



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
HELENA REGULATORY OFFICE
10 WEST 15TH STREET, SUITE 2200
HELENA MT 59626

November 12, 2008

Helena Regulatory Office
Phone: (406) 441-1375
Fax: (406) 441-1380

RE: Jurisdictional Determination, Poorman Alternative
Montanore Project
Corps File No. 2005-90790

Mr. Eric Klepfer
Klepfer Mining Service LLC
13058 Sherwood Court
Hayden Lake, Idaho 83835

Dear Mr. Klepfer:

As requested in your letter of March 21, 2008 to Chandler Peter, the Corps of Engineers has prepared a preliminary jurisdictional determination (JD) for the Poorman Alternative site, which is a written indication that waterways and wetlands within your project area may be waters of the United States. USACE will treat these waters as jurisdictional waters of the U.S. for the purposes of determining project impacts and compensatory mitigation requirements. A copy of the preliminary JD is enclosed with this letter.

You have the option of requesting an approved jurisdictional determination for any or all of the waters listed in the preliminary JD. An approved JD is an official determination regarding the presence or absence of Waters of the U.S. Completion of an approved JD may require coordination with the U.S. Environmental Protection Agency. An approved JD may be appealed.

If you find the enclosed preliminary JD satisfactory, please sign and return it to the letterhead address above.

An approved JD is mandatory for isolated waters. We will prepare a draft approved JD for all isolated waters on the Poorman site and provide it to EPA for their review and concurrence. Upon receipt of their concurrence, or completion of an interagency elevation process, we will provide you a copy of the final approved JD.

All site numbers on the enclosed preliminary JD correspond to "WUS Number" presented in Table 2, page 10 of the October 2007 report provided by Geomatrix entitled "Survey of Wetlands, Sensitive Plants, and Amphibian/Reptiles in Alternative Sites for Tailing Impoundment, Plant Facility, and Mine Tunnel Montanore Mine Project." Please regard the latitude/longitude listings as approximate. They were generated by visually transferring mapped

waters shown on Exhibit 1 of the referenced report to the USGS Cable Mountain quadrangle. Lat/long determinations are not provided for linear features. I added two waters to this list that are not on the Geomatrix report. I have enclosed a USGS base map showing the location of these waters. Water 36 is a small scrub/shrub wetland just north of WUS 4. Joe Elliot, representing Geomatrix, also observed this wetland when we were conducting a field review of mapped sites on August 21, 2008. I request that you ask one of your consultants to determine the footprint of this wetland and the other new waters noted on the enclosed map. Water 37 is a small wetland we noted on August 21 when we were following the drainage channel below WUS 1. We were tracing that channel to determine if WUS 1 had an outlet that eventually connected to a jurisdictional water. Water 37 is a small emergent palustrine wetland that formed where the channel grade flattens out for a short distance. The other new water noted is water 35, which I believe is just within the north boundary of the Poorman site. Water 35 is a small, isolated emergent palustrine wetland that is along the west side of the road 6212, the Little Cherry Creek Loop road.

There are four waters mapped as isolated wetlands in the October 2007 Geomatrix report that I have included in this preliminary JD. They are WUS 1, 2, 11 and 30 as listed in Table 2 of the Geomatrix report. In all cases, these wetlands have outlet channels that connect the wetland in question to a water of the US. The course of the outlet channels were field verified on either 21 August 2008 or 29/30 October 2008. The outlet channels themselves are not jurisdictional, as they do not have a continuous ordinary high water mark or a continuum of wetlands. As noted on page 11 of the June 5, 2007 Joint Corps/EPA guidance issued in response to the Supreme Court's decision in the *Rapanos/Carabell v. United States* decision, non-jurisdictional waterways can serve to establish adjacency to traditional navigable waters.

WUS 2 is listed as an emergent wetland in the 2007 Geomatrix report. It should be listed as a forested – shrub/scrub wetland. Another clarification I would like to make is the Legend in Exhibit 1 of that report should show that channels 3a, 5a, and 10a are jurisdictional. There is currently a parenthetical insert indicating they are non-jurisdictional. Per conversations with Geomatrix staff, the parenthetical insert is a mistake.

Please call me at the phone number listed above if you have questions. You can also e-mail me at allan.e.steinle@usace.army.mil.

Sincerely,



Allan Steinle
Montana Program Manager

Encl:
Preliminary JD
Map of new waters

CF w/encl:

Geomatrix Consultants, Inc.
1824 N. Last Chance Gulch
Helena, MT 59601

Ms. Bobbie Lacklen
Kootenai National Forest
31374 U.S. Highway 2
Libby, MT 59923

Mr. Chandler Peter
CENWO-OD-R-CO

Ms. Cheryl Goldsberry
CENWO-OD-R

PRELIMINARY JURISDICTIONAL DETERMINATION FORM

This preliminary JD finds that there “*may be*” waters of the United States on the subject project site, and identifies all aquatic features on the site that could be affected by the proposed activity, based on the following information:

A. Report Completion Date for Preliminary Jurisdictional Determination (JD): 5 November 2008

B. Name and Address of Person Requesting Preliminary JD:

Eric Klepfer
Klepfer Mining Service LLC
13058 Sherwood Court
Hyden Lake, Idaho 83835

C. District Office, File Name, and Number: Omaha, Mines Management Inc, NWO-2005-90790-MTH

D. PROJECT LOCATION(S), BACKGROUND INFORMATION, AND WATERS:

State: MT
City: Libby
County: Lincoln

Name of nearest waterbody: Depending on the location within the Poorman Alternative site, the nearest named water body is either Poorman Creek, Little Cherry Creek or Libby Creek

Identify amount of waters in the review area: Approximately 9.552 acres of wetlands and 0.727 acre of non-wetland waters, for a total of 10.279 acres of jurisdictional waters.

(Table 1 identifies the impacts). **Note: Site # corresponds to WUS Number in Table 2 on page 10 of the October 2007 Survey of Wetlands, Sensitive Plants,...etc produced by Geomatrix. Sites 36 and 37 were added to this report based on USACE site inspections.**

Name of any water bodies on the site that have been identified as Section 10 waters:

Tidal:
Non-Tidal:

Table 1 - Waters of the U.S.

Site #	Latitude	Longitude	Stream Flow	Cowardin Class	Estimated amount of aquatic resources in review area	Estimated amount of aquatic resource impact	Class of aquatic resource
1	48.15944	-115.54784		Palustrine emergent	1.475 acre	1.475 acre	Non-tidal
2	48.15851	-115.54179		Forested & shrub/scrub	0.460 acre	0.460 acre	Non-tidal

3	48.16159	-115.53889	Perennial	Riverine	0.393	0.393	Non-tidal
3a			Intermittent		0.140	0.140	Non-tidal
4	48.16379	-115.53427		Palustrine emergent & shrub /scrub	0.277	0.277	Non-tidal
5	48.16491	-115.53567	Perennial	Riverine	0.400	0.400	Non-tidal
5a			Intermittent		0.140	0.140	Non-tidal
10	48.16603	-115.53911	Perennial	Riverine	0.720	0.720	Non-tidal
10a			Intermittent		0.220	0.220	Non-tidal
11	48.15763	-115.53288		Shrub/scrub	0.026	0.026	non-tidal
14	48.15450	-115.53948	Perennial	Riverine	1.254	1.254	Non-tidal
15	48.15382	-115.54322		Forested & Shrub/scrub	4.445	4.445	Non-tidal
30	48.15499	-115.53985		Palustrine emergent	0.102	0.102	Non-tidal
34	48.14907	-115.55715	Intermittent		0.227	0.227	Non-tidal
36	48.16408	-115.53350		Shrub/scrub			Non-tidal
37	48.15885	-115.54184		Palustrine emergent			Non-tidal

E. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- Office (Desk) Determination. Date: 5 November 2008
- Field Determination. Date(s): 21 August 2008, 29/30 October 2008

F. SUPPORTING DATA:

Data reviewed for preliminary JD (check all that apply - checked items should be included in case file and, where checked and requested, appropriately reference sources below):

- Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:Geomatrix.
- Data sheets prepared/submitted by or on behalf of the applicant/consultant.
 - Office concurs with data sheets/delineation report.
 - Office does not concur with data sheets/delineation report.

Note: see cover letter for additions / changes to the Geomatrix report.

- Data sheets prepared by the Corps:
- Corps navigable waters' study:
- U.S. Geological Survey Hydrologic Atlas:
 - USGS NHD data.

- USGS 8 and 12 digit HUC maps.
- U.S. Geological Survey map(s). Cite quad name: Cable Mountain.
- USDA Natural Resources Conservation Service Soil Survey. Citation: .
- National wetlands inventory map(s). Cite name: .
- State/Local wetland inventory map(s):
- FEMA/FIRM maps:
- 100-year Floodplain Elevation is: (National Geodetic Vertical Datum of 1929)
- Photographs: Aerial (Name & Date):
or Other (Name & Date):
- Previous determination(s). File no. and date of response letter:
- Other information (please specify):

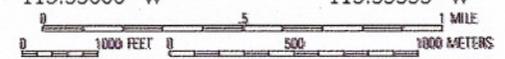
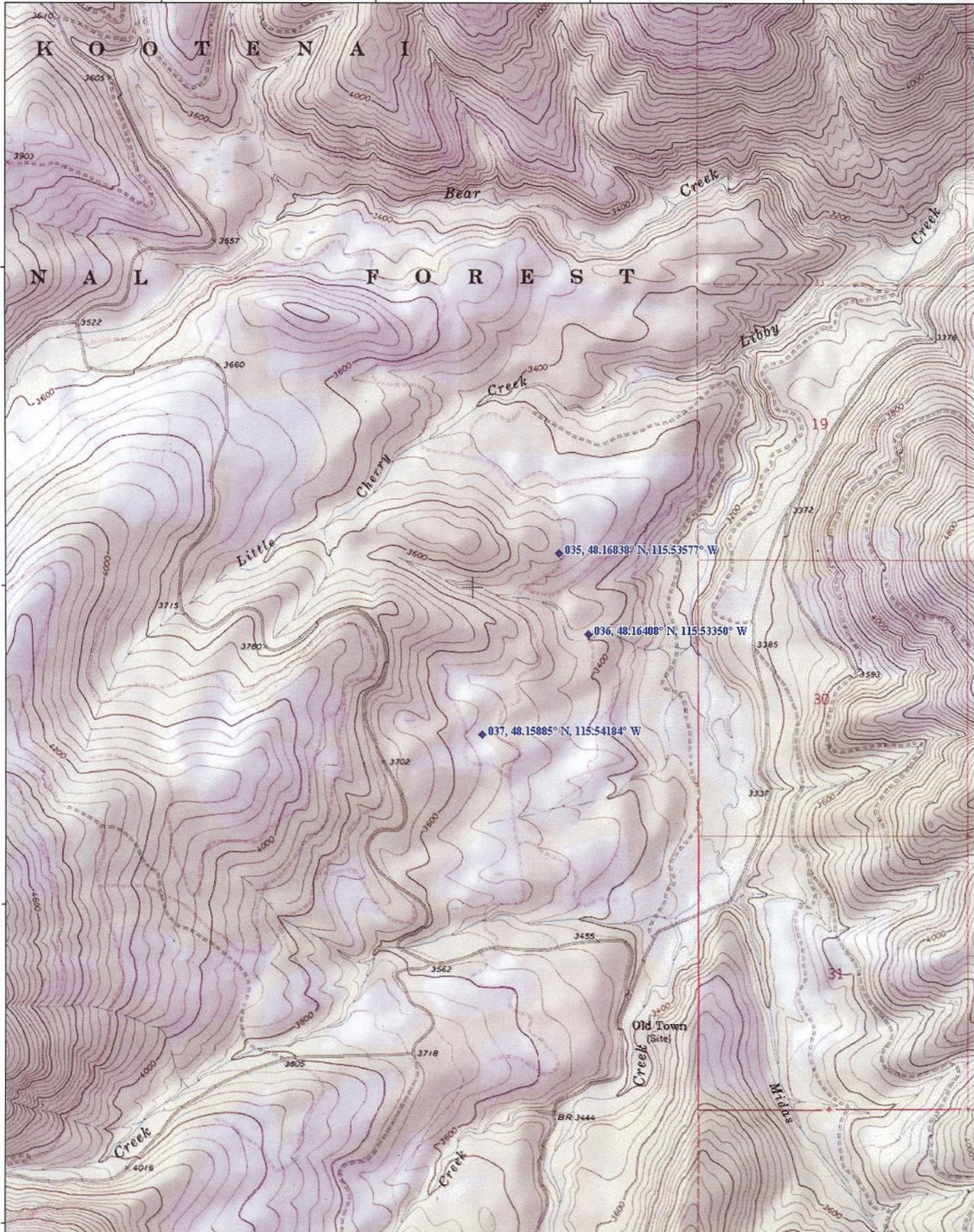
IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.

Allan Steiner 12 Nov 08
 Signature and date of
 Regulatory Project Manager
 (REQUIRED)

 Signature and date of
 person requesting preliminary JD
 (REQUIRED, unless obtaining the signature is
 impracticable)

G. EXPLANATION OF PRELIMINARY AND APPROVED JURISDICTIONAL DETERMINATIONS:

1. The Corps of Engineers believes that there may be jurisdictional waters of the United States on the subject site, and the permit applicant or other affected party who requested this preliminary JD is hereby advised of his or her option to request and obtain an approved jurisdictional determination (JD) for that site. Nevertheless, the permit applicant or other person who requested this preliminary JD has declined to exercise the option to obtain an approved JD in this instance and at this time.
2. In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "pre-construction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an approved JD for the activity, the permit applicant is hereby made aware of the following: (1) the permit applicant has elected to seek a permit authorization based on a preliminary JD, which does not make an official determination of jurisdictional waters; (2) that the applicant has the option to request an approved JD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an approved JD could possibly result in less compensatory mitigation being required or different special conditions; (3) that the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) that the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) that undertaking any activity in reliance upon the subject permit authorization without requesting an approved JD constitutes the applicant's acceptance of the use of the preliminary JD, but that either form of JD will be processed as soon as is practicable; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary JD constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an approved JD or a preliminary JD, that JD will be processed as soon as is practicable. Further, an approved JD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331, and that in any administrative appeal, jurisdictional issues can be raised (see 33 C.F.R. 331.5(a)(2)). If, during that administrative appeal, it becomes necessary to make an official determination whether CWA jurisdiction exists over a site, or to provide an official delineation of jurisdictional waters on the site, the Corps will provide an approved JD to accomplish that result, as soon as is practicable.





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Montana Program Manager

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Preliminary JD
Map of new waters