

**BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE**

In the Matter of the Designation of the)
Groundwater Management District No. 4 District Wide)
Local Enhanced Management Area in Cheyenne, Decatur,)
Gove, Graham, Logan, Rawlins, Sheridan, Sherman,) **002 – DWR-LEMA – 2017**
Thomas, and Wallace Counties, Kansas.)
)
Pursuant to K.S.A. 82a-1041.)
)
_____)

**ORDER OF DECISION RETURNING THE LOCAL ENHANCED MANAGEMENT
PLAN WITH PROPOSED MODIFICATIONS**

The above captioned matter came before the Chief Engineer of the Division of Water Resources, Kansas Department of Agriculture (“Chief Engineer”), for a second and final public hearing regarding the acceptance of the District Wide Local Enhanced Management Area (“District Wide LEMA”) proposed by the Northwest Kansas Groundwater Management District No. 4 (“GMD4”) on November 14, 2017 at the City Limits Convention Center, 2227 South Range Avenue, Colby, Kansas commencing at approximately 9:05 a.m. Such proceedings were held pursuant to K.S.A. 82a-1041(b) and (c). Pursuant to K.S.A. 82a-1041(d) and for the reasons set forth below, the Chief Engineer hereby returns the District Wide LEMA Management Plan to the GMD4 Board of Directors for consideration of proposed modifications to the management plan. Therefore, a subsequent Order of Designation shall only be issued upon approval of the modified management plan by the GMD4 Board of Directors and acceptance of such by the Chief Engineer.

I. Procedural Background

1. On June 8, 2017, GMD4 submitted a formal request to the Chief Engineer for the approval of a local enhanced management area (“LEMA”), including a proposed management plan for the period January 1, 2018 through December 31, 2022 pursuant to K.S.A. 82a-1041(a).

2. On June 27, 2017, the Chief Engineer found that the proposed management plan for the District Wide LEMA proposed clear geographic boundaries, pertained to an area wholly within a groundwater management district, proposed appropriate goals and corrective control provisions to meet the stated goals, gave due consideration to existing conservation measures, included a compliance monitoring and enforcement element, and is consistent with state law.
3. Pursuant to K.S.A. 82a-1041(a) and (b), the Chief Engineer initiated proceedings to designate the District Wide LEMA and scheduled an initial public hearing. Timely notice of the initial public hearing was mailed to each owner located within the proposed District Wide LEMA and published in two local newspapers of general circulation and the Kansas Register. Such initial hearing was delegated to Constance C. Owen (“Initial Hearing Officer”) pursuant to K.A.R. 5-14-3a.
4. The Initial Public Hearing was held on August 23, 2017 at the Cultural Arts Center at Colby Community College, 1255 S. Range Avenue, Colby, Kansas. Based on all testimony entered into the record and the applicable law, the Initial Hearing Officer issued findings that the District Wide LEMA Management Plan satisfied the three initial requirements as set forth in K.S.A. 82a-1041(b)(1)-(3).
5. Since the Initial Hearing Officer determined that the three initial requirements were satisfied, the Chief Engineer scheduled a second hearing for November 14, 2017, to consider whether the District Wide LEMA Management Plan is sufficient to address any of the existing conditions set forth in K.S.A. 82a-1036(a)-(d). Timely notice of the second public hearing was mailed to each owner located within the proposed District Wide LEMA and published in the Colby Free Press on October 13, 2017, the Goodland Star-News on October 13, 2017, and in the Kansas Register on October 12, 2017.
6. On October 10, 2017, a group of five water right owners (“Intervenors”) located within the proposed District Wide LEMA submitted a *Notice of Intervention* and a *Motion for Continuance*. The Chief Engineer did not rule on the *Motion for Continuance*, as K.S.A.

82a-1041 does not mandate that the public hearings be conducted as adversarial hearings and all notice requirements were met. In accordance with the requirements of K.S.A. 82a-1041, the intent was to allow anyone to submit evidence, testimony, or other information before, during, and after the second public hearing, with the opportunity to ask clarifying questions and submit written follow-up testimony afterwards.

7. On October 17, 2017, the Intervenors filed a *Motion to Provide Due Process Protections*. This motion requested additional time to prepare for the second public hearing and argued for the addition of procedures that would turn the scheduled public hearing into an adversarial proceeding. The Chief Engineer responded on November 6, 2017, and stated in his *Decision to Expand Due Process Procedures* that the prescribed hearing procedure would be modified to include greater opportunity for cross-examination. In his *Pre-Hearing Order*, the Chief Engineer also granted a two-week extension of the deadline to submit written comments after the hearing, and then granted an additional extension until December 22, 2017, upon the later request of the Intervenors. A summary and discussion of the procedural challenges brought forth by the Intervenors' Submittal are presented below in Section III.
8. On February 26, 2018, the Chief Engineer issued a corrected Order of Decision to correct several clerical errors in the original order.

II. Applicable Law

1. The formation of a local enhanced management area is governed pursuant to K.S.A. 82a-1041. When the Chief Engineer finds that a local enhanced management plan submitted by a groundwater management district is acceptable for consideration, then the Chief Engineer shall initiate proceedings to designate a local enhanced management area as soon as practicable.
2. Once the proceedings are initiated, the Chief Engineer shall hold an initial public hearing to resolve the following:

1. Whether one or more of the circumstances specified in K.S.A. 82a-1036(a) through (d), and amendments thereto, exist;
 2. Whether the public interest of K.S.A. 82a-1020, and amendments thereto, requires that one or more corrective control provisions be adopted; and
 3. Whether the geographic boundaries are reasonable.
3. The following circumstances are specified in K.S.A. 82a-1036(a) through (d):
1. Groundwater levels in the area in question are declining or have declined excessively;
 2. The rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area;
 3. Preventable waste of water is occurring or may occur within the area in question;
 4. Unreasonable deterioration of the quality of water is occurring or may occur within the area in question.
4. K.S.A. 82a-1020 recognizes that it is in the interest of the public to create “special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets. It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas.”
5. K.S.A. 82a-1041(b)(3) directs the Chief Engineer to conduct a subsequent hearing only if the initial public hearing is favorable on all three issues of fact and the expansion of geographic boundaries is not recommended.

6. K.S.A. 82a-1041(c) limits the subject of the second hearing to the local enhanced management plan that the Chief Engineer previously reviewed and in subsection (d) requires the Chief Engineer to issue an order of decision within 120 days:
 1. Accepting the local enhanced management plan as sufficient to address any of the conditions set forth in K.S.A. 82a-1036(a)-(d);
 2. Rejecting the local enhanced management plan as insufficient to address any of the conditions set forth in K.S.A. 82a-1036(a)-(d);
 3. Returning the local enhanced management plan to the groundwater management district, giving reasons for the return and providing the district with the opportunity to resubmit a revised plan for public hearing within 90 days of the return of the deficient plan; or
 4. Returning the local enhanced management plan to the groundwater management district and proposing modifications to the plan, based on testimony at the hearing or hearings, that will improve the administration of the plan, but will not impose reductions in groundwater withdrawals that exceed those contained in the plan. If the groundwater management district approves of the modifications proposed by the chief engineer, the district shall notify the Chief Engineer within 90 days of receipt of return of the plan. Upon receipt of the groundwater management district's approval of the modifications, the chief engineer shall accept the modified local management plan. If the groundwater management district does not approve of the modifications proposed by the Chief Engineer, the local management plan shall not be accepted.

7. Pursuant to K.S.A. 82a-1041(e), if the Chief Engineer issues an order of decision accepting the management plan, then an order of designation that designates the area in question as a local enhanced management area shall be issued within a reasonable time following the order of decision.

III. Purpose of the Order of Decision and Procedural Adequacy

1. Prior to recounting the testimony provided, it is useful to examine the purpose of the order of decision and how it fits into the LEMA process. First, an order of decision is an intermediate step in the LEMA process and does not constitute a final order because a LEMA does not come into existence or become effective until a subsequent order of designation is issued. K.S.A. 82a-1041(d)-(h). An order of decision is intended to provide a close examination of the proposed management plan and provide a process for any changes deemed necessary based on the testimony received at public hearing. K.S.A. 82a-1041(c).
2. K.S.A. 82a-1041 does not require that detailed circumstances and findings be outlined in the order of decision as it is an intermediate order or step in the process. Such circumstances and findings upon which the LEMA decision is ultimately based are properly set forth in the order of designation, which serves as the final order. Therefore, it is important to note that while this order of decision contains a summary of the testimony provided, it only contains such testimony as is necessary to support the issuance of an intermediate order.
3. Since this order of decision does not accept the District Wide LEMA Management Plan but instead returns it to the GMD4 Board of Directors with specific recommendations for changing such plan, this order is primarily focused on the evidence submitted at public hearing that supports changes to the management plan.
4. In addition to the testimony supporting modification of the District Wide LEMA Management Plan, the adequacy of the entire LEMA process was raised by the Intervenors. Many of their arguments were addressed prior to the second public hearing in the *Decision Regarding Motion for Expanded Due Process* and will only be summarized here. However, it is important to establish the adequacy of these proceedings before issuing any further orders.

5. The following procedural challenges, summarized, were brought forth in the *Intervenors' Submittal in Opposition to the Proposed District Wide LEMA* ("*Intervenors' Submittal*"), *Section VI*:

1. The Chief Engineer failed to properly issue an initial order accepting the proposed District Wide LEMA Management Plan when he determined that the initial plan was acceptable for consideration;
2. The GMD4 District Wide LEMA process failed to provide adequate time for preparation and improperly limited discovery procedures;
3. The Chief Engineer has failed to adopt administrative rules and regulations regarding LEMA proceedings;
4. The Chief Engineer unlawfully delegated his obligation to conduct the initial hearing.

Other substantive questions of law were raised in the *Intervenors' Submittal*, but such issues will only be addressed in this order of decision insofar as is necessary at this intermediate stage, and will be fully addressed in a subsequent order of designation, if any is issued.

6. First, did the Chief Engineer properly find that the District Wide LEMA Management Plan was acceptable for consideration? K.S.A. 82a-1041(a) requires that when a groundwater management district recommends the approval of a local enhanced management plan, the Chief Engineer shall review whether the plan: (1) proposes clear geographic boundaries; (2) pertains to an area wholly within a groundwater management district; (3) proposes goals and corrective control provisions adequate to meet the stated goals; (4) gives due consideration to prior reductions in water use; (5) includes a compliance monitoring and enforcement element; and (6) is consistent with state law. If based on such review, the Chief Engineer finds that the local enhanced management plan is acceptable for consideration, the Chief Engineer shall initiate, as soon as practicable thereafter, proceedings to designate a local enhanced management area. A "review" is not the same as a formal order and since there are no further instructions for the Chief

Engineer and the next subsection, K.S.A. 82a-1041(b) describes the initial public hearing process, it appears that the legislature did not require that a formal order be issued prior to the commencement of the LEMA proceedings.

7. The *Intervenors' Submittal* argues that K.S.A. 82a-1041(a) requires that a formal order, which includes findings of fact, conclusions of law, and other considerations be issued, and that failure to issue such an order creates a fatal flaw in the LEMA process, puts opposed parties at a significant disadvantage, and endangers the ability for proper judicial review if necessary. *Id.* at 46-47.

8. There is no evidence in K.S.A. 82a-1041(a) that the legislature intended a formal order to be issued by the Chief Engineer prior to initiating LEMA proceedings. First, when the legislature intended for the Chief Engineer to issue a formal order containing findings, conclusions, and other circumstances in this process, it plainly required it in the order of decision and order of designation. K.S.A. 82a-1041(d) and (e). Second, requiring a formal order before the commencement of the public hearings would not provide an order that is subject to judicial or administrative review because it would only be an initial order. (This issue of reviewing an initial order has already been extensively addressed by both the Chief Engineer and the Secretary of Agriculture, *See, Decision Regarding Intervenors' Motion for Reconsideration and Order Declining Petition for Administrative Review.*) Third, all six of these initial factors are fully considered over the course of the public hearings and must be addressed in the order of designation, which is fully subject to administrative and judicial review. If evidence is not presented that shows these conditions are met, any proposed management plan will fail. Since all of these issues must be addressed at public hearing and set forth in a reviewable final order, it is unclear how any prejudice against opposed parties is created. The Chief Engineer conducted the initial review as required by statute and determined that the management plan was acceptable for review by the public at public hearing, whereby a formal record and review of such plan could be conducted and reviewed. K.S.A. 82a-1041 does not forbid the issuance of such an initial order, but a formal order is also not required nor does it appear that such order is necessary in the LEMA process.

9. Second, did the Chief Engineer provide adequate time to prepare for the second public hearing and were adequate discovery measures allowed? This issue was raised prior to the second public hearing and was previously addressed in detail in the *Decision regarding Motion for Expanded Due Process* (“*Decision re: Due Process*). In summary, it is important to note that all required notice provisions of K.S.A. 82a-1041 were timely met. *Decision re: Due Process*, 6-7. However, the opportunity to gather information and offer input to the process began in January of 2015 when the GMD4 Board of Directors began work on developing a management plan, after which the topic was discussed at numerous board meetings and other public meetings specifically held as part of the development process. *Id.* at 7. Proper statutory notice was given prior to all public hearings, and of the 1,781 owners within the proposed LEMA boundaries, only five requested a delay in the second public hearing. *Id.* at 8. No party requested a delay in the initial public hearing. Ultimately, the delay was requested by five water right owners, two of whom were former board members, one of whom served during the development of the management plan, and who both appear to be active participants in the public process. *Id.* Further, these five water right owners waited until just a month prior to the second public hearing to hire an attorney. While that attorney was put in an unenviable position, no evidence of prejudice was presented that would justify delaying a scheduled hearing that was properly noticed and that was part of a two plus year process that more than 1,700 water right owners did not object to holding. *Id.*
10. There was also no evidence presented regarding prejudice for lack of opportunity to conduct discovery. The timeline for these proceedings was published and frequently discussed at open and advertised GMD4 meetings. However, no inquiries were made until just weeks before the second public hearing. Further, no evidence was ever presented that indicated any information was withheld from the opposing parties. All information was freely available through the Kansas Open Records Act. The primary complaint brought forth against the process was not the ability to obtain information, but that the attorney was hired too late in the process to have adequate time to review all the information requested. Again, while an unenviable position, the entire process was well

publicized, the information was freely available, and since this issue was raised by only the five opponents, no evidence of prejudice was presented that justified delaying a long scheduled public process.

11. Third, does the Chief Engineer's failure to adopt administrative rules and regulations regarding the LEMA process invalidate the proceedings? The simple answer is no and this is dealt with in detail in the *Decision re: Due Process*. In the *Intervenors' Submittal*. Intervenors propose that since K.S.A. 82a-1041 requires the adoption of administrative rules and regulations, any administrative rules and regulations adopted by the Chief Engineer must further expand and outline specific public hearing procedures to be used when forming a LEMA. *Intervenors' Submittal*, p. 48-49. There is no direct evidence in K.S.A. 82a-1041 indicating that the legislature's intent was for the Chief Engineer to put in place further hearing requirements or require discovery procedures, etc. In fact, when the legislature explicitly intends for greater procedural requirements in water law matters, they have plainly written them. For example, in K.S.A. 82a-1503 and 82a-1504 of the Water Transfer Act, the legislature explicitly set forth the additional procedures to be followed. In contrast, it is helpful to examine K.S.A. 82a-1036, *et seq.*, which deals with Intensive Groundwater Use Control Areas ("IGUCAs"), which are created in a somewhat similar process to LEMAs. Similar to LEMAs, IGUCAs only require that public hearings be held. Multiple IGUCAs were established without any further due process procedures being formally adopted by statute or regulation. The Chief Engineer may in fact develop procedural administrative rules and regulations at some point, as was ultimately done after the formation of all of the state's IGUCAs, but there is no evidence in the plain text of K.S.A. 82a-1041, or any other water statutes, that legislature intended for the Chief Engineer to put additional procedural rules in place for LEMA proceedings, and there is certainly no evidence that failure to further outline the applicable procedures in regulation would invalidate the legislature's intent to allow the formation of LEMAs.

12. Fourth and finally, did the Chief Engineer delegate the initial public hearing in error? The *Intervenors' Submittal* states that this is more than a "technical" violation, however, no evidence of actual prejudice is brought forth, other than a vague suggestion that no

person other than the Chief Engineer could be qualified to take evidence and exercise the judgement of someone familiar with water and water law principles. *Id.* at 50. The procedures set forth in K.A.R. 5-14-3a, including the designation of a hearing officer, may be applied to any hearing required to be conducted by the Chief Engineer. In this case, notice that the initial hearing would be delegated to a hearing officer was first given in the *Division of Water Resources ("DWR") Letter to GMD No. 4 Finding LEMA Acceptable for Consideration*, dated June 27, 2017 and further notice was provided when the *Order Setting the Prehearing Conference* was issued on July 17, 2017 by Constance C. Owen. Ms. Owen has considerable experience dealing with water and water law matters and was deemed to be competent to conduct such a hearing by the Chief Engineer.

13. Upon review of the arguments presented in the *Intervenors' Submittal* regarding the hearing process to date, no substantial evidence suggests the LEMA process set forth in K.S.A. 82a-1041 nor the Chief Engineer's efforts to follow such requirements has resulted in any fatal flaws in process that require or justify the termination of these proceedings.

IV. Testimony

1. Ray Luhman, Manager, GMD4 – Mr. Luhman presented the primary case for establishment of the District Wide LEMA on behalf of GMD4. Written testimony was submitted prior to the second public hearing and additional testimony was received after the second public hearing. Mr. Luhman largely summarized the written testimony submitted by GMD4. He highlighted the process used to develop the proposed management plan. He explained that the process was originally initiated in January of 2015 when a more restrictive management plan was developed. This plan was discussed at four public meetings and the GMD4 Board of Directors ultimately decided to revise the plan because there was not sufficient public support to move their original plan forward. A new, less restrictive plan was developed and four additional public meetings were held before the plan was approved and submitted to Chief Engineer. *Transcript* p. 20-21, 44-48. As early as January 2015, GMD4 had established a webpage to keep the

public up to date on the LEMA process and the proposed management plan was discussed at a minimum of 28 board meetings. *Id.* at 22-23.

2. The proposed management plan called for improved management of water and for the withdrawal of water for irrigation to not exceed 1.7 million acre-feet over a five-year period within townships with a rate of decline of one-half percent or greater. *Id.* at 23. Based on data provided by the Kansas Geological Survey (“KGS”) decline levels for each public land survey section were developed for the period 2004-2015 and this data was combined into townships and an annual average decline for each township was calculated. *Id.* at 23-24. The townships were then categorized as having no decline, an average annual decline in saturated thickness per year of zero to one-half percent, one-half percent to one percent decline, one percent to two percent decline, and greater than two percent decline. *Id.* at 24. The Natural Resources Conservation Service (“NRCS”) net irrigation requirements for corn in the applicable areas were consulted, and two irrigation zones per county were established as a basis from which water would be allocated in the townships with greater rates of decline. *Id.* Finally, for those townships with average decline rates greater than one-half percent per year, based on the amount of decline and the amount of water required per the NRCS calculations, proposed annual water allocations on an acre-inch per acre basis were assigned to each zone and ultimately, to each water right. *Id.* at 24-25. The plan stipulates that no user shall be reduced by more than 25 percent, except for those water rights that must be reduced to meet the maximum allocation of 18 inches per acre per year (provided as a five-year allocation of 90 inches). *Id.* at 25, 71-74. The plan also specifies that all allocations would be provided as five-year allocations which could be used flexibly so long as the water right’s authorized quantity is not exceeded in any individual year. *Id.* In no case would a water right be reduced to an allocation that is below the net irrigation requirement for corn under average precipitation conditions (50 percent chance rain NIR), and most water rights will have allocations that are at or above net irrigation requirement for corn in dry years (the 80 percent chance rain NIR). *Id.* at 30, 68-70. The townships in GMD4 that are experiencing low or no decline (zero to one-half percent decline) would not have an allocation assigned to them, and would not be subject to any

enhanced management except for increased compliance monitoring and enforcement of over-pumping of the existing water rights. *Id.* at 34.

3. Mr. Luhman, on behalf of the GMD4 Board of Directors, requested that two modifications be made to the management plan as submitted to the Chief Engineer. First, for stock water use, rather than require a mandatory reduction, the management plan would encourage adoption of best practices with the goal to use only 90% of authorized quantity. Second, that any conversion of a water right from irrigation to a non-irrigation use be done in accordance with the consumptive use provision in K.A.R. 5-5-9, K.A.R. 5-5-10, or any applicable groundwater management district regulation, and not be subject to the irrigation allocation established by the management plan. *Id.* at 26-27, 41-43. The primary reason for asking for no mandatory reductions on existing non-irrigation rights, specifically stock water rights, is that such uses make up only one-half percent of use in GMD4 and that such reductions could unduly limit production animal feeding and dairy operations and cause harm to the local economy. *Id.* at 26-27.
4. On cross-examination, Mr. Luhman testified that it was necessary to develop proper boundaries based on the rate of decline, and in this case, the best representation in his opinion was at the township level based on the available data. *Id.* at 104-107, 203. The annual decline was based on saturated thickness changes between 2004 and 2015. *Id.* at 158.
5. Mr. Luhman also clarified that under the plan's proposed allocations, no allocation would result in a cut of more than 25% from the average 2009-2015 use, except in those cases where a reduction to the 18 inches per acre per year cap (provided as a five-year allocation of 90 inches) is applied. *Id.* at 184-185. In other words, in those townships with greater than one-half percent per year decline in water levels, no one (except for vested rights) will be allowed a five-year allocation of greater than 90 inches per acre for the five-year period (18 inches per acre per year cap), but no other allocation will result in reductions from the average 2009-15 use of greater than 25%, even if that is greater than the net irrigation standard in the plan for that township and county.

6. Aaron Popelka, Kansas Livestock Association (“KLA”) – Mr. Popelka submitted written testimony and testified that his organization was opposed to the restrictions originally proposed on stock water rights in the proposed management plan. *Id.* at 127. Specifically, they opposed the stock water restrictions because they were based on the size of the animal feeding operation as of December 15, 2015, which restricts plans for growth or growth that may have already occurred, and because reducing the amount water required by animals is not viable if the operation is near its capacity and using its full allotment of water. *Id.* at 127-128. The proposed management plan was also not clear on whether it referred to a Kansas Department of Agriculture permit or Kansas Department of Health and Environment permit, each having different permitted numbers, to establish the gallons per head allotment. *Id.* at 130. KLA would prefer that the proposed management plan encourage best management practices, rather than any specific reduction in use. *Id.* at 130. KLA also is concerned that the consumptive use standard applied to changes in use made of water under the proposed management plan would permanently change the water right, and that their proposed change was to simply follow existing regulations. *Id.* at 132-133.
7. Brownie Wilson, Kansas Geological Survey (“KGS”) - Mr. Wilson presented the same written testimony as at the initial public hearing and his previous written testimony was made a part of the record at this second hearing. Along with Mr. Wilson’s written testimony, a full discussion of the factors causing decline in the GMD4 District Wide LEMA is contained in the *Order on Initial Requirements*.
8. Mr. Wilson testified that the major reason for the decline in the water table in GMD4 is groundwater pumping and the proposed management plan would result in water savings. *Id.* at 213, 217. He explained the design and data sources for the High Plains Aquifer monitoring network, how the data is reviewed, and the analysis completed by KGS for GMD4 which was used as the basis for establishing the allocations within the proposed LEMA. Further, the decision to aggregate the decline rate at the township, rather than the section, level is, in his opinion, justified and reasonable based on the resolution and

distribution of the data collected from the monitoring network, and the relative homogeneity of the aquifer in northwest Kansas. *Id.* at 218-222, 234-235.

9. Kelly Stewart, Water Commissioner, DWR – Mr. Stewart testified that DWR staff under his supervision reviewed and analyzed the data provided by GMD4 and determined that the proposed management plan would be able to meet the stated goal of limiting pumping to 1.7 million acre-feet of water over the five-year period. DWR staff also helped develop an online tool to allow members of the public to look up their proposed LEMA allocations. *Id.* at 245-246. DWR also submitted written testimony into the record.
10. Lane Letourneau, Water Appropriation Program Manager, DWR – Mr. Letourneau testified that even though the allocations in the proposed management plan are not based on the priority date of the water rights, should any impairment complaints be received by DWR, an impairment investigation would be conducted, and if necessary, any junior water rights would be curtailed as required to secure the senior water right. *Id.* at 249-250.
11. Concerns were expressed in testimony regarding the sufficiency of the appeals process in the proposed management plan. Specific concerns were raised regarding the determination of historical acres used as the basis for allocations and how to properly consider past conservation when setting allocations as required by K.S.A. 82a-1041(a)(4) if such conservation reductions were done voluntarily. In written testimony, Justin Sloan cited an example of a pair of water rights (File Nos. 49,205 and 49,206) that were not used for irrigation during 2009-2015 and were thus allocated no water according to the LEMA management plan methodology. These water rights are still within their perfection period. In another case, Bert Stramel cited water right File No. 31,073-00 which is authorized to irrigate 320 acres. However, the proposed management plan methodology determined the irrigated acres during 2009-2015 to be 125 acres based on water use reported during this period. Mr. Stramel acquired the property in 2015 and has invested in equipment to resume irrigation on authorized land that was not provided an allocation in Attachment 2. Mr. Sloan also raised a concern about three of his water rights which are

authorized to irrigate lands in two different allocation zones and where Attachment 2 has assigned an allocation for all acres based on the lower allocation. *See written testimony dated December 20, 2017 from Justin Sloan and written testimony dated December 21, 2017 from Bert Stramel.*

12. Concerns were expressed in testimony regarding the sufficiency of the water level data that was relied upon to develop the management plan and whether additional data could or should have been used to develop it. For example, Scott Ross, in oral and written testimony, questioned whether the distribution of the water well measurement points was “sufficient to determine with any uniform degree of accuracy declines in the Ogallala aquifer.” He and others noted DWR requirements to install water level measurement tubes with new well construction and whether this data could be used to improve the water level network. *See written testimony dated November 14, 2017 from Scott E. Ross L.G.*

V. Discussion

1. Besides the issues related to the testimony recounted in this order, there are other issues that were raised in both the oral and written testimony received as a part of the second hearing process. These issues should, and will ultimately be addressed when and if an order of designation is issued. However, since the District Wide LEMA Management Plan is being sent back to the GMD4 Board of Directors with suggested modifications, this order of decision is not the appropriate place to engage in such discussions as there is no formally approved management plan at this time.
2. As discussed in detail in Section III (above), several procedural concerns were presented prior to and during the second public hearing. However, all the statutory requirements of K.S.A. 82a-1041 have been fulfilled, no evidence of actual prejudice or harm was presented, and therefore, nothing in the Chief Engineer’s duties grants him the authority to invalidate these proceedings.

3. Besides the procedural concerns, it is also worth addressing some general concerns about how the allocations proposed in the management plan will be applied alongside the doctrine of prior appropriation, which K.S.A. 82a-706 directs the Chief Engineer to use in administering water rights. First, K.S.A. 82a-1041(f) allows for the use of four specific corrective controls plus any additional requirements that the public interest may require. Of these, the only mention of the prior appropriation doctrine is in K.S.A. 82a-1041(f)(2), which relates to determining the total permissible withdrawal in an area apportioned “insofar as may be reasonably done” with the relative dates of priority. This is a logical instruction from the legislature, as no LEMA management plan permanently changes the underlying base water rights. Since the rates of decline and the remaining saturated thicknesses vary across GMD4, strict use of prior appropriation could reduce the effectiveness of the LEMA. Therefore, it is reasonable to use other factors when determining allocations. For example, K.S.A. 82a-1041(f)(3) explicitly allows for “reducing the permissible withdrawal of groundwater by *any* one or more appropriators....” (*emphasis added.*) It is also important to note that the priority to use water only comes into effect when the “supply is not sufficient to satisfy all water rights.” K.S.A. 82a-707b. Further, as testimony by DWR staff shows, priority is still very much alive and well if impairment between two water rights occurs. The prior appropriation doctrine will be used to secure water to the senior appropriator. To borrow a phrase from the proceedings in the Sheridan 6 LEMA, the “concern over not basing allocations on prior appropriation is more apparent than real.” The allocations are based on the rate of decline in the underlying aquifer and the irrigation requirements in each county. The strictest allocations proposed are five-year allocations based on five times the local net irrigation requirement for corn under average precipitation conditions, and these allocations would only be implemented in the areas with the most severe declines (two townships). K.S.A. 82a-1041 allows for reductions to address specific problems, and provides the flexibility to implement management plans that adequately address such problems while still protecting senior water rights. For these same reasons, and as will be set forth later in this order, it is also reasonable to exclude non-irrigation rights from specific allocations under the proposed management plan. For all these reasons, the proposed management plan is consistent with the Kansas Water Appropriation Act.

4. Based upon all written and oral testimony submitted as a part of the second public hearing, and upon a review of the testimony and findings from the initial public hearing, the Chief Engineer has decided to return the proposed management plan, pursuant to K.S.A. 82a-1041(d)(4) with modifications. The modifications shall include: 1) changes to requirements of non-irrigation rights as proposed by GMD4 at the second public hearing; 2) changes to the boundaries of the District Wide LEMA Management Plan; 3) adjustments to allocations where the lands authorized for irrigation are in two or more allocation zones; 4) removing any LEMA management plan quantity restrictions on water rights in their perfection period; 5) changes to the appeal process to ensure every water right holder understands the basis of the allocations provided by the LEMA management plan and that water rights are provided allocations on acres where they demonstrate to the appeals board that they have lawfully expanded their place of use from that of 2009-2015 and have the means to irrigate such expanded acres; 6) requiring the advisory committee to review the availability and usefulness of adding data to the water level network for future decision-making; and 7) clarification of the Board's intent for allocations in the areas indicated as "18 inch max restriction."
5. In addition, it will improve the administration and evaluation of the district-wide LEMA to establish a database to track changes in allocations from appeals allowed pursuant to the plan and during the LEMA period. Such database will be maintained by GMD4 in cooperation with DWR, and used by the review committee when evaluating the final LEMA goal.
6. First, GMD4 proposes that, summarized, Part (2)(a) of the District Wide LEMA Management Plan be amended to only "encourage" livestock and poultry operations to use 90% of the amount provided by K.A.R. 5-3-22 based on the maximum amount supportable by the numbers of animals authorized by a current facility permit. It was also recommended that Part (2)(b) be amended to allow a change in use from irrigation to non-irrigation and that the amount of water available for non-irrigation use will be based on K.A.R. 5-5-9 and K.A.R. 5-5-10, and not the irrigation allocation under the

management plan. *GMD 4 Written Testimony*, p. 10. Testimony presented by KLA suggested that the same or very similar modifications be made by the Chief Engineer. *KLA Written Testimony*, pp. 3, 7.

7. Upon review of these proposed modifications and the evidence in record, the proposed management plan should be amended as suggested by GMD4, along with clarifying the intent that the permit referenced is issued by Kansas Department of Health and Environment. It is necessary to provide clarification on this issue, because many, but not all, livestock facilities also receive a license from the Kansas Department of Agriculture, Division of Animal Health. Each license is based on a different head count, and for the sake of clarity, the KDHE license shall be the point of reference for water conservation goals which are based on a permitted number.

8. Second, the boundaries of the proposed management plan should be modified. The initial findings established after the initial public hearing found that the proposed boundaries which encompassed the entirety of GMD4 were reasonable. *Order on Initial Requirements* at p. 20. The presiding officer in that matter offered a detailed and well-reasoned decision, including the conclusion that had smaller boundaries excluding the townships that are experiencing less than one-half percent decline been proposed, such boundaries would also likely have been reasonable. *Id.* at 19. The Chief Engineer is in full agreement and adopts the findings regarding reasonable boundaries, however, he may also propose less restrictive changes based on testimony given at the second public hearing if such changes will improve the administration of the plan. K.S.A. 82a-1041(d)(4). The rationale put forth by GMD4 is reasonable and makes sense, specifically that inclusion of all townships would encourage conservation of water. Further, the increased monitoring requirements would result in improved management, and inclusion within the boundaries would provide motivation to avoid increasing declines because reductions would be automatically applied if such declines increased without restarting the LEMA process. *Id.* at 16-17. A LEMA is intended to address the problems set forth in K.S.A. 82a-1036(a) through (d). The existence of the GMD4 boundaries confirms there is a communal hydrological relationship within GMD4, but at this time, the administration

of the plan will be improved by focusing resources on those areas that present the greatest decline rates pursuant to K.S.A. 82a-1036. In addition, the removal of areas with little or no decline allows those water right owners the opportunity to use and conserve water without unnecessary government intervention. There will be no, or a minimal impact, on the overall LEMA if these townships are removed because no reduction of the numeric goals, allocations or substantive actions set forth in the management plan is required.

9. If an order of designation eventually establishes this LEMA, and should the rate of decline increase in the future in areas of GMD4 excluded from this decision, there likely will be ample evidence to justify an expansion of the District Wide LEMA boundaries and cause to expand the resources dedicated to administering the plan. Although this path is more cumbersome and time consuming than including the less-than-one-half percent annual decline townships in the initial LEMA, it will provide those water right owners with the opportunity to separately examine their positions apart from their neighbors who are suffering greater rates of decline. Further, the restrictions put in place in areas of decline within GMD4 should serve as a constant reminder that prudent water management activities and conservation are vital and that a failure to adopt and take these things into consideration could ultimately result in the need to apply corrective controls to their townships. Finally, by not requiring the administrative and monitoring tasks associated with the management plan in those low or no declines areas, local and state resources can be focused on assisting the high decline areas in solving their problem.

10. At the hearing, there appeared to be some confusion about how the 18-inch per acre cap would be applied. Such procedure is set forth in the District Wide LEMA Management Plan, but for the sake of clarity, Section 1.b states that: *“All irrigation water rights, excluding vested rights, shall be limited to the allocation for the water right location on the accompanying map over the five-year period beginning January 1, 2018 and ending December 31, 2022.”* Attachment 1 to the District Wide Management Plan describes the allocation in townships with one-half percent to one percent average annual decline in saturated thickness as an *“18 inch max restriction.”* Testimony by Ray Luhman at hearing stated the Board’s intent was a five-year allocation of five times 18 inches. *Id.* at

206. This is consistent with the allocations provided in the District Wide LEMA Management Plan for townships with declines greater than one-percent per year as well as the preliminary allocations provided in Attachment 2.

11. Two corrections to the allocations provided in Attachment 2 to the Plan are necessary to provide an equitable allotment. First, Mr. Sloan provided, in his written testimony, an example where the places of use of a group of water rights receiving a single allocation spanned two different allocation zones, and the total allocation provided in Attachment 2 was based on the more restrictive allocation zone. The allocation should be based instead on a weighted average of allocations based on authorized acres in each zone. Second, Mr. Sloan provided an example of a water right where no use was reported for 2009-2015 but whose perfection period has not yet expired. It is inappropriate to restrict the opportunity to develop this water right under temporary controls.
12. With the adjustments required pursuant to this order, the appeal procedures contained in the District Wide LEMA Management Plan are adequate to ensure that due consideration is given to water users who have voluntarily implemented past conservation. It was asserted in testimony that the appeal provisions do not protect those who have conserved in the past. However, rather than using historical reported water use as the basis of allocation, allocations are based on maximum acres during 2009-2015, multiplied by the allowable allocation per acre. The District Wide LEMA Management Plan provides for appeals that include timely notice and a clear process where water users can bring evidence to support a different allocation. Such procedure includes the consideration of other years prior to 2015, and “any and all aspects of the water right, use, place of use, point of diversion, or any other factors the reviewer determines appropriate to determine eligible acres and allocated water”.
13. Based on the testimony provided at hearing, the following improvements to the appeal process are necessary to ensure the process is sufficient to assign proper allocations and give due consideration to past voluntary conservation: 1) the GMD and DWR should cooperate to provide fuller explanation of the basis and calculations that determine the

allocations assigned; and 2) the appeals process must insure that when evidence is brought to demonstrate that a water right owner has lawfully expanded the place of use from that of 2009-2015, the appropriate allocation for such additional lands will be provided.

14. The District Wide LEMA Management Plan is based on the KGS water level measurement network as described in the testimony provided. It was the judgement of both GMD4 and KGS that the network is sufficient to inform the management decisions that led to the allocations based on township-level rates of decline. While additional water level data might be available via self-reporting by water users or by taking additional measurements from water level measurement tubes, evaluating whether and how this can be done in a manner that improves the network will take some time. Based on the testimony, it is reasonable to proceed with the proposed LEMA based on the existing network, and to charge the advisory committee to evaluate whether the network can be improved for future management decisions.

VI. Findings of Fact

1. The *Order on Initial Requirements* and the *Decision Regarding Motion for Expanded Due Process* are hereby adopted by reference and made a part of this record.
2. The proposed geographical boundaries of the GMD4 District Wide LEMA contain the entire area incorporated into GMD4.
3. Groundwater levels in much of the area contained within the proposed GMD4 District Wide LEMA have declined or are still declining, in some cases precipitously; these levels have declined excessively; and the rate of withdrawal of groundwater there exceeds the rate of recharge.
4. However, the following townships have suffered declines of less than one-half percent per year in saturated thickness between 2004-2015:

Cheyenne County

Township 2 South, Range 37 West
Township 2 South, Range 38 West
Township 2 South, Range 39 West
Township 2 South, Range 40 West
Township 2 South, Range 41 West
Township 2 South, Range 42 West
Township 3 South, Range 38 West
Township 3 South, Range 39 West
Township 3 South, Range 40 West
Township 3 South, Range 41 West
Township 3 South, Range 42 West
Township 4 South, Range 39 West
Township 4 South, Range 41 West
Township 4 South, Range 42 West
Township 5 South, Range 38 West

Decatur County

Township 5 South, Range 29 West
Township 5 South, Range 30 West

Graham County

Township 6 South, Range 21 West
Township 6 South, Range 22 West
Township 6 South, Range 23 West
Township 6 South, Range 24 West
Township 6 South, Range 25 West
Township 7 South, Range 21 West
Township 7 South, Range 22 West
Township 7 South, Range 23 West
Township 7 South, Range 24 West
Township 7 South, Range 25 West
Township 8 South, Range 25 West
Township 9 South, Range 24 West
Township 9 South, Range 25 West

Logan County

Township 11 South, Range 32 West
Township 11 South, Range 33 West
Township 11 South, Range 34 West
Township 11 South, Range 35 West
Township 11 South, Range 37 West

Rawlins County

Township 2 South, Range 35 West
Township 2 South, Range 36 West

Township 3 South, Range 35 West
Township 4 South, Range 33 West
Township 4 South, Range 34 West
Township 4 South, Range 35 West
Township 5 South, Range 31 West
Township 5 South, Range 33 West
Township 5 South, Range 34 West
Township 5 South, Range 35 West
Township 5 South, Range 36 West

Sheridan County

Township 6 South, Range 26 West
Township 6 South, Range 27 West
Township 7 South, Range 26 West
Township 8 South, Range 26 West
Township 8 South, Range 27 West

Sherman County

Township 6 South, Range 38 West
Township 6 South, Range 39 West
Township 10 South, Range 38 West
Township 10 South, Range 39 West

Thomas County

Township 6 South, Range 32 West
Township 10 South, Range 34 West
Township 10 South, Range 35 West

5. The boundaries as proposed are clear and reasonable, however, the administration of the plan can be improved by reducing the boundaries as proposed herein by removing from the LEMA the townships listed in Paragraph No. 4 of this Findings section. The boundary change will not require a change to the District Wide LEMA Management Plan's principal numeric goal or its allocations.

6. Modifying the management plan to require: 1) changes to requirements of non-irrigation rights as proposed by GMD4 at the second public hearing; 2) changes to the boundaries of the District Wide LEMA Management Plan; 3) adjustments to allocations where the lands authorized for irrigation are in two allocation zones; 4) removing any LEMA management plan quantity restrictions on water rights in their perfection period; 5) changes to the appeal process to ensure every water right holder understands the basis of

the allocations provided by the LEMA and that water rights are provided allocations on acres where they demonstrate to the appeals board that they have lawfully expanded their place of use from that of 2009-2015 and have the means to irrigate such expanded acres; 6) requiring the advisory committee to review the availability and usefulness of adding data to the water level network for future decision-making; and 7) clarification of the Board's intent for allocations in the areas indicated as "18 inch max restriction," will improve administration of the plan.

7. The District Wide LEMA Management Plan, as modified herein, would give due consideration to prior voluntary reductions in water use by providing allocations not based on historical reported water use but by instead basing allocations on inches per acre multiplied by the maximum reported acres and by providing an adequate appeal process to consider factors related to past conservation, including government-sanctioned conservation programs, and the unique complexities of certain water rights.
8. The goal of the proposed management plan is to restrict groundwater pumping to no more than 1.7 million acre-feet over a five-year period.
9. The corrective control provisions of the proposed management plan are sufficient to meet this goal.
10. The irrigators within the proposed LEMA can sustain their irrigated farming operations with the proposed allocations since no user will be allocated less than the net irrigation requirement under average conditions for corn.
11. This corrected order was issued to correct the omission of Sherman County from the title of the order, to fix the citations to K.S.A. 82a-1036 in Section II, paragraph 6.1., page 5 of the original order, and to correct the reference to Rawlins County Township 4 South, Range 31 West to Township 5 South, Range 31 West at pages 23 and 28 of the original order. No other changes or corrections have been made to the original order.

VII. Conclusions of Law

1. Notice of the initial public hearing and the second public hearing was proper and complied with the requirements of K.S.A. 82a-1041(b).
2. As determined at the Initial Public Hearing, the initial requirements for the establishment of a LEMA were met during the initial public hearing.
3. The second public hearing took place pursuant to the requirements of K.S.A. 82a-1041.
4. All other procedures required pursuant to K.S.A. 82a-1041 have been complied with in the formation and submittal of the District Wide Management Plan.
5. Corrective controls are required within the GMD4 District Wide LEMA in order to address excessive declines in the groundwater level and to address rates of withdrawal that exceed the rate of recharge as stated by K.S.A. 82a-1036.
6. A corrective control provision that only reduces the rate of decline, but does not prevent decline, is in the public interest as contemplated by K.S.A. 82a-1020.
7. Pursuant to K.S.A. 82a-1041(d)(4) and based on the testimony submitted at the hearings, the proposed District Wide Management Plan's administration will be improved by modifications proposed by the Chief Engineer.
8. Such proposed modifications do not impose reductions in groundwater withdrawals that exceed those contained in the plan and improve the administration of the plan by focusing reductions in areas expressing the greatest amounts of decline.
9. The proposed District Wide Management Plan is consistent with the Kansas Water Appropriations Act and other Kansas law.

VIII. Order of Decision

COMES NOW, the Chief Engineer, who, based upon substantial competent evidence, as provided by the testimony and comments offered at, or in relation to, the public hearings regarding the proposed District Wide LEMA Management Plan, finds that the District Wide LEMA Management Plan should be modified as recommended by the Chief Engineer herein.

THEREFORE, the Chief Engineer, pursuant to K.S.A. 82a-1041(d)(4), orders the proposed District Wide LEMA Management Plan to be returned to the GMD4 Board of Directors for consideration and approval of the modifications proposed by the Chief Engineer, and that such approval or rejection by the GMD4 Board of Directors be transmitted to the Chief Engineer within 90 days of receipt of the proposed modifications.

The following modifications should be made to the District Wide Management Plan:

1. Section 2) Allocation – Non-irrigation, Subsection a) should be replaced with the following language:

Livestock and poultry use will be encouraged to maintain their use at 90% of the amount provided by K.A.R. 5-3-22 based on the maximum amount supportable by the number of animals authorized by a current facility permit authorized by the Kansas Department of Health and Environment. At no time will a stock water right be authorized to pump more than its authorized quantity.

2. Section 2) Allocation – Non-irrigation, Subsection d) should be replaced with the following language:

When converting from irrigation to non-irrigation use, the base water right will be converted under the procedures in K.A.R. 5-5-9, 5-5-10, or Groundwater Management District No. 4 regulations.

3. The following townships with less than a one-half percent per year decline in saturated thickness shall be removed from the boundaries of the District Wide Management Plan:

Cheyenne County

Township 2 South, Range 37 West
Township 2 South, Range 38 West
Township 2 South, Range 39 West

Township 2 South, Range 40 West
Township 2 South, Range 41 West
Township 2 South, Range 42 West
Township 3 South, Range 38 West
Township 3 South, Range 39 West
Township 3 South, Range 40 West
Township 3 South, Range 41 West
Township 3 South, Range 42 West
Township 4 South, Range 39 West
Township 4 South, Range 41 West
Township 4 South, Range 42 West
Township 5 South, Range 38 West

Decatur County

Township 5 South, Range 29 West
Township 5 South, Range 30 West

Graham County

Township 6 South, Range 21 West
Township 6 South, Range 22 West
Township 6 South, Range 23 West
Township 6 South, Range 24 West
Township 6 South, Range 25 West
Township 7 South, Range 21 West
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Township 7 South, Range 23 West
Township 7 South, Range 24 West
Township 7 South, Range 25 West
Township 8 South, Range 25 West
Township 9 South, Range 24 West
Township 9 South, Range 25 West

Logan County

Township 11 South, Range 32 West
Township 11 South, Range 33 West
Township 11 South, Range 34 West
Township 11 South, Range 35 West
Township 11 South, Range 37 West

Rawlins County

Township 2 South, Range 35 West
Township 2 South, Range 36 West
Township 3 South, Range 35 West
Township 4 South, Range 33 West
Township 4 South, Range 34 West
Township 4 South, Range 35 West
Township 5 South, Range 31 West
Township 5 South, Range 32 West
Township 5 South, Range 33 West
Township 5 South, Range 34 West
Township 5 South, Range 35 West
Township 5 South, Range 36 West

Sheridan County

Township 6 South, Range 26 West
Township 6 South, Range 27 West
Township 7 South, Range 26 West
Township 8 South, Range 26 West
Township 8 South, Range 27 West

Sherman County

Township 6 South, Range 38 West
Township 6 South, Range 39 West
Township 10 South, Range 38 West
Township 10 South, Range 39 West

Thomas County

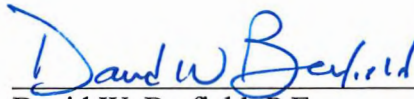
Township 6 South, Range 32 West
Township 10 South, Range 34 West
Township 10 South, Range 35 West

4. Section 1) Allocations – Irrigation, shall include the following language: “*Where the place of use of a water right or group of water rights receiving a single allocation span two different allocation zones, the total allocation granted shall be based on a weighted average of allocations based on authorized acres in each zone.*”

5. Section 1) Allocation – Irrigation, shall include the following language: “*Water rights which are still in their perfection period shall not be restricted by this LEMA.*”

6. Section 6) Appeals Process, shall include the following new sub-section: “*c) Should a water right holder or water use correspondent bring evidence that demonstrates that they have lawfully expanded their place of use from 2009-2015, the appropriate allocation for such additional lands will be provided.*”
7. Section 6) Appeals Process, Section a) shall be amended to add the following paragraph as a new number (1) and renumbering the remaining sections: “*(1) GMD4 and DWR shall coordinate to ensure that no later than 60 days after the order of designation, the basis of the allocations provided in Attachment 2 shall be publicly available through the DWR and GMD4 websites.*”
8. Section 10) Advisory Committee, shall add the following section: “*The advisory committee shall keep an accounting of any changes to allocations approved through the appeal process and during LEMA implementation, and shall assess the effects of these changes on the LEMA goal to restrict pumping in the LEMA to 1.7 MAF should the GMD request a new LEMA beyond the first five-year period.*”
9. Section 10) Advisory Committee, will add the following section: “*The advisory committee shall review what additional water level data is available, its quality and suitability for use in improving the water level data network used for future water management decisions should the GMD wish to continue with LEMA management based on water level decline rates.*”
10. The legend on Attachment 1 shall be revised by replacing the text “*(18 inch max restriction*” with “*(18 inch allocation; 5 years = 90 inches)*”.
11. In accordance with this order, GMD4 shall amend and update the management plan, all necessary attachments, and any other related documents necessary for the administration of the LEMA management plan. This shall include but not be limited to the:
 - a. Management Plan;
 - b. Attachment 1;
 - c. Attachment 2 (irrigation); and
 - d. Attachment 2 (stock water insofar as still required by the proposed modifications).

ENTERED THIS 26th DAY OF FEBRUARY, 2018.



David W. Barfield, P.E.
Chief Engineer, Division of Water Resources
Kansas Department of Agriculture

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CERTIFICATE OF SERVICE

On this 26th Day of February 2018, I hereby certify that the original of the foregoing Decision was sent by U.S. Mail and a true and correct copy by electronic mail to:

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