



INTRODUCTION TO COLORADO WATER LAW
&
DROUGHT PLANNING ISSUES

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CMU 2020 Water
Course



COLORADO

WATER LAW

“The simplest way to tell a story . . . is to begin at the beginning and go on until you reach the end or your audience falls asleep.”

ABA Journal, Nov. 2016

So, to begin at the
beginning:

What is a water right
anyway?



WATER RIGHTS DOCTRINES

- Riparian Doctrine
 - Eastern U.S.
 - Right to use water limited to owners of land along a water course
 - Reasonable use – minimal stream flow alterations
- Prior Appropriation Doctrine
 - Western U.S.
 - First in time, first in right

Colorado Constitution

Article XVI. Mining and Irrigation

§ 5. Water of streams public

property. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, *subject to appropriation as hereinafter provided.*

§ 6. Diverting unappropriated water .

. . The right to *divert* the unappropriated waters of any natural stream to *beneficial uses* shall never be denied . . .

CREATION OF A WATER RIGHT

- Two critical elements
 - First: Diverting water
 - Removing or controlling water in its natural course
 - Second: Applying water to beneficial use
 - Reasonable amount to accomplish the purpose
 - Without waste



1. Diversion or Control





2. Traditional Beneficial Uses



2. New Beneficial Uses



- Instream flow uses
 - Only held by CWCB
 - Minimum stream flows or lake levels
- Wildlife and recreation (ponds)
- Recreational In-Channel Diversions (RICDs)

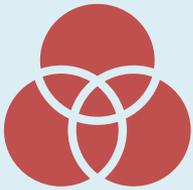
CREATION OF WATER RIGHTS

- When the two items occur:
 - There has been an “appropriation” of water
 - A water right is created
- Nothing else needed to create a water right
 - But: need additional action to perfect the water right and get a priority for it

PERFECTION OF A WATER RIGHT

- Value of a water right is in its priority
- “First in time, first in right”
- Priority is based on adjudication in court
- Really “First to the courthouse, first in right”

SUMMARY



Creation of water rights

- Diversion (taking or control)
- Application to beneficial use



Perfection of water rights

Adjudication

TYPES OF WATER RIGHTS

- Absolute v. Conditional
 - Absolute
 - Appropriation completed
 - Conditional
 - Appropriation started but not completed
 - Periodic diligence applications
 - Conversion to absolute
 - Maintain priority

TYPES OF WATER RIGHTS

- Direct Flow v. Storage
 - Direct Flow
 - Water flowing in a ditch or pipeline
 - Rate of flow - c.f.s. or g.p.m.
 - Storage
 - Water in a reservoir or pond
 - Volume - acre feet

TYPES OF WATER RIGHTS

EQUIVALENTS

- One c.f.s. = about 450 g.p.m.
- One acre foot = about 326,000 gallons
 - About $\frac{3}{4}$ of a football field, covered one foot deep
- One c.f.s. flowing for 24 hours = about 2 acre feet

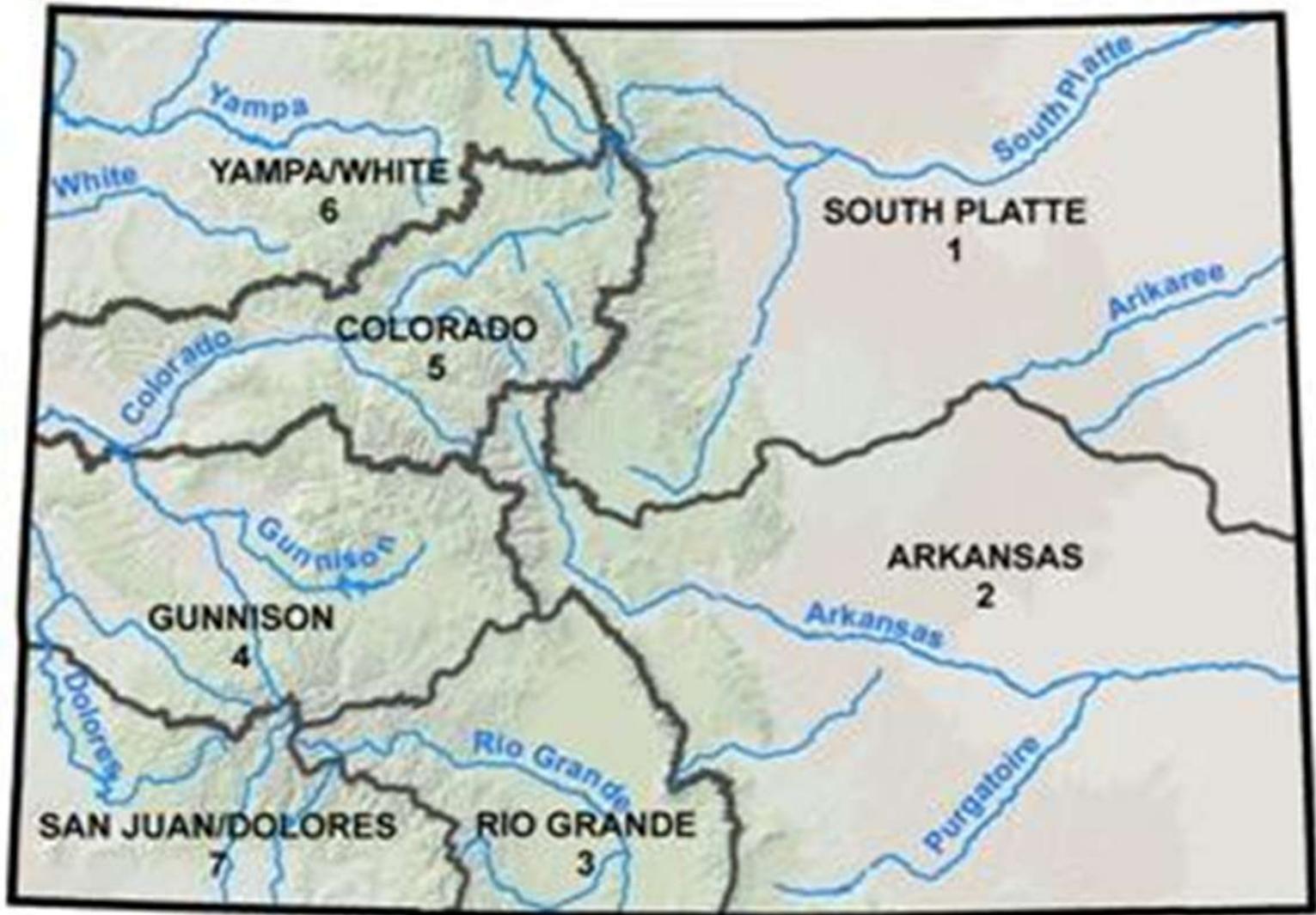
TYPES OF WATER RIGHTS

- Underground
 - Surface and groundwater systems are integrated
 - All water is presumed to be tributary
 - Exception to general rule:
 - Need permit from State
 - No injury to other water rights

WATER RIGHTS ADJUDICATION

- Water Right Adjudication and Administration Act of 1969
 - Established seven water divisions
 - Correspond to major river basins

WATER DIVISIONS



WATER DIVISIONS

- Each division has a
 - Division Engineer
 - Water Court
 - Water Judge
 - Water Referee
 - Water Clerk

ADJUDICATION PROCEDURES

- Applicant prepares an "Application"
 - Contents
- Application filed with appropriate water court
- Resume – published in papers and on web
- Two month waiting period
- Others can oppose application by filing a statement of opposition
 - Standing to file

ADJUDICATION PROCEDURES

- If no statement of opposition is filed
 - Application is reviewed by
 - » Division Engineer
 - » Water Referee
 - Referee issues a "Ruling of Referee"
 - Water Judge confirms Ruling and makes it a "decree"

ADJUDICATION PROCEDURES

- If statement of opposition is filed
 - Options
 - Settle
 - Go to trial before the water judge
 - After trial, judge either denies the application or confirms the water right
- Many applications are not opposed

ADJUDICATION PROCEDURES

- Effect of Adjudication
 - End result is a “decree”
 - Confirms the water right
 - Awards a priority to the water right
- Principal value of a water right is in its priority
 - The older the better
 - What does this mean?

PRIORITY

- Priority depends on two things
 - First: Year the application was filed with court
 - “Adjudication date”
 - Second: Appropriation date
- General Rules
 - Water rights based on applications filed in one year are junior to water rights based on applications filed in previous years
 - Within a year – use appropriation dates

PRIORITY

Priority

Adj. Date

Approp. Date

1

2007

06/01/1998

2

2007

08/15/2002

3

2008

04/10/1995

4

2008

05/01/1995

5

2009

06/01/1888

6

2009

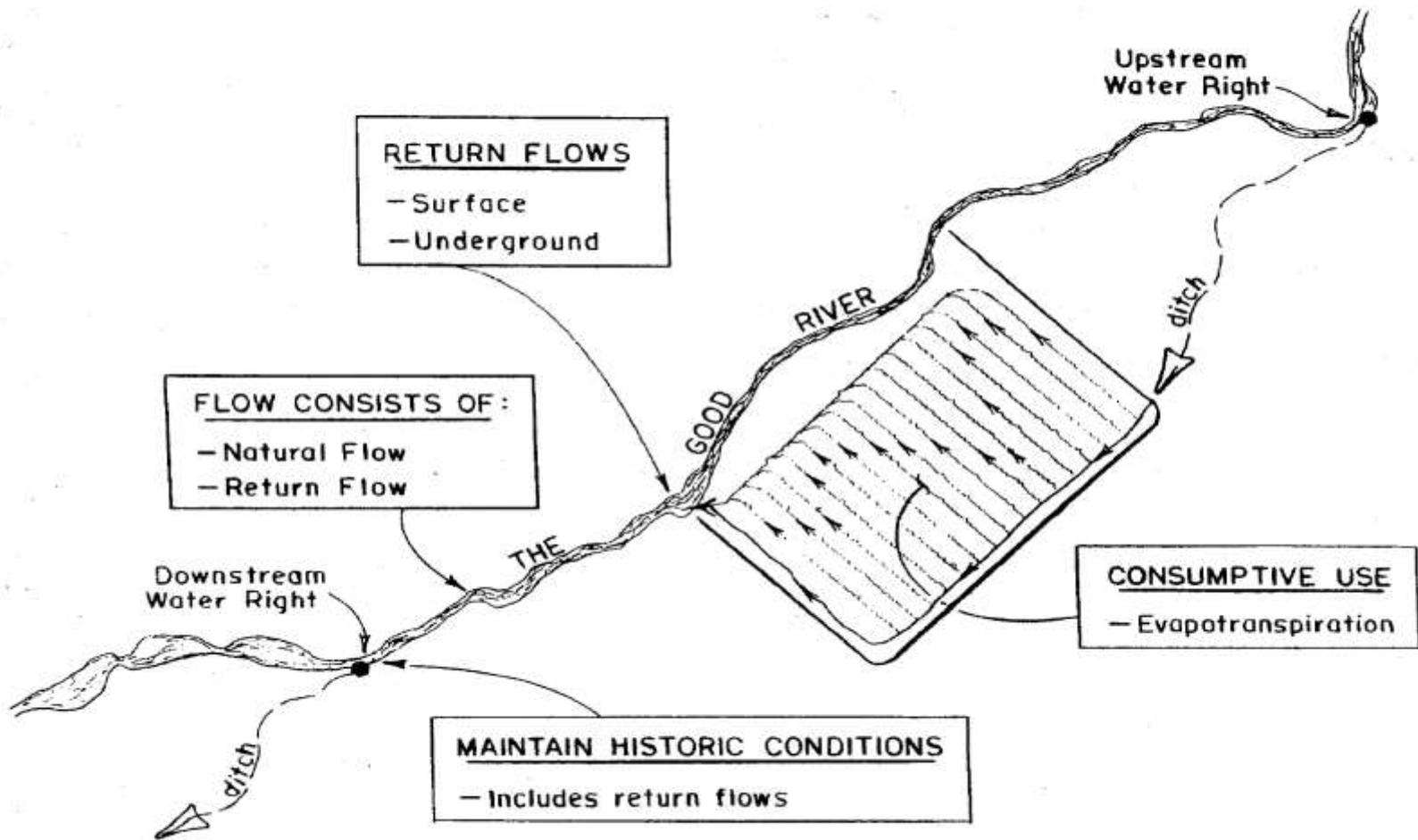
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ADDITIONAL LIMITATIONS

- “Can and Will” doctrine: Applicant must show:
 - That the waters can and will be diverted and beneficially used; and
 - That the project can and will be completed with diligence and within a reasonable time
- Anti-Speculation Doctrine
 - Prohibits the acquisition of a conditional right without a vested interest or a specific plan to use the water for a specific beneficial use

CHANGES TO WATER RIGHTS

- Water right owner can make changes to his water right
- Permanent changes need water court approval
- No injury to other water rights
 - Limited to “historical consumptive use” (HCU)
 - Maintain return flows
- Examples of types of changes
 - Use
 - Point of diversion
 - Place of use



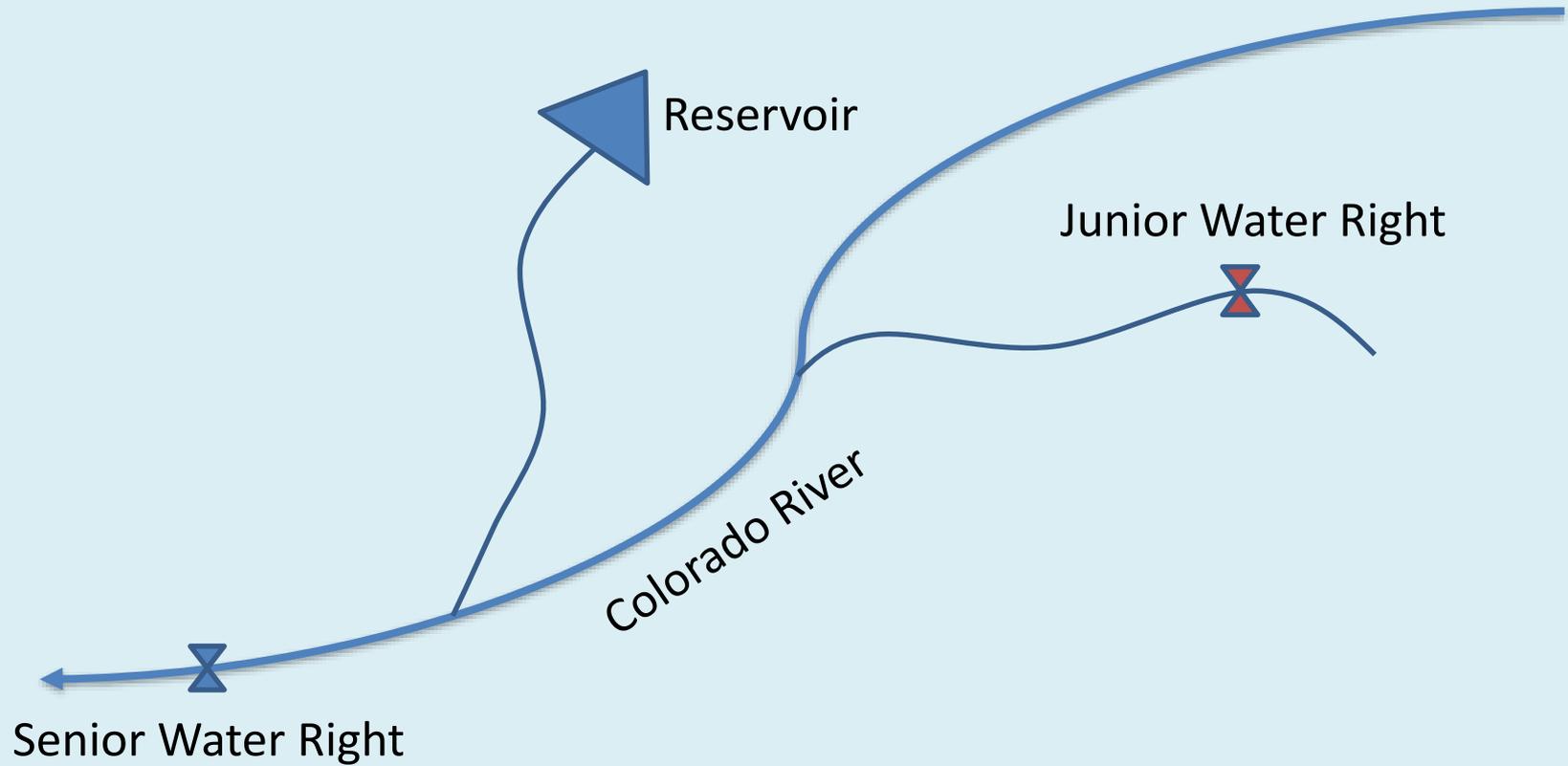
TEMPORARY CHANGES

- Substitute Water Supply Plans (SWSP's)
 - Notice to interested parties (list maintained by State Engineer)
 - Approval by State Engineer
- Loans
 - Ag water rights
 - For Instream Flow purposes

AUGMENTATION PLANS

- “A detailed program . . . to increase the supply of water available for beneficial use . . .”
- Allows a junior water right to continue diverting when senior water rights are calling for water
 - Use HCU from senior water rights
 - Release of reservoir water

AUGMENTATION PLAN EXAMPLE



ABANDONMENT OF WATER RIGHTS

- Water rights can be abandoned, in whole or in part
 - Non-use
 - Intent never to use the water right again
- Result: water right (or portion) is terminated
- Methods
 - Independent action
 - Abandonment list – every 10 years



DROUGHT PLANNING ISSUES

LAW OF THE RIVER

- Colorado River flows through 7 states
 - Over 1400 miles, from Colorado and Wyoming to Gulf of California in Mexico
- Flows in Colorado River are governed by a series of compacts, treaties, court decrees and other laws
 - “Law of the River”
- Foundational Document: Colorado River Compact

LAW OF THE RIVER

- Colorado River Compact
 - Upper and Lower Basins
 - Division between basins at Lee Ferry, below Lake Powell
- Allocations (simplified)
 - 7.5 MAF/yr to Upper Basin
 - 7.5 MAF/yr to Lower Basin, plus add'l 1 MAF/yr
 - 1.5 MAF/yr to Mexico
- Upper Basin can't deplete flows below 75 MAF/10 yrs.



LAW OF THE RIVER

- Compact allocates 17.5 MAF/yr to Upper and Lower Basins and Mexico
- Recent ave. Colorado River flows (at Lee Ferry):
 - 2000-2018 12.4 MAF/year
 - 1988-2017 13.4 MAF/year
 - 1906-2017 14.8 MAF/year
 - 1878-2014 14.4 MAF/year
 - 1931-2014 13.7 MAF/year
 - 1120-1170 12.6 MAF/year

LAW OF THE RIVER

- Lakes Powell and Mead are the two primary regulating reservoirs on the Colorado River
 - Powell – Upper Basin “savings account;” power production
 - Mead – Water for Lower Basin; U.S. Bureau of Reclamation is the water master
- Ongoing 20 year “drought” has depleted them
 - Current storage (as of 2/6/20):
 - Powell: ~ 12,225,000 AF (~ 50% full)
 - Mead: ~ 11,280,000 AF (~ 43.6% full)

DROUGHT CONTINGENCY PLANNING

- Upper and Lower Basins and USBOR have been talking for several years about the declining river flows and storage levels
- Negotiated “drought contingency plans” (DCPs)
 - Finalized in 2019
 - Confirmed by federal legislation
 - Each basin has its own DCP

DROUGHT CONTINGENCY PLANNING

- Lower Basin DCP
 - Each lower basin state will reduce its water use as Lake Mead declines to certain defined levels
 - Initially, just AZ and NV
 - CA will participate if Lake Mead continues to decline
 - Also provides incentives for voluntary conservation measures

DROUGHT CONTINGENCY PLANNING

- Upper Basin DCP - Consists of three components
 - Augmentation of river flows
 - Cloud seeding
 - Phreatophyte control
 - Drought operations of upstream reservoirs (Flaming Gorge, Blue Mesa, Navajo)
 - Demand Management – reduction of consumptive use

DEMAND MANAGEMENT

- Most controversial element of the DCP
- No clear definition of what it means
- Number of ongoing efforts to put “meat on the bones”
 - CWCB, CBRT, Colorado River District
- Goal of DM: reduce consumptive use in Upper Basin to allow more water to flow to Lake Powell

DEMAND MANAGEMENT

- Consensus elements (as of this moment):
 - Temporary
 - Voluntary
 - Compensated
- Sounds simple, but . . .

DEMAND MANAGEMENT ISSUES

- Avoiding disproportionate impacts
 - East Slope v. West Slope
 - River basins on West Slope
 - Types of use – ag, municipal, industrial
- Where will compensation come from?

DEMAND MANAGEMENT ISSUES

- How to quantify the water savings?
 - Collection of data
 - Verification of data collected
 - Measuring devices
 - Calculation of savings
 - Geographical and elevation differences

DEMAND MANAGEMENT ISSUES

- How to protect water rights that participate in a DM program from claims of:
 - Abandonment
 - Reduction of HCU
 - Waste

DEMAND MANAGEMENT ISSUES

- How to prevent speculation in water rights
- How to prevent a DM program from increasing the need for more DM
 - Successful DM program shouldn't be used as a “reservoir” to encourage future consumptive use development

DEMAND MANAGEMENT ISSUES

- Shepherding issues
 - To the Colorado state line
 - Across Utah to Lake Powell
- How to address secondary impacts:
 - Economic
 - Community
 - Social

DEMAND MANAGEMENT ISSUES

- What does “voluntary” mean?
 - Water right owner/tenant issues
 - Water in federal projects
- Preventing “voluntary and compensated” from becoming “mandatory and uncompensated”

CONCLUSION

- Many unresolved issues
- Lots of ongoing discussions
- Goal is to avoid a crisis – will we be successful?



That's all for today.
QUESTIONS?