



# **Use It Or Lose It**

## ***Colorado's Oldest and Best Recycling Program***

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# Executive Summary

The subject of water rights in Colorado often generates confusion, anger and hysteria, even among those experienced in dealing with it. According to one old timer, “Whiskey’s for drinkin’. Water’s for fightin’.”

Colorado is notorious for the number of water lawyers it has, and it’s easy to criticize a system of law that generates so much conflict. However, much criticism of this system is based on a poor understanding of how and why it works. Some people believe Colorado should more closely follow the model of other western states where water allocation is more tightly controlled by government, and less by market forces. I argue in this paper that its free market origins and traditions are the strength of Colorado water law, based on protecting private property rights against all comers, public and private. This can work as well for streamflow protection as it has for power plants.

## Origins

Early Colorado water rights were established through the hard work of pioneers who created a system of water allocation long before Colorado became a state. The Colorado constitution and courts later adopted and continued this tradition of protecting private property rights for using an important but scarce resource. Colorado water law has repeatedly upheld the “first in time, first in right” principle upon which the system is based. This means water rights established earlier (senior rights) get to take water first, and water rights established later (junior rights) are cut back when seniors are not satisfied.

Although the Colorado constitution proclaims that all water in the state belongs to the “people,” it allows for water to be claimed (“appropriated”) for private use. Water rights are created by using water not previously appropriated, recognizing the prior right of those who came before. Water rights so established are considered to be property rights, and may be transferred to different locations or types of use as long as other water rights are not injured in the process.

## “Use it or Lose it” – Like Catching Wild Horses

Since water in a stream is a moving resource, water left unused by one person may be used by others. This simple fact produced the “use it or lose it” principle, based on using only as much water as you need and can use. It’s like catching wild horses as they run by - you don’t own the ones you don’t catch. Unused water rights may be reduced or lost, since other water users develop a reliance on water left in the stream. The “use it or lose it” principle is widely criticized by those who believe it encourages waste, inefficiency and inhibits environmental or streamflow protection. On the contrary, it is Colorado’s oldest and best recycling program, as explained in this paper.

Colorado water law has changed to recognize new kinds of water rights, including storage rights, conditional rights and instream flow rights. Storage rights allow water to be saved for later use in ponds and reservoirs. Conditional rights allow water users to claim rights for future water use and instream flow rights allow water rights to be dedicated to maintaining streamflows. The evolution of new kinds of water rights is clear evidence of the flexibility and adaptability of this system to meet changing needs.

All Colorado water rights have limits such as flow rates or volumes and specific types of use. In court cases involving changes of water rights, a historical use standard is imposed to prevent injury to other water users. Waste is not considered to be part of the water right, providing a disincentive for water users to waste water to maintain or enhance their rights. Of course, the system is not perfect. Abuses occur, but they pale in light of the accomplishments of a unique system of law and custom applied to a resource that doesn't sit still while you think about grabbing it.

Colorado water law today represents a most elegant example of private property creation and protection because of the steadfast efforts of those who would not concede their "selfish" private interests to those who would take their property without compensation. Unique among western states, the State of Colorado maintains a healthy respect for the pioneer spirit and hard work of people who came before. This free market tradition should not be sacrificed on the altar of "public interest" to subsidize latecomers who prefer not to pay for their economic choices.

Ironically, working within the current water rights system may be the best means of accomplishing its critics' goals, because the system would protect their future instream flow rights from attack. Senior water rights, purchased and converted to instream flow protection, would be protected during future droughts if they were acquired and transferred according to the same rules as everyone else. If, however, critics are successful in gaining special privileges for their new water uses, their new streamflow protection "rights" would likely be ignored, vilified and made practically useless when the next major drought comes along.

This paper explains the origins and traditions of Colorado water rights, and defends the principles upon which it is based.

"While the prior appropriation doctrine and western water development has been lampooned and lambasted, no one has made a serious proposal for substitution of a water law system that would better serve the needs of humans and the environment with equal or greater security, reliability, and flexibility – these being the hallmarks of an effective resource allocation system."

- Colorado Supreme Court Justice Gregory L. Hobbs, Jr.

**Use It Or Lose It:**

# Colorado's Oldest and Best Recycling Program

*By J. Craig Green, P.E., Water Consultant*

## Introduction

Imagine yourself a Colorado pioneer in the mid-1800's. At great risk, you chose to create a new life for yourself and your family, staking a claim to land, water and other natural resources. You didn't ask anyone's permission; you didn't fill out any forms; you didn't show anyone a picture ID. Since Colorado wasn't even a state yet, you simply started using the resources you needed, hoping you could survive against the forces of nature and other humans. You probably never heard of the Englishman John Locke,<sup>1</sup> whose brilliant principles of property rights you were about to implement:

"... every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands...are properly his."

Before Colorado became a state in 1876, water rights were established by the labor of farmers and miners who needed water for their livelihoods. As water was diverted from Colorado streams and applied to beneficial uses, a system of water use and allocation began that has now lasted 150 years. Though it is popular today to criticize the foundations of this system, it remains one of the most sensible and productive examples of property rights development in the semi arid western United States. At the heart of this system is the idea that latecomers must respect the rights of those who came before them. Today, water use in Colorado is complicated by law, engineering, economics and politics, but this principle remains paramount.

The goals of this paper are twofold: 1) to explain the origins and basic rules of Colorado water rights, and 2) to defend the often criticized "use it or lose it" principle as a necessary component of a dynamic water allocation system. This system evolved through decades of both cooperation and conflict, striking a balance between the rights of competing water users to become Colorado's oldest and best recycling program. The system did not come from planners, social engineers or administrators, but the free market tradition of establishing and protecting private property rights. Today's attempts to overhaul this system in favor of more legislated and politicized solutions<sup>2</sup> would do far more harm than good.

The scope of this paper is limited to discussing Colorado surface water rights as created by common law and currently adjudicated and administered under state law. It does not address transmountain diversions, interstate compacts, federal water projects, or groundwater - all important issues to understand in a wider context.

## Colorado Rivers and Water Use

The State of Colorado includes the origin or headwater basins of several major rivers in the western United States. These include the Colorado River, South Platte River (“too thin to plow, too thick to drink”), the Arkansas River and the Rio Grande. In each of these basins, water originating in Colorado flows downstream to other states. Within Colorado, each river basin is divided into smaller basins called tributaries. For example, the South Platte River basin has tributaries such as Bear Creek, Clear Creek, the St. Vrain River and the Cache la Poudre. Inflows from tributaries increase streamflow at some locations, while diversions of water for human use decrease streamflow at other locations.

A complicated network of diversion structures, ditches, pipelines and return flows creates a dynamic system of streamflow gains and losses that change every day. Most water uses create a reduction of streamflow at one location and an increase of streamflow at another location from return flows. Return flows are water that returns to the stream after irrigation, municipal and most other uses. For almost a century and a half, Colorado water users have relied on return flows from upstream water uses, which are rediverted and used again and again for downstream water uses. This is Colorado’s oldest recycling program, though it was not created with that goal in mind.

## What is a Water Right?

Part of the confusion about allocating water from Colorado streams comes from the nature of a moving resource. Streamflow in Colorado is highly variable, with spring snowmelt usually producing a peak annual flow sometime in May or June. As winter mountain snows continue to melt throughout the summer, streamflow declines, often resulting in a shortage by late summer. In dry years, shortages can be chronic and year round.

If you don’t take available water, it keeps flowing downstream for someone else’s use. It does not sit still and wait for you to use it when you need it, unless you build a pond or reservoir to save it. Because a water right is a right to use a flowing (moving) resource, it is usually identified by a maximum flow rate rather than a volume. Appropriating water from a flowing stream is like catching wild horses. You may catch and keep a few, but you have no claim to the ones you let go by or could not catch.

Once identified and recognized, a water right is considered a legal property right which can be moved from one place to another so long as the change does not injure other water rights. According to Colorado Supreme Court Justice Gregory Hobbs, an experienced water attorney, “A water right is a property right that arises solely by the act of placing water, theretofore unappropriated, to the appropriator’s beneficial purpose.”<sup>3</sup>

In Colorado and other western states, the word “appropriation” most often means claiming water for use. The first act of appropriation for older water rights was usually the beginning of construction of a ditch or other means of diverting water from a stream.

Today, the first act for a new claim might be placing a public notice of the intent to divert at the proposed point of diversion.

## **Appropriation Doctrine**

“First in Time, First in Right” is the foundation of Colorado Water Law - a principle established well before Colorado became a State in 1876. After farmers and miners in the 1850’s and 1860’s started using water from Colorado streams, they began to notice that in some months and years, there was not enough water to meet the needs of all who wanted to use it. Inspired by the previous experience of California gold miners, Colorado water users adopted a priority system called the “Prior Appropriation Doctrine.” This means those who developed the earliest claims to water (prior, or senior rights) have preference over those who developed later claims (junior rights). When senior water rights experience shortages, they may “call out” junior water rights. Today, water commissioners administer this system of priorities under state law, regularly curtailing junior rights so senior rights may be satisfied. According to Justice Hobbs, “The essential element and value of a water right is its priority for beneficial use to the exclusion of others not then in priority.”<sup>4</sup>

Occasionally, Colorado streams are completely dried up by senior water rights, though return flows and tributary inflows usually occur a short distance downstream to restore at least some of that streamflow. Based on the “first in time, first in right” principle, this legal right was established long before you and I were born. However, advocates of the so-called “public trust doctrine” would reverse this history of prior property rights recognition and protection in favor of more invasive government intervention.<sup>5</sup> Senior water rights are not free to exercise their demands without limits. Each water right was established by defining limits of water use based on the original use of the right.

## **Water Right Limits**

Colorado water rights were originally established by building a ditch or pipeline and diverting water to a beneficial use, usually irrigation or mining. As this custom developed along with the appropriation doctrine, the first adjudications (court recognitions) of water rights took place a few years after Colorado became a state in 1876. These adjudications were established by Colorado District Courts in various river basins to allow water users to present evidence as to the amounts and locations of their water claims. Water users testified about their water use, and this testimony was used by the courts to issue decrees confirming that use. Thus, Colorado courts (and statutes) adopted the previous claims of water users as legal property rights to use water.<sup>6</sup>

Decrees included limits to water use for each water right recognized by the courts. These limits included a specific point of diversion, a maximum rate of flow and a type of use such as irrigation or mining. Some early irrigation decrees included a number of acres irrigated. In this manner, each decree set forth limits of water use with respect to location, amount and type of use, which were necessary to protect other water rights against expanded claims beyond these original amounts.

“The owner of a water right has no right as against a junior appropriation to waste water or to divert more than can be used beneficially.”<sup>7</sup>

The earliest water rights in Colorado were for direct and immediate use, such as the irrigation of crops or washing ore from a gold mine. As more water rights became established and occasional shortages became more apparent, water users realized the benefit of diverting and saving water for beneficial use later. As ponds and reservoirs sprang up to accomplish this, the law once again had to catch up with human ingenuity. Over the years, two kinds of water rights were recognized: direct flow rights, and storage rights.<sup>8</sup> “Put the extra horses in the corral, Jake. We’ll need them later.”

Direct flow rights are those whose amounts are described in flow rates such as cubic feet per second (cfs), for immediate use. Storage rights are those whose amounts are described as a water volume such as acre feet, for use at a later time. An acre foot is the amount of water that would cover one acre to a depth of one foot. It is equivalent to 43,560 cubic feet, or about 326,000 gallons. One cfs flowing for one day (24 hours) will fill a pond with a volume of about two acre feet.

## Historical Use

Conflicting claims for water were resolved by the courts, establishing rules that later applied to other water users. One such rule, developed through experience with water conflicts, was the application of historical use limits in change cases.

As long as the decree defining the limits of a water right was not violated, historical use was not usually considered to be an issue. However, a “non injury” principle developed from disputes to protect water users from severe changes in the use patterns of other water rights. If someone wanted to change a water right from one type of use or location to another, this required a return to the court to change the decree. Other water users often appeared in court to express their objections, claiming the change would reduce the water available to their water rights. As a pattern of actual use developed under existing decrees, downstream water users became dependent on the historical operation of water rights upstream, including both diversions and return flows. An increase in diversion or reduction in return flows was perceived as injuring the rights of downstream water users, including junior water rights.

The law thus evolved to protect junior rights in change cases as they came to rely on the historical diversions and return flows from senior rights. This developed into the custom of using a water right’s actual historical use as a limit to future use in change cases.<sup>9</sup> This often meant reducing the amount of water described in the original decree.

For example, if an irrigation right requesting a change was decreed for 5 cubic feet per second (cfs) but historical use was only 3 cfs, then a condition of the change would be that only 3 cfs can be used at the new location, with the other 2 cfs permanently abandoned to the stream system. This recognized the reliance of downstream water users on the previous pattern of use by upstream water users.

Water rights in Colorado are real property rights which can be bought, sold and transferred from one location or type of use to another. However, due to the customs and traditions of Colorado water law; this can be done only if such a change does not injure other water rights, including water rights junior to the water right being changed. The standard by which injury is determined is usually expansion of historical use.

## Abandonment

*If a water right owner demonstrates that the intent to use the water right has been permanently terminated, then the whole water right may be declared to be abandoned, never to be used again. After a court decreed abandonment, water previously used by a water right is added to the stream system and may be diverted by other water rights. The horse, so to speak, is “out of the barn.”*

Some water rights used for a few years and then not used for decades have been declared abandoned in their entirety by Colorado courts. In other cases, courts have been more lenient, allowing water rights not used for long periods of time to be restored. Today, the historical use standard and the prospect of abandonment are more likely to be applied than they were in the past, due to increasing competition for water and its increasing value.

## “Use it or Lose it”

Early Colorado water rights were established with maximum flow rates for the beneficial use claimed, but flow rates in decrees were not guarantees that those amounts would be physically and legally available at all times. Although senior rights can cause junior rights to be curtailed, they cannot create more streamflow than nature provides, nor can they divert their maximum decreed amount when their actual need is less. The concept of preventing waste in water use was established by case law and statute.<sup>10</sup>

“Use it or lose it” means that exercising a water right less than its full entitlement may result in a reduction or loss of that water right, through abandonment or the application of a historical use standard. Critics of this principle believe it creates an incentive for wasting water to avoid these possibilities.<sup>11</sup> However, the same historical use standards that evolved to protect some water users from the actions of others also prevent a water user from benefiting from waste. Since water right changes must maintain historical return flows, there is no real incentive for a water user to divert more water than needed, which only increases those return flows. Many critics of the current system don’t seem to understand that the unused portion of a water right is no longer a water right if you want to change it to another location or type of use. If this were to change through legislation, other water rights would be injured from the expanded use this would allow. Did you really think you owned those horses you couldn’t catch?



“Use it or lose it” comes from the simple idea of taking what you need, but no more. Unlike fixed property rights such as land and minerals, water not taken from a flowing stream is immediately available for use by others. Storage rights evolved to address this problem within the existing legal system, but such rights are limited to the size of a reservoir and the actual demands on its use.

## Conditional Water Rights

Conditional water rights came about to respond to the need of water users who have growing demands not reflected in current or historical use. These rights are granted by the courts recognizing this future need, while establishing a priority date as against other water rights established later. Cities and water districts that plan to serve larger populations in the future often obtain court decrees for uses that have not yet been exercised. By filing their plans with the court before they need to use water under the new right, they put other water users on notice of their intentions, who can object to the new claim. These claims are adjudicated by the courts considering limits proposed by objectors before the water is actually used, much in the same way that earlier rights were limited by actual historical use when changed. Conditional rights may be established by legitimate water using entities that can convince the court of their sincerity and ability to develop the facilities needed to use a larger amount of water in the future. Cities often obtain conditional water rights for future reservoirs, guaranteeing priority dates according to the “first in time, first in right” principle, before spending construction money.

Storage rights and conditional rights are two ways the legal system has responded to needs for future uses of water not apparent from today’s use. Another is instream flow protection.

## Instream Flows

In 1973, the Colorado Water Conservation Board (CWCB) was authorized by state statute to claim new instream flow water rights to protect the environment “to a reasonable degree.”<sup>12</sup> Water claims by the CWCB have been adjudicated since then as the only kind of water right in Colorado that does not have to be diverted to be considered a beneficial use. As of December 2001, more than 1300 water rights had been appropriated or acquired by the CWCB, covering over 8000 miles of Colorado streams.<sup>13</sup> Since these are mostly junior water rights, they have not been effective at preventing the occasional drying up of streams by senior water rights, but they have been effective at preventing further streamflow reductions from new changes in water rights.

The CWCB is now authorized to receive donations of senior water rights for the purpose of leaving those water rights in the stream to maintain and enhance fish habitats. Earlier this year (2002), Governor Owens signed into law Senate Bill 156, which expanded the CWCB’s authority to use senior rights for the purpose of enhancing instream flows beyond the minimum necessary to preserve the existing environment.<sup>14</sup> This law was written to respect existing priorities of water rights, but provides an enlarged opportunity for private parties to dedicate water rights to instream flow protection. Once dedicated to instream flow, senior rights can be administered to bypass downstream diversions. As

long as this is done through the water court in a way that recognizes prior rights and prevents injury to others, instream flow rights can now compete on an even footing with other water rights.

Even without instream flow rights, Colorado cities and water districts have actually increased streamflow in many stream segments by transferring upstream irrigation rights to downstream municipal use. This occurs because upstream irrigation diversions are put back into the stream, increasing streamflow until the City takes the water out downstream. Although new water rights reduce streamflows when they are in priority, they can only divert water when there are no calls from senior rights, which usually means during high streamflows. The existing system based on protecting private property rights is better able to deal with the diversity and complexity of competing water rights than new state laws or a federal mandate making new instream flows suddenly senior to all others. Yet, this is proposed by some opponents to the present system.<sup>15</sup>

## **New Water Users**

The growth of cities in the last few decades has resulted in an increased conversion of senior water rights from irrigation to municipal use. This has been done mostly through the water court system, respecting the rights of other water users by purchasing water rights on the open market and applying standards of historical use.

Because private property rights are protected under Colorado water law, some people who want to change the way Colorado water is used criticize the foundations of Colorado water law as needing fundamental change to accommodate their interests. These interests consider their desires for changing water use to be in the “public interest,” viewed as more important than the selfish interests of private water users like farmers, miners, breweries and cities. Cities are included in this list because, though they are public entities, they usually develop, buy and transfer water rights in a competitive marketplace to meet their water needs.

There is a variety of ways water use can be changed within the present system based on non injury to other water rights, but many latecomers to the Colorado water scene don’t want to pay the price to achieve their goals. Rather than buy senior rights and donate them to the Colorado Water Conservation Board for streamflow preservation, these latecomers would rather have their special interests subsidized by new laws that would ignore 150 years of labor by Colorado water users to establish and maintain senior water rights. Latecomers want to implement the “public trust doctrine” instead of respecting long-established property rights.<sup>16</sup> This would be a huge mistake for Colorado in general, and for existing water users in particular.

It’s easy to recommend spending someone else’s money to solve a problem – that’s why government solutions are so popular. By cloaking self interests in the ever-nebulous term, “public interest,” advocates for overhauling Colorado’s water law place themselves on a higher plane than those who came before, like priests who worship fish above people. There are adequate means in today’s water law to allow protection and enhancement of streamflows, but this requires dedicating resources to the acquisition of senior water

rights, a distasteful alternative for those who would rather force someone else to pay for their economic choices.

Critics who oppose the current system had better be careful what they wish for – they just might get it. The same laws they now oppose would protect their instream flow or other water rights against attack from others. Once changed in water court from other uses to instream flow protection, historical use of senior rights can be adjudicated so as to not require future diversion, which would accomplish streamflow protection advocates' goals. If they succeed in eliminating the "use it or lose it" principle or obtain special privileges for their desired new water uses, they will likely be hoisted on their own petard at some future time when thirsty cities experience another drought. Water users with widely different, even contradictory, goals have accepted the current system because they know people with whom they disagree have to play by the same rules.

The history of Colorado water law has been long, confusing and difficult, but more than any other state, Colorado has retained an emphasis on protecting the rights of those who came before. As other western states routinely sacrifice private water rights to the "public interest," Colorado remains the last and best example of protecting those rights. Colorado residents should be reluctant to support claims to "protect Colorado's rivers" if this requires senior water rights to be suddenly made junior to those claims.

"Western prior appropriation water law is a property rights-based allocation and administration system, which promotes multiple use of a finite resource. The fundamental characteristics of this system guarantee security, assure reliability, and cultivate flexibility. Security resides in the system's ability to identify and obtain protection for the right of use. Reliability springs from the system's assurance that the right of use will continue to be recognized and enforced over time. Flexibility emanates from the fact that the right of use can be transferred to another, subject to the requirement that other appropriators not be injured by the change."

- Colorado Supreme Court Justice Gregory L. Hobbs, Jr.<sup>17</sup> ■

## Endnotes

1. John Locke was an English philosopher whose ideas on property and other human rights strongly influenced the founders of the American republic. See "Two Treatises of Government," first published in 1690. Specifically, the second book, Section 27: "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others."
2. "A Dry Legacy – The Challenge for Colorado's Rivers," Trout Unlimited Colorado Water Project. January 2002. p. 15: "New and changed water rights should come with requirements that build in conservation." p. 13: "Colorado should make it easier for federal agencies to help protect the state's rivers." p. 12: "Sound use of federal authorities can be an important tool for restoring flows to dry streams."

3. Hobbs, Jr., Gregory L. "Colorado Water Law: An Historical Overview" University of Denver Water Law Review, Volume 1, fall 1997, Number 1, p. 7.
4. Hobbs, p. 7.
5. Dry Legacy, p. 5: "Moreover, unlike a number of other states, Colorado does not recognize the public trust doctrine – under which there is a public right to have water kept in rivers to maintain fisheries..." p. 5: "Not only is public participation difficult, but Colorado water courts cannot consider whether a water right application is in the public interest..." For Colorado water law's existing public policy, see Hobbs, p. 7: "Colorado water law often exhibits its anti-speculation, pro-individual public policy choice. Within the context of state water law, governmental regulation is employed for the primary purpose of identifying and administering rights which water users enjoy by virtue of appropriation for beneficial use under Colorado's Constitution and statutes."
6. Hobbs, p. 9: "Soon after statehood, Colorado undertook the identification of existing rights and claimed rights through a litigation process." See also Colorado Revised Statutes (CRS) 37-82-101 II. A: "The right to the water in the streams of Colorado, by prior appropriation, antedated any legislation. It was the common law of the people; and legislation, both national and territorial, was but a recognition declaratory of the right as it had theretofore and then existed..."
7. Hobbs, p. 8.
8. Hobbs, p. 13: "Water storage rights allowed unappropriated water to be captured and preserved for the time of need."
9. Hobbs, p. 7: "Over an extended period of time, a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for purposes of change."
10. Colorado Revised Statutes (CRS) 37-92-P.2<sup>nd</sup> 1254 (Colo. 1996) and CRS 37-90-103 (4). Annotated with reference to prior court cases.
11. Dry Legacy, p. 4: "Given the magnitude for demands for water, ensuring that it is used as efficiently as possible is critical. Unfortunately, this vital goal is undermined by another aspect of Colorado's water law system: the 'use it or lose it' principle."
12. CRS 37-60-102.
13. "Tabulation of Instream Flow Water Rights – December 2001," Colorado Water Conservation Board website, Stream and Lake Protection Section.
14. Colorado Senate Bill 02-156, making changes to CRS section 37-92-102 (3). Signed by Governor Owens on May 21, 2002.
15. Dry Legacy, p. 14: "...recognizing water rights for federal agencies (Forest Service, National Park Service) for protection of streams on federal lands." p. 15: "Colorado should consider closing some rivers to increased diversions, as Montana and Washington have done..."
16. Phillip T. Doe, Citizens' Progressive Alliance. Letter to Colorado Central Magazine, June 2002. Quoting Mr. Doe, "Were a public trust doctrine in place... the first priority would be to satisfy the minimum needs of the river." See also "Dry Legacy," p. 5 in footnote 5.
17. Hobbs, P. 2.

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