

§ 420.24

18 CFR Ch. III (4-1-23 Edition)

(ii) Physical capability as required for such taking; or

(iii) The total allocable flow without augmentation by the Commission, using a seven-day, ten-year, low-flow criterion measured at the point of withdrawal or diversion.

(2) *Physical capability* means the capacity of pumps, water lines and appurtenances installed and operable, determined according to sound engineering principles. The physical capability specifically includes plant facilities actually using water, but excludes facilities which may have been installed in anticipation of future plant expansion not yet realized.

(c) Whenever adequate records of legal entitlement for agricultural irrigation purposes are not available to the Commission, such legal entitlement shall be measured by the maximum number of acres under irrigation by the water user at any time during the year ending March 31, 1971, allowing one acre-foot of surface water annually per acre irrigated.

(d) Notwithstanding the provisions of paragraphs (a), (b) and (c) of this section, there shall be no charge for water made available from storage where:

(1) The cost of the storage facility has or will be otherwise paid for by the user,

(2) Such storage controls a drainage area, and

(3) The use does not exceed the yield of such storage without augmentation from other surface water of the basin.

§ 420.24 Effective date of rates.

Rates and charges shall apply to all water users not exempt hereunder on and after the date of the first impoundment of water for water supply purposes at the Beltzville Reservoir (February 8, 1971), or the effective date hereof, whichever is later.

ENTITLEMENT; MEASUREMENT; BILLING

§ 420.31 Certificate of entitlement.

(a) The Executive Director will issue to each known water user a certificate of entitlement within 30 days after the effective date of these regulations subject to the provisions of paragraph (b). In addition, any other water user may apply for a certificate of entitlement

at any time. A preliminary notice of entitlement shall be issued to each user. Such entitlement shall become final and take effect, unless the user shall file with the Commission, within 20 days after the service of the notice of entitlement, a request for hearing by the Commission. At such hearing the water user may show cause why the proposed entitlement shall not take effect.

(b) The Executive Director shall schedule a hearing to be held not less than ten days after receipt of a request for a hearing by the Commission. Hearings shall be conducted and the results thereof subject to review in accordance with Article 5 of the Commission's rules of practice and procedure.

(c) A final certificate of entitlement will be issued either upon expiration of the time to request a hearing, where there has been no request, or in accordance with the determination of a hearing where one is held.

(d) *Limitations.* (1) A certificate of entitlement is granted to a specific user for water withdrawals or diversions at a specific facility in the amount of the Legal Entitlement as defined in § 420.23(b).

(2) A certificate of entitlement shall not be applied, transferred or modified to apply to a facility other than the facility initially specified in the certificate.

(3) A certificate of entitlement may not be transferred from the certificate holder to another user, except as provided in the exceptions set forth in paragraph (f) of this section.

(4) A certificate of entitlement does not exempt the certificate holder from paying water supply charges for any portion of water withdrawals or diversions used outside the facility specified in the certificate and any additional service area to which the facility supplied water as of October 27, 1961 or at the facility specified in the certificate by a user other than the certificate holder. For purposes of this paragraph (d)(4), a certificate holder claiming an exemption from charges for water supplied within a service area shall submit proof satisfactory to the Commission identifying the facility's service area as of October 27, 1961. In the absence of proof of the service area as of October

27, 1961, the service area defined in the Commission docket, if any, for the facility in effect at the time the certificate was issued shall be deemed to be the facility's service area. In the absence of proof of a service area, the certificate shall only exempt the certificate holder from paying water supply charges for water used at the facility.

(e) *Termination of certificate.* (1) A certificate of entitlement terminates pursuant to this section and without the need for Commission action if at least one of the following occurs:

(i) The certificate holder dissolves or otherwise ceases to exist;

(ii) The certificate holder ceases the withdrawals or diversions at the facility to which the certificate of entitlement applies, or abandons the intake, provided that a shutdown of the facility for maintenance or improvement, or a replacement of the intake, that is performed at the earliest practicable commercially reasonable time following commencement of the shutdown or replacement, shall not be deemed to be a cessation of withdrawal or diversion;

(iii) The certificate holder through contract, lease or other agreement ceases to be the user or public water system supplier of the water withdrawn or diverted at the facility; or

(iv) There is a change in the ownership or control of the facility. Once terminated, a certificate of entitlement may not be reinstated or reissued.

(2) A change in ownership or control of the facility includes, but is not limited to, any transaction, acquisition, merger or event (collectively "transaction") resulting in at least one of the following:

(i) A transfer of title to the facility;

(ii) A person or entity or the shareholders or other owners of an entity becoming the beneficial owner, directly or indirectly, or acquiring alone or in concert the power or right to vote at least 20 percent of any class of ownership interest in a certificate holder or any of its parent entities, regardless of the tier in the corporate or entity structure at which the transaction occurs;

(iii) A change in ownership or control for purposes of any of the certificate

holder's or any of its parent corporations' employee agreements; or

(iv) A change of the de facto controlling interest in a certificate holder or any of its parent entities, regardless of the tier in the corporate or entity structure at which the change occurs.

(3) A change of the de facto controlling interest in an entity includes, but is not limited to, a change of the persons or entities with the ability or authority, expressed or reserved, to direct the management or policies of an entity and/or to take at least one of the following actions:

(i) Amend or change the entity's identity (*e.g.* joint venture agreement, unincorporated business status);

(ii) Appoint or remove at least 50% of the members of the Board of Directors or Trustees of a corporation, general partner of a partnership, or a similar member of the governing body of an entity;

(iii) Amend or change the by-laws, constitution, or other operating or management direction of the entity;

(iv) Control the sale of, use of or access to any or all of the entity's assets;

(v) Encumber the entity's assets by way of mortgage or other indebtedness;

(vi) Control any or all of the assets or other property of the entity upon the sale or dissolution of the entity;

(vii) Dissolve the entity;

(viii) Arrange for the sale or transfer of the entity to a new ownership or control;

(ix) Select or change the management of the entity or determine management compensation; or

(x) Set operating policies, financial policies or budgets.

(4) For purposes of applying paragraph (e)(3) of this section, consideration may be given to circumstances particular to the person or entity and certificate holder involved, including without limitation the ability of that person or entity to take actions in light of the number of shares in the certificate holder or its parent entities that are actively voted, the practice of any majority shareholder in exercising or refraining from exercising majority rights, and any agreements giving the person or entity the right to control votes of others.

(5) A series of transactions undertaken pursuant to a plan or that are otherwise related shall be considered a single transaction for purposes of this section. For purposes of calculating the twenty percent threshold in paragraph (e)(2)(ii) of this section, the securities, shares or other interests held immediately prior to the transaction shall be added to the securities, shares or other interests acquired in the transaction.

(f) *Exceptions*—(1) *Agricultural exception.* (i) Whenever ownership or possession of land in agricultural use is transferred, any certificate of entitlement with respect to such land shall be deemed to run with the land, if but only if within sixty days following the land transfer the new user demonstrates to the Executive Director that it will continue to use the water withdrawn or diverted for agricultural irrigation. Following any such timely demonstration, the Executive Director shall transfer the certificate of entitlement to the new user. The Executive Director may extend the sixty day period for good cause shown.

(ii) A certificate of entitlement that has been transferred pursuant to paragraph (f)(1)(i) of this section relieves the user of the obligation to pay water supply charges only with respect to the quantity of water in fact used by the new certificate holder for agricultural irrigation up to the Legal Entitlement specified in the certificate, and not with respect to the quantity of water used for any other purposes. The provisions of § 420.43 shall apply to water uses outside the scope of the certificate of entitlement.

(iii) A certificate of entitlement that has been transferred pursuant to paragraph (f)(1)(i) of this section terminates pursuant to this paragraph (f)(1) and without the need for Commission action if and when the certificate holder ceases using the water for agricultural irrigation, provided that if the cessation occurs in conjunction with a transfer of ownership or possession of the land in agricultural use, the certificate of entitlement may be transferred to a new user pursuant to paragraph (f)(1)(i). Once terminated, a certificate of entitlement may not be reinstated or reissued.

(2) *Corporate reorganization exceptions.* The following provisions apply where a corporate parent directly or indirectly owning 100% of each class of shares of all of its subsidiary corporations decides to reorganize those subsidiary corporations without affecting the corporate parent's 100% ownership interest.

(i) Whenever a corporate reorganization consists solely of a change of the name, identity, internal corporate structure, or place of organization of a corporate certificate holder or any of its parent corporations, the Executive Director may reissue a certificate of entitlement in the name of the new owner of the facility, provided that the reorganization does not affect ownership and/or control by the certificate holder's corporate family of companies within the meaning of paragraphs (e)(2) through (5) of this section and does not alter the ultimate corporate parent's 100% ownership interest.

(ii) A merger or other plan, transaction or series of transactions that effectuates a change of ownership or control within the meaning of paragraphs (e)(2) through (5) does not fall within the exemption of paragraph (f)(2)(i) of this section on the basis that a corporate reorganization constitutes part of the merger, plan, transaction or series of transactions.

[42 FR 13544, Mar. 11, 1977, as amended at 59 FR 64571, Dec. 15, 1994; 81 FR 35608, June 3, 2016]

§ 420.32 Measurement and billing of water taken.

(a) The quantity and volume of waters used by each person shall be determined by meters, or other methods approved by the Commission, installed, maintained and read by or on behalf of the taker. Meters or other methods of measurement shall be subject to approval and inspection by the Commission as to installation, maintenance and reading.

(b) Each user of surface water who is not exceeding the quantity specified in his "certificate of entitlement" shall annually, on or before January 31, file with the Commission, on a form to be prescribed by the Executive Director, a report of the user's physical capability, as defined, permit limitations, and the