

FACT SHEET 3

HOW TO BECOME SUBJECT TO THE DISCRETIONARY PROVISIONS

Reclamation Reform Act of 1982 (RRA)

This fact sheet explains how to become subject to the discretionary provisions. If you represent a trust, estate, public entity, or foreign entity, or you are a nonresident alien, see the section that begins on page 6 of this fact sheet. If you are unsure of the information discussed in this fact sheet, contact your district or the appropriate Bureau of Reclamation office, or see the **Sources for more information** section at the end of this fact sheet.

What are the discretionary provisions?

The RRA includes a group of provisions commonly known as the **discretionary provisions** (specifically RRA sections 203 through 208, except for section 203[b]). Districts and landholders (direct or indirect landowners or lessees) **did not** automatically become subject to the discretionary provisions upon passage of the RRA; rather, districts and landholders must take specific actions in order for the discretionary provisions to apply. Landholders subject to the discretionary provisions are either qualified or limited recipients. Landholders not subject to the discretionary provisions are prior law recipients.

- Generally, landholders subject to the discretionary provisions have higher ownership and nonfull-cost entitlements than landholders who remain subject to the prior law provisions. Landholders subject to the discretionary provisions must also pay at least the full operation and maintenance cost for all irrigation water deliveries from Bureau of Reclamation projects. Landholders subject to the discretionary provisions **cannot** revert to prior law status.
- When a landholder becomes subject to the discretionary provisions, that landholder is subject to the discretionary provisions in **all districts** in which they own or lease land. In other words, an individual or entity cannot be subject to the discretionary provisions in one district and subject to the prior law provisions in another district.
 - All land in Reclamation projects **directly or indirectly owned or leased** by that landholder becomes subject to the discretionary provisions regardless of where the land is located.

How do you become subject to the discretionary provisions?

There are two ways to become subject to the discretionary provisions. If you are a part owner that is subject to the prior law provisions, see the **Irrevocable election by part owners subject to the prior law provisions** section of this fact sheet for further information applicable to part owners.

1. By being a direct landowner or direct lessee in a *district that takes (or has taken) a specific contract action that makes the district subject to the discretionary provisions, such as:*

- A district submits to Reclamation a written request to amend its contract to conform to the discretionary provisions.
 - A resolution adopted by the district's board of directors must accompany this written request.
- A district executes a **new contract**, or **renews a contract**, with the United States, or **amends** its existing contract to provide **additional or supplemental benefits**.
 - Districts that take these actions **automatically** become subject to the discretionary provisions.

All landholders who **directly own or directly lease** irrigable and/or irrigation land in a district that takes one of the contract actions listed above automatically become subject to the discretionary provisions. Landholders who also hold land in other prior law districts will be subject to the discretionary provisions even in those prior law districts.

- The exceptions are trusts, estates, public entities, nonresident aliens, and foreign entities (legal entities not established under State or Federal law). See the **Information for trusts, estates, public entities, nonresident aliens, and foreign entities** section below for more information.

Landholders who **only indirectly own or indirectly lease** irrigable and/or irrigation land (stockholders, part owners, beneficiaries, etc.) within a district that has conformed to the discretionary provisions do not automatically conform to the discretionary provisions because of the district's actions. Therefore, such landholders will need to make an irrevocable election as explained below.

- For example, if a legal entity (such as a partnership, tenancy-in-common, joint tenancy, corporation, etc.) directly owns or directly leases land in a district that has amended its contract to conform to the discretionary provisions, then:
 - The entity itself will be subject to the discretionary provisions.
 - None of the part owners of the entity will be subject to the discretionary provisions unless they make their own irrevocable election as explained below, or also directly own or directly lease land in either the district that conformed or another district that is subject to the discretionary provisions.

2. By *filing an irrevocable election to conform to the discretionary provisions, as an individual or entity.*

- Once an irrevocable election is filed with and approved by Reclamation, it is **permanently binding** and the individual or entity is subject to the discretionary provisions in **all districts** where land is directly or indirectly owned or leased.
- **All land** that is directly or indirectly owned or leased westwide (in the 17 Western States where Reclamation has projects) by the individual or entity, either currently or in the future, will be subject to the discretionary provisions, even if the land is held in multiple districts or states.

- Irrevocable election forms are available at both your district office and the appropriate Reclamation office.

Things to consider before making an irrevocable election

The choice for an individual or entity to make an irrevocable election is always available. Before you make an irrevocable election, you must be aware of the following:

- Once an irrevocable election is filed with and approved by Reclamation, it is **permanently binding** and all directly or indirectly owned or leased land held westwide by the individual or entity will be subject to the discretionary provisions, regardless of where the land is located.
- Landholders who become subject to the discretionary provisions cannot revert back to prior law status.
- An irrevocable election is not binding on any subsequent landholder of the land, but it will be binding on any land you hold in the future, regardless of whether the land is located in the same district. In other words, the irrevocable election follows the elector, not the land.
- An irrevocable election binds only the elector. An irrevocable election by a legal entity does not make the entity's stockholders, part owners, or beneficiaries subject to the discretionary provisions. Similarly, an irrevocable election by a stockholder, part owner, or beneficiary does not make the entity subject to the discretionary provisions.
 - For example, if an entity makes an irrevocable election and a stockholder, part owner, or beneficiary would also like to become subject to the discretionary provisions, that part owner **must also** make an irrevocable election for itself.
- A single family or surviving spouse who wishes to make an election for themselves and their wholly-owned entities **must identify the wholly-owned entities** by both type and name on the irrevocable election filed for the single family or surviving spouse.
 - All appropriate signatures and documentation (including a corporate resolution if the entity is a corporation) must accompany the submitted irrevocable election.
 - Any wholly-owned entities (including partnerships, tenancies, corporations, etc.) not identified on the election **will remain subject to prior law** until an irrevocable election is submitted by the wholly-owned entity on its own behalf.
- If a married couple makes an irrevocable election and then divorces, the divorced husband and divorced wife will each remain subject to the discretionary provisions because an irrevocable election follows the electors, not the land. Furthermore, a new spouse of the divorced husband or divorced wife will become subject to the discretionary provisions.
 - In other words, a spouse that **has never** made an irrevocable election (either personally or as part of another marriage) will become subject to the discretionary provisions by marrying someone that **has** made an irrevocable election (either personally or as part of another marriage).

How do you make an irrevocable election?

The steps for making an irrevocable election are:

- Submit the appropriate completed irrevocable election form (notarized, except for corporations), the appropriate RRA certification form(s), and any additional required documents to your district.
 - Copies of the completed irrevocable election form and the certification form(s) are to be submitted concurrently to **ALL** districts in which the landholder holds irrigation land and/or irrigable land that is subject to the acreage limitation provisions. This applies even if the total landholding involved in the irrevocable election is below the applicable RRA forms submittal threshold of the district(s) to which the irrevocable election is being submitted.
 - Irrevocable elections filed by or on behalf of prior law corporations must be accompanied by a corporate resolution in addition to the appropriate certification form(s).
- The district(s) will submit the materials to Reclamation for review and approval.
- Upon completion of its review, Reclamation will advise the landholder and the district(s), in writing, of the approval or disapproval of the election.

Who must sign the irrevocable election?

- For **individuals**, both the landholder and spouse (if applicable) must sign the irrevocable election.
- For **partnerships, joint tenancies, or tenancies-in-common**, each partner, joint tenant, or cotenant must sign the irrevocable election.
 - The only exception is in a case where a power of attorney document has been utilized. The power of attorney document **must accompany** the irrevocable election.
- For entities that are **corporations**, an authorized official and the secretary of the corporation must sign the irrevocable election.
 - A copy of the corporate resolution authorizing the irrevocable election **must accompany** the irrevocable election.
- Individuals who are making irrevocable elections and have identified **wholly-owned corporations** on their irrevocable election must sign the irrevocable election on their **own behalf** as individuals and sign **again as an officer(s)** of the corporation acting on behalf of the corporation.
 - A copy of the corporate resolution authorizing the irrevocable election **must accompany** the irrevocable election.
- A Spousal Signature Authorization or an Entity Signature Authorization **cannot be used** to satisfy the irrevocable election signature requirements.

Irrevocable election by part owners subject to the prior law provisions

If you are a part owner of an entity that is subject to the discretionary provisions because the entity directly holds land in a district subject to the discretionary provisions **AND** you hold land **only indirectly** (in other words, you do not directly own or directly lease land in your own name), you can **become subject to the discretionary provisions in two ways** that are in addition to submitting an irrevocable election (see the **How do you make an irrevocable election** section above):

- 1. Simply submitting a CERTIFICATION (blue) RRA form** to the district instead of an irrevocable election form.
 - If you wish to remain subject to the prior law provisions and you are required to submit RRA forms, you must submit a **REPORTING** (brown) form to the discretionary provisions districts where land is held.
- 2. Not submitting a REPORTING (brown) RRA form** if you hold more than 40 acres westwide (the RRA forms submittal threshold for a prior law recipient) **AND** less than the applicable RRA forms submittal threshold in **each** discretionary provisions district where land is held.
 - If you wish to remain subject to the prior law provisions and hold more than 40 acres westwide, you must submit a **REPORTING** (brown) form to **all** districts.

Because the submittal of a certification (blue) RRA form, or the nonsubmittal of a reporting (brown) RRA form, is treated in the same manner as an irrevocable election, part owners should take care to ensure the submittal (or nonsubmittal) of the correct RRA form to avoid an inadvertent irrevocable election. Making an irrevocable election in either of the two manners listed above is not applicable to nonresident aliens or foreign entities.

Irrevocable elections by individual contractors

A landholder that has an individual contract with Reclamation to receive Reclamation irrigation water (in other words, the landholder serves in the district capacity) and wants to become subject to the discretionary provisions may do so by taking one of the following two actions:

- 1. Submit to Reclamation a *written request to amend the contract to become subject to the discretionary provisions, accompanied by a resolution to amend the contract for this purpose.***
 - As a result, the individual contractor and all individuals and entities who directly lease irrigable and/or irrigation land from the individual contractor become subject to the discretionary provisions, except for nonresident aliens or foreign entities.
 - Landholders who **only indirectly own or indirectly lease** (as stockholders, part owners, beneficiaries, etc.) irrigable and/or irrigation land from the individual contractor are not forced to conform to the discretionary provisions because of the individual contractor's actions.

- For example, if a legal entity (such as a partnership, tenancy-in-common, joint tenancy, corporation, etc.) directly leases land from an individual contractor that has amended the contract to conform to the discretionary provisions:
 - The entity itself will be subject to the discretionary provisions.
 - None of the part owners of the entity will be subject to the discretionary provisions unless they (a) make their own irrevocable election, (b) also directly own or directly lease land in another district that is subject to the discretionary provisions, or (c) submit a certification form as explained above within the **Irrevocable election by part owners subject to the prior law provisions** section.
- An individual contractor is able to obtain a Category 1 RRA forms submittal threshold if the contractor amends its contract to become subject to the discretionary provisions and the individual contractor is current in its financial obligations to Reclamation. See Fact Sheet 1 (RRA Forms) for more information on forms submittal thresholds.

2. Submit the *appropriate completed irrevocable election form* (notarized, except for corporations), the appropriate certification forms(s), and any additional required documents to Reclamation for review and approval.

- Irrevocable elections filed by or on behalf of prior law corporations must be accompanied by a corporate resolution in addition to the appropriate certification form(s).
- Upon completion of its review, Reclamation will advise the individual contractor in writing of the approval or disapproval of the election. The impacts of an individual contractor's irrevocable election are the same as explained above.
- An individual contractor that makes an irrevocable election has a Category 2 RRA forms submittal threshold because the individual contractor has not conformed to the discretionary provisions by a contract action. See Fact Sheet 1 (RRA Forms) for more information on forms submittal thresholds.

Information for trusts, estates, public entities, nonresident aliens, and foreign entities

Trusts and estates do not have acreage limitation entitlements.

- The amount of land eligible to receive Reclamation irrigation water that can be held by trusts and estates is determined by the acreage limitation entitlements of the individuals or entities to which land is attributed.
- A trust's or estate's eligible landholding can be affected by district conformance to the discretionary provisions and irrevocable elections made by the individuals or entities attributed with land held in a trust or estate.
- See Fact Sheet 12 (Trusts and Estates) for more information on trusts and estates.

Public entities also do not have acreage limitation entitlements, as long as certain criteria and the RRA forms requirements are met.

- Any public entity land that is leased to other landholders must be included as owned land by the lessee and be eligible to receive Reclamation irrigation water in the lessee's ownership entitlement.
- For more information on the application of acreage limitations to public entities, contact your district or the appropriate Reclamation office.

For **nonresident aliens and foreign entities**, any land *directly owned or directly leased* in a discretionary provisions district is ineligible to receive Reclamation irrigation water under **any circumstances**.

- If a prior law district should conform to the discretionary provisions, any eligible land that is **directly owned or directly leased** by nonresident aliens and foreign entities becomes ineligible to receive Reclamation irrigation water unless that land is placed under recordable contract, the land is sold to an eligible buyer, or the nonresident alien or foreign entity becomes an indirect landholder of that land.
- A nonresident alien or foreign entity that **does not hold land directly** in a prior law district and who is a citizen of or established in, respectively, a country that meets the criteria specified in section 426.8(d) of the Acreage Limitation Rules and Regulations (43 CFR¹ part 426) is eligible to make an irrevocable election using the appropriate irrevocable election form.
- See Fact Sheet 16 (Nonresident Aliens and Foreign Entities) for more information regarding the applicability of the acreage limitation provisions, including eligibility to make an irrevocable election.

Sources for more information

More information for your landholding situation and the corresponding acreage limitation entitlements can be found in the following documents. Contact your district or the appropriate Reclamation office for further guidance.

Form 7-21INFO	General Information About the RRA Forms	The Form 7-21INFO also contains definitions. The RRA Fact Sheets and the current water year's RRA forms and instructions are available online and at your district or the appropriate Reclamation office.
Separate instructions to each RRA form applicable to your landholding situation		
RRA Fact Sheet 1	RRA Forms	
RRA Fact Sheet 2	Acreage Limitation Status	
RRA Fact Sheet 4	Qualified Recipient Entitlements	
RRA Fact Sheet 6	Limited Recipient Entitlements	
RRA Fact Sheet 8	Prior Law Recipient Entitlements	
RRA Fact Sheet 12	Trusts and Estates	
RRA Fact Sheet 16	Nonresident Aliens and Foreign Entities	www.usbr.gov/rra
RRA website (including the RRA forms, District Reference Sources, and the text of the RRA and its associated Regulations)		

¹ Code of Federal Regulations