

NON-BINDING ARBITRATION

**PURSUANT TO:
FINAL SETTLEMENT STIPULATION**

Kansas v. Nebraska and Colorado
**No. 126, Original, U.S. Supreme Court
Decree of May 19, 2003, 538 U.S. 720**



ARBITRATOR'S PRELIMINARY DECISION ON LEGAL ISSUES



December 19, 2008

BACKGROUND

On December 15, 2003, the states of Kansas, Nebraska, and Colorado (the “States”) executed the Final Settlement Stipulation (the “FSS”) “... to resolve the currently pending litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment” FSS, Volume 1 of 5, at 1. The FSS was filed with the Special Master appointed by the U.S. Supreme Court (the “Court”) in *Kansas v. Nebraska and Colorado*, No. 126, Original, who recommended entry of the proposed consent judgment which would approve the FSS. Second Report of the Special Master (Subject: Final Settlement Stipulation) at 77. On May 19, 2003, the Court entered a consent decree approving the FSS (the “Consent Decree”).

By 2007, disputes arose between the States regarding compliance with the FSS and the Republican River Compact. The disputes were submitted to the Republican River Compact Administration (the “RRCA”) pursuant to the provision in the FSS for dispute resolution. *See* FSS, Volume 1 of 5, § VII., at 34-40. The RRCA addressed the disputes, but no resolution of certain disputes was reached. *See* Resolution of the RRCA dated May 16, 2008, Exhibit 1 to Arbitration Agreement dated October 23, 2008. The RRCA submitted these disputes to non-binding arbitration pursuant to the provisions of § VII. of the FSS, the States executed the Arbitration Agreement on October 23, 2008 (the “Arbitration Agreement”), and I was retained by the States to serve as the Arbitrator.

Exhibit 2 to the Arbitration Agreement sets forth the “Time Frame Designation” for the non-binding arbitration, Exhibit 3 to the Arbitration Agreement sets forth the disputed issues identified by the State of Kansas to be arbitrated, and Exhibit 4 to the Arbitration Agreement sets forth the disputed issues identified by the State of Nebraska to be arbitrated. The disputed issue originally raised by the State of Colorado with the RRCA, which the RRCA submitted to non-binding arbitration pursuant to the provisions of § VII. of the FSS (*See* Attachment 3 to Resolution of the RRCA dated May 16, 2008), has been withdrawn from this non-binding arbitration and is not included in the Arbitration Agreement.

From the issues set forth in Exhibit 2 and Exhibit 3 to the Arbitration Agreement, the States identified six legal issues to be decided by the Arbitrator by December 19, 2008, for the purpose of narrowing discovery and the hearing on the merits scheduled in mid-March of 2009. Based on a disagreement regarding the appropriate scope of the arbitration, the Arbitrator identified a seventh issue during a prehearing conference held telephonically on November 5, 2008. Each of the States filed opening briefs on these seven legal issues with the Arbitrator on November 10, 2008. (The State of Colorado briefed 3 arguments pertaining to only 4 of the legal issues.) Responsive briefs were filed on November 24, 2008, and reply briefs were filed on December 5, 2008. Oral argument on these legal issues was heard at the University of Denver, Strum College of Law, on December 10, 2008.

Each of the States stated the seven legal issues differently, and the Arbitrator has synthesized the statements of the States into the following seven questions. References to the argument or issue are from the opening briefs of each of the States.

Question 1: Are Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures proper subjects of dispute resolution and for this arbitration?

(Kansas' Argument A., Nebraska's Issue I.A., Colorado's Argument I.)

Question 2: Is the evaporation from Non-Federal Reservoirs below Harlan County Lake required to be included in the Compact accounting?

(Kansas' Argument B., Nebraska's Issue I.B.)

Question 3: Do the current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation? If yes, how should evaporation from Harlan County Lake be allocated?

(Kansas' Argument C., Nebraska's Issue I.C.)

Question 4: If Nebraska has violated the Compact or the consent decree of May 19, 2003, causing damage to Kansas, is Nebraska subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as monetary sanctions, or should any damages awarded to Kansas be limited to actual damages suffered by Kansas?

(Kansas' Argument D., Nebraska's Issue III.B., Colorado's Argument II.)

Question 5: Is Kansas' proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation a proper subject for this arbitration, and can the U.S. Supreme Court formulate and mandate a remedy for future compliance?

(Kansas' Argument E., Nebraska's Issue II., Colorado's Argument III.)

Question 6: If Nebraska's alleged violations during both 2005 and 2006 are substantiated, is Kansas entitled to damages for both 2005 and 2006 or for 2006 only?

(Kansas' Argument F., Nebraska's Issue III.A.1.)

Question 7: Is Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years a proper subject for this arbitration?

(Kansas' Argument G., Nebraska's Issue III.A.2., Colorado's Argument I.)

PRELIMINARY DECISION

The Arbitrator has treated the briefs filed by the States as being analogous to cross-motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. “A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.” Fed. R. Civ. P. 56(a). “The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

The Arbitrator has carefully considered the briefs of counsel for the States and has determined that there are no material facts genuinely at issue that would preclude decision of the seven legal issues set forth above as a matter of law. Therefore, the Arbitrator issues this decision on these seven legal issues, including a summary of his reasons for deciding each issue. With the States’ consent during oral arguments on December 10, 2008, this decision is preliminary only in so far as the Arbitrator’s written analysis of each legal issue has not been completed. The Arbitrator will complete his written analyses and issue a final decision on these seven legal issues as soon as practicable.

Question 1:

Are Nebraska’s proposed changes to the Republican River Compact Administration Accounting Procedures proper subjects of dispute resolution and for this arbitration?

(Kansas’ Argument A., Nebraska’s Issue I.A., Colorado’s Argument I.)

Decision: Nebraska’s proposed changes to the Republican River Compact Administration Accounting Procedures are proper subjects of dispute resolution and for this arbitration. If any changes to the Accounting Procedures are determined to be warranted, the appropriate effective date for such changes will be determined following a hearing of the facts. Finding for Nebraska and Colorado; finding against Kansas.

Summary of Reasoning. The “equitable division” or “allocation” of the waters of the Republican River Basin between the States is set forth in Article IV of the Compact, subject to the proportionate adjustment required in Article III. This equitable division or allocation is the paramount reason for the Compact and cannot be enforced without accurate accounting of how the waters are actually distributed between the States. Significant flaws in accounting will result in significant differences between the enforceable allocations established in the Compact and the actual distributions of the waters between the States. Correcting errors in the Accounting Procedures used by the RRCA will help assure that the States actually receive the waters to which they are entitled pursuant to the Compact. Correcting such errors will not change the allocations set forth in the Compact, which cannot be changed unless the Compact is amended. Since the Court has jurisdiction to enforce the distribution of waters pursuant to the Compact, it must also have jurisdiction to require application of accurate accounting procedures used to determine whether the distribution of the waters as required by the Compact has in fact occurred.

The Compact contains no explicit accounting procedures, but the FSS, which must be construed such that it is entirely consistent with the Compact, does provide detailed accounting procedures to be used by the RRCA (the “RRCA Accounting Procedures”). The FSS provides that: “The RRCA may modify the RRCA Accounting Procedures, or any portion thereof, in any manner consistent with the Compact and this Stipulation.” See FSS, § I.F. See also RRCA Accounting Procedures and Reporting Requirements, § I. The FSS also sets forth a process for dispute resolution in a separate section. See FSS, § VII. This section of the FSS clearly states that the dispute resolution process applies to “Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest” See FSS, § VII.A., ¶ 1. and ¶ 7. The scope of “Any matter relating to Republican River Compact Administration . . .” is broad and includes accounting procedures used to determine compliance with the Compact, unless such procedures are specifically excluded. The specific provisions for dispute resolution in the FSS do not exclude the RRCA Accounting Procedures. Similarly, the provisions in the FSS affirming that the RRCA may modify the RRCA Accounting Procedures do not specifically exclude disputes involving those procedures from the provisions in the FSS for dispute resolution.

Because the FSS specifies how the RRCA is to determine compliance with the Compact, the FSS must also be construed as rules and regulations of the RRCA, pursuant to Article IX of the Compact, unanimously adopted by the official in each State charged with the duty of administering the Compact, which duty is exclusively reserved to those officials in Article IX. Through § VII. of the FSS, the rules and regulations of the RRCA include provision for dispute resolution involving “Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest” (FSS, § VII.A., ¶ 1.) and “any dispute submitted to the RRCA pursuant to this Section VII.” FSS, § VII.A., ¶ 7.

Question 2:

Is the evaporation from Non-Federal Reservoirs below Harlan County Lake required to be included in the Compact accounting?

(Kansas’ Argument B., Nebraska’s Issue I.B.)

Decision: The evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Finding for Kansas; finding against Nebraska.

Summary of Reasoning. In § VI.A., the FSS affirmatively provides that: “For purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in accordance with the methodology set forth in the RRCA Accounting Procedures.” The provision is silent about how or whether evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Nebraska asserts that this provision should be read that because it includes evaporation from Non-Federal Reservoirs above Harlan

County Lake, it implies exclusion of evaporation from Non-Federal Reservoirs below Harlan County Lake. However, the FSS must be read such that it is entirely consistent with the Compact. To be entirely consistent with Article II of the Compact, which defines “Beneficial Consumptive Use” as including “water consumed by evaporation from **any** reservoir” [*emphasis added*], § VI.A. of the FSS can not mean that evaporation from Non-Federal Reservoirs below Harlan County Lake is to be excluded in Compact accounting. Rather, § VI.A. of the FSS simply does not provide a specific requirement as to **how** evaporation from Non-Federal Reservoirs below Harlan County Lake is to be included in the Compact accounting [*emphasis added*]. Regarding the exclusion of reservoirs having a storage capacity of less than 15 acre-feet, this can only be consistent with Article II of the Compact because the evaporation from such small reservoirs is *de minimus*.

Question 3:

Do the current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation? If yes, how should evaporation from Harlan County Lake be allocated?

(Kansas’ Argument C., Nebraska’s Issue I.C.)

Decision: The current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation. However, the Accounting Procedures should be modified so that evaporation from Harlan County Lake is allocated between Kansas and Nebraska in proportion to each state’s use of water from Harlan County Lake for all purposes. Finding in part for Nebraska and in part for Kansas; finding in part against Kansas and in part against Nebraska.

Summary of Reasoning. In § IV.A.2.e)(1) of the RRCA Accounting Procedures, evaporation from Harlan County Lake is expressly “charged to Kansas and Nebraska in proportion to the annual diversions made by the Kansas Bostwick Irrigation District and the Nebraska Bostwick Irrigation District” except “For any year in which no irrigation releases were made from Harlan County Lake” The States could have chosen language that would have expressly apportioned the evaporation losses from Harlan County Lake between Nebraska and Kansas according to the use of water from Harlan County Lake by each state, whatever those uses might lawfully be, but they did not. Assuming Kansas’ assertion of the underlying intent to be true, that the States would share the consumptive beneficial use associated with evaporation from Harlan County Lake on the basis of the relative amount of their uses, that intent cannot be used to ignore the plain meaning of the specific language actually adopted by the States. There is no ambiguity in the language of this provision, and its plain meaning must be applied until such time as this provision of the RRCA Accounting Procedures is modified, as it should be, as provided for in the FSS.

There is no dispute that Nebraska paid the Nebraska Bostwick Irrigation District to forgo its use of water from Harlan County Lake in 2006 and that the District did not use water from Harlan County Lake in 2006. By its own admission, Nebraska undertook this action in an effort to comply with the Compact. That is, so that Nebraska could continue beneficial consumptive uses that otherwise may have been subject to curtailment to comply with the Compact. Forgoing direct use of water from Harlan County Lake so that other uses of water in the Republican River Basin in Nebraska could continue is still a use of water in Nebraska. An apportionment of the evaporation from Harlan County Lake for such uses would be equitable and consistent with Article II and Article XI(a) of the Compact, which impliedly apportions evaporation based on where the associated beneficial use occurs not where the evaporation occurs, and the RRCA Accounting Procedures should be amended to provide this equity and consistency with the Compact when water is used for purposes other than irrigation.

Question 4:

If Nebraska has violated the Compact or the consent decree of May 19, 2003, causing damage to Kansas, is Nebraska subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as monetary sanctions, or should any damages awarded to Kansas be limited to actual damages suffered by Kansas?

(Kansas' Argument D., Nebraska's Issue III.B., Colorado's Argument II.)

Decision: Under the facts alleged by Kansas, the FSS, as a part of the consent decree of May 19, 2003, is properly enforced as a contract, like the Compact itself. Any damages awarded to Kansas are properly limited to the actual damages suffered by Kansas, and evidence pertaining to Nebraska's gains for its alleged overuse of water will not be considered. Finding for Nebraska and Colorado; finding against Kansas.

Summary of Reasoning. The FSS was approved by the Court in the Consent Decree and thus must be construed as part of the Consent Decree. But the FSS is first and foremost an agreement amongst the States, sovereigns who each agreed to "resolve litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment" FSS, § I.A. Because the FSS specifies how the RRCA is to determine compliance with the Compact, the FSS must also be construed as rules and regulations of the RRCA, pursuant to Article IX of the Compact, unanimously adopted by the official in each State charged with the duty of administering the Compact, which duty is exclusively reserved to those officials in Article IX. While the Court clearly has broad power to find contempt and to impose sanctions to remedy violations of its orders and decrees as asserted by Kansas, the Court also has the correlative power to limit or decline to impose contempt sanctions. Given the unique attributes of the FSS (i.e., consent decree, contract between the States, and rules and regulations of the RRCA) and given the purpose of the States in entering into the FSS (i.e., to resolve litigation regarding breach of the Republican River Compact, which itself is to be enforced as a contract between the States), the Arbitrator determines that the FSS as part of the Consent Decree should be enforced as a contract between the States, and any damages awarded to Kansas should be limited to the actual damages suffered by Kansas.

Limiting any damages awarded to Kansas to the actual damages suffered by Kansas is also consistent with the only provision in the FSS itself that provides a remedy for Nebraska's violation of § V.B.2.a. of the FSS, as alleged by Kansas. This remedy, which is set forth in § V.B.2.f. of the FSS, limits Nebraska's compensation (in water) to Kansas in the first year after Water-Short Year Administration is no longer in effect, for Nebraska's exceedance of its annual allocation above Guide Rock in the previous year, to a maximum amount equal to Nebraska's exceedance in the previous year^{*}; i.e., Kansas' actual loss.

Question 5:

Is Kansas's proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation a proper subject for this arbitration, and can the U.S. Supreme Court formulate and mandate a remedy for future compliance?

(Kansas' Argument E., Nebraska's Issue II., Colorado's Argument III.)

Decision: Kansas' proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation is a proper subject for this arbitration; however, Kansas can not mandate its proposed remedy. Any alternative remedy to that proposed by Kansas can also be considered during this arbitration, and the U.S. Supreme Court can formulate and mandate a remedy for future compliance, as it determines to be necessary. Finding for Kansas and finding in part for Nebraska and Colorado; finding in part against Nebraska.

Summary of Reasoning. The FSS sets forth a specific process for dispute resolution. *See* FSS, § VII. The FSS clearly states that the dispute resolution process applies to "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest" *See* FSS, § VII.A., ¶ 1. and ¶ 7. The remedy proposed by Kansas for future compliance with the Compact and the FSS is a proper subject for this arbitration provided it was first submitted to the RRCA (FSS, § VII.A., ¶ 1.), the RRCA was unable reach unanimous agreement or resolution (FSS, § VII.A., ¶ 7.), and Kansas desires to proceed with resolution by submitting to non-binding arbitration, unless otherwise agreed to by all States with an Actual Interest (*Id.*). As documented in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement), Kansas has followed all three procedural steps.

Kansas presented its proposed remedy for future compliance with the Compact and the FSS in its letter to Nebraska dated December 19, 2007. The mere act of presenting a proposed remedy for Nebraska's consideration did not impose the remedy, nor could Kansas impose any remedy on a coequal sovereign. However, once the facts are heard at hearing regarding Nebraska's alleged violations of the Compact and the FSS, and both Kansas' and Nebraska's proposed plans for future compliance are presented and considered, it is appropriate for the Arbitrator to recommend

^{*} "Nebraska must either make up the entire amount of the previous year's Computed Beneficial Use in excess of its Allocation, or the amount of the deficit needed to provide a projected supply in Harlan County Lake of at least 130,000 Acre-feet, whichever is less." FSS, § V.B.2.f.

actions that may be necessary for future compliance. If this matter is eventually submitted to the Court, the Court certainly can impose equitable relief in the form of an injunction or in other form as determined to be necessary to enforce future compliance with the Compact and the FSS. However, in enforcing the FSS, the Court should not impose any greater burdens than what the States have consented to in the FSS.

Question 6:

If Nebraska's alleged violations during both 2005 and 2006 are substantiated, is Kansas entitled to damages for both 2005 and 2006 or for 2006 only?

(Kansas' Argument F., Nebraska's Issue III.A.1.)

Decision: If Nebraska's alleged violations during both 2005 and 2006 are substantiated, Kansas is entitled to damages for both 2005 and 2006, but not based on the methodology set forth by Kansas, i.e., not two times the average of the shortages from 2005 and from 2006. Nebraska's compliance with the Compact in 2005 will be determined based on the evidence presented at hearing. Finding in part for Kansas and in part for Nebraska; finding in part against Nebraska and in part against Kansas.

Summary of Reasoning. By the plain wording of the FSS, the States waived "all claims against each other relating to the use of the waters of the [Republican River] Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002," (FSS, § I.C.) but not "[w]ith respect to activities or conditions occurring after December 15, 2002" FSS, § I.D. Further, the "States agree[d] that this Stipulation and the Proposed Consent Judgment are not intended to, nor could they, change the States' respective rights and obligations under the Compact." *Id.* The States also agreed "to implement the obligations and agreements in this Stipulation in accordance with the schedule attached hereto as Appendix B." FSS, § I.B. Appendix B of the FSS unambiguously sets the "First year Water-Short Year Administration compliance" as 2006, not 2005. The FSS also prescribes that "any Water-Short Year Administration year [is] treated as the second year of the two-year running average and using the prior year as the first year." FSS, § V.B.2.e.i. The common meaning of a two-year running average is the average value for a parameter calculated by adding the value for that parameter in a given year to the value for that same parameter from the preceding year and dividing the sum by two. The calculations shown in Table 5C of the RRCA Accounting Procedures for determining Nebraska's compliance during Water-Short Year Administration are wholly consistent with this meaning. Therefore, since Appendix B of the FSS sets 2006 as the first year for Water-Short Year Administration compliance, the only purpose for the 2005 calculations of Nebraska's Computed Beneficial Consumptive Use above Guide Rock, Nebraska's Allocation from sources above Guide Rock, Nebraska's share of any unused portion of Colorado's Allocation, and credits for imported water, pursuant to § V.B.2.a. of the FSS and Table 5C of the RRCA Accounting Procedures, is for calculation of the corresponding two-year running averages for 2006. Nebraska's compliance with § V.B.2.a. of the FSS in 2005 would require calculation of two-year running averages using parameter values from 2004 and 2005, but is not relevant

since the FSS plainly established 2006 as the first year for Water-Short Year Administration compliance.

While compliance with § V.B.2.a. of the FSS in 2005 is not required by the implementation schedule set forth in Appendix B to the FSS, this does not relieve Nebraska from any actual damages to Kansas resulting from noncompliance with the Compact in 2005.

Question 7:

Is Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years a proper subject for this arbitration?

(Kansas' Argument G., Nebraska's Issue III.A.2., Colorado's Argument I.)

Decision: Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years is not a proper subject for this arbitration at this time, since the issue has not been directly and fully submitted together with supporting materials to the RRCA. However, this issue can be addressed at hearing and in post-hearing briefs to the extent it must be addressed in considering Kansas' proposed remedy, or other alternative remedies or plans that may be considered at hearing, for future compliance with the Compact and the Final Settlement Stipulation. Alternatively, since this issue was identified in Exhibit 4 to the Arbitration Agreement, once directly and fully submitted with supporting materials to the RRCA and if the RRCA is unable to resolve this issue, it would then be a proper subject as an issue in this arbitration. Finding in part for Kansas, Nebraska, and Colorado; finding in part against Kansas, Nebraska, and Colorado.

Summary of Reasoning. In Nebraska's Opening Brief Re: Issue III.A.2., illustrative information is presented (*See* Table 1 in Nebraska's Opening Brief) to show "the importance of providing Nebraska with a credit for damages paid for violations in 2006 (a WSY Administration year)." Nebraska's Opening Brief at 8-9. While this information is helpful to the Arbitrator for context, there is no indication in the Arbitration Agreement or the States' opening, responsive, or reply briefs that demonstrates Nebraska's Issue III.A.2. was previously and specifically defined for the RRCA, that the type of supporting information presented in Table 1 of Nebraska's Opening Brief regarding this issue was supplied to the RRCA, or that Nebraska designated a schedule for the RRCA to attempt resolution of this issue, as expressly required by § VII.A.6. of the FSS.

Nebraska's Issue III.A.2. may very well need to be addressed in a limited manner while considering the formulation of any plan for ongoing compliance with the Compact and the FSS that is determined to be necessary, and to the limited extent required to address other issues that have been properly submitted to but unresolved by the RRCA. To the limited extent necessary to address issues specifically set forth in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement), Nebraska's Issue III.A.1. can be considered in this arbitration. While the Arbitrator agrees with the principal of judicial economy in addressing related issues in a broader context, that principal cannot defeat the specific requirements of the FSS set forth in §§ VII.A.1. & 6. Therefore, if Nebraska desires to have its Issue III.A.2. fully addressed in this

arbitration, Nebraska must first directly submit this issue to the RRCA as a separate issue with a specific definition, supporting materials, and a schedule for resolution.

Dated: December 19, 2008



Karl J. Dreher
Arbitrator

CERTIFICATE OF SERVICE

I, Karl J. Dreher, hereby certify that I caused a copy of the foregoing Arbitrator's Preliminary Decision on Legal Issues to be placed in the U.S. Mail, postage paid, on this 19th day of December, 2008, addressed to each of the following:

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