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43 CFR Part 428

Information Requirements for Certain Farm Operations in Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 428

RIN 1006–AA38

Information Requirements for Certain Farm Operations in Excess of 960 Acres and the Eligibility of Certain Formerly Excess Land

AGENCY: Bureau of Reclamation, Interior.

ACTION: Final rule.

SUMMARY: This final rule adds a new part to the Bureau of Reclamation's (Reclamation) regulations. This part supplements the Acreage Limitation Rules and Regulations, which implement the Reclamation Reform Act of 1982 (RRA). The final rule requires certain farm operators to submit RRA forms that describe the services they perform and the land they service. The rule also addresses the eligibility of certain formerly excess land held in trusts or by legal entities to receive nonfull-cost Reclamation irrigation water.

DATES: *Effective date:* This rule is effective October 1, 2000, except that §§ 428.9 and 428.10 are effective January 1, 2001.

APPLICABILITY DATES: For the applicability dates of this rule, see § 428.11.

ADDRESSES: A copy of all comments received on the proposed rule are available for review. To make arrangements to review those comments, please write to: Commissioner's Office, Bureau of Reclamation, 1849 C Street NW., Washington, DC 20240, Attn: Erica Petacchi, or e-mail epetacchi@usbr.gov.

FOR FURTHER INFORMATION CONTACT: Steve Richardson, Chief of Staff, Bureau of Reclamation, 1849 C Street NW., Washington, DC 20240, telephone (202) 208–4291.

SUPPLEMENTARY INFORMATION: This section provides the following information:

I. Background
II. Summary of the Final Rule as Adopted
III. Public Involvement
IV. Procedural Matters

I. Background

This final rule supplements the Acreage Limitation Rules and Regulations, 43 CFR part 426, that govern implementation and administration of the RRA. The rule creates a separate Code of Federal Regulations part, 43 CFR part 428, addressing information requirements for certain farm operators and the eligibility of certain formerly excess land held in a trust or by a legal entity or any combination of trusts and legal entities to receive nonfull-cost Reclamation irrigation water.

This final rule was preceded by a proposed rule, which we published in the **Federal Register** (63 FR 64154, Nov. 18, 1998), and an Advance Notice of Proposed Rulemaking (ANPR), that we also published in the **Federal Register** (61 FR 66827, Dec. 18, 1996). When we finalized the Acreage Limitation Rules and Regulations (43 CFR part 426), we published the ANPR to address certain issues not dealt with in 43 CFR part 426. Please see the preambles to the ANPR and the proposed rule for a more complete history of this regulation.

II. Summary of the Final Rule as Adopted

The final rule will extend RRA certification and reporting forms requirements to farm operators who:

(1) Provide services to more than 960 acres held (directly or indirectly owned or leased) by one trust or legal entity, or

(2) Provide services to the holdings of any combination of trusts and legal entities that exceed 960 acres.

In addition, this part prevents former owners of excess land who sold or transferred the excess land at an approved price from receiving nonfull-cost water on that land if they are now farming it as farm operators. This provision only applies to formerly excess land held in trusts or by legal entities.

The provisions of 43 CFR part 426 not specifically addressed in this rule are unchanged.

Summary of Changes We Made Since the Proposed Rule

In response to comments, we renamed the term ''custom operator'' to ''custom service provider'' in the definitions section (43 CFR 428.3). In addition, we made it clear that a custom service provider is an individual or legal entity that provides one specialized, farm related service to the land in question.

In the section that establishes the RRA forms submittal requirement for farm operators (43 CFR 428.4), we narrowed the requirement for part owners of legal entities that are farm operators and must submit forms. The final rule now provides that indirect owners of legal entities that are farm operators meeting the criteria of section 428.4(a) must submit forms to us annually only if any of the land to which services are being provided by that legal entity is land that the part owner formerly owned as excess land and sold or transferred at an approved price. We have also clarified in this section that farm operators cannot use verification forms and that they are not subject to the landholding change requirements of 43 CFR 426.18.

We made a minor change in 428.9(a)(2) to add the words ''or transferred'' after ''sold'', so that these regulations are consistent with part 426.

Finally, we altered § 428.11 to provide for a later effective date than provided in the proposed rule; specifically the effective date will be January 1, 2001, rather than 2000. However, our intent is to make the rule effective for the 2001 water year in all districts. In § 428.11 we have included an October 1, 2000, effective date for those few districts whose water year commences before January 1, to accomplish that objective.

III. Public Involvement

We invited comments for a total of 120 days, and received comments from 33 sources: 16 from water/irrigation/drainage districts; 3 from public interest groups (including environmental and water users groups); 4 from members of the Congress; 4 from farms (or farm operators or custom service providers); 1 from a Federal government agency; 1 from a county government agency; 1 from a law firm; 2 from trusts (one trustee and one trust beneficiary); and 1 from a joint power authority. The commenters' letters came from the following States: 26 from California; 2 from Arizona; 2 from Colorado; 1 from Washington; 1 from Utah; and 1 from Virginia. We note that some of the letters had more than one signature, to reflect that more than one person or entity endorsed those comments.

The following section presents our responses to these public comments. We sorted these comments into subjects such as authority, trusts, the ANPR, environmental concerns, impacts and need for the rule. Then, we sorted comments that referred to specific sections of the proposed rule.

Public Comments and Responses on General Issues

The following section presents public comments on the proposed rules that are general in nature. This section includes comments on the ANPR, the Paperwork Reduction Act of 1995, trusts, impacts of the rule, authority, need for the rule, and National Environmental Policy Act (NEPA) issues.

General Issues

Comment: We believe that the adoption of westwide regulations to

address a limited problem is unwarranted.

Response: We believe that this issue has the potential to emerge westwide, and a regulation of general applicability is necessary to ensure consistent implementation and enforcement of the RRA.

Comment: The RRA did not create any farm size limitations, but continued to provide ''ownership'' limitation and extend the new concept of full-cost pricing to certain ''leased'' lands.

Response: While the RRA did not create farm size limits, it did tie eligibility of land for nonfull-cost irrigation water to acreage owned or leased. Congress also reaffirmed its policies that the benefits of irrigation water should be distributed widely and that excess landholdings should be broken up into family size farms. The regulations we finalize today will continue to implement the ownership and leasing limitations of the RRA by helping us identify farm operators of relatively large tracts of land. Once we identify them, we will require those farm operators to submit documentation concerning their farm operating arrangements to us for review, so we can determine if they are leases for acreage limitation purposes. If we determine a farm operating arrangement is a lease, we would apply retroactively the applicable nonfull-cost entitlement (the maximum acreage a landholder may irrigate with Reclamation irrigation water at the nonfull-cost rate; 43 CFR 426.2) to the landholding of that lessee (the farm operator). If the farm operator had been providing services to more acreage than the applicable nonfull-cost entitlement under his/her/its farm operating arrangements that are determined to be leases, the full-cost rate would apply.

Comment: The proposed rules would use a different standard of how to identify a lessee and who makes the most decisions regarding the farm. Any divergence from the economic-interest test causes uncertainty and poses a major risk to your ability to enforce reclamation law consistently.

Response: With the final rule, we are not diverging from the economic-interest test found in the Acreage Limitation Rules and Regulations, 43 CFR part 426. We are collecting information that will enable us to apply the economic-interest test more effectively.

Comment: The apparent intent of the regulation is to assist you in determining whether a lease exists. Your current enforcement capabilities enable the collection of information necessary to make this determination.

Response: As we explained in the proposed rule preamble, we currently do not have enough information to determine which farm operators should be reviewed to determine if their farm operating arrangements are leases for acreage limitation purposes. We have tried to collect this information from landholders in the past, but this approach is not effective. Requiring certain farm operators to submit RRA forms is the most effective means of obtaining the necessary information.

Comment: Why not just ask the landholders if you need information to determine (1) Who has use or possession of the land being farmed under a farm operating arrangement, (2) Who is responsible for payment of operating expenses, and (3) Who is entitled to receive the profits from the farming operation. You could get the information about who receives the economic benefit from the land and who has use and possession of the land from the current forms. Then, if that information shows that a party other than the owner, lessee, or sublessee qualifies as a lessee, you could require the named party to provide supplemental information.

Response: We have asked landholders to provide information concerning their operators and found that this approach is not effective in identifying farm operators providing services to more than 960 acres westwide. If we were to rely entirely on information provided by landholders, we would have to review many more farm operating arrangements than necessary, because we would not know until we actually contacted the farm operator and reviewed his/her/its farm operating arrangement if that farm operator was providing services to more than 960 acres. This would mean that districts would be required to contact all farm operators included on RRA forms to obtain their farm operating arrangements, most of which we would later determine were unnecessary to obtain due to the overall number of acres the farm operator was farming. The only alternatives are to either (1) Have certain farm operators submit RRA forms or (2) Collect information concerning farm operators identified on landholder forms westwide and collate the data to determine which farm operators are providing services to more than 960 acres. We have already tried the latter alternative and found it to be inefficient and ineffective. Rather than requiring districts to collect and submit to Reclamation information from all farm operators identified on RRA forms submitted by landholders, and then having to review all of that data, we believe it is in the best interest of all parties if we first narrow the field of farm operators that need to be reviewed. In order to effectively narrow the scope of the audit effort, we will require certain farm operators to submit RRA forms.

Comment: The proposed rule is flawed because it attempts to create an ''entity'' for purposes of reclamation law where none currently exists. There is no logical reason or purpose to create this new ''entity.'' There are plenty of established, recognized, and accepted legal forms of business ''entities'' already, such as sole proprietorships, partnerships, trusts, corporations, etc.

Response: In implementing these final rules, we will not be creating a new ''entity.'' We defined farm operators so that those affected by the regulations would know who must submit RRA farm operator forms.

Comment: The potential for evasion and abuse of the law remain, despite the good intentions in the proposed rule. You could make clear that any ''scheme or device'' employed to evade a requirement or limitation in the regulations will be punished in some way. The record of abuses of reclamation law in California is now so well documented that no one could fault you for taking steps to protect the taxpayers and clean up enforcement.

Response: We can only respond to what we actually find and can reasonably anticipate in the regulated community. We believe we have crafted a regulation to ensure that the acreage limitation provisions of the RRA are enforced properly. As a result we do not believe this suggested change is necessary.

Comment: We believe that the call for additional administrative discretion to address ''scheme or device'' violations would cause problems for water districts and water users who are in good faith trying to comply with the law.

Response: We believe we have crafted a regulation to ensure that the acreage limitation provisions of the RRA are enforced properly.

Comment: If you publish a final rule like the proposed one, please include a way for people to request formal, written rulings on their farm service contracts, similar to the ones you provide for trusts.

Response: Landholders and farm operators have always been welcome to submit farm operating agreements to us for review and a determination of whether the arrangement is a lease for acreage limitation purposes. This practice will continue; however, we have not included it in the regulation. The review procedure for trusts is also

not established in the Acreage Limitation Rules and Regulations.

Comment: The proposed rule does not work and should be withdrawn.

Response: We disagree. We have made several modifications to the final rule at the suggestion of commenters, and we believe that the rule will help us administer reclamation law more effectively.

Comment: Repeated tinkering with the reclamation law regulations causes destabilization for water districts. It makes no difference to us that you propose to add a new ''supplemental'' section instead of reopening the existing regulations.

Response: The law and regulatory programs are rarely static; adjustments are necessary from time to time to ensure the program is working as it should.

Comment: If you do anything, you should strengthen the regulations. Any weakening of these already limited regulations will perpetuate abuses of reclamation law.

Response: While we have made modifications to the final rule as a result of public comments, we do not believe the final rule is weakened by those changes.

Comment: It appears that the reforms the Congress mandated in 1982 may finally be implemented westwide. However, I remain concerned that, without further refinement, these regulations will remain open to abuse.

Response: We have made several adjustments to the final rule and believe the regulations will allow us to enforce the RRA westwide.

Comment: You admit there are no actual abuses of the existing regulations concerning trusts, but you are worried about ''potential future abuses.'' If there are no violations by the 75 trusts with more than 960 acres, then adopting these regulations would be an abuse of discretion.

Response: The large trusts we have reviewed have been found either (1) To lease out the land held in trust or (2) To have a farm operating arrangement that is not a lease for acreage limitation purposes. This does not in any way mean we have found all farm operators providing services to more than 960 acres and reviewed the associated farm operating arrangements. Because we do not currently collect forms from farm operators, we do not have the information we need to identify all farm operators providing services to relatively large amounts of acreage.

Comment: We believe the Natural Resources Defense Council lawsuit was intended to punish a very small segment of the farming community for perceived abuses of reclamation law, but the proposed regulations sweep into the same bucket the great majority of large and small farmers who follow the law.

Response: We contend that the regulation is narrowly tailored and will not affect the majority of farmers westwide.

Comment: If your real motive is to punish those who have manipulated the regulations so as to qualify for Federal water, then why not merely use the remedies you already have and simply turn off the water to those few? We suspect an ulterior motive, perhaps to make more irrigators ineligible to qualify for Reclamation water.

Response: As discussed above and in the proposed rule preamble, we do have remedies for violations of the law. However, we do not have enough information in all cases to determine if a violation has occurred so that we may apply those remedies. The final rule will help us collect that information.

Comment: The current regulations carry out the intent of the RRA.

Response: The final rule will supplement the current regulations and enable us to more effectively carry out the intent of the RRA.

Comment: We request that you start a stakeholder process, that includes both field hearings and workshops, to explain the intent and application of the rule before you adopt any final rule. Public participation is crucial before you make any final decisions.

Response: We do not believe that field hearings or workshops are necessary, because the scope of the final rule is so narrow. We have collected public comments from the ANPR and the proposed rule and have carefully explained the intent and application of the rule in these rulemaking documents. However, we do anticipate holding workshops after we publish the rule to explain their effects.

ANPR

Comment: Your responses to comments on the ANPR acknowledge that the only issue requiring further review is how those trusts holding more than 960 acres westwide are farming their land. Yet under the logic that large trusts might be replaced with some other arrangement that reclamation law critics would regard as violating the intent of the law, the proposed rule contains such vague, sweeping requirements that it is likely to impact even the smallest landowners.

Response: We believe that the final rule is narrow in scope and will not affect the majority of water users.

Comment: The custom farmer reporting provisions exceed the scope of the ANPR. In public statements, you had limited the discussion to large trusts.

Response: We explained in the ANPR that we were collecting comments in order to formulate a proposed rule to address concerns about compliance with Federal reclamation law by large trusts and other as yet unregulated forms of landholdings in excess of 960 acres. When we analyzed comments submitted by the public, we found that we needed to make changes in order to address problems associated with large farming operations.

Comment: We thought the reason for proposing new regulations was to limit certain large trusts, but it appears the regulations far exceed this objective. We relied on your assurances that changes in the regulations would only deal with trusts. At several meetings and conference calls after you published the ANPR, you confirmed that you did not intend to reopen issues from the regulations that had been recently adopted (43 CFR 426). We believe that this proposed rule does not comply with the ANPR nor with the record produced at your workshop held in Sacramento on March 14, 1997. You have misled the public about the purpose of the proposed rulemaking, since the only relationship between the proposed rule and the ANPR is that you are attempting to deal with farm operators of ''large trusts.''

Response: The purpose of an ANPR is to gather information and public comment in order to form issues to address in a proposed rule. In the ANPR published on December 18, 1996, we asked for input on how we can ensure compliance with the acreage limitation provisions by large trusts *and other forms of landholdings in excess of 960 acres.* Our intent has remained the same as it was at the time we published the ANPR, and that is to ensure that everyone that receives Reclamation irrigation water complies with Federal reclamation law, including the acreage limitation provisions.

Information Collection and Forms (Paperwork Reduction Act of 1995)

Comment: You should develop separate forms for farm operators. A true farm operator has no interest in the land it operates, so that land cannot be considered to be part of the farm operator's landholding. It is therefore inappropriate for a farm operator to submit landholder reporting or certification forms.

Response: We have reviewed this issue and concur. A separate form named the ''Declaration of Farm Operator Information'' (Form 7–

21FARMOP) has been developed. Farm operators who provide services to more than 960 acres held in trusts or by legal entities will complete this form. In addition, we have prepared a tabulation sheet (Tabulation G of ''Declaration of Farm Operator Information'' Forms) that districts will complete as part of their summary form packages.

Comment: You should tailor forms for farm operators and submit drafts for public comment.

Response: Both the Form 7–21FARMOP and Tabulation G were included in the package of RRA forms for the year 2000 submitted to the Office of Management and Budget for review and approval. The public was provided two comment periods on the RRA forms. The first 60-day comment period was provided in the **Federal Register** (64 FR 174, Jan. 4, 1999). The second required comment period of 30 days was also announced in the **Federal Register** (64 FR 28009, May 24, 1999). As part of our continuing effort to provide information on acreage limitation activities to those affected, the draft RRA forms, including the Form 7–21FARMOP and Tabulation G, were sent to all districts that are subject to the acreage limitation provisions on January 8, 1999, along with a copy of the **Federal Register** notice. It should be noted that our current approval of the RRA forms, including the Form 7–21FARMOP and Tabulation G is for both the 2000 and 2001 water years. Thus, no further action will be taken with respect to these forms before they are first required to be completed for the 2001 water year.

Comment: You should remove the information requirement imposed on indirect owners of farm operators.

Response: We have partially incorporated this comment in the final rule. We do not need to know about part owners of entities who are farm operators unless a part owner formerly owned all or a portion of the land in question as excess and sold or transferred it at an approved price. We need information from those part owners in order to fully implement the excess land provision found in § 428.9 of the final rule. Accordingly, we have narrowed the scope of the information requirements for part owners of farm operators.

Comment: We do not believe the proposed collection of information is necessary for the performance of your functions.

Response: We are required to ensure that farm operating arrangements are not leases for acreage limitation purposes. The Congress reinforced its desire for us to take such action when it specifically required the auditing of operations as part of the Omnibus Budget Reconciliation Act of 1987 (43 USC 390ww; Section 224[g]). The most effective way to accomplish this requirement is to obtain information from farm operators. The proposed collection of information is intended to be a more effective and efficient method than those used to date to identify those farm operators who we are most interested in auditing.

Comment: Your estimated burden for the proposed collection of information appears accurate, except that the total number of respondents affected could increase if the potential loopholes are corrected and the RRA is actually fully enforced.

Response: We have reviewed the requirement of who would be required to submit the new Form 7–21FARMOP and decided not to expand it beyond the criteria identified in the proposed rules. Accordingly, we stand by the estimated burden reported in the proposed rules.

Comment: The proposed rule changes would improve enforcement of the acreage limitations, but you must modify the language to close all loopholes to ensure that nobody is exempt due to unintended wording, omissions or oversights. For instance, the rules need to expand collection requirements to include all ''farm operators,'' including ''custom operators.'' We suggest that you require all operators to fill out the forms.

Response: We believe that it would be an inefficient use of resources for landholders, farm operators, districts, and us, if the final rule required ''custom operators'' (custom service providers) to complete the Form 7–21FARMOP. By the way the term ''custom service provider'' is defined, we would not find them to be a lessee under any circumstance. Accordingly, there is no value added in requiring custom service providers to complete RRA forms.

Comment: You should extend the regulations to include reporting on the direct and indirect ownership of excess acreage lands. Shell games regarding indirect ownership devices should be clearly discouraged.

Response: We have required the reporting of direct and indirect ownership of excess land since the 1997 water year. We recommend the commenter examine the ''Designation of Excess Land'' (Form 7–21XS) and associated instructions for further information.

Comment: We agree with the goals stated in the proposed rule, but we believe you should collect information through audits instead of the proposed information gathering system. This would be more effective and less burdensome.

Response: In order to be able to run an effective audit program, we first have to be able to identify the individuals, entities, and organizations that need to be audited. We have found that the RRA forms submitted by landholders have the additional benefit of being an effective means to identify those landholders who should be audited or otherwise reviewed. The RRA form for farm operators simply extends this concept to farm operators. Once the farm operators are identified, their operations will still have to be audited before we can determine if they are leases for acreage limitation purposes.

Comment: What will be the incentive for ''operators'' that are not landowners to file certification forms?

Response: There are various incentives for farm operators to submit the required RRA forms. The first is to ensure the land to which they are providing services does not lose its eligibility to receive Reclamation irrigation water. The second incentive is to not owe the district(s) in question $260 when we issue an administrative fee bill to recover the additional costs we incur as a result of the farm operator not submitting the required form. An additional incentive may be to maintain an effective business relationship with landholders by ensuring compliance with all statutory and regulatory provisions, which will impact the landholders if compliance is not achieved.

Comment: Who would audit and determine accuracy of the reports submitted by farm operators?

Response: It is our responsibility to audit the RRA forms submitted by farm operators. The responsibility of the districts is to collect such forms and to complete the Tabulation G annually based on the information provided on the Form 7–21FARMOP. Nevertheless, it must be remembered that the primary purposes of the forms requirement for certain farm operators is to identify farm operators and provide us with information to determine an audit priority of their associated farm operating arrangements, not to audit the Form 7–21FARMOP.

Comment: How will the government verify the data submitted by farm operators?

Response: We will use the documentation associated with the farm operating arrangement that we review during an audit to verify the data. We will also review information submitted by landholders who have hired the farm

operator in question to verify information provided by the farm operator on the Form 7–21FARMOP.

Comment: Regarding the forms you submitted for comment on January 8, 1999, we believe there will be problems for irrigation districts trying to get people to turn in the forms. A district would send the new form to all farm operators identified on the landowners' forms. However, consider a situation where a farm operator who operates on more than 960 acres in more than one district fails to file forms. While one district may not find this to be a problem, because the farm operator works less than 960 acres in that district, the combined acreage requires that the farm operator file forms. How would either district know that they should not deliver water until the forms are filed? It seems that each district would have to require farm operators to file forms regardless of whether the proposed rules require them to do so.

Response: We have not extended the RRA forms requirements to all farm operators. If a district determines that it would be best to require all farm operators to submit Form 7–21FARMOP, that is the district's prerogative. An alternative would be to send Form 7–21FARMOP to all farm operators identified on landholder forms and let the farm operator decide if he/she/it is required to complete it and return it to the district. Moreover, districts often have knowledge of large farm operators doing business in the region and could send these operators forms. We anticipate holding workshops after we publish the rule to ensure that districts, landowners, and farm operators have notice of the final rule.

Comment: Is a farm operator who is required to report the landholdings on which he provides services eligible to apply class 1 equivalency under 43 CFR 426.11? If so, can equivalency be applied to all land attributed to a particular farm operator, if it is otherwise eligible nonexcess land?

Response: Farm operators are not eligible to use class 1 equivalency factors. Class 1 equivalency factors are not to be used in determining if an individual, legal entity, or organization is required to submit RRA forms. This prohibition is clearly stated in 43 CFR 426.18(g)(3)(i). If, upon review of the farm operating arrangement, a farm operator is determined to be a lessee, then and only then will that lessee be eligible to utilize available class 1 equivalency factors in determining how much land can be selected as nonfull-cost when the lessee completes the ''Selection of Full-Cost Land'' (Form 7–21FC).

Trusts

Comment: We object to the proposed rules and urge Interior to refrain from further rulemakings that target trusts.

Response: The purpose of the final rule is to identify certain farm operators whose farm operating arrangements will then be audited to determine if they are leases for acreage limitation purposes. Determining if a farm operating arrangement is a lease for acreage limitation purposes is not a new compliance activity, nor does it specifically ''target'' trusts. The rule will also ensure the intent of the excess land provisions is being met.

Comment: We object to any change in the law or regulations that deprives us of our ability to do what we believe is in the best interest of the trust's beneficiaries. We object to any change in the regulations which would preclude us from selecting the best possible farm manager for the trust.

Response: The regulation would not prevent you from selecting the best farm manager for your trust as long as the farming arrangement you agree to is not a lease for acreage limitation purposes (this does not represent any change from the current regulatory environment). The regulation would, however, require you to pay the full-cost rate for the water received on the land if you employ a farm operator who once held that land as excess land and sold or transferred it at an approved price.

Comment: Trusts that you already approved should not be subject to any additional regulations.

Response: As with most regulatory programs, in recognition of changing conditions from time to time, we need to adjust regulations to ensure that we continue to properly implement the law. Nevertheless, there are no new additional regulatory requirements being imposed on trusts by this rulemaking, unless the trust holds formerly excess land and the trustee contracts with a farm operator who was the former owner of that land who sold or transferred it at an approved price. In such cases the trustee has three options: (1) Before January 1, 2001, hire a different individual or legal entity to provide services to the land; (2) Pay the full-cost rate for Reclamation irrigation water delivered to such land; or (3) Do not irrigate the land in question with Reclamation irrigation water.

Comment: The 960-acre limitation on trusts is reasonable, but trusts in existence before January 1, 2000 should be exempt from this regulation.

Response: We have not placed a 960-acre limitation on trusts. Rather, the rule requires farm operators to submit RRA forms if they provide services to more than 960 acres held in trusts or by legal entities. We therefore have not accommodated this suggestion in the final rule.

Comment: Our entire farming arrangement, including the initial engagement of the former landholder as farm manager, was approved by the Department of the Interior at the time the trust was created. Any change in that situation appears to be targeted in a punitive way to this trust and its beneficiaries.

Response: The Secretary approves trusts under Section 214 of the RRA and, on occasion, has determined that certain farm operating arrangements are not in fact leases. The Secretary does not approve ''entire farming arrangements,'' nor would doing so preclude the exercise of rulemaking authority under Section 224(c) of the RRA. Moreover, this rule is not targeted at any particular arrangement. This rulemaking addresses the practice of landholders selling excess land at an approved price and then being hired by the new landholder to continue to farm the former land as a farm operator. This practice has been used by existing large trusts in the Central Valley Project. Without the finalization of the proposed rule, this practice may spread to other areas, thereby allowing excess landholders to fashion arrangements that permit them to continue substantially the same enterprise using subsidized water. By eliminating any incentive for the excess landowner to maintain any interest, either property or contractual, in its formerly excess lands, we believe we will have furthered the policies set forth in Section 209 of the RRA and the excess land provisions of Federal reclamation law. Further, Reclamation has decided not to make this provision effective until January 1, 2001, to provide time for trustees and others who may have hired the former excess landowner to determine how best to continue to farm the land.

Comment: We disagree that excess landowners deed land to trusts in order to abuse the congressional intent of reclamation law. As farmers get older, they use the trusts to preserve their heritage for future generations. This allows small family farms to remain intact after the death of the head of the household.

Response: The Congress was clear with regard to excess land. The landowner is to divest all interest in that land if such land is to become eligible to receive Reclamation irrigation water. No exceptions were made for estate planning purposes.

Impacts of the Rule

Comment: The impacts of the rule on farmers and districts would be outrageous with no resulting benefits; we request that you rescind the proposed rule.

Response: The final rule does provide a benefit to landholders and districts because it will help minimize the likelihood that districts and landholders will face cost prohibitive retroactive charges. Under the Acreage Limitation Rules and Regulations, if we determine a farm operating arrangement is a lease, the applicable nonfull-cost entitlement is applied retroactively to the landholding of that lessee (the farm operator). If the farm operator had been providing services to more acreage than the applicable nonfull-cost entitlement under his/her/its farm operating arrangements, the full-cost rate would be applicable. If the farm operating arrangements have been in place for a number of years, the resulting bill to the district could be in the tens of thousands of dollars. It is likely that districts will ultimately hold the landowner and lessee responsible for payment of such a bill.

The final rule provides us with an effective means to identify farm operators who are providing services to land totals that exceed the maximum acreage limitation entitlement (the ownership and nonfull-cost entitlements; 43 CFR 426.2). As a result, we will be able to request that the associated farm operating arrangement be submitted for review early in the process and, hopefully, minimize the likelihood of districts facing full-cost bills long after the lessee (farm operator) provided the services.

Comment: You have grossly understated the impacts of the proposed rules, particularly on small farmers. Many small farmers have their land planted to permanent crops. These farmers, unlike large farming operations, cannot afford all of the equipment necessary to farm the land, and rely heavily on contractors. These contractors provide services to many farmers to spread their investment in the equipment across the requisite number of acres. Although you say the effect of the proposed rules should be limited to approximately 100 farming operations westwide, this is simply not the case.

Response: The regulation itself is limited to those farm operators providing services to trusts and legal entities and to their formerly excess land. The primary way a small farmer will be impacted is if that landholder is a trust or legal entity and its farm operator is required to submit an RRA form because he/she/it is providing services to more than 960 acres held in trusts and by legal entities, but does not. The trust or legal entity can remedy this problem by encouraging its farm operator to submit the required form. Of course, if it turns out that the farm operator is a lessee for acreage limitation purposes, then the nonfull-cost entitlement would be applied, which would happen even without this regulation. The other way a small farmer would be impacted is if the landholder (1) Is a trust or legal entity, (2) Holds formerly excess land, and (3) Hires a farm operator who was the former owner of that land when it was excess and who sold or transferred it at an approved price. We do not believe there are many ''small farmers'' who face this situation.

Comment: The proposed rule would have significant impacts on many growers who receive Reclamation water. Many farms could suffer if you force the vendors to file forms just to justify doing business in our district. This could mean loss of jobs in those companies and loss of profits.

Response: We fail to see how requiring a farm operator to file an RRA form could result in a loss of jobs or profits to companies who provide farm operating services.

Comment: The regulation could negatively affect individuals who are not part of any ''large trust'' and who are in full compliance with reclamation law.

Response: The regulation could negatively affect individuals who are not part of any ''large trust'' only if such individuals are not currently in full compliance with Federal reclamation law, e.g., if their farm operating arrangement is really a lease for acreage limitation purposes. A primary purpose of this regulation is to collect information to ensure certain farm operating arrangements are in full compliance.

Comment: By its vague and overgeneralized approach, the proposed rule is sweeping in its information requirements and puts districts at risk of violating the prohibition on water deliveries to non-reporting service providers they do not even know exist.

Response: In order to help implement this new RRA forms requirement and provide district staff time to familiarize themselves with farm operators providing services in their districts, we have provided for a later effective date than we included in the proposed rule; specifically the effective date will be January 1, 2001, rather than 2000.

Comment: RRA forms and regulations require an exceptional time commitment, both to comment on new regulations/forms and to monitor acreage limitation and eligibility status. RRA regulations are becoming more complicated and more difficult to administer.

Response: Unfortunately, the enforcement and administration of the RRA is somewhat complicated because of the nature of the provisions included in the Act. Reclamation has tried to simplify the forms requirements where possible.

Comment: The regulation places an unreasonable burden on irrigation districts. Each district will have to send out forms, collect and store them, be subject to audits, all of which will increase costs. There will be increased time and expense for district personnel to receive, review, reissue forms, and track the receipt of the new forms for a farm operator. You should make a finding and determination of the impact that the regulations would have on irrigation districts who are responsible for implementing the regulations.

Response: We believe such impacts would be minimal westwide. We have no evidence that currently there is widespread use of farm operators providing services to more than 960 acres held in trusts or by legal entities. We prepared an Environmental Assessment (EA) on this rulemaking, and we refer the commenter to that EA for further information concerning impacts.

Comment: The information requirements are burdensome because no time limit is placed on determining prior ownership of formerly excess land and it requires information to be submitted by parcel.

Response: All RRA forms require information to be submitted by land parcel. As a result, we anticipate that the information requirement for certain farm operators will be no more burdensome than the information requirements imposed on landholders.

Comment: It is inappropriate to require information from parties not directly benefitting, when the consequences fall on the actual beneficiaries, not those parties.

Response: We do not believe it is inappropriate to require certain farm operators to submit RRA forms. Farm operators directly benefit from providing services to land by receiving payment for those services.

Comment: We are concerned about this regulation causing an adverse impact of the future eligibility of irrigation land. For example, we are concerned that when a deed covenant

on acquired excess land expires, the proposed rules could keep the buyer's land ineligible for project water indefinitely, if the farm operator was the former owner of the land when it was excess.

Response: This rulemaking will not prohibit the delivery of irrigation water to formerly excess lands being operated by the former owner. Rather, the full-cost rate will be charged for water delivered to formerly excess lands operated by the former owner of such lands. This rule creates a strong disincentive to the disposition of excess lands to trusts or other legal entities that the former owner of excess lands itself created or with which the former owner has a continuing relationship or interest, and creates an incentive to dispose of excess land in parcels of 960 acres or less to independent parties.

Comment: Your field offices have been downsized. How will you find money in the budget for compliance specialists to enforce these regulations? If operators fail to file forms, how will anyone ever know?

Response: We already are required to audit farm operators. The requirement for farm operators to submit RRA forms should simplify the process used to determine what farm operators are providing services to more than 960 acres. We expect to find instances of farm operators not filing RRA forms through our normal water district review process and audits of large landholders.

Authority

Comment: You do not have statutory authority to issue § 428.9 of the proposed rule. The proposed rule contains no reference to its statutory authority, and in the preamble, there is only one attempt to explain that RRA Section 209 authorizes the proposed rule. We assert that Section 209 does not authorize the proposed rule, because nothing in that Section authorizes Interior to impose eligibility or pricing restrictions on owners or farm managers once lands have been disposed of in compliance with Federal reclamation law to nonexcess owners.

Response: We believe that we have such authority based on the excess land provisions of Federal reclamation law, specifically Section 209 of the RRA, and our general rulemaking authority to carry out the provisions of the RRA, as set forth in Section 224.

Under the Supreme Court's decision in *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), an agency may issue regulations to the extent that its statutory interpretations reasonably relate to the purposes of the enabling act and are within the agency's grant of authority. Section 209 of the RRA requires landholders to dispose of their interest in excess lands in order for such land to be eligible to receive Reclamation irrigation water. By eliminating the capacity of an excess landowner to retain or obtain an interest in its formerly excess lands, the Congress created a strong incentive for excess landowners to dispose of their excess lands and sever their relationship with such lands.

In practice, we have found that the capacity of an excess landowner either to retain or obtain a contractual interest in formerly held excess lands creates an incentive in the excess landowner, contrary to that created by the Congress in Section 209, to dispose of the excess lands to a trust or other legal entity that the former owner of excess lands itself created or with which the former owner has a continuing relationship or interest. Rather than disposing of the excess lands through independent sales in tracts of 960 acres or less, a former excess owner could dispose of its excess lands to a large trust or other legal entity that the former owner itself created or with which the former owner has a continuing relationship or interest, which would allow the former owner, by contract, to continue to farm its formerly excess lands as a single unit. We would view such practices as an abuse of the excess lands laws because through these dispositions, a situation is created where substantially the same enterprise—using the same employees, same equipment, and same water at the nonfull-cost rate on the same undivided tract of land—continues to farm the same large acreage.

We believe allowing such practices is contrary to policies enunciated by the Congress in enacting Section 209 of the RRA. Under Federal reclamation law, the Congress sought to provide irrigation water to small family-owned farms in its effort to develop the West and increase agricultural production, but in a manner that did not fuel land speculation or contribute in any way to the monopolization of lands in the hands of a few private individuals. *Peterson* v. *U.S. Dept. of the Interior*, 899 F. 2d 799, 802–03 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990). The policy was and still is to make the benefits from the program ''available to the largest number of people, consistent with the public good.'' *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 292 (1958). In 1982, the Congress amended Federal reclamation law with the RRA to curb known abuses like leasing and to limit the water subsidy being provided. The Congress did not see any public purpose or rationale for providing taxpayer subsidies to large-scale farming interests that could well afford to pay for the public benefits they receive. Full-cost pricing for farms in excess of the acreage limitations was a compromise between the economics of current farming enterprises and the policy of broad distribution of water benefits to small farmers.

We have already developed and enacted regulations found in 43 CFR 426 to carry out the Congress's intent in the excess lands provisions. However, the development of current practices that impede the fulfillment of congressional intent requiring the total divestiture of a former owner's interest in its excess lands in independent transactions of 960 acres or less requires the supplementation of the rules dealing with the disposition of excess lands. To reduce the incentive to create and engage in practices contrary to congressional intent in enacting Section 209, we are exercising our rulemaking authority under Section 224(c) of the RRA. By requiring full-cost pricing of water delivered to lands operated by a former owner of excess lands, the final rule creates a strong disincentive to the disposition of excess lands to trusts or other legal entities that the former owner of excess lands itself created or with which the former owner has a continuing relationship or interest, and creates an incentive to dispose of excess lands in parcels of 960 acres or less to independent parties, as intended by the Congress.

Comment: Section 428.9 is clearly beyond the scope of your authority under the RRA, and you should delete it in its entirety. A true operating arrangement is not an interest in the land or a lease. Your assertion that the contractual relationship between the former excess landowner as farm operator and the current landholder represents a continuing financial interest in the land is not true. The RRA does not attempt to limit the former excess owner's relationship with the new landholder, and you have no authority to do so.

Response: As discussed in the above response, our reading of Section 209 and congressional intent in enacting the excess land provisions provides the authority for this rulemaking. Moreover, we are not limiting the relationship between the new landholder and the former owner. We are monitoring the relationship between the former owner and its formerly excess land to ensure that the excess land is eligible to receive Reclamation irrigation water in accordance with the RRA. If excess land

is truly being sold or transferred in a manner that results in the intent of the excess land provisions being fulfilled, then this rulemaking should have no impact on those new landowners.

Comment: There is no authority that provides that the farm manager, under a farm management agreement, owns an ''interest'' in the farmed land. In fact, authorities conflict with this proposition. (In the case of *Von Goerlitz* v. *Turner*, 65 Cal. App. 2d 425, 429 (1944) it was held that an operating agreement does not create an ''interest'' in real property.) Interior itself has never interpreted the entry into a farm management agreement as creating an ''interest'' in property. Interior has always recognized that the reclamation laws relate only to ''ownership'' and ''leasing'' of lands, not to farm size, and not to operation under a management agreement.

Response: By requiring full-cost pricing of water delivered to lands operated by a former owner of excess lands, the final rule creates a strong disincentive to the disposition of excess lands to trusts or other legal entities that the former owner of excess lands itself created or with which the former owner has a continuing relationship or interest, and creates an incentive to dispose of excess lands in parcels of 960 acres or less to independent parties, as intended by the Congress. This causes no harm to the former owner of that land. If the former owner wants to continue to be involved in the land in question either as a lessee or a farm operator providing services, the former owner may do so, and the land will be eligible to receive Reclamation irrigation water. However, where the former owner contracts to farm formerly excess land, such deliveries will be at the full-cost rate.

Comment: With regard to farm operators who provide services to land sold or transferred out of excess status, there does not appear to be any legal basis to preclude delivery of water to such land, because it has been brought into compliance with the acreage limitation provisions by the sale.

Response: See our response to the first comment in this section. The final rule does not preclude water delivery to formerly excess lands. It is up to the new landowner how the land is to be farmed, factoring in the costs for Reclamation irrigation water, and this final rule provides options regarding the use of Reclamation irrigation water.

Comment: The RRA does not give you a basis to impose the full-cost rate on a qualified recipient, except as determined by the recipient's landholding, which according to Section 202 of the RRA, must be owned or operated under a lease.

Response: See response to first comment in this subsection. Section 209 clearly expresses the Congress's intent that a former owner of excess land must totally divest its interest in his/her/its formerly excess lands. Using full-cost pricing to discourage the former owner of excess lands from providing services to formerly excess land as a farm operator serves as a strong disincentive to the disposition of excess lands to trusts or other legal entities that the former owner of excess lands itself created or with which the former owner has a continuing relationship or interest, and creates an incentive to dispose of excess lands in parcels of 960 acres or less to independent parties, as intended by the Congress. In fulfilling congressional intent regarding disposition of excess lands, we determined that we could allow the delivery of irrigation water to such lands if the full-cost rate was paid because full-cost pricing serves as a sufficient disincentive against the former owner transferring the land to an entity that the former owner of excess lands itself created or with which the former owner has a continuing relationship or interest without foreclosing all farming options available to the current owner.

Comment: You lack authority for this rulemaking because the Secretary of the Interior has approved the large trust arrangements, and the Congress exempted trusts from the acreage limitation provisions.

Response: See response to first comment in this subsection. The RRA does not exempt trusts from application of the acreage limitation provisions. It exempts trustees acting in a fiduciary capacity from application of the acreage limitation provisions if the trusts meet certain criteria. In approving trusts, the Secretary determined whether these criteria have been met. Moreover, the rulemaking does not impose additional requirements on trusts per se. It addresses practices of excess landowners that have developed since the enactment of the RRA to avoid Section 209 and the Congress's intent that former owners of excess lands totally divest themselves of interests in excess lands by disposing of excess lands in parcels of 960 acres or less to independent parties.

Comment: You do not have the authority to adopt regulations that would apply ownership or full pricing limitations to lands held in trust. The Congress explicitly addressed the applicability of these limitations in Section 214 of the RRA, which is clear and unambiguous. You must give effect to this explicit congressional intent, and not try to finalize these regulations.

Response: The provisions of Section 214 apply solely to a trustee acting in a fiduciary capacity and only if the trust in question meets certain criteria. The RRA does not provide that land held in trust is totally exempt from the application of the acreage limitation provisions. All land held in trust is attributed to either the beneficiaries, grantors, or trustees, depending on the type of trust and if the criteria found in 43 CFR 426.7 have been met. The acreage limitation entitlements and other landholdings of the parties to whom the land held in trust is attributed will determine if that land is eligible to receive Reclamation irrigation water and at what price.

Comment: Interior faces substantial legal barriers when it seeks to change RRA regulations, including breach of contract, regulatory takings, and administrative res judicata (see *United States* v. *Utah Construction & Mining Co.,* 384 U.S. at 394, 421–422.)

Response: These regulations supplement the 1996 RRA regulations to address some current practices engaged in by former owners of excess lands that are contrary to the policies set forth by the Congress in the RRA. We do not believe that any claims based on breach of contract, regulatory takings, administrative res judicata, or statutory violations have merit. While it is unclear what contract is alleged to be breached or what vested property right will be taken, these regulations should not affect any contracts between Reclamation and the districts. Moreover, landowners have no vested right to the delivery of nonfull-cost water to excess lands regardless of who owns, leases, or operates the lands. We believe that this rulemaking is rationally related to the provisions of the RRA and the Congress's concerns to promote small farming operations and equitable distribution of water under modern farming conditions.

Comment: The proposed rule would impose significant information requirements on non-water using parties identified in the rule as ''farm operators.'' Neither the RRA nor other Federal reclamation law contemplates placing information requirements on parties other than landowners and water users. It is unclear whether you have the legal authority to compel parties other than project beneficiaries to submit information to you.

Response: Section 224(c) of the RRA requires us to collect all data needed to carry out and ensure compliance with the acreage limitation provisions of

Federal reclamation law. We have determined that we need additional information concerning farm operators to ensure that we are aware of those providing services to more than 960 acres held in trusts or by legal entities. Only by reviewing farm operating arrangements can we be sure that they are not really leases for acreage limitation purposes.

Need for the rule

Comment: We believe that until there is actual evidence that the vast majority of water users are not in strict compliance with the current RRA regulations, you should not impose additional burdens upon the water users.

Response: Most parties have long agreed that Reclamation should be auditing farm operating arrangements to ensure they are not leases for acreage limitation purposes. If we do not take such action, we believe that in a relatively short time the vast majority of water users would not be in strict compliance. A primary purpose of this regulation is to more effectively identify farm operating arrangements that should be reviewed to determine if they are leases.

Comment: Expanding the reporting and certification net to capture more than what is required for the economic interest standard is a waste of time, will add an additional burden to districts westwide, and will do nothing to help compliance with the RRA.

Response: We are expanding the RRA forms requirements so that we can more efficiently and effectively identify those farm operators that need to be audited to determine if their farm operating arrangements are leases for acreage limitation purposes. We will audit all farm operators who will be required to submit the new Form 7–21FARMOP. At that point, we will apply the economic interest-test.

Comment: You could more fully utilize the sources of information already available, such as the Farm Service Agency and existing RRA forms.

Response: We have been utilizing both of these sources of information concerning farm operators. Records maintained by the Farm Service Agency (FSA) are useful. However, because of the differences between the acreage limitation program and the FSA programs, the FSA records do not always provide the information we need to identify farm operators. As for the RRA forms, we have been collecting information on farm operators since 1988. However, as we explained in the Preamble to the proposed rule, this effort requires the district staff to provide information to us on every farm operator reported by landholders on RRA forms submitted to the district. We must then collate that information to determine if any farm operators are providing services to more than 960 acres and, thus, be the subject of an audit. Any differences in the information included on the RRA forms by landholders concerning names, addresses, telephone numbers, etc. materially affect the effectiveness of this process. This entire system can be significantly simplified for both the districts and us by requiring only those farm operators who provide services to more than 960 acres to submit RRA forms.

Comment: New farm operator forms are not necessary. Landowners could just note the taxpayer identification number of the entity providing farm operating services on their annual certification forms. Then, if Interior determines an operator is operating more than 960 acres, it could collect applicable data as per RRA Section 224(c). The burden should lie with Interior, not with farmers and farm operators.

Response: Requiring landholders to include the taxpayer identification number for farm operators on landholders forms would reduce problems associated with using names, addresses and telephone numbers as identifiers; however, it is only a partial solution. This is because taxpayer identification numbers apply only to legal entities. Individuals who are providing services as farm operators have social security numbers and while we can ask, we cannot require an individual to provide his or her social security numbers on RRA forms. We also do not believe a landholder would normally have the taxpayer identification number for farm operators with whom the landholder has contracted for services. Thus, this would add to the burden landholders face in completing their RRA forms. Finally, a requirement to include the taxpayer identification number for farm operators on landholder forms does not address the problems we have encountered with districts annually having to provide us with information on all operators providing services to land in their districts or the need to then collate that data in order to determine which farm operators are providing services to more than 960 acres.

Comment: Farm operator information is already provided on individual, entity, and trust forms. To require an additional farm operator form is redundant and burdensome. We suggest that you could change Forms 7–21Summ–C and 7–21Summ–R to include information on whether a landholder utilizes an operator, and if so, whether the operator works on more or less than 960 acres. You could then review the forms and compile a list of farm operators—this would allow you to gauge the scope and size of the problem without causing hardship on custom operators, landowners, and districts.

Response: This suggestion would require districts to include additional information on the tabulation sheets they are required to annually submit with their summary forms. We will require districts, as a result of this final rule, to complete a new tabulation sheet providing limited information from the new Form 7–21FARMOP submitted by farm operators. The difference is that the commenter's suggestion would significantly increase the burden on districts as compared to what this final rule will require, because rather than providing information on the tabulations sheets for less than an anticipated 200 farm operators submitting forms, district staff would be required to submit information on every farm operator reported on landholder forms. In addition, this suggestion would not relieve the need for us to collate that information to determine which farm operating arrangements need to be audited. The only way this suggestion would address that problem is for us to require much more detailed information on landholder forms concerning any farm operating arrangements. That information would then have to be included by districts on tabulation sheets. Such an arrangement would increase the RRA forms burden on both landholders and districts.

Comment: You already have the tools available to determine whether a farming arrangement is a lease since all leases must be in writing. You should focus on your current enforcement powers instead of imposing new useless requirements.

Response: It is true that all leases must be in writing. However, if we only reviewed those farming arrangements that the landowner and other party readily admit are leases, then we would not be in compliance with the statutory requirement to review compliance by all individuals and legal entities. This includes reviewing operating arrangements to determine if they are really leases for acreage limitation purposes.

Comment: There are sufficient legal remedies under reclamation law to correct perceived abuses and to stop water deliveries to ''entities'' that are not in compliance with acreage limitation.

Response: We agree we have legal remedies to correct abuses. The regulation is intended to gather information more effectively to determine if there has been an ''abuse'' and further define noncompliance with respect to the excess land provisions.

Comment: Because you may not apply ownership and full-cost limitations to lands held in trust, the information collection from farm operators that perform operations on trust lands in excess of 960 acres is unnecessary.

Response: The acreage limitation requirements are in fact applied to land held in trust. They are applied in two ways. First, all land held in trust must be attributed to individuals or entities, be it the beneficiaries, trustees, or grantors. The acreage limitation entitlements and westwide landholdings of those individuals and entities to whom the land is attributed determine if the land held in trust is eligible to receive Reclamation irrigation water and how much must be paid for such water. The second application occurs if the trustee should lease out the land held in trust. The nonfull-cost provisions apply to that lessee. The new information collection is to ascertain if the trustee has employed a farm operator so that we can review the farm operating arrangement to determine if it is really a lease for acreage limitation purposes.

NEPA Review

Comment: The environmental impact statement (EIS) prepared for the last rulemaking generated substantial public involvement and resulted in ''preferred alternative'' regulations that did not include farm operator reporting requirements. Those regulations were finalized subject only to the trust issues discussed in the ANPR. We do not think that anything has changed since the preparation of the EIS to warrant this or any other change in the RRA regulations.

Response: This rulemaking is a result of the trust issues discussed in the ANPR.

Comment: The law is clear that any new rulemaking that considers limiting water subsidies in the 17 Western States but then results in a final set of regulations that fails to limit subsidies is fatally defective if the regulations are not fully analyzed under NEPA. The effect on the environment of failing to enforce the RRA's pricing limits is simply too great to allow for categorical exclusion.

Response: We believe that the categorical exclusion is justified for this rulemaking. However, in order to be responsive to public comments, we have prepared an Environmental Assessment to more carefully analyze the regulation under NEPA.

Comment: You should consider the alternative of returning any water savings from the Central Valley Project to the Trinity River for implementation of the Trinity River Flow Decision.

Response: This suggestion falls outside of the scope of this rulemaking. In addition, we do not anticipate any water savings, since it is more than likely that landholders will adjust their farming practices to minimize any impact of this final rule.

Part 428—Summary of Changes; Public Comments and Responses

This section of the preamble describes changes from the proposed rule to the final rule and provides responses to public comments received on the proposed rule by section.

Section 428.1 Purpose of this Part

This section concisely identifies the issues that 43 CFR part 428 addresses. We made no changes to this section in the final rule as compared to the proposed rule. We received no comments on this section.

Section 428.2—Applicability of this Part

This section summarizes to whom the final rule applies and provides that this rule supplements the regulations found in 43 CFR part 426. We made no changes to this section in the final rule as compared to the proposed rule.

Comments Concerning § 428.2—Applicability of this Part

Comment: The language in § 428.2(a) will add another layer of categorization of landholders, which will only add to the confusion for landholders and districts. This categorization will add to the administrative burden on districts and Reclamation.

Response: We agree that at least initially another RRA forms submittal threshold and the limitation of the application to farm operators providing services to trusts and legal entities could cause confusion. However, we believe this is preferable to the burden associated with requiring all farm operators to submit Form 7–21FARMOP if they are providing services to more than 40, 80, or even 240 acres.

Comment: The proposed regulations concerning ''farm operator'' are not necessary because the original act makes no mention of this group and more importantly the farm operator has nothing to do with the ownership of the land which is the basis for eligibility.

Response: While ownership is the basis for determining the eligibility of land to receive Reclamation irrigation water, the price to be paid for such water is based on the amount of eligible acreage, leased or owned, to be irrigated. As a result, farm operating arrangements must be reviewed to determine if they are leases for acreage limitation purposes and thus subject to application of the nonfull-cost entitlement provisions of the RRA.

Comment: The text of § 428.2 includes a possible oversight: subsection (b) extends the regulations to certain operators of formerly excess land (those who previously owned the land). But it does not address the fact that the operator can mask his true identity, perhaps by setting up a second legal entity to farm the land, or adding one limited partner so that the two identities are not identical. The use of ''indirect'' ownership devices and creation of new legal entities should not be allowed to frustrate the purpose of the regulations. While § 428.4(b) helps somewhat by bringing indirect owners of farm operators into the definition, that may not be enough if the operating entity that is indirectly owned is still not the same as the original ownership entity. Also, § 428.9(b)(2) helps by making clear that part owners of legal entities are still subject to the new regulations, but this still assumes the operating and owning entity are technically the same. You must change the regulations to address what happens when the original owner simply changes the legal entity that it uses to operate the formerly excess land, even though the benefits still flow to the same person or persons.

Response: We have not made any changes to the regulation as a result of this comment. While we recognize that those who really want to evade the new RRA forms requirement may find a way to do so, we must balance our efforts to close such possible loopholes with the additional burdens such actions will have on the public.

Comment: Section 428.2 states that the proposed rule applies to farm operators who provide services to more than 960 acres. If a district has not conformed to the discretionary provisions of the RRA does the 960-acre threshold still apply?

Response: Yes, the 960-acre forms submittal threshold applies to all farm operators regardless of the acreage limitation status of the district where the land in question is located.

Comment: Section 428.2(b) requires annual forms for ''anyone who is the indirect owner of a legal entity that is a farm operator * * *'' What about publicly traded corporations that fit the definition of ''farm operator''? Does this mean that shareholders of corporate

farm operators must file individual forms every year? What about other part owners where there is no change in the operation?

Response: Section 428.2(b) does not establish forms requirements for farm operators. However, in § 428.4(b) which does establish those requirements, we have made it clear that part owners of legal entities that are farm operators which are required to submit RRA forms only have to submit a Form 7–21FARMOP if a portion or all of the land to which the legal entity is providing services was formerly owned by the part owner as excess and sold or transferred at an approved price. Accordingly, if a corporation is a farm operator that is required to submit an RRA form, only those shareholders that formerly owned land as excess and sold or transferred it at an approved price that is now being farmed by that corporation would have to submit Form 7–21FARMOP annually.

Comment: We understand the proposed rule to mean that if the same contractor does work on my ranch and someone else's that the two farms would be considered as one, so that if the total acreage reaches 960, the remainder of the property would be ineligible.

Response: That is not a correct interpretation. The simple fact that a farm operator is providing services to more than 960 acres held in trusts or by legal entities does not result in the ineligibility of land. The regulation only requires such farm operators to submit RRA forms. The land only becomes ineligible for delivery of Reclamation irrigation water if a farm operator does not submit the required RRA form; then all of the land to which that farm operator is providing services would be ineligible until the form is submitted. If as a result of an audit of a farm operating arrangement, it is determined the farm operator is a lessee, then the nonfull-cost entitlement would apply. This does not affect the eligibility of the land; rather, it will impact the price paid for Reclamation irrigation water delivered to a portion of the land that is leased.

Comment: We request clarification as to how land held by a 100 percent family-owned entity would be affected—would land be counted against the farm operator as land held by a legal entity?

Response: Yes, there is no exception for family-owned entities.

428.3—Definitions Used in this Part

This section establishes acreage limitation program definitions for terms that are not defined in 43 CFR part 426. We made two changes to this final rule as compared to the proposed rule as a result of comments received. First, we changed the term ''custom operator'' to ''custom service provider.'' We believe that change will eliminate any confusion that may have occurred when we used the terms ''custom operator'' and ''farm operator.'' The second change we made was to make it clear that when we define ''custom service provider,'' we are referring to an individual or legal entity that is providing one specialized service to the landowner, lessee, sublessee, or farm operator. We used in the proposed rule the phrase ''a specialized, farm related service * * *'' which seemed to cause some confusion.

Comments Concerning § 428.3—Definitions Used in this Part

Comment: The definition of farm operator is unnecessary, unsupported in reclamation law, and far too broad.

Response: We disagree with the commenter. The Congress decided in 1987 that we were to audit operators, and it was clear those operators were a distinct group from landholders. We have had definitions of ''operator,'' ''custom farming service,'' ''principal operator,'' etc., that we use in reviewing farm operating arrangements for quite some time. We believe that such definitions are necessary for effective enforcement of the RRA.

Comment: The regulation creates a great deal of uncertainty regarding the definition of an operator. This is unnecessary because the Congress has dealt with this definition in reclamation law.

Response: On the contrary, this definition will provide districts, landholders, and others a clearer understanding of the term ''farm operator.'' We are not aware of any definition of the term ''operator'' created by the Congress in conjunction with the acreage limitation provisions.

Comment: Definition of ''farm operator'' could be interpreted to include any number of employees or contractors who assist in a farming operation but are not invested in the farming enterprises.

Response: The definition of ''farm operator'' specifically excludes employees for whom the employer pays social security taxes. It also specifically excludes custom service providers if that individual or legal entity provides one specialized, farm-related service. If a contractor is providing multiple services and those services are being provided to more than 960 acres held in trusts or by legal entities, then we want to know about that contractor for further review.

Comment: The definition of ''farm operator'' is not sufficient. Many operators provide multiple services to one landholder, often this is done by verbal agreement. This could fall under either ''farm operator'' or ''custom operator.''

Response: We disagree. However, we have revised the definition of ''custom service provider'' to make it clear that it only includes those individuals or entities providing one specialized, farm-related service. All individuals or entities providing multiple services to one landholder would be classified as ''farm operators,'' with the exceptions included in that definition (e.g., spouses and minor children).

Comment: The definition of ''farm operator'' is inconsistent with the term ''custom operator.'' What is the meaning of ''performs any portion of the farming operation''? Custom operators perform part of the farming operation and may make a decision, based on equipment availability and crop maturity when the crop is fertilized, sprayed, or harvested.

Response: What we mean is that any individual or legal entity that is providing more than one specialized, farm-related service is a ''farm operator'' for acreage limitation purposes. In order to make sure that landholders and others do not consider ''management'' of the farm to be one service, we have made it clear in the definitions that all farm managers are considered to be ''farm operators.''

Comment: The definition of ''farm operator'' is far too broad; we understand it to mean that anyone else except ''custom operators'' is a ''farm operator.'' This could affect farm managers who are employees of the farmer and carry out the directions of the farmer. These managers do not share in the risk of the operation, and should not be included in the definition.

Response: As we have stated, if the ''farm manager'' is an employee of the farmer for whom the landholder (employer) is paying social security taxes, then we do not consider that individual to be a farm operator. However, a farm manager who is an ''employee'' of the landholder, but the landholder is not paying social security taxes will be considered to be a farm operator for acreage limitation purposes. Other than completing an RRA form if required, generally this should cause no problems since a true employee of a landholder is not likely to have an arrangement that we will consider to be a lease for acreage limitation purposes. If the land in question is formerly excess land and the ''employee'' is the former landowner, all the current landholder will need to do to avoid application of

the new excess land provision is to make the individual a true employee by paying the social security taxes.

Comment: You should redefine ''farm operator'' as follows: ''*Farm Operator* means an individual or legal entity other than a landholder that performs a substantial portion of the farming operation on behalf of the landholder. Farm operator does not include (i) custom service providers, (ii) ancillary service providers, or (iii) employees for whom the landholder pays social security taxes.''

Response: We have not incorporated this suggested change in the final rule. We have learned that including a phrase such as ''substantial services'' in a definition makes administration and enforcement difficult.

Comment: The definitions of ''farm operator'' and ''custom operator'' are confusing and should be more clearly distinguished. We believe you are attempting to distinguish between those who provide discrete services to a farm under the direction of the landholder or other operator, and those individuals and legal entities that truly ''operate'' the farm on behalf of the landholder. Using the term ''operator'' in both definitions blurs the distinction. We suggest you use ''custom service provider'' for the category of those who do not have to file forms. We suggest you define the term to mean an individual or legal entity that provides a discrete service or a limited range of discrete services, and provide as many examples as possible, including:

- pest control advisors,
- irrigation consultants,
- fertilizer applicators, and
- labor contractors.

Response: We have made the suggested change to ''custom operator''; it is ''custom service provider'' in the final rule. However, we have decided not to add more examples to the ''list'' of services that would be considered to be ''custom services,'' because it would be impossible to make an all-inclusive list as part of the regulation and we do not want to give the impression that we have created an all-inclusive list. The definitions are clear that any specialized, farm related service will be considered, as long as that service is not ''management.''

Comment: You should exclude certain contracting arrangements from the application of the proposed rule. Commission merchants may offer financing and consulting services to a landholder, but do not share in the risk of loss of the farming operation. Also, specialty crops are produced on a forward or output contract basis. A commodity buyer similarly offers financing and consulting services to the landholder, but does not share in the profits or risk of loss of the farming operation. We suggest that you include these ''ancillary service providers'' within the custom service definition, or create an exclusion from the definition of farm operator.

Response: We have not included the suggested change in the final rule. It has been our experience that upon review, some forward contracting arrangements actually include transfers of economic risk from the landholder to the forward contractor. We have also seen ''forward contracts'' where the landholder's responsibilities have been reduced to basically being a gate-keeper, while the forward contractor performs all of the work or arranges for all of the work to be done. Consequently, we have determined that we need to audit forward contracting and similar arrangements to ensure they are not leases for acreage limitation purposes.

Comment: The definitions of ''farm operator'' and ''custom operator'' are not understandable, and the distinction between the two is not clear—by ''farm operator'' do you mean farm managers only? Is a tomato cannery that provides both contract planting and harvesting a ''custom operator'' or a ''farm operator''?

Response: A custom service provider is an individual or legal entity that is providing one specialized, farm-related service to a landholder or farm operator. Everyone else is a farm operator, including all farm managers. The only exceptions are for spouses, minor children, and employees for whom social security taxes are being paid by the employer. Since the subject tomato cannery is providing a planting service and a harvesting service to the same land, it is a farm operator of that land.

Comment: You should delete the term ''farm manager.''

Response: We have not incorporated this suggestion. It is important for everyone to understand that we consider all farm managers to be ''farm operators.'' Otherwise, it could be interpreted that the farm manager is an exempt custom service provider because the farm manager only provides one service; namely, management of the farm.

Comment: In many cases it is virtually impossible to determine whether a contractor hired by a farmer is a farm operator or a custom operator, because many ''custom operators'' may provide more than one service. Is the distinction between the two based on the number of services a contractor provides?

Response: Yes. We have made that clear in the final rule by revising the definition of custom service provider to state that it is an individual or legal entity that provides one specialized, farm-related service to the land in question.

Comment: Section 428.3 defines farm operator, but does not address the reclamation law status of the farm operator. This raises several questions about how the regulations would apply:

- If a farm operator only performs services in a district that has not conformed to the RRA discretionary provisions, is the farm operator subject to prior law provisions?
- Can a farm operator make an irrevocable election to conform to the discretionary provisions?
- Would a farm operator that benefits more than 25 natural persons be considered a limited recipient (defined in 43 CFR 426.2)?
- If a farm operator is attributed to a foreign entity or nonresident aliens, do all the provisions of the proposed rules still apply?

Response: A farm operator is not subject to either the discretionary provisions or the prior law provisions, since we are not applying the acreage limitation provisions to farm operators. However, if after reviewing the associated farm operating arrangement, it is determined that a farm operator is a lessee, then the farm operator will be required to submit the appropriate certification or reporting forms. Whether or not that lessee is subject to the discretionary or prior law provisions will then depend on the acreage limitation status of the district where the lessee holds the land in question and if the lessee has made an irrevocable election. If the lessee is subject to the discretionary provisions and is a legal entity, whether or not the entity is a qualified recipient or a limited recipient will depend on how many natural persons the legal entity benefits.

If a farm operator is a foreign entity or nonresident alien and provides services to more than 960 acres held in trusts or by legal entities, the foreign entity or nonresident alien will be required to submit a Form 7–21FARMOP. If it is determined that the associated farm operating arrangement is a lease, then whether or not the foreign entity lessee or nonresident alien lessee is eligible to receive Reclamation irrigation water will depend on if they meet the criteria provided in 43 CFR 426.8.

Comment: If a farm operator is employed for an ''agreed-upon payment,'' does this make the farm operator a custom operator and therefore exempt?

Response: We cannot provide a general answer to this question. We have reviewed more than one farm operating arrangement where the farm operator is employed for an ''agreed-upon payment'' and then find a bonus clause included elsewhere in the documentation. If the farm operator is being compensated solely on a dollar-per-hour or dollar-per-acre basis, then they have not assumed any economic risk and the arrangement will not be determined to be a lease for acreage limitation purposes. However, that does not make the farm operator exempt from the RRA forms requirement if he/she/it is providing services to more than 960 acres held in trusts or by legal entities. Only by identifying such farm operators and reviewing the associated farm operating arrangements can we determine if the farm operating arrangement is or is not a lease for acreage limitation purposes.

Comment: The proposed rule does not take into consideration the actual farming practices in the west. Is a processor of any kind of an agricultural commodity that finances a grower considered to be a ''custom farmer'' or a ''farm operator'' because they provide one or more services to the farm? What if this processor has several thousand acres of this crop? We do not think that the Congress intended to do this in 1982.

Response: If a processor is only providing financing, then the processor will not be considered to be a farm operator. However, if the processor, for example, is providing financing, harvesting services, and marketing the crop we will consider that processor to be a farm operator. If that processor is providing multiple services to more than 960 acres held in trusts or by legal entities, the processor will need to submit a Form 7–21FARMOP. Regardless of whether a processor has to submit an RRA form or not, if it turns out, upon review of the farm operating arrangements, that the processor is a lessee for acreage limitation purposes, the nonfull-cost entitlement will apply to that processor. That was the intent of the Congress when they required us in 1987 to audit landholdings and operations.

Comment: Section 428.2 states that the new regulations apply only to ''farm operators,'' and the definition of this term excludes ''custom operators.'' But the second term is defined so broadly that many true farm operators might believe that they qualify as a ''custom operator'' and fail to comply with any part of the new regulations. To fix this gigantic loophole which could render the whole rulemaking pointless, the definition of ''custom operator'' must be tightly reworded so that operators know exactly who is covered.

Response: We have revised the definition of ''custom service provider,'' which is now defined very narrowly. That is, it includes only individuals or legal entities that provide one specialized, farm-related service.

Comment: In order to ensure that you receive information on the full range of operators who may meet the standards for ''use or possession of land'' or ''economic risk,'' the definition of ''farm operator'' must include ''custom operators,'' or else you should place some reporting requirements on ''custom operators.'' Without requiring some response from these entities, you would be relying on self-definition and self-reporting to determine which operators have to submit forms. An entity could determine that it is a custom operator, and be completely exempt from the new reporting requirements.

Response: We have not incorporated this suggested change. To do so would be imposing an RRA forms requirement on individuals and legal entities that we would never determine to be lessees for acreage limitation purposes. Accordingly, we do not need to collect information from such parties and to do so would not be in the spirit of the Paperwork Reduction Act of 1995.

Comment: Based on the definition of ''farm operator,'' independent contractors who perform specialized services for farms and have no vested interest in the outcome of the crops would have to fill out forms.

Response: If an independent contractor is providing more than one service to more than 960 acres held in trusts or by legal entities, then that independent contractor will have to complete the Form 7–21FARMOP. Even without this form requirement, we would want to review the associated farm operating arrangement to ensure it is not a lease for acreage limitation purposes.

Comment: Instead of creating a new section on farm operators, you should create a definition of ''economic interest.'' This would avoid the confusion regarding custom operators and place the responsibility of reporting accurately on the landowner/operator, not the district.

Response: We are not sure if the commenter is suggesting a change to the definitions in this rulemaking or to the information submitted by landholders on their RRA forms. We have not made any change to the final rule based on this comment; however, the question of who has all or a portion of the economic risk in a farm operating arrangement remains a key component of our review of farm operating arrangements.

428.4 Who Must Submit Forms Under this Part

This section establishes an RRA forms submittal requirement for farm operators who provide services to more than 960 acres held in a single trust or legal entity or any combination of trusts and legal entities. We have made several changes to this section of the final rule as compared to the proposed rule, primarily in response to comments received. Specifically, we have made it clear that farm operators will be submitting forms to districts, not directly to us. We have reviewed the references we included in the proposed rule to the ''exceptions'' provided in 43 CFR 426.18(g)(2) and (3) and determined adjustments were needed. We have limited which part owners of legal entities providing services to more than 960 acres held in trusts or by legal entities must submit a farm operator form. We have made it clear that farm operators will not be eligible to use a verification form, even if their farm operations do not change from year to year. Farm operators will also not be subject to the RRA forms requirement associated with landholding changes, if their farm operations change during a water year after they have submitted their RRA form for that year.

Paragraph (a) provides the general criteria as to which farm operators must annually submit RRA forms to districts. In the proposed rule, we referenced ''exceptions'' included in 43 CFR 426.18(g)(2) and (3). Upon review, we determined that we need to better explain the forms requirements concerning entities that are farm operators and are wholly owned subsidiaries, rather than simply referring to 43 CFR 428.18(g)(2). Accordingly, we have included that explanation as the new § 428.4(a)(2). The provisions of 43 CFR 426.18(g)(3)(i) (cannot utilize class 1 equivalency factors in determining if RRA forms must be submitted) apply to this new RRA forms submittal requirement without such being specified, since this final rule supplements 43 CFR part 426. The provisions of 43 CFR 426.18(g)(3)(ii) (part owners not considering certain involuntarily acquired land in determining if RRA forms must be submitted) do not apply to this final rule, because § 428.4(b) specifies which part owners of legal entities that are farm operators must submit RRA forms, regardless of how much land is attributed to the part owner in question. Consequently, we

removed all references to 43 CFR 426.18(g)(2) and (3) from the final rule.

Paragraph (b) continues to address the applicability of the RRA forms submittal requirements to indirect owners of a legal entity that is a farm operator and is required to submit RRA forms. We have limited the application of the RRA forms submittal requirements to only those part owners who owned the land the legal entity is now providing services to, when that land was excess and those part owners sold or transferred that land at an approved price.

Paragraph (c) is new in the final rule. It provides that a verification form cannot be used to meet a farm operator's annual RRA form submittal requirement.

Paragraph (d) is new in the final rule. It provides that once a farm operator has met his/her/its RRA forms submittal requirements for a water year, no additional RRA form needs to be submitted for that year, even if the farm operator experiences a change to the farm operating arrangements reported on the form that was submitted.

Comments Concerning § 428.4—Who Must Submit Forms Under this Part

Comment: We strongly support the proposal to expand information collection requirements to farm operators, since without this change, any meaningful enforcement of the acreage limitation provisions is impossible.

Response: We agree. The final rule retains the expansion of the information collection requirements to certain farm operators.

Comment: Regarding the 960-acre threshold for submission of forms, although the regulation requires reporting by operators of multiple holdings that total more than 960 acres, these holdings are limited to lands held by trusts and legal entities, leaving the situation of lands held by individuals unclear. We believe that trusts and legal entities and individuals should submit forms, so you can make the nonfull-cost eligibility determination as to all large scale operators.

Response: We have reviewed this matter and decided at this time not to further expand the information collection in the regulation to include farm operators providing services to more than 960 acres held by individuals or any combination of individuals, trusts, and legal entities. Nevertheless, just because such farm operators do not have to submit an RRA form, it does not mean their farm operating arrangements will not be audited when Reclamation becomes aware of their existence. On the contrary, we will audit such farm operators, and if we determine their farm operating arrangements are leases for acreage limitation purposes, we will apply the nonfull-cost entitlement accordingly. The same holds true for any legal entities that are farm operators, but would be limited recipients if they were landholders and are providing services to any acreage.

Comment: You should rewrite § 428.4(a)(1) to add the words ''directly or indirectly'' after ''services'' so it reads: ''You provide services directly or indirectly to more than 960 acres westwide . . .'' This is necessary because otherwise, operating companies could choose a new corporate shell for each 960 acres they operate. Subsection (b) tries to solve this problem, but does not because the triggering standard is in subsection (a).

Response: We have not incorporated this comment. However, we have explained how the parent entity of wholly owned subsidiaries must submit a Form 7–21FARMOP and include on that form all land to which its wholly owned subsidiaries are providing services.

Comment: All landholdings that farm more than 960 acres must have forms submitted which clarify whether there are farm operators or custom operators affiliated with that farm or operation. In the case of any landholding or farm that claims to have no farm operator subject to the new rules, yet reports one or more custom operators serving that farm, you should ensure that adequate documentation is provided to ensure the intent of the regulations is met, and there is no ''farm operator'' in fact.

Response: Any landholding that includes more than 960 acres (other than for a trust) must be in compliance with the current acreage limitation provisions. Accordingly, all ineligible excess land is not receiving Reclamation irrigation water, and any land selected as full-cost is either not receiving Reclamation irrigation water or the full-cost rate is being paid for the delivery of such water to that land. We see no value in auditing farm operating arrangements associated with such lands, since entering into a farm operating arrangement does not alter the fact that the land in question is either ineligible excess land or subject to the full-cost rate. A landholder who holds less than 960 acres westwide should not be responsible for determining if his/her/its farm operator is providing services to more than 960 acres westwide.

Comment: We believe the proposed rules impose significant and unnecessarily burdensome reporting requirements on ''farm operators.''

Response: We disagree. We estimate that the reporting burden would be increased by less than 200 hours (or on average 1 hour, 18 minutes per Form 7–21FARMOP) as a result of the final rule.

Comment: Section 428.4 is far too broad in its reach. It would be enough to limit the certification requirement to farm operators providing services to ''a single trust or legal entity.'' But then the section continues to require certification from such providers to ''any combination of trusts and legal entities.'' This language covers not only large trusts or other legal entities, but sweeps in every single testamentary trust and intervivos trust, no matter how small. Farm operators who think they are working only for a series of individuals or entities will become subject to the regulation without knowing it if some landowner dies leaving a testamentary trust. There are countless trusts and legal entities, including part-ownerships created through inheritance or other family arrangements that have nothing to do with large trusts created to hold excess land, and operated by the original owner.

Response: We have considered this issue and determined to make no change to the regulation. We do not need to collect additional information that only concerns the landholdings and operations of single trusts or legal entities that hold more than 960 acres. This is because we already know about all trusts that hold more than 960 acres, their farm operators have been identified, and any associated farm operating arrangements have been reviewed to determine if they are leases for acreage limitation purposes. As for legal entities, if a legal entity holds more than 960 acres, the land is either eligible excess due to an exception included in the acreage limitation provisions (e.g., the involuntary acquisition provisions), ineligible excess, or full-cost. Again, we do not need any additional information from such legal entities because the forms they already submit results in the determination of the eligibility of the land and the water rate to be paid, regardless of any existing farm operating arrangement.

The information we do not have concerns farm operators who are providing services to multiple landholders, the total of which would exceed the applicable nonfull-cost entitlement if the farm operating arrangement was determined to be a lease. We cannot make an exception for testamentary trusts or any other types of trusts from the RRA forms requirements,

because to do so would create a means for avoiding our intent to identify farm operators providing services to more than 960 acres held in any combination of trusts and legal entities. The RRA did not make any distinction between trusts established for families, inheritance purposes, etc., and we will not initiate such a distinction in these rules.

Comment: Requiring indirect owners of farm operators to submit forms under § 428.4 is burdensome and unnecessary. If indirect owners are shown on the farm operator's form, the only purpose served by indirect owner forms would be to determine if the indirect owner exceeds the acreage limitations through farm operator arrangements. To do this implies that all farm operators are lessees until proven otherwise. The RRA does not support this, or require it.

Response: We have incorporated this suggestion in the final rule. We have limited the requirement to submit an RRA form by part owners of legal entities who are farm operators to those part owners who formerly owned the land in question as excess and sold or transferred that land at an approved price. We need information from such part owners in order to administer § 428.9 of the final rule.

Comment: Determining who must submit forms will be very hard, if not impossible, for the districts.

Response: We realize that it will be harder for districts to identify farm operators who will need to submit RRA forms than to identify landowners and lessees. In order to facilitate this activity we encourage districts to provide information to all their landholders concerning the new requirements, especially those landholders who include information about farm operators on the RRA forms they submit. We have also changed the effective date to January 1, 2001, rather than 2000, to provide all parties an opportunity to prepare for the new requirements.

Comment: The landholder has the burden of identifying what farm operators must submit forms.

Response: We disagree. The farm operator is responsible for knowing how much land is held in trusts and by legal entities to which he/she/it provides services. If that acreage totals more than 960 acres, the farm operator must submit the new Form 7–21FARMOP. Farm operators are responsible for being aware of and in compliance with all statutory, regulatory, and other requirements that impact their activities. The landholder also may have contractual remedies against a farm operator whose failure to comply with legal requirements causes damages to a landholder. Moreover, the landholder is receiving the benefits of the Reclamation irrigation program and is responsible at all times for maintaining its farming enterprise in full compliance with existing law.

Comment: If the farm operator does not assume any risk in the growing, harvesting and sale of the crops, does the farm operator still have to comply with the proposed rules?

Response: Yes, a farm operator would still need to submit RRA forms if he/she/it provides services to more than 960 acres held in trusts or by legal entities.

Comment: Instead of requiring farm operators to file forms, you should add to the existing forms a requirement that the landowner identify anyone other than the lessee listed (if any) who has the use or possession of the property, is responsible for paying the operation expenses or is entitled to any of the profits. If there are questions about the arrangement disclosed, you have the authority to request copies of contracts, examine financial records, etc.

Response: We considered this approach, but decided against it. The alternative to requiring the submission of RRA forms from the farm operators in question is to request data on an as-needed basis and require landholders to provide information on their RRA forms about any farm operators with which they contract. We have been using this approach since 1988 and have determined that the approach taken in this rule will be more effective. Further, the approach suggested by the commenter places a greater burden on both the districts and Reclamation, than if certain farm operators are required to submit RRA forms. The commenter's approach also greatly increases the likelihood that all farm operators providing services to more than 960 acres westwide will not be identified. We need to identify those farm operators providing services to multiple landholdings, the total of which exceed 960 acres. Then we can determine if the arrangements under which the services are being provided are leases for acreage limitation purposes.

Comment: What determined that 960 acres should be the form submittal threshold for farm operators? If the reason for the 960 acres is to identify those who formerly owned lands as excess and are operating them again, the 960-acre form submittal threshold may not be sufficient for identification of such lands. Farm operators should be subject to the certification/reporting thresholds currently established.

Response: We chose the 960-acre forms submittal threshold for farm operators because it is the maximum acreage limitation entitlement. We agree that certain farm operators, if they were landholders, would have much lower acreage limitation entitlements applicable. However, we have determined at this time not to impose forms requirements on such farm operators. As for the excess land provision, we believe that the 960-acre forms submittal threshold for farm operators will help us find many of the farm operators who are directly providing services to their formerly excess land or indirectly providing those services as part owners of legal entities that are farm operators.

Comment: If the proposed rule is adopted, the submittal threshold for farm operators should not be less than 960 acres.

Response: We have not changed the forms submittal threshold in the final rule.

Comment: Landowners who wish to receive water should only have to file their eligibility papers one time, not every year, and require a refiling only when there is a change in ownership.

Response: This comment is outside of the scope of the proposed rulemaking and this final rule. RRA forms submittal requirements for landholders were reviewed and adjusted during the rulemaking that was completed on December 18, 1996. Annual RRA forms submission for all landholders remains a statutory and regulatory requirement. All exemptions from this requirement are provided in 43 CFR 426.18(g).

428.5 Required Information

This section specifies what information farm operators must submit. Paragraph (a) provides that we will determine what RRA form farm operators will complete, while paragraph (b) requires farm operators to include on that form all land to which they are providing services that is subject to the acreage limitation provisions.

Paragraph (c) provides a list of the information we will require farm operators to provide on their RRA forms. This list is not to be considered an all-inclusive list.

We made no changes to this section in the final rule as compared to the proposed rule.

Comments Concerning § 428.5—Required Information

Comment: The information you would request would provide you no benefit, and may potentially damage the parties providing it. This is an invasion of privacy, and farm operators and landowners may have more incentive to

avoid filing the forms than to comply, because of fear of adverse business consequences if the information is available to anyone that could misuse the information. For example, it is unlikely that a farm operator would be willing to disclose to its customers the names of all the other customers of that farm operator and a list of the lands owned or leased by those other customers. Similarly, landowners may be unwilling to allow a farm operator to disclose to another landowner the information about that landowner's operations—who determines when services should be performed, which services are provided to that landowner, etc.

Response: We contend the information we will collect from farm operators will be very useful. We do not believe the new RRA forms requirements are any more of an invasion of privacy than it is for a lessee who must provide information about the land being leased and the terms of the lease agreement. Section 224(c) of the RRA authorizes Reclamation to collect all data necessary to carry out the acreage limitation provisions. Therefore, if a farm operator wants to provide services to land that is subject to the acreage limitation provisions, that farm operator must be prepared to provide us with information, whether it be through the submittal of an RRA form or in response to a request for information that he/she/it receives. In addition, information provided by farm operators on Form 7–21FARMOP is protected by the Privacy Act of 1974 as is information provided by landholders on other RRA forms.

Comment: We generally agree with the listing of information you would collect on the farm operator forms, but you should clarify § 428.5(c)(7) to exclude the assignment of accounts receivable as collateral.

Response: We have considered this suggested change and decided to not include it in the final rule. We believe the provision in question is clear. It asks if the farm operating agreement itself can be used as collateral in any loan, not if the farm operator can assign accounts received as collateral.

Comment: You should not require farm operators to provide the following information: details on all lands that he or she works on, including legal descriptions and acreage; who decides what services are needed; a list of services provided for each parcel; whether he can use his agreement with the landowner as collateral for any loan; and whether he can be sued by the landowner. If you try to implement this, it will take another bureaucracy of people to administer it and check the forms.

Response: On the contrary, including all of this information on the form will help us effectively utilize our limited resources dedicated to acreage limitation administration and enforcement. The information we ask from farm operators is necessary so that we can prioritize our audit efforts in determining if farm operating arrangements are leases. Without some of the information, such as legal descriptions, we would not know if all the land was owned by one trust, related companies, etc. It should also be noted that this information needs to be provided to us when we audit such farm operators, even if we do not ask for it on an RRA form.

Comment: This information collection does not appear to address the issue of financial risk. If it is going to address the issue of who has use of the land, I think it should address financial risk, or else leave both issues to be decided through a review of the actual agreement.

Response: We think that many commenters have the belief that we will be able to determine if a farm operating arrangement is a lease for acreage limitation purposes simply by reviewing the information provided on the Form 7–21FARMOP. That is simply not the case. We will have to review associated farm operating documents (e.g., farm operating agreements, farm management agreements) before making such a determination. After we have some experience with the forms submitted by farm operators, we may revise those forms to include additional questions, some of which may be about financial risk. If we decide to revise the Form 7–21FARMOP in the future, we will provide the public with ample opportunity to comment through the process associated with the Paperwork Reduction Act of 1995.

Comment: Farm operator or custom operator information will be virtually impossible to acquire or verify.

Response: We disagree. Farm operators will submit forms, and then we can audit the farm operating arrangements to determine if they are leases, and thus, subject to application of the nonfull-cost entitlement. Verification of the information submitted will be possible by comparing the information on the Form 7–21FARMOP with the documentation associated with the farm operating arrangement and the information submitted on the landholders' RRA forms.

Comment: The reporting regulations ask the right questions regarding farm operations, but they do not necessarily ask those questions of all the right people. To avoid the problem of you having to survey all Reclamation-irrigated land that is not reported on by farm operators, I suggest you require that landowners subject to RRA reporting requirements also submit information about their farm operators. Those landowners who employ farm operators would have to supply the names, addresses, and other identifying information for these entities. Without this, you would remain virtually blind with respect to those farm operators who fail to report.

Response: Direct landowners have been required to provide information on their RRA forms concerning certain farm operators since the late 1980's. The required information has included the name, address, and telephone number for each farm operator by land parcel.

428.6 Where To Submit Required Forms and Information

This section specifies where farm operators are to submit their completed RRA forms. We made no changes to this section in the final rule as compared to the proposed rule. We received no comments on this section.

428.7 What Happens if a Farm Operator Does Not Submit Required Forms?

This section establishes what will happen if a farm operator does not submit the required RRA form. Paragraph (a) provides that if a farm operator does not submit the required RRA form, the district is not to deliver Reclamation irrigation water to the land in question and nobody is to accept delivery of such water to that land. We made no changes to this paragraph.

Paragraph (b) specifies that once the required RRA form is submitted, eligibility of the land in question to receive Reclamation irrigation water will be restored. We made no changes to this paragraph.

Paragraph (c) provides that we will impose the administrative fee defined in 43 CFR 426.20 if a farm operator fails to submit the required RRA forms and the land in question receives Reclamation irrigation water despite noncompliance with the forms requirements. We made changes to this paragraph to make it clear that we will determine the amount of any applicable administrative fee in the manner we do for landholders.

Comments Concerning § 428.7—What Happens if a Farm Operator Does Not Submit Required Forms?

Comment: A district is powerless to require compliance from a farm operator

that it has no relationship with. Districts have no legal ability to do so, and they do not want it. Districts have no way to identify farm operators within their service areas and will have no way of enforcing the proposed rules unless an operator voluntarily complies.

Response: We suggest that districts review RRA forms submitted by trusts and legal entities. That will provide an initial basis of who might be a farm operator that will be required to submit the new Form 7–21FARMOP, since landholders have been required to provide limited information concerning any operators for a number of years. The year 2000 can be used by districts to start reviewing such forms and preparing lists of farm operators who might need to be contacted. Then, starting with the 2001 water year, district staff can contact such operators to determine if they provide multiple services to more than 960 acres held in trusts or by legal entities, or simply send them a copy of the Form 7–21FARMOP with instructions.

Comment: Districts may be unfairly at risk for an administrative fee under the following example: Farm Operator X operates a 640 acre farm in District A and a 960 acre farm owned by a trust located in District B. If District A is unaware of the fact that the farm operator is operating more than 960 acres total, and they fail to get a form, then District A may be at risk for an administrative fee. This may also place the landowner at risk for full-cost charges.

Response: If the land in District A is held by a trust or legal entity, then the District A would be subject to receiving an administrative fee bill if Reclamation irrigation water is delivered to the land in question. District B would also be subject to such a bill, if it too delivered Reclamation irrigation water to Farm Operator X without a form being on file. At that point, the districts have the option of contacting the farm operator to collect the assessed administrative fee; how districts encourage payment is up to each district. The landowners will not be at risk for full-cost charges, because we no longer apply the compensation rate (full-cost) for instances of violations of RRA forms submittal requirements. However, if it turns out that a farm operating arrangement is a lease for acreage limitation purposes, then full-cost charges may apply. That would be the case regardless of whether the RRA forms submittal requirement applies to farm operators.

Comment: The proposed rules are unworkable for both districts and landowners. Farm operators are independent contractors and cannot be controlled by the farmers that hire them. Farmers have no way of correcting a problem caused by a farm operator failing to file forms other than firing them. Terminating contractors may be difficult, legally or practically.

Response: If a landholder is concerned about a farm operator being in compliance with the RRA forms requirements, that landholder has the option of including in any written farm operating agreement a requirement that the farm operator must be in compliance with those provisions. If a landholder cannot control or terminate their farm operator, the landholder's lack of control might indicate that the farming arrangement has characteristics of a lease.

Comment: The prohibition in § 428.7 against delivering water to land if a farm operator fails to submit forms is particularly harsh. It will take time after the landholders submit forms for an irrigation district to determine whether a farm operator has submitted their forms. To allow a district to determine which lands have become ineligible because of this failure, the submission date for farm operators' forms should be at least 60 days after the landholders submit their forms.

Response: We have considered this comment and decided not to incorporate it in the final rule. We encourage districts to take advantage of the delay in implementing this final rule, until the 2001 water year, to identify farm operators who may be subject to the new RRA forms requirement. Based upon more than a decade of administration of forms requirements, it is our experience that districts have proven effective in obtaining voluntary compliance. Moreover, when we discover a failure to comply with the forms requirement of this final rule during a water year (after irrigation water has been delivered), then we would make a ''final determination'' that the farm operator has not complied with this final rule. Such ''final determinations'' are subject to the notice and appeal provisions of 43 CFR 426.24.

428.8 What Can Happen if a Farm Operator Makes False Statements on the Required Forms

This section provides what action we can take if a farm operator makes a false statement on his/her/its RRA form. We made no changes to this section in the final rule as compared to the proposed rule. We received no comments on this section.

428.9 Farm Operators Who are Former Owners of Excess Land

This section establishes a restriction on former owners of excess land who sold or transferred such land at an approved price from becoming the farm operator of their formerly excess land, if that land is to be eligible to receive Reclamation irrigation water. This restriction is limited to land held in trust or by a legal entity and two exceptions are provided as explained below.

Paragraph (a) specifies that formerly excess land may not receive Reclamation irrigation water if that land is now held by a trust or legal entity and the individual or legal entity that formerly owned the land as excess and sold or transferred it at an approved price is the direct or indirect farm operator of that land.

Paragraph (b) provides two exceptions to this restriction: The land becomes exempt from the acreage limitation provisions or the full-cost rate is paid for Reclamation irrigation water delivered to such land. This paragraph also explains how the full-cost rate will be applied if a legal entity that is the farm operator has a part owner who formerly owned the land as excess and sold or transferred it at an approved price.

We have made grammatical changes to this section, and also added the words ''or transferred'' after the word ''sold'' in 428.9(a)(2), so that these regulations are consistent with part 426.

Comments Concerning § 428.9—Farm Operators Who are Former Owners of Excess Land

Comment: We agree with you clamping down on the operation of formerly excess land by those with ties to the former excess landowner. A situation where the prior owner of excess land serves as the current farm operator for a trust is a clear abuse of the RRA, and I applaud your decision to look past trust arrangements to the reality of the single underlying farm operation.

Response: We believe this provision will make our enforcement efforts under the RRA more effective.

Comment: With respect to the excess land provisions, I believe it is appropriate to extend the prohibition against receiving Reclamation water to farm operators operating land they formerly owned. However, the regulation appears to leave open the possibility that a simple corporate shell or other legal fiction could be used to allow continued operation by an entity controlled by the former owner of

excess land. You should modify the regulation to ensure that such transactions cannot be used to shield the former owner.

Response: We do not believe this result would occur because the proposed rule clearly refers to indirect farm operators in § 428.9(a)(3). Accordingly, we made no revisions to this section of the final rule.

Comment: We do not understand Interior's statement that the intent of the excess land provisions is not met in the example given in the proposed rule at 63 FR 64155. The farm operator would not earn a share of the profits or income on the land that was sold. If the farm operator is paid a fixed fee for services, and profits go to trust beneficiaries, why does this not meet the intent of reclamation law?

Response: The intent of the excess land provisions of Federal reclamation law is for the former owner of the excess land to be totally divested of any interest in excess land, if such land is to become eligible to receive Reclamation irrigation water when it is sold or transferred. The reason the excess land provisions were created was to provide farming opportunities to new family farmers. The intent of the excess land provisions cannot be met if the land is being sold or transferred to non-farmers, speculators, investors, absentee owners, etc., who then hire the former owner to farm the land for a fixed fee for service. The final rule strongly encourages the former owner of excess land to have only the most limited relationship with that land. Specifically, the former owner can provide one specialized, farm-related service to the new landholder as a custom service provider. If the new landholder believes the former owner is indispensable to the operation of the land, the full-cost rate can be paid for any Reclamation irrigation water delivered to that land.

Comment: The excess land provisions with respect to the operation of formerly excess land by a former owner are draconian. Exceptions should be made, such as when a farmer moves operations from one region to another. In order for the land to be profitable while the new operation is beginning, the farmer often leases land back to the previous landowner or lessee. The new owner should not be penalized for using the most qualified farm operator (the former owner).

Response: The excess land provision only applies to farm operators who are providing services to excess land they formerly owned and disposed of at an approved price. If the farm operator moves operations from one region to another, that farm operator is not likely to be providing services to land he/she/it formerly owned as excess and sold or transferred at an approved price. As for new owners utilizing the former excess landowner to farm the land, the entire point of the excess land provisions of Federal reclamation law is to provide farming opportunities for new family farmers, not to continue farming opportunities for the former landowner, now with the availability of Reclamation irrigation water. We would also like to note that 43 CFR 426.12(g) already prohibits that new owner from leasing the land to the former owner of that land when it was excess, unless the new owner and lessee do not intend to use Reclamation irrigation water or they intend to pay the full-cost rate.

Comment: You should not adopt the proposed rule, but if you do, the two exemptions provided should be the minimum. You should add at least one additional exemption: Expiration of the deed covenant associated with the sale of formerly excess land should negate application of the proposed rule. You should include this as § 428.9(b)(3)

Response: While we seriously considered adding this additional exemption, we have decided not to include any further exemptions in § 428.9(b) than those found in the proposed rule.

Comment: Section 426.14 of the current rules provides that nonexcess land acquired through an involuntary foreclosure or similar involuntary process of law, conveyance in satisfaction of a debt (including, but not limited to, a mortgage, real estate contract or deed of trust), inheritance, or devise remains eligible to receive irrigation water for 5 years. During the 5-year period, you charge the same rate for water as you charged the former owner (unless the land becomes subject to full-cost pricing through leasing). Our question is that if the acquiring lender or landowner uses a farm operator on the involuntarily acquired land, will you price the water under the current rules, or will it be subject to § 428.9 (b)(2) of the proposed rules?

Response: The acquiring lender or landowner would be subject to § 428.9 in its entirety if they hire as a farm operator the former owner of that land when it was excess and who sold or transferred it at an approved price.

Comment: Section 428.9(b)(2), which requires districts to calculate separate water rates for each proportional owner or for different parcels owned by one landowner, exceeds your regulatory powers.

Response: Districts are already required to calculate separate water rates for different parcels owned by one landowner and for those parcels owned by proportional owners, as required by 43 CFR 426.12(g)(3). For example, if a landowner leases a portion of his land to a lessee who selects the land as full-cost, the district must apply the full-cost rate to only those portions of the landowner's land. In fact, except for limited recipients that did not receive Reclamation irrigation water on or before October 1, 1981, the nonfull-cost entitlement requires districts to apply the nonfull-cost rate to selected portions of a landholding and the full-cost rate to the rest of the land for any landholder whose westwide landholding exceeds the applicable nonfull-cost entitlement.

Comment: Requiring a farmer to fire a non-complying operator may limit or prohibit a farmer from employing someone with a specialized and necessary service, one that may not be easily replaced. The proposed rule leaves farmers at the mercy of operators that must be willing to comply with burdensome RRA rules, when these operators are not a problem according to reclamation law.

Response: While there may be situations where only one individual or legal entity has the knowledge and expertise to provide a specific, specialized farm-related service to land in an area, we believe such instances are rare. Nevertheless, if it is only one service that is being provided, other than management of the land, there should be no need to terminate the contract or arrangement, because such a individual or legal entity can probably be classified as a custom service provider as defined in § 428.3.

Comment: We are not aware of more than two or three farming operations where § 428.9 would apply. It appears to us that you have specifically targeted one company's farm operator arrangement with a specific trust in an attempt to appease certain environmental groups. Such a targeted rulemaking is abusive and clearly violates the equal protection provisions of the Constitution.

Response: This rule is not targeted at any particular arrangement. This rulemaking addresses the practice of landholders selling excess land at an approved price and then being hired by the new landholder to continue to farm the formerly owned land as a farm operator. We believe this practice has been used by some existing large trusts in the Central Valley Project. Without the finalization of the proposed rule, this practice may spread to other areas, thereby allowing excess landholders to fashion arrangements that permit them to continue substantially the same enterprise using subsidized water. By

eliminating any incentive for the excess landowner to maintain any interest, either property or contractual, with its formerly excess lands, we believe we will have furthered the policies set forth in Section 209 of the RRA and the excess land provisions of Federal reclamation law.

428.10 District's Responsibilities Concerning Certain Formerly Excess Land

This section specifies that districts are not to deliver Reclamation irrigation water to formerly excess land that is prohibited from receiving such water under § 428.9. We made no changes to this section in the final rule as compared to the proposed rule. We received no comments on this section.

428.11 Effective Date

This section provides details concerning the effective date of this final rule. We have made several changes to this section of the final rule as compared to the proposed rule, primarily in response to comments received and to reflect when the final rule is likely to be published in the **Federal Register**. Specifically, we decided to postpone the effective date for implementation of this rule until January 1, 2001.

Paragraph (a) provides a January 1, 2001, implementation date for all provisions of the final rule. However, our intent is to make this rule effective for the 2001 water year. Since there are a few districts that are subject to the acreage limitation provisions whose water years commence before January 1, we have recognized that fact by including an October 1, 2000, effective date for such districts concerning the forms requirements for farm operators.

As with the proposed rule, in paragraph (b) we make it clear that on January 1, 2001, the excess land provisions will apply to all farm operating arrangements then in effect and those that may be agreed to in the future. This has the effect of applying the excess land provisions of the final rule both prospectively to future farm operating arrangements and retroactively to those already in place starting on January 1, 2001.

Comments Concerning § 428.11—Effective Date

Comment: Regarding § 428.11, the second sentence seems to limit the applicability of this effective date to only one of the 10 subsections of the regulations. This is confusing and could lead to enforcement problems and possibly litigation over the intent of the regulations. We suggest you include the sentence in § 428.9, instead.

Response: In preparing the final rule, we have made it clear that all provisions of the final rule will be effective with the 2001 water year.

Comment: The January 1, 2000, effective date is not fair and does not allow enough time for landholders to make other farming arrangements to avoid cost implications. You should pick some later date to allow irrigation districts, landholders, and farm operators adequate time to adjust their operations to conform to the regulations. Many tree and vine operators have long-term operating agreements.

Response: In response to this and similar comments, we have postponed the effective date of the final rule until January 1, 2001.

Comment: Regarding § 428.11, your assertion that parties potentially affected by the regulations need merely make ''other farming arrangements'' before January 1, 2000, to avoid paying full-cost for water is unrealistic. There are many long-term contracts that cannot be easily terminated, and the result of terminating these contracts will significantly affect perfectly legitimate (from an RRA perspective) business relationships.

Response: As we stated above, the excess land provision is narrowly focused and will only affect land that is now held in trust or by a legal entity and was formerly owned as excess land by the current farm operator of that land. Nevertheless, we have changed the effective date for the rule to January 1, 2001.

Comment: You should have a phase-in period for the forms collection. We suggest that you do not apply full-cost or shut off water during the first year if any farm operator fails to file a form. You will not be harmed by the year delay in imposing penalties, and this would make it more fair for landholders and farm operators.

Response: Instead of having a phase-in period, we have changed the effective date to January 1, 2001, rather than 2000. It should be noted that we no longer apply the compensation rate (full-cost) when we find instances of RRA forms requirements being violated.

Comment: We suggest a 3-year implementation period, which would allow land owners, farmers, custom harvesters and farm operators time to sort out contractual matters, cropping questions and long-term financing.

Response: We believe that a 3-year implementation period is too long. However, we have changed the effective date for the rule to January 1, 2001.

Comment: You issued a memorandum to water districts dated February 1, 1999. The memorandum blurs the risk-based distinction between lessees and custom operators that has been the primary basis for determining who is a lessee since the adoption of the 1987 regulations. The terms defined in the memorandum as ''custom farming service,'' ''contract operator,'' and ''principal operator'' are not in the current regulations. The proposed rule defines the terms ''custom operator'' and ''farm operator'' similarly to the definitions in the memorandum. It appears you have begun to prematurely implement some of the new concepts and definitions contained in the proposed rule before the comment period closed and before the Commissioner has reviewed the comments, responded to them, and made a determination on the rule. We believe this conflicts with the Administrative Procedure Act and that it is improper for you to administratively direct water districts to use those terms until the rulemaking is complete. You should withdraw the memorandum.

Response: Clearly, the commenter misunderstands the purpose of the February 1, 1999 memorandum. The policy memorandum, dated February 1, 1999, was the most recent clarification of how Reclamation applies the acreage limitation provisions to sharecropping arrangements. Previously, we issued internal policy memoranda applying the criteria on what constitutes a lease under the RRA, as set forth in 43 CFR 426.6, to farming arrangements, including sharecropping. See Lease and Farm Operating Agreement Review Guidelines (April 1990); Applicability of the Reclamation Reform Act of 1982 to Sharecropping Arrangements (Sept. 28, 1993); Sharecropping and Custom Farming Services (Dec. 17, 1997). These memoranda do not address the same issues as those contained in the final rule.

Through data gathering, the final rule will assist us in identifying those farming operations that may constitute leases under the RRA. Neither the final rule nor the memoranda change the analysis for determining what is a lease. They make no change to the economic risk plus use or possession test currently set forth in 43 CFR 426.6.

While it is true that some of the definitions used in the prior memoranda are also used in the final rule, principal operator, farm operator, and custom operator are not new concepts or terms. We used similar definitions, where possible, to provide consistency and avoid confusion for those implementing

the RRA. However, to the extent that any definitions in the policy memoranda conflict with those promulgated in the final rule, the rule controls. Accordingly, there is no reason to withdraw the February 1, 1999 memorandum because it deals with whether sharecropping arrangements constitute leases under the acreage limitation provisions. The final rule does not affect those criteria or determinations.

Comment: A few commenters addressed the substance of the February 1, 1999 memorandum, asserting that the memo defined principal operator but did not provide any implications of being so identified, that the risk-based test was being abandoned, and that the determination of reasonable and ordinary crop shares to pay for services fluctuated and depended on political changes or the amount of pressure being exerted by opponents of the Reclamation program.

Response: As discussed above, the February 1, 1999 memorandum addresses issues distinct from the final rule. It is beyond the scope of this rulemaking to address the substance of the February 1, 1999 memorandum. Any substantive concerns should be addressed in another forum.

IV. Procedural Matters

National Environmental Policy Act

We have analyzed this regulation in accordance with the criteria of the National Environmental Policy Act of 1969 (NEPA) and Departmental Manual 516 DM. In the proposed rule, we stated that the regulation was categorically excluded from NEPA review under 40 CFR 1508.4, Departmental Manual 516 DM 2, Appendix 1, paragraph 1.6, and 516 DM 6, Appendix 9, paragraph 9.4A.1. However, we received comments that suggested we needed further environmental review. In order to be responsive to public comments, we have therefore prepared an Environmental Assessment (EA) and have found that the final rule would not constitute a major federal action significantly affecting the quality of the human environment under Section 102(2)(C) of NEPA [42 U.S.C. 4332(2)(C)]. We have placed the EA and the Finding of No Significant Impact (FONSI) on file in the Administrative Record for this rulemaking. We invite you to review these documents by contacting us at the addresses listed above (see **ADDRESSES**).

Executive Order 12866, Regulatory Planning and Review

Under Executive Order (E.O.) 12866, (58 FR 51735, Oct. 4, 1993), an agency must determine whether a regulatory action is significant and therefore subject to Office of Management and Budget (OMB) review and the requirements of the E.O. Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action meeting any 1 of 4 criteria specified in the E.O. This rulemaking is considered a significant regulatory action under criterion number 4, because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. We have therefore submitted the regulation to OMB for review.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). We provide some 140,000 western farmers with irrigation water. We estimate that out of this number, fewer than 200 entities, not necessarily small entities, could be affected by the regulation. The effect on most of these entities starting on January 1, 2001, would be limited to the annual completion of RRA forms. The annual costs of completing such forms is estimated to total $4,200. The costs to the districts will be limited to distributing the RRA forms which is a nominal additional cost, if any, since districts are required to distribute RRA forms to all landholders anyway. In addition, some districts would collect a few additional forms and place information concerning farm operators on a new tabulation sheet. Considering that there are very few farm operators Westwide providing services to more than 960 acres held in trusts and by legal entities, such costs to most districts will be zero and Reclamation estimates that no district will incur more than $1,000 in additional costs due to the expansion of the information collection requirements.

For some of these entities, the farm operator was also the owner of the land in question when the land was ineligible excess land or under a recordable contract. In cases where such a farm operating arrangement is still in place on January 1, 2001, or is implemented on or after that date, the full-cost rate will apply to all deliveries of Reclamation irrigation water to such land. However, the landholder in question can avoid paying the full-cost rate by hiring a different farm operator who did not formerly own the land in question as excess. We believe it is extremely likely that trusts and legal entities will take action to have any formerly excess land in their possession farmed by farm operators who did not own such land as ineligible excess or under recordable contract. In such cases, the trustees of trusts and the owners of legal entities may incur two types of opportunity costs: (1) Additional costs if economies of scale cannot be realized because the trustee or owner cannot select a certain farm operator to provide services to their land without incurring the full-cost rate for Reclamation irrigation water and (2) additional costs because the trustee or owner was not able to hire the farm operator with the most knowledge of the land in question without incurring the full-cost rate for Reclamation irrigation water.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This regulation is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This regulation:

(1) Will not have an annual effect on the economy of $100 million or more. The regulation could affect up to an estimated 200 farms, but the effects would not approach $100 million or more. For the 1996 water year, Reclamation collected nearly $6.5 million in full-cost charges westwide. These collections were from many more landholders with more associated acreage than would be affected by the final regulations. However, these regulations will not result in any immediate application of the full-cost rate, unless a farm operator is determined to actually be a lessee for acreage limitation purposes or the farm operator also was the former owner of the land when it was excess. In the case of a determination that the farm operating arrangement is a lease for acreage limitation purposes, that determination would be made with or without this rule. Nevertheless, the intent of this rulemaking is to provide a more efficient and effective way to find farm operators that should be audited. Consequently, it is likely that we will find more farm operating arrangements that are leases for acreage limitation purposes and, therefore, subject to application of the nonfull-cost entitlement than we would without this rule. But without the information collection, we simply do not know how many that may be and how much additional full-cost will be collected. Therefore, the initial economic effect is

estimated at approximately $7,000; the cost of the expanded information collection requirements and these costs include additional costs to Reclamation for the design and distribution of the new forms.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. There could be an economic effect on less than an estimated 200 farms, but we do not anticipate that this will cause any increase in costs or prices.

(3) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. At most the regulation will only affect a small sector of the farming industry, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Paperwork Reduction Act

This regulation requires a new information collection from 10 or more parties, and thus a submission under the Paperwork Reduction Act was required. On July 14, 1999, OMB approved the new Declaration of Farm Operator Information (Form 7–21FARMOP) as part of the RRA forms package for landholders, under control number 1006–0005. On the same date, OMB approved new tabulation forms called Tabulation G [1. District Summary of Certification and Declaration Forms, Tabulation G of ''Declaration of Farm Operator Information'' Forms (Form 7–21FARMOP) and 2. District Summary of Reporting and Declaration Forms, Tabulation G of ''Declaration of Farm Operator Information'' Forms (Form 7–21FARMOP)] as part of the RRA forms package for districts, under control number 1006–0006. Both clearances expire on December 31, 2001.

Executive Order 13132, Federalism

In accordance with Executive Order 13132, this rule does not have Federalism implications. This rule does not substantially and directly affect the relationship between the Federal and State governments. The rule would not affect the roles, rights, and responsibilities of States in any way. The rule would not result in the Federal Government taking control of traditional State responsibilities, nor would it interfere with the ability of States to formulate their own policies. The rule would not affect the distribution of power, the responsibilities among the various levels of government, nor preempt State law. The rule modifies existing provisions for administering the RRA by requiring a new collection of information and extending the excess land provisions to certain farm operators.

Executive Order 12630, Takings

In accordance with E.O. 12630, the regulation does not have significant takings implications. Thus, a takings implication assessment is not required. This final rule will not result in imposition of undue additional fiscal burdens on the public. The regulation will not result in physical invasion or occupancy of private property or substantially affect its value or use. Specifically, the regulation will not result in the taking of contractual rights to storage water in Reclamation reservoirs or water rights established under State law.

Unfunded Mandates Reform Act of 1995

This regulation does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The regulation does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required. The regulation will require certain farm operators, which are not small governments, to submit RRA forms. The excess land provisions of the regulation will not affect small governments. The potential effects of this final rule will not amount to costs of more than $100 million per year.

Executive Order 12988, Civil Justice Reform

In accordance with E.O. 12988, the Office of the Solicitor has determined that this regulation does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the E.O.

List of Subjects in 43 CFR Part 428

Agriculture, Irrigation, Reclamation, Reporting and recordkeeping requirements, Water resources.

Dated: January 18, 2000.

Patricia J. Beneke,

Assistant Secretary—Water and Science.

For the reasons stated in the preamble, the Bureau of Reclamation adds a new part 428 to title 43 of the Code of Federal Regulations as follows:

PART 428—INFORMATION REQUIREMENTS FOR CERTAIN FARM OPERATIONS IN EXCESS OF 960 ACRES AND THE ELIGIBILITY OF CERTAIN FORMERLY EXCESS LAND

Sec.
428.1 Purpose of this part.
428.2 Applicability of this part.
428.3 Definitions used in this part.
428.4 Who must submit forms under this part.
428.5 Required information.
428.6 Where to submit required forms and information.
428.7 What happens if a farm operator does not submit required forms.
428.8 What can happen if a farm operator makes false statements on the required forms.
428.9 Farm operators who are former owners of excess land.
428.10 Districts' responsibilities concerning certain formerly excess land.
428.11 Effective date.

Authority: 5 U.S.C. 301; 5 U.S.C. 553; 16 U.S.C. 590z–11; 31 U.S.C. 9701; 32 Stat. 388, as amended.

§ 428.1 Purpose of this part.

This part addresses Reclamation Reform Act of 1982 (RRA) forms requirements for certain farm operators and the eligibility of formerly excess land that is operated by a farm operator who was the landowner of that land when it was excess.

§ 428.2 Applicability of this part.

(a) This part applies to farm operators who provide services to:

(1) More than 960 acres held (directly or indirectly owned or leased) by one trust or legal entity; or

(2) The holdings of any combination of trusts and legal entities that exceed 960 acres.

(b) This part also applies to farm operators who provide services to formerly excess land held in trusts or by legal entities if the farm operator previously owned that land when the land was ineligible excess or under recordable contract.

(c) This part supplements the regulations in part 426 of this chapter.

§ 428.3 Definitions used in this part.

Custom service provider means an individual or legal entity that provides one specialized, farm-related service that a farm owner, lessee, sublessee, or farm operator employs for agreed-upon payments. This includes, for example, crop dusters, custom harvesters, grain haulers, and any other such services.

Farm operator means an individual or legal entity other than the owner, lessee, or sublessee that performs any portion of the farming operation. This includes farm managers, but does not include

spouses, minor children, employees for whom the employer pays social security taxes, or custom service providers.

We or *us* means the Bureau of Reclamation.

You means a farm operator.

§ 428.4. Who must submit forms under this part.

(a) You must submit RRA forms to districts annually as specified in § 428.6 if:

(1) You provide services to more than 960 nonexempt acres westwide, held by a single trust or legal entity or any combination of trusts and legal entities; or

(2) You are the ultimate parent legal entity of a wholly owned subsidiary or of a series of wholly owned subsidiaries that provide services in total to more than 960 nonexempt acres westwide, held by a single trust or legal entity or any combination of trusts and legal entities.

(b) Anyone who is the indirect owner of a legal entity that is a farm operator meeting the criteria of paragraph (a) of this section must submit forms to us annually, if any of the land to which services are being provided by that legal entity is land that the part owner formerly owned as excess land and sold or transferred at an approved price.

(c) If you must submit RRA forms due to the requirements of this section, then you may not use a verification form for your annual submittal as provided for in § 426.18(l) of this chapter to meet the requirements of this section.

(d) If you must submit RRA forms solely due to the requirements of this section, then once you have met the requirement found in paragraph (a) of this section you need not submit another RRA form during the current water year, even if you experience a change to your farm operating arrangements. Specifically, the requirements of § 426.18(k)(1) of this chapter are not applicable.

§ 428.5 Required information.

(a) We will determine which forms you must use to submit the information required by this section.

(b) You must declare all nonexempt land to which you provide services westwide.

(c) You must give us other information about your compliance with Federal reclamation law, including but not limited to:

(1) Identifier information, such as your name, address, telephone number;

(2) If you are a legal entity, information concerning your organizational structure and part owners;

(3) Information about the land to which you provide services, such as a legal description, and the number of acres;

(4) Information about whether you formerly owned, as ineligible excess land or under recordable contract, the land to which you are providing services;

(5) Information about the services you provide, such as what they are, who decides when they are needed, and how much control you have over the daily operation of the land;

(6) If you provide different services to different land parcels, a list of services that you provide to each parcel;

(7) Whether you can use your agreement with a landholder as collateral in any loan;

(8) Whether you can sue or be sued in the name of the landholding; and

(9) Whether you are authorized to apply for any Federal assistance from the United States Department of Agriculture in the name of the landholding.

§ 428.6 Where to submit required forms and information.

You must submit the appropriate completed RRA form(s) to each district westwide that is subject to the acreage limitation provisions and in which you provide services.

§ 428.7 What happens if a farm operator does not submit required forms.

(a) If you do not submit required RRA form(s) in any water year, then:

(1) The district must not deliver irrigation water before you submit the required RRA form(s); and

(2) You, the trustee, or the landholder(s) who holds the land (including to whom the land held in trust is attributed) must not accept delivery of irrigation water before you submit the required RRA form(s).

(b) After you submit all required RRA forms to the district, we will restore eligibility.

(c) If a district delivers irrigation water to land that is ineligible because you did not submit RRA forms as required by this part, we will assess administrative costs against the district as specified in § 426.20(e) of this chapter. We will determine these costs in the same manner used to determine costs for landholders under §§ 426.20(a)(1) through (3) of this chapter.

§ 428.8 What can happen if a farm operator makes false statements on the required forms.

If you make a false statement on the required RRA form(s), Reclamation can prosecute you under the following statement:

> Under the provisions of 18 U.S.C. 1001, it is a crime punishable by 5 years imprisonment or a fine of up to $10,000, or both, for any person knowingly and willfully to submit or cause to be submitted to any agency of the United States any false or fraudulent statement(s) as to any matter within the agency's jurisdiction. False statements by the farm operator will also result in loss of eligibility. Eligibility can only be regained upon the approval of the Commissioner.

§ 428.9 Farm operators who are former owners of excess land.

(a) Land held in trust or by a legal entity may not receive irrigation water if:

(1) You owned the land when the land was excess, whether or not under recordable contract;

(2) You sold or transferred the land at a price approved by Reclamation; and

(3) You are the direct or indirect farm operator of that land.

(b) This section does not apply if:

(1) The formerly excess land becomes exempt from the acreage limitations of Federal reclamation law; or

(2) The full-cost rate is paid for any irrigation water delivered to your formerly excess land that is otherwise eligible to receive irrigation water. If you are a part owner of a legal entity that is the direct or indirect farm operator of the land in question, then the full-cost rate will apply to the proportional share of the land that reflects your interest in that legal entity.

§ 428.10 Districts' responsibilities concerning certain formerly excess land.

Districts must not make irrigation water available to formerly excess land that meets the criteria under § 428.9(a), unless an exception provided in § 428.9(b) applies.

§ 428.11 Effective date.

(a) All provisions of this part apply on January 1, 2001, except:

(1) For those districts whose 2001 water year commences prior to January 1, 2001, the applicability date of §§ 428.1 through 428.8 is October 1, 2000.

(b) On January 1, 2001, this part applies to all farm operating arrangements between farm operators and trusts or legal entities that:

(1) Are then in effect; or

(2) Are initiated on, or after, January 1, 2001.

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