OVERVIEW OF FEDERAL RECLAMATION LAW & RECLAMATION WATER

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This article seeks to do three things: (1) provide a general overview of federal reclamation law; (2) summarize the various types of eligibility for reclamation water in farm operations; and (3) provide a resource for certain U.S. Bureau of Reclamation reference material.

I. INTRODUCTION

One in every five acres of irrigated farmland in the Western United States receives irrigation water from the U.S. Bureau of Reclamation (the “Bureau”). [2] The Bureau is a division of the federal government that was created to “reclaim” arid farmlands in the American West. The Bureau's origins can be traced back to 1902, when Congress enacted the first Reclamation Act. [3] The purpose of the 1902 Act was to “encourage family farming on modest sized parcels and to increase agricultural output by subsidizing the irrigation of formerly arid and unproductive lands.” [4]

To further this “reclamation” activity, the Bureau provided federal funds for the installation or implementation of various irrigation and water projects in the Western portion of the Country, including power plants, dams and canals. These funds were used for costs associated with the planning and design of various projects, land and rights-of-way acquisition, water-rights acquisitions, and construction expenditures. [5] The Bureau has constructed more than 600 dams and reservoirs (to date), including the Hoover Dam (Colorado River) and the Grand Coulee Dam (Columbia River). [6] The Bureau oversees wholesale water distribution and reclamation projects in five different regions: (i) the Pacific Northwest, (ii) Mid-Pacific, (iii) Lower Colorado, (iv) Upper Colorado, and (v) the Great Plains. [7] The term “westwide” refers to the 17 States where Bureau projects are located: Arizona, Californa, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. [8]

The Bureau provides irrigation water sourced from its water projects to eligible landowners through its relationship with local irrigation districts. The Bureau holds the water rights and contracts for water delivery directly with local irrigation districts or other water providers. [9] These irrigation districts receive water from the Bureau and deliver it to eligible farmers, who use it to water their crops. The farmers pay the irrigation districts for their water, and in turn the irrigation districts pay the Bureau according to the terms of their contract. The contracts between the irrigation district and the Bureau include a repayment obligation for a portion of the costs associated with the initial construction expenditures for the irrigation or water project (as initially funded with federal funds). [10] Until the applicable irrigation district repays its allocated portion of those construction costs, any water sourced from these

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irrigation or water projects (referred to herein as “Reclamation Water”), the districts can only deliver water to recipients that meet certain eligibility requirements. [11] Further, so long as the Reclamation Water is being provided to an irrigation district with an unpaid construction contract, a recipient is charged for this water at either a nonfull-cost (or subsidized) rate or full-cost rate (a rate higher than the non-full cost rate), and the eligibility for these different rate categories is based on the amount of land owned or leased by a given recipient within all reclamation districts westwide. [12]

II. RECLAMATION LAW

Under the 1902 Act, as mentioned above, a landowner was not eligible to receive federally-subsidized water from the Bureau unless the landowner actually lived on the land and owned 160 acres or less of farmland within areas served by the Bureau. [13] However, much of the subsidized water wound up flowing not to small family farms but to large farming interests who “found ways to circumvent the 160-acre limitation” through “leasing arrangements and other devices.” [14] In 1982, Congress sought to close these loopholes and fix its water subsidy program by passing the Reclamation Reform Act of 1982. [15] “With the [Reclamation Reform Act of 1982], Congress redefined completely who could receive subsidized reclamation water and the price they would pay.” [16]

It is important to note: while the 1982 Act (the “RRA”) updated the rules of eligibility for Reclamation Water (the “New Law”), it did not replace certain aspects of the 1902 Act; these provisions of the RRA are commonly referred to as “Prior Law.” As a result, any determination of a given receipient's eligibility to Reclamation Water is subject to a legal and fact-based analysis as to whether a given parcel or person is subject to the RRA under either the New Law or Prior Law system.

III. ELIGIBILITY CALCULATIONS

Eligibility calculations under the RRA vary dramatically based on (a) where the land in question is located (i.e., which irrigation district is supplying the Reclamation Water), (b) whether the property is subject to Prior Law or New Law, and (c) the identity of the person or entity that is the direct or indirect owner or lessee of the property receiving Reclamation Water. [17]

A. Land Eligibility

Land is subject to New Law or Prior Law, and can therefore vary in application of eligibility calculations for a given recipient. Each is described in brief below, subject to certain exceptions. [18]

1. *Land subject to “New Law,” or the “discretionary provisions*.” [19] The majority of the land within federal reclamation districts falls under the New Law provisions of the RRA. This land is located within in an irrigation district that is either (a) subject to a construction contract between the irrigation district and the Bureau that was entered into after October 12, 1982, or (b) the irrigation district elected to amend its contract with the Bureau to conform to the discretionary provisions of the 1982 Act (thereby bringing land within the district under the provisions of the New Law). [20]

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2. *Land subject to "Prior Law."* Some irrigation districts are not subject to the RRA's discretionary provisions because of a combination of historical use and elective choice, and are subject to the terms of Prior Law. In these districts, the acreage limitations are much lower. If land is located within a prior law district, it is usually possible for an individual landholder to make an irrevocable election to be subject to the discretionary provisions (and potentially more permissive acreage limitations) instead. For details on this election, see RRA Fact Sheets 3.

Examples of exceptions to New Law or Prior Law land status:

Land that was formerly subject to acreage limitations but is now exempt. Some land within reclamation districts is no longer subject to acreage limitations. This is usually because the federal funds used for federal reclamation project that provides water to the land has been completely repaid by completion of irrigation district payment obligations per their applicable contract with the Bureau. [21] The list of exempt lands changes regularly as time passes and the various contracts are paid out (similar to the payoff of a mortgage or the expiration of a lease). [22] Each year, additional lands within reclamation districts become exempt as reclamation projects are paid off. Further, within each district, there may be plot-by-plot differences in exemption status. [23] To determine whether land is exempt, it is advisable to consult with legal counsel, the Bureau, or the relevant local irrigation district.

Land that is subject to some other form of exemption. There are also other kinds of exemptions that may apply to land that is otherwise located within a Prior Law or New Law irrigation district. [24] Specifically, some land is legislatively exempted because it falls under the jurisdiction of another branch of the government (such as the U.S. Army Corps of Engineers), some land has been administratively exempted for applicable statute or action of the Secretary of the Interior, and some land is exempted based on the use (e.g., barns, feedlots, public roads, and fish farms are all exempt; temporary roads or plantings (which may be altered at the choice of the farmer) are not exempt). [25]

B. Recipient Eligibility

There are three types of recipients that may receive Reclamation Water: (i) **qualified recipient**, (ii) **limited recipient**, and (iii) **prior law recipient**. Each such recipient type has two applicable entitlements under the RRA: (a) **ownership entitlement** and (b) **nonfull-cost entitlement**. For guidance on a given person or entity's eligibility status, see RRA Fact Sheet 2.

A general overview is set forth below:

		Ownership Entitlement	**Nonfull-Cost Entitlement**
Qualified Recipient	▪ Individual who is a US citizen or resident alien ▪ Married couple, if either spouse is a US citizen or resident alien ▪ Legal entity established under state or Federal law and benefits 25	960 acres	960 acres

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	natural persons or less (25 or fewer part-owners/members/shareholders) ▪ Subject to the discretionary provisions of the RRA by: ▪ Directly owning or leasing land in New ▪ Directly owning land subject to New ▪ [illegible]		
Limited Recipient	▪ A legal entity established under state or Federal law benefitting more than 25 natural persons, including, but not limited to: ▪ Corporation ▪ Partnership ▪ LLC ▪ Joint Tenancy ▪ Subject to the discretionary provisions of the RRA by: ▪ Directly owning or leasing land in New ▪ Directly owning land subject to New ▪ [illegible]	640 acres	320 acre nonfull-cost entitlement IF entity received Reclamation Water on or before 10/1/1981 OR 0 acre nonfull-cost entitlement if entity did not receive Reclamation Water on or before 10/1/1981
Prior Law Recipient	▪ Individual who is a US citizen or resident alien ▪ Married couple, if either spouse is a US citizen or resident alien ▪ Legal entity established under state or Federal law AND ▪ Has not become subject to the discretionary provisions of the RRA by either irrevocable election, or by directly or indirectly owning or leasing land in a discretionary provisions district	Individual - 160 acres (married couple = 320 acres) Corporation – 160 acres Partnership – 160 acres per partner, if interests are equal, separable and alienable Joint tenancy or tenancy-in-common – 160 acres per tenant	Individual - 160 acres (married couple = 320 acres) Corporation – 160 acres Partnership – 160 acres per partner, if interests are equal, separable and alienable Joint tenancy or tenancy-in-common – 160 acres per tenant

Attribution rules. The above noted ownership and nonfull-cost eligibility limitations cannot be avoided simply by creating separate legal entities or subsidiaries to hold title to land. A landowner's landholdings include not only

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land directly owned by the landholder (i.e., land to which the landholder holds title, *see* 43 C.F.R. § 426.2), but also lands *indirectly owned* by the landholder. *See*, e.g., 43 C.F.R. §§ 426.2, 426.4, 426.5. *Indirectly owned* land is any land in which the landholder has a "beneficial interest." 43 C.F.R. § 426.2. For example, if a property owning LLC is a wholly-owned subsidiary of a parent company, all of the land held by the LLC counts toward the parent company's acreage limitations. If the LLC is half-owned by another legal entity, half of the land will count toward that entity's acreage limitations.

C. Nonfull-Cost and Full-Cost Application to Acreage and Recipient Eligibility

It is important to remember that each recipient type (qualified, limited or prior law) has two separate entitlements: ownership eligibility and nonfull-cost eligibility. Ownership eligibility simply speaks to how much land within an irrigation district subject to RRA Prior law or New Law a given person or entity can own (directly or indirectly); as noted above, this calculation is (with limited exception) measured across all land subject to RRA provisions westward, and is attributed to direct and indirect owner calculations. By contrast, other than for land leased from a public entity, there is no such limitation on the amount of land a person or entity can lease. [32] In other words, a person can *own* 960 acres in a New Law district and *lease* 2,000 acres, and be compliant with the ownership eligibility limitations for a qualified recipient. This is where the nonfull-cost eligibility is an important metric.

In the above scenario where our individual farmer owns 960 acres and leases 2,000 acres, the farmer has control over 2,960 acres. However, as a qualified recipient, the farmer can only receive Reclamation Water at the nonfull-cost rate for 960 acres of the total acreage. The balance of the land, the 2,000 acres, may still receive water at the (higher) full-cost rate. For more information on allocation of nonfull-cost and full-cost (for those recipients that are eligible for both, and have land holdings in excess of their nonfull-cost eligibility), see RRA FORM 7-21INFO (page 4).

D. Exceptions and Limitations.

There are a variety of exceptions and limitations for the foregoing eligibility requirements and calculations. A few that may affect farmland operations are set forth below.

3. *Acreage limitations do not apply to all landholders*. Acreage limitations apply only to landholders who receive irrigation water from an irrigation district (or similar entity) that has a water supply contract with the Bureau. Not all farms within a given reclamation district will receive their irrigation water from such entities. Some farms may, for example, directly appropriate water for irrigation from a river or contract for irrigation water with a private company such as a "ditch" or "canal" company. Any landholder who gets all of its water from a non-Bureau source is not subject to Reclamation acreage limitations.
4. *Acreage limitations do not apply to all lands*. As explained above, some lands are exempt from acreage limitations entirely because the irrigation districts that serve them have already paid off the capital costs associated with the reclamation project (or because some other exemption applies). In these areas, land can be held without regard to acreage limitations and without regard to whether the land receives Bureau-sourced water. Determination of exempt status should be made on a case by case basis, and it would be

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advisable to consult with legal counsel, the Bureau, or the applicable water district to determine the land's status and implications to the landholder.

5. *Leased Land is treated differently*. As noted above, leased lands and owned lands are treated differently under the RRA. With the exception of land leased from a public entity, tenant use of Reclamation Water on leased land does not apply toward the subject tenant's ownership calculations (i.e., 960 or 640, depending on the type of entity); however, the acreage limits do apply for the nonfull-cost/full-cost eligibility. For guidance, see RRA Fact Sheet 15.
6. *A party may own "excess" land above their ownership limit*. A party may own land above its ownership limitation, provided that they deem these extra acres "excess" and not irrigable for purposes of Reclamation Water. If a person or entity owns more acreage than the permitted 640 or 960 acres, as applicable for New Law, or more than the 160, as applicable for Prior Law, then the landholder may elect to designate the extra acreage as "excess" acreage. This excess acreage is not eligible for Reclamation Water. For guidance, see RRA Fact Sheets 4, 6, and 8.

E. Eligibility Considerations Unique to Nonresident Aliens and Foreign Entities

There are special limitations and restrictions on a nonresident alien or foreign entity's right to receive Reclamation Water. These persons or entities (a "foreign recipient") are only eligible to receive Prior law entitlements as the base acreage limitation entitlements (for ownership and nonfull-cost eligibility). Further, a foreign recipient may only hold land *indirectly* in a New Law irrigation district; a foreign recipient may hold land directly or indirectly in a Prior Law irrigation district. For more information on foreign recipient entitlements, see RRA Fact Sheet 16.

F. Eligibility Considerations Unique to Trusts

Eligibility calculations for trusts are determined with reference to the trust beneficiaries. The acreage entitlements of all beneficiaries are aggregated, and as a result a trust with numerous beneficiaries could have a very large total land entitlement (depending on each individual beneficiary's available eligibility). For more information on trust and estates and Reclamation Water, see the RRA Fact Sheet 12 (Trusts and Estates).

IV. REFERENCE MATERIALS & BUREAU CONTACT INFORMATION

Washington State is located in the Pacific Northwest RRA region, and the applicable Bureau office is located in Boise, Idaho. The Bureau maintains various Fact Sheets on its website as a resource for landholders and others seeking information on Reclamation Water, the RRA and Prior Law. In addition to the Fact Sheets mentioned in this overview, you can obtain RRA forms, district reference sources, and other materials relevant to the RRA (including information on Prior Law application). See www.usbr.gov/rra (last checked on 5/23/17).

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[2] Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 Va. Envtl. L.J. 363, 364 (1997).

[3] See Reclamation Act of 1902, and acts amendatory and supplementary thereto (43 U.S.C 371 et seq.) that were in effect prior to the enactment of the RRA, and as amended by the RRA; *See also Nat. Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1535 (E.D. Cal. 1991).

[4] *Id*.

[5] https://www.usbr.gov/main/about/mission.html (last checked 5/22/17)

[6] *Id*.

[7] https://www.usbr.gov/rra/RRA_Law_Regs/43CFR426.pdf

[8] *Id*.

[9] See 43 U.S.C Section 485h(d)-(e).

[10] Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 Va. Envtl. L.J. 363, 364 (1997).

[11] See 43 CFR Section 426.16(b)

[12] Note: some Prior Law districts calculate the nonfull-cost and full-cost eligibility on a district-by-district basis. For guidance, see RRA Fact Sheet 8

[13] *See Nat. Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1535 (E.D. Cal. 1991).

[14] *Id*.

[15] See the Reclamation Reform Act of 1982, Public Law 970293, Title II, 96 Stat. 1263, (43 U.S.C 390aa *et seq*.) as amended

[16] *Id*.

[17] Note: there is a separate RRA analysis for farm operators hired by a given farm owner or farm tenant to provide farming services for hire. See RRA Fact Sheet 15 (Leases and Farm Operating Arrangements).

[18] For guidance in determining which category applies to a particular parcel of land, see RRA Fact Sheet 2 (Acreage Limitation Status).

[19] The term discretionary provisions refers to Sections 390cc through 390hh, except 390cc(b), of the Reclamation Reform Act of 1982 (43 U.S.C. 390aa *et seq*.). See CFR 426.2.

[20] See CFR 426.3(a)(1-2).

[21] Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 Va. Envtl. L.J. 363, 364 (1997).

[22] *Id*.

[23] Note that some irrigation districts are able to do a 'lump sum' payment of its reclamation obligations; accordingly, on a landholder by landholder basis, these irrigation districts sometimes allow a given party to accelerate the payment allocated to that party's property (thereby releasing the reclamation obligation from that parcel). The Bureau or the applicable irrigation district can verify whether or not an accelerated payment is permissible for a given parcel. As of the date of this article, the following irrigation districts allow pre-payment: Kennewick Irrigation District, Kittitas Irrigation District, Roza Irrigation District. Email from Janice DeBoer, Compliance Specialist, U.S. Dept' of Reclamation (May 22, 2017, 11:12 A.M. PST).

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[24] See Bureau of Reclamation Form 7-21INFO, page 1.
[25] See Bureau of Reclamation Form 7-21INFO, definition of “nonexempt land.”
[26] For more information, see RRA Fact Sheet 4.
[27] The acreage limitations are stated in terms of acres owned on farmlands with a productivity designation of “Class 1” (land deemed by the Bureau as equivalent in productive potential to the most suitable irrigable ground). If the farmland in question is less productive than a “Class 1” farmland, it may be possible to increase the acreage limitation in proportion to the productivity shortfall. For details on this process, see 43 C.F.R. § 426.11.
[28] For more information, see RRA Fact Sheet 6.
[29] The entity must have received water in its current formation (i.e. Big Water User Group Inc. may have received Reclamation irrigation water in 1980, but has since been re-organized as Bigger Water User Group LLC; the land they own remains the same. Bigger Water User Group LLC is a new entity that did not receive Reclamation irrigation water prior to 10/1/1981). The foregoing example is from Janice DeBoer, Compliance Specialist, U.S. Dep't of Reclamation (conversation and correspondence on May 19, 2017).
[30] For more information, see RRA Fact Sheet 8.
[31] Note: a landholder that owns or leases land in both a New Law irrigation district and a Prior Law irrigation district is subject to New Law eligibility limits (as either a qualified recipient or a limited recipient). See RRA Fact Sheet 2.
[32] See RRA Fact Sheet 15

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