

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE
STATE OF OREGON**

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-10978, Jackson County)	PROPOSING APPROVAL OF A
)	CHANGE IN PLACE OF USE AND
)	CHARACTER OF USE AND PARTIAL
)	CANCELLATION OF A WATER
)	RIGHT

Authority

ORS 540.505 to 540.580 establishes the process in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

Kellogg Kin Inc.
2312 Sardine Creek Rd.
Gold Hill, OR 97525

Agent

Herb Farber, CWRE
Farber Surveying
PO Box 5286
Central Point, OR 97502

Findings of Fact

Background

1. On November 17, 2009, Kellogg Kin Inc., filed an application to change the place of use and character of use under Certificate 16201 to instream use. The Department assigned the application number T-10978.
2. On May 10, 2010, Herb Farber, agent for the applicant, submitted a revised application map and updated application materials in response to a deficiency letter sent from the Department on April 12, 2010.
3. On November 15, 2010, Herb Farber, agent for the applicant, submitted an affidavit to cancel the placer mining portion of Certificate 16201.

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.
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4. The portion of the right to be transferred is as follows:

Certificate: 16201 in the name of James U. Smith (confirmed by Rogue River Final Decree)

Use: Irrigation of 14.5 acres

Priority Date: 1859 and 1885

Rate: 0.25 CFS, being 0.17 Cubic Foot per Second (CFS) for Irrigation of 10.0 acres under the 1859 priority date and 0.08 CFS for Irrigation of 4.5 acres under the 1885 priority date

Source: Sardine Creek, tributary to the Rogue River

Authorized Point of Diversion: Not specified in the Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tract	Acres
36 S	3 W	WM	4	NW SW	1	9.0
36 S	3 W	WM	4	SW SW	1	5.5

5. Certificate 16201 does not specify the location of the authorized point of diversion. However, information submitted with the application identifies the point of diversion located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	3 W	WM	33	SW NW	360 FEET NORTH AND 490 FEET EAST FROM THE WEST ¼ CORNER OF SECTION 33

6. Certificate 16201 does not specify the authorized irrigation season. However, the irrigation season established by the Rogue River Decree is April 1 to November 1.
7. Certificate 16201 does not specify a duty limit per acre nor is one specified by Decree. Historically the applicant has diverted the full quantity allowed by the water right.
8. Application T-10978 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
9. Application T-10978 proposes to change the place of use of the right to create an instream reach from the point of diversion described in Finding of Fact #5 to the lower boundary of the place of use, 7800 feet downstream, located on the south line of the NE SE of Section 5, T36S, R3W, W.M.
10. The applicant proposes the quantities water to be transferred instream to be protected as follows:

Period	Priority Date	Rate (cfs)	Volume (acre-feet)
March 1 through October 31	1859	0.17	82.47
	1885	0.77	37.11
Total		0.94	119.58

11. The applicant proposes that any instream water right established as a result of this instream transfer to be additive to existing instream water rights for the same reach established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process). The applicant also proposes that any instream water right established as a result of this instream transfer replace a portion of any existing instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process), with an earlier priority date.
12. It does not appear that the applicant provided notification of the proposed action to the Jackson County prior to the transfer being submitted. However, notice was provided by the Department to Jackson County upon receipt of Transfer Application T-10978.
13. Notice of the application for transfer was published on November 24, 2009, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
14. On November 24, 2010, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10978 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of December 23, 2010, for the applicant to respond. The applicants requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

Instream Transfer Review Criteria (OAR 690-77-0075 and 690-380-4010)

15. Water has been used within the last five years according to the terms and conditions of the right, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
16. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Application T-10978.
17. The instream use requested by the applicant, as described in Finding of Fact #10, requires modification. The instream period requested is longer than the decreed irrigation season, being April 1 through October 31. In addition, the quantity of water requested under the 1885 priority date (0.77 CFS) is higher than the portion of right available for transfer as described in Finding of Fact #4.
18. Based on Finding of Fact #17, the instream use has been modified from the original request and the quantities to be transferred and protected instream are as follows:

Priority Date	Instream Rate	Instream Volume	Instream Period
1859	0.17 CFS	72.16 AF	April 1 through October 31
1885	0.08 CFS	33.96 AF	
Totals	0.25 CFS	106.12 AF	

19. The proposed change, as modified, would not result in enlargement of the right.

20. The proposed change, as modified, would not result in injury to other water rights.
21. The amount and timing of the proposed instream flow are allowable within the limits and use of the original water right.
22. The protection of flows within the proposed reach is appropriate, considering:
 - a) The instream water right begins at the recorded point of diversion;
 - b) The location of confluences with other streams downstream of the point of diversion;
 - c) There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - d) Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
23. There do not appear to be any existing instream water rights for the same reach as that proposed for the new instream water right. There is an existing instream water right, Certificate 59824, to be maintained in Sardine Creek at the mouth, for the purposes of aquatic life and pollution abatement. This instream use is not met in certain months of the year.
24. By replacing a portion of any instream right established in the future under the state agency application process, the instream right will provide protection for streamflows previously identified as necessary for aquatic life under an earlier priority date, unless otherwise identified in a subsequent order establishing a new instream water right under the state agency instream application process.
25. In addition, by adding any instream water rights established in the future under the instream transfer or allocation of conserved water process for the same location, the instream right established by this instream transfer will provide protection for additional streamflows necessary for aquatic life, unless otherwise identified in a subsequent order establishing a new instream water right under those statutes.
26. The total monthly quantities of water to be protected under the proposed instream right in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Partial Cancellation of a Water Right

27. On November 15, 2010, an affidavit certifying that a portion of a water right has been abandoned and requesting cancellation of the right was received from the applicant.
28. ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or portion thereof, has been abandoned and to voluntarily request that it be cancelled.

29. The portion of the right to be cancelled is described as follows:

Certificate: 16201 in the name of JAMES U. SMITH (confirmed by Rogue River Final Decree)

Use: Placer Mining

Priority Date: 1885

Rate: 5.0 CFS

Period of Use: November 1 to May 1

Source: SARDINE CREEK, tributary to the ROGUE RIVER

Authorized Point of Diversion: Not specified in the Certificate

Authorized Place of Use to be Cancelled:

Twp	Rng	Mer	Sec	Q-Q	Tract
36 S	3 W	WM	4	SW NW	2

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-10978 appear to be consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075 and the abandoned portion of the right should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved and the abandoned portion of the right will be cancelled.

If application T-10978 is approved, the final order will include the following:

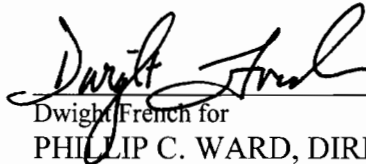
- The changes in character of use and place of use to instream use proposed in application T-10978 are approved. The portion of the right that has been abandoned is cancelled.*
- Water right certificate 16201 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer and cancellation.*
- The instream water right shall provide for the protection of streamflows from the point of diversion described in Finding of Fact #5 to the lower boundary of the place of use, 7800 feet downstream, located on the south line of the NE SE of Section 5, T36S, R3W, W.M.*
- The quantities of water to be protected under the instream water right are:*

Priority Date	Instream Rate	Instream Volume	Instream Period
1859	0.17 CFS	72.16 AF	April 1 through October 31
1885	0.08 CFS	33.96 AF	
Totals	0.25 CFS	106.12 AF	

- Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.*

6. *The instream right established by this transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470.*
7. *The right to the use of the water is restricted to beneficial use at the place of use described, and is subject to all other conditions and limitations contained in Certificate 16201 and any related decree.*
8. *The former place of use of the transferred water shall no longer receive water as part of this right.*

Dated at Salem, Oregon this 26 day of January, 2011.


Dwight French for
PHILIP C. WARD, DIRECTOR

Protests should be addressed to the attention of Field Services Division, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.

This Preliminary Determination was prepared by Laura Wilke. If you have questions about the information in this document, you may reach me at 503-986-0884 or Laura.K.Wilke@wrdd.state.or.us.