist in maintenance of water right ownership records, maintain water right descriptions such as points of diversion and places of use, and provide watermaster review and comments for water right transfers, water supply bank transactions and potential new water right applications.

9. Following the presentation, the hearing officer provided time for hearing participants to ask questions regarding the proposed water district.

10. Persons attending the hearing were provided opportunity to make oral statements for the record. In addition, the hearing officer held the record open through February 22, 2013.

11. Two (2) individuals made oral statements for the record at the hearing. These two individuals hold irrigation water rights within the proposed water district area. Both water users supported creation of the water district as proposed by the Department.

12. Written comments were received from the United States Bureau of Indian Affairs Fort Hall Agency (BIA) and the Water District 01 Committee of Nine. The written comments were submitted to the Department on or before the February 22, 2013 deadline.

13. The written comments from the BIA included specific questions about administration of non-Indian rights within the Ft. Hall Reservation (Reservation), measurement of surface water entering or “bypassed” to the Reservation and measurement of diversions within the Reservation owned by the Tribes or BIA. The BIA comments also expressed some concern about ground water withdrawals reducing the surface flow of Bannock Creek. The BIA suggested that data be gathered to determine the impact of ground water withdrawals on Bannock Creek, including monitoring and measuring ground water diversions, measuring ground water levels, and monitoring Bannock Creek flows above and below major ground water diversions.

14. The written comments submitted by the Water District 01 Committee of Nine requested that the Department ensure that ground water diversions on the southwestern edge of the Bannock Creek drainage be included; assure the water district boundary does not include or overlap American Falls Reservoir; and that any overlap of the proposed water district and Water District 120 not recognize any administrative or hydrologic connection.

CONCLUSIONS OF LAW

1. Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* Idaho Code §§ 42-101, 42-103, and 42-226.

2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602 et seq.

3. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. Idaho Code § 42-604 authorizes the Director to form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation.

5. Idaho Code § 42-1417 provides that the district court having jurisdiction over a general water rights adjudication may authorize the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with Director's Reports filed with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the Director's Reports.

6. All of the water rights claimed in the SRBA and within Basin 29, including the Bannock Creek Drainage, have been partially decreed or reported to the SRBA District Court.

7. Idaho Code § 42-227 provides that a water right permit may be issued, but shall not be required for appropriation of ground water for domestic and stock water purposes as defined under Idaho Code § 42-111.

8. The hearing notice and hearing record in this matter show that one of the reasons the Department proposes creation of the water district is to facilitate the measurement and reporting of both surface and ground water diversions that are subject to administration under the proposed water district. At the hearing held on February 12, 2013, the Department also discussed the potential need for the proposed water district to measure and monitor ground water levels from wells subject to administration by the district.

9. As described in the Department's hearing notice and as explained at the hearing, the State shall administer the distribution of those rights acquired under state law within the Ft. Hall Reservation that are not a part of the Fort Hall Agency, Tribal or Fort Hall Irrigation Project water rights. Rights held by the United States in trust for the benefit of the Shoshone-Bannock Tribes and the BIA water rights will be administered in accordance with the Fort Hall Agreement and the Consent Decree.

10. The Fort Hall Agreement provides that the Tribes, BIA and State may cooperatively inspect diversions and water monitoring devices administered by the respective parties. Additionally, the Fort Hall Agreement provides for an Intergovernmental Board comprised of representatives from the Tribes, BIA and the State "to continue cooperative efforts to efficiently manage water resources and resolve disputes arising under this *Agreement*." Therefore, the Intergovernmental Board will be requested to address measurement of flows from Bannock Creek and tributaries entering the Reservation. The Intergovernmental Board may also be asked to discuss measuring and monitoring of both surface water sources and ground water levels throughout the drainage in a manner that meets the collaborative objectives of the parties represented by the Intergovernmental Board. Measurement and reporting of diversions within the proposed water district will be necessary for the proper distribution of water within the water district in accordance with the prior appropriation doctrine as established by Idaho law. The Director should issue a separate order requiring installation of measuring devices and controlling works for state based water right diversions that are subject to administration by the water district. The Director may also direct the water district to measure or monitor ground water levels and/or surface water flows as necessary for the proper distribution of water within the water district and drainage.

11. The Bannock Creek Drainage water district boundary does not include or overlap the American Falls Reservoir.

12. The Department cannot include ground water rights in the proposed Bannock Creek Drainage water district where the holders of such water rights were not provided notice of the proposed action as required under Idaho Code § 42-604. The Director can propose expansion of the water district boundary at a later date if necessary.

13. The hearing notice and hearing record in this matter shows that the Department proposed to exclude ground water rights within Water District 120 and overlying the ESPA from the proposed Bannock Creek Drainage water district. Neither the Department's hearing notice or the hearing record address any hydrologic connection between the proposed water district and Water District 120.

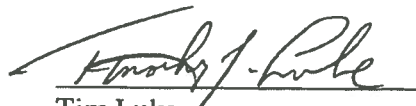
14. Based upon the above statutory authorities, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create a water district to administer and regulate water rights, and protect senior priority water rights in the Bannock Creek Drainage.

ORDER

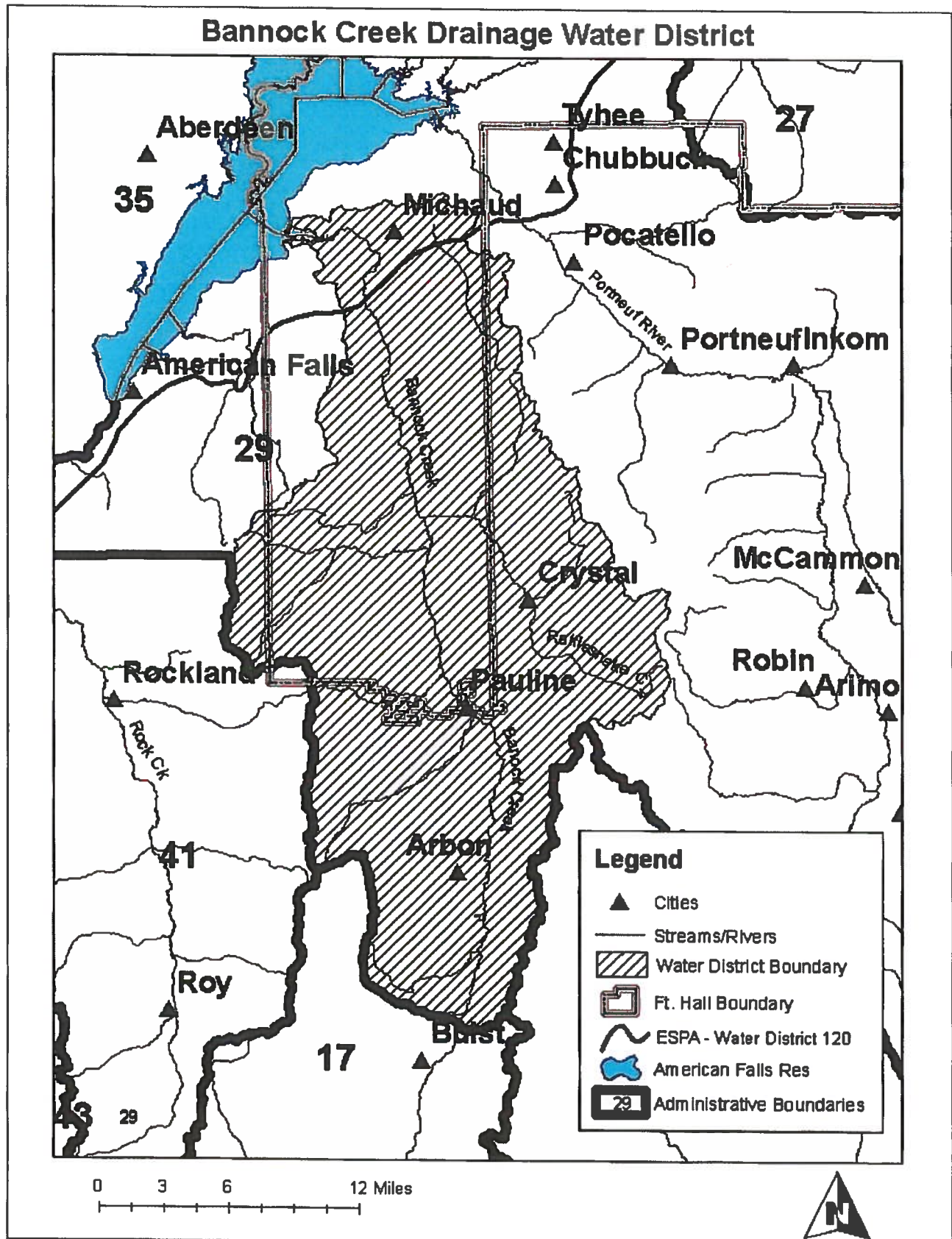
IT IS HEREBY ORDERED that:

1. Water District No. 29-O is created to include all state based surface water and ground water rights in the Bannock Creek Drainage in Basin 29 as shown in the map appended hereto as Attachment A, except the following water rights:
 - a. Ground water rights used for domestic and stock water purposes as defined by Idaho Code §§ 42-111 and 42-1401A (11);
 - b. Ground water rights located within Water District 120 overlying the ESPA; and
 - c. Water rights administered by the United States and/or Shoshone-Bannock Tribes pursuant to the *1990 Fort Hall Indian Water Rights Agreement* and as decreed by the SRBA District Court in its *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, dated August 2, 1995.
2. The holders of water rights within Water District No. 29-O shall meet at a date, time and place to be announced by the Director to conduct its annual meeting to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district.
3. The watermaster for Water District No. 29-O shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:
 - a. Measure, collect, and record the diversions under state based water rights;
 - b. Administer and enforce state based water rights in priority; and
 - c. Curtail unauthorized or excessive diversions as necessary (i.e., any diversion without a water right or in excess of the elements or conditions of a water right).
4. The Director shall issue a separate order requiring the installation of measuring devices and controlling works for state based water right diversions within Water District No. 29-O.

DATED this 8th day of March, 2013.


Tim Luke
Hearing Officer

ATTACHMENT A



EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2013, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: www.idwr.idaho.gov. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.



Sarah Garceau
Office Records Specialist
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