

POST DECREE WATER COURT ASSISTANCE  
STANDARD OPERATING PROCEDURES  
248 ORDERS



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*MT Department of Natural Resources & Conservation  
Water Resources Division  
Updated January 2024*

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# POST DECREE WATER COURT ASSISTANCE

## PURPOSE

As provided in §85-2-243, MCA, the Water Court may at any time direct DNRC to provide information and assistance, when required to adjudicate claims of existing rights. This includes conducting field investigations, assisting with the enforcement of water court decrees, and assisting with issue remark resolution. This document will outline the roles and responsibilities of the Water Court, DNRC, and the claimant(s). It will also define the exceptions of the Water Court and DNRC. There are different kinds of Post Decree assistance that DNRC provides to the Water Court. This SOP is specific to 248 Orders.

## TABLE OF CONTENTS

<u>POST DECREE WATER COURT ASSISTANCE</u>	<u>2</u>
PURPOSE	2
<u>I. INTRODUCTION</u>	<u>4</u>
<u>II. ROLES AND RESPONSIBILITIES</u>	<u>5</u>
<u>III. WATER COURT EXPECTATIONS</u>	<u>6</u>
OVERVIEW – WATER COURT	6
WATER COURT PROCEDURES – WATER COURT	9
<u>IV. DEPARTMENT EXPECTATIONS</u>	<u>13</u>
PROCEDURES OVERVIEW	13
TOOLS AND RESOURCES – DEPARTMENT	15
<u>V. DEPARTMENT INITIAL REVIEW</u>	<u>17</u>
248 ORDER DISTRIBUTION AND STAFF ASSIGNMENTS	17
<u>VI. DEPARTMENT AND CLAIMANT</u>	<u>19</u>
MEETING PROCESS	19
<u>VII. DEPARTMENT MEMORANDUM &amp; DOCUMENTATION</u>	<u>21</u>

MEMORANDUM ORGANIZATION	21
<u>VIII. POST-MEMORANDUM PROCESSES</u>	<u>26</u>
MEMO PROCESS	26

# I. INTRODUCTION

On July 13, 1989, the Montana Supreme Court issued an order amending the Water Right Claim Examination Rules ([W.R.C.E.R.](#)). Based on the proposed changes submitted by the Water Court and DNRC on May 8, 1989. The purposed changes are for rules since their adoption on July 15, 1987, focused on areas that are recognized as unclear. Activities that are minimally productive, and limits on DNRC's activities were not adequately defined. The amendments were to increase the efficiency, and the pace of examining claims. The effective date for implementing the amendments was September 1, 1989. On December 18, 1990, the Montana Supreme Court issued a second order amending the Water Right Claim Examination Rules with an effective date of January 15, 1991.

The most significant revisions occurred in the proposed rules submitted to the Supreme Court on December 30, 2004. The Water Court has a set of rules called Water Right Adjudication Rules and DRNC has its own set called Rules for Claim Examination can be found here ([W.R.ADJ.R.](#)). The proposed rules specify the practice and procedures by which the court reviews statements of claims on its initiative (also called the court's "on motion" policy). How the Water Court reviews settlement documents and the court's use of DNRC in the post-decree evaluation of claims or settlement documents.

"248 Orders" are orders sent by the Water Court to parties in a case and to the DNRC, to resolve issue remarks on decreed claims. The Orders are named based on the statute number that dictates the process, Section [85-2-248](#), MCA. Subsection 5 of this statute specifically addresses the process that dictates how the court orders claimants to confer with DNRC. Based on their discussions, this subsection specifies the documentation that DNRC and the claimant are to provide to the court. In addition, it specifies the process when no resolution is reached.

## II. ROLES AND RESPONSIBILITIES

### Water Court

The Montana Water Court has a statutory obligation and the exclusive authority to adjudicate claims of existing water rights. If not otherwise resolved by the objection process, the Water Court shall review, resolve, and remove all issue remarks appearing on the abstracts of any claim. While the Water Court may be able to resolve an issue remark based on information in the claim file, some issue remark resolution might require the involvement of the DNRC Water Resource Specialists. The Court will issue a 248 Order directing the claimant(s) to meet with the DNRC in an attempt to resolve the issue remarks on their claims.

### Department

Rule 1(b) of the W.R.C.E.R states, in part: The water right claim examination rules describe how the DNRC gathers data and facts pertinent to the claims of existing water rights. The water court determines the necessity and scope of any preliminary department examination as set out in these rules, but in no way influences the results of the directed examination. During the 248 Order process, DNRC assists claimant(s) with gathering the evidence required to resolve issue remarks and file the proper documentation but does not provide legal advice. DNRC also writes and files its recommendation regarding whether the issue remarks on the claims have been resolved. DNRC's recommendation should include the reasoning and clear analysis of the evidence behind its recommendation of whether the issue remarks are resolved.

### Claimant

It is the responsibility of the claimant(s) to initiate contact with DNRC on all 248 Orders. Claimant(s) are also expected to participate in discussions with DNRC. DNRC can assist the public in creating maps, searching for historical documents, and/or providing the claimant(s) with proper documentation templates. It is the claimant(s) responsibility to provide the new information and fill out the supporting documentation. It is not the claimant(s) responsibility to draft or review department recommendations. The Water Court will provide the claimant(s) with an opportunity to respond to any recommendation made by DNRC. It is the claimant(s) responsibility to review DNRC's recommendations and reply to the Water Court promptly if they disagree.

# III. WATER COURT EXPECTATIONS

## OVERVIEW – WATER COURT

When Water Masters review the documentation filed by DNRC in response to a 248 Order, they are looking for:

- A brief synopsis of what happened and what resulted in the discussion with the claimant. For example, what issue remarks were discussed, what information was provided to DNRC by the claimant, and what DNRC resources were reviewed.
- A recommendation from the DNRC on what should be done with the issue remark(s) in question. The Water Court is bound by department recommendations, but they need one to proceed with the resolution. DNRC should always make a recommendation.
- A brief explanation about why that recommendation is being made, for what evidence is there to support the recommendation, and what is the reasoning behind the recommendation (all evidence should be Pre 1973 evidence unless the issue is abandonment which may include pre & post-1973 evidence).
- Does the claimant agree with the DNRC recommendation, and has the claimant indicated agreement in writing? If you're not sure of the claimant's position, state that. Having claimants sign or initial documentation used by DNRC in the recommendation is encouraged.
- Recommendations need supporting evidence and information. Attachments can add clarity to complicated or numerous recommendations:
  - All supporting documents discussed in the memorandum.
  - Edited abstracts that reflect DNRC's recommendations when applicable are always appreciated.
  - Maps identifying proposed changes/modifications to the place of use, point of diversion, source, etc.
    - Does the claimant(s) agree with the DNRC recommendation, and has the claimant(s) indicated agreement in writing? If you're not sure of the claimant(s)'s position, state that. Having the Claimant(s) sign or initial documentation used by DNRC in the recommendation is encouraged.

## Scope of a 248 Order – Water Court

Issue remarks are added during examination and reexamination by DNRC. These issue remarks

may be “formatted”, or they may be free text remarks for unique situations. Each remark is coded with a letter designation which identifies the category of the remark. Despite the category, an issue remark may encompass more than one element. The elements are assigned and put on the in the Objection List by the Water Masters. Water Masters look at the entire context of the text and the elements of both free text and standard format remarks when assigning the elements to the Objection List.

Example: The D5 could trigger “all elements” but if it’s the only issue remark, it can’t be used to change the place of use, period of diversion, etc.

Ultimately, both the Water Court and DNRC are bound by the limitation set by the elements identified on the Objection List once published. If inaccuracies and/or errors are discovered that are outside of the scope during the 248 Order process. It is the claimant(s) responsibility to review their claim during pre-decree claimant(s) contact, object to their claim during the objection period, or address issue remarks that were placed on the claim. It’s a party-driven process. Ultimately, if that means something is incorrect, it stays incorrect. It can be hard to swallow, but it’s a matter of balancing finality and accuracy. Issues arising from the limited scope of re-exam are no exception. DNRC can give basic assistance while meeting with the claimant(s), but if these issues are outside the scope of the orders, DNRC should be careful not to overstep our role.

#### Verified Motions to Amend Within the Scope of a 248 Order – Water Court

Motions to Amend are not required to resolve issue remarks. If the elements being modified, corrected, or adjusted are identified on the Objection List, the recommendation within the DNRC memorandum is not sufficient to resolve the issue without supporting documentation. Other claimant(s)-provided documents like affidavits or written statements are always a good idea and encouraged. Having claimant(s) sign or initial proposed abstracts with recommended changes is a good way to clearly communicate the claimant(s) intent. The Water Court will provide the claimant(s) a chance to respond via a filing deadline if they disagree with DNRC’s recommendations. Do **not** draft documents for the claimant(s). DNRC does not give legal advice and drafting documents for Claimant(s) could be considered the practice of law.

#### Verified Motions to Amend Outside the Scope of a 248 Order – Water Court

Situations may arise where a claimant(s) wishes to submit a Motion to Amend during the 248 Order process. Issues outside the scope of the 248 Order are not open to review and are out of the scope of this process. Often issues are directly related and likely should have been identified during the examination or reexamination process but weren’t. We cannot go back, and address missed issues. If an element is not identified on the Objection List, it is outside the scope. This may lead to odd- looking and incorrect water rights, but our hands are bound.

DNRC should not be accepting these Motions to Amend as part of any 248 Orders. Claimant(s) who wish to file a Motion to Amend outside of the scope of the order at hand need to send those documents directly to the Water Court themselves. DNRC is not a party in these issues or

Motions to Amend filings. DNRC should not weigh in or send the Water Court anything regarding these out- of-scope Motions to Amend. The Water Court will request assistance from DNRC if they need it.

A Motion to Amend must specify the requested amendment and the grounds for such amendment. Upon review, the Water Court will determine the notice required pursuant to [§ 85-2-233\(6\)](#), MCA, and issue an appropriate order. Claimant(s) have had opportunities to address elements of their claims during previous decree(s), claimant contact, and the objection period. Whether Motions to Amend will be considered by the Water Court is scrutinized more as we get closer to final decrees. The Water Court always errs on the side of requiring more notice to protect existing water rights. The DNRC can give basic assistance while meeting with the claimant(s), but if these issues are outside the scope of the orders, DNRC should be very careful not to overstep our role here.

Claimant(s) are welcome to contact the Water Court and ask any questions they have about the process.

#### Technical Experts & Maintaining that Relationship – Water Court

The Water Court relies on the technical expertise of the DNRC. It is the DNRC’s responsibility as the technical experts to make sure that we explain what the problem is, why it’s a problem, and the implications of the problem not being addressed. Keep all recommendations and discussions within the scope of the order but be thorough. Don’t assume something is implied or obvious.

If the evidence in the record is contradictory and lacks an explanation, it can be discredited by the claimant(s) and the court. Discrediting the technical expert has a great deal of weight on the value of the evidence provided by DNRC. If there are blatant errors in the evidence provided, it leaves all the evidence open to being suspected that has been supplied by that expert. Take care to be consistent and clear in your interactions.

#### Service Lists – Water Court

The service lists are put together by the Water Court while consolidating cases. DNRC does not have the authority to modify or selectively choose from the list. The list as presented must be respected. If an apparent error is found by DNRC, notify the Water Court, and wait for direction or clarification.

The Water Court will send copies of 248 Orders to all parties identified on the service list. Most often, the DNRC is included on the service list for 248 Orders on a “this Order only” basis. These are sent by both email (digitally) and mail (physically). Parties can proactively opt to be served digitally by contacting the Water Court, otherwise, everyone is served by mail.

All correspondence between DNRC and the Water Court should be in writing and sent to all parties on the service list per Rules of Civil Procedure See [MCA Title 25 Chapter 20](#) This



correspondence should be limited practice and directed through the proper channels. Both email (digitally) and mail (physically) are acceptable on a case-by-case basis determined by DNRC. Phone calls between the Water Court and DNRC should not discuss specifics on any particular 248 Order.

Correspondence between the claimant(s) and DNRC does not need to include the Water Court. These meetings can be held in person, over the phone, and potentially in written format. See the “DNRC-Claimant Meeting” section for more information.

### WATER COURT PROCEDURES – WATER COURT

After claims are consolidated into cases, issue remarks may be resolved through the objection process, using the information in the record, or information obtained from the claimant(s). If issue remarks are not resolved through other avenues, the Water Court may issue a 248-order seeking the DNRC’s assistance. The Water Court will only issue 248 orders if they need technical assistance from DNRC.

The first order is typically titled “ORDER SETTING DEADLINES PURSUANT TO SECTION 85-2-248, MCA”. Often, these orders establish three deadlines. Two for the claimant(s), and one for DNRC. The first deadline is for the claimant(s) to make initial contact with DNRC and schedule an appointment to confer with the appropriate department staff. The second deadline is for the claimant(s), with the assistance of DNRC, to prepare and submit any documents to DNRC that are needed to support the resolution of the issue remarks. The third deadline is for the DNRC employee who met with the claimant(s) to file a memorandum and all supporting documents to the Water Court. DNRC is required to send a copy of that memorandum to everyone on the service list.

Ultimately, the Water Master will write a “Master’s Report” outlining their findings. Claimant(s) are given time to review and file objections to the Master’s Reports. If no objections are received in the allotted time, a Water Judge issues an Order Adopting the Master’s Report and the case is closed.

Processes that occur but DNRC is not often involved in are issue remark resolution, settlement proceedings, mediation, and hearings. The Water Court promotes and will facilitate the resolution of objections and issue remarks through settlement or mediation. Department settlements and/or mediation are uncommon as the primary process that DNRC is engaged in. Any settlement reached by the parties is subject to review and approval by the Water Court. The Water Court, upon motion of a party or its initiative, may appoint a mediator to promote and facilitate settlement. The Water Court will issue an order commencing formal hearing proceedings if the parties fail to file settlement documents or issue remark resolution documents within a reasonable amount of time after the Water Court has issued a decree.

## Supporting Documents – Water Court

There are two primary sources of supporting documents: those supplied by the claimant(s) and those provided by the DNRC. Claimant(s)-supplied supporting documents could be affidavits, marked-up maps, historical records, photographs, and/or anything to help resolve the issues at hand. DNRC supporting documents can be anything discovered by researching our available resources.

All claimant(s) supporting documents should be submitted to the appropriate department staff responsible for writing the memorandum to the Water Court. DNRC should discuss all documents provided by the claimant(s) regardless of if DNRC agrees or disagrees with the documents. If the claimant(s) documents do not resolve the issues at hand, explain why not. If the documents do resolve the issues, explain how. DNRC should discuss everything submitted by the claimant(s) that is within the scope of the order.

Label and organize all attachments in a consistent order. For example, label each attachment: “Attachment 1” and reference it as such in your memorandum.

If a claimant(s) wishes to provide supporting documents after DNRC’s memorandum is filed, they should file it with the Water Court. If DNRC receives documents after deadlines, they need to be returned with a letter outlining why.

## Level of Evidence for 248 Orders -Water Court

Rule 19 of the W.R.Adj.R. states: A properly filed Statement of Claim for Existing Water Rights is prima facie proof of its content pursuant to § 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for the claimant(s) objecting to their own claims.

Prima facie means that the claims made during the filing of each Statement of Claim are accepted as correct until proven otherwise. A preponderance of the evidence means that the facts might not be 100 percent clear, but they are far more likely than not. DNRC’s examination and reexamination of all Statements of Claim were done under this level of review.

During post-decree assistance, DNRC should still be making recommendations based on a preponderance of the evidence sufficient to overcome the prima facie level of the claim(s) in question. Documenting is key in this process. The Water Court needs supporting documents and clear guidance from DNRC on why DNRC believes prima facie evidence has been proven incorrect or false.

Don’t assume the Water Court knows the implications of issue remarks added by DNRC.

Explain what “can’t determine means of diversion” or “point of diversion can’t be refined” means in terms of the validity of water right. Recommendations need to be explained and documented. Explicitly state and submit copies of all material you reviewed to reach your recommendation. The Water Court will use this to determine if an adequate level of evidence has been met to overcome the prima facie status of the claim. It is DNRC’s responsibility to effectively communicate our findings.

#### Legal vs Factual issue remarks – Water Court

“Factual Issues” means unclear information or issues with a statement of claim that are factual in nature, such as the number of acres irrigated, or quantity of water used. Such issues result in issue remarks being added to claims during an examination.

“Legal Issues” could mean unclear information of a legal nature discovered during the examination of a statement of claim. For example, if a decree-exceeded situation is present DNRC cannot recommend the resolution of the decree-exceeded issue. We can provide information from the decree itself.

#### Department Questions for the Water Court – Water Court

The Water Court is ok with an Adjudication Specialist contacting them with general questions. Department staff should NOT bring up specific cases when calling the Water Court. The Water Court cannot discuss any details of any case unless otherwise specified. They can however help with general questions or hypotheticals. A consistent dialogue between DNRC and the Water Court can be beneficial to all parties. Be aware of DNRC’s policy on water court contact before doing so.

#### Extensions Requests – Water Court

If department staff needs additional time, they should file a written request to the Water Court, copied to all parties on the service List, and titled “Request for Extension of Time to File Memorandum.” The request must include a brief explanation of why the extension is needed and how long DNRC needs to complete and file the memorandum. These extension requests should be submitted in writing to the Water Court at least five business days before the due date. The Water Court historically has been accepting and granting these requests, but do not take advantage. If you want 60 days, the Water Court prefers you just ask for 60 days instead of asking for 30 days two times.

If the claimant(s) needs an extension for their deadlines, they should request extensions in writing to everyone on the service list. If they need assistance, DNRC can give basic assistance, but DNRC should be very careful not to overstep our role here. Extensions to 248 Order Deadlines are granted by the Water Court. Questions from the claimant(s) on this topic should be directed to the Water Court.

## Corrected Orders – Water Court

Mistakes happen. DNRC can submit corrected 248 Orders if they notice a mistake or something changes. Call it a “Corrected Memo” and send a copy to everyone on the service list. Make sure it is very clear exactly what the corrections are or differences from the original memo. E-file the corrected memo as you did with the original and email the Water Master letting them know you’ve uploaded a corrected document in case they’ve already started working on the original Memorandum.

## Deadlines – Water Court

Deadlines are the date by which a document must be “filed” (received) at the court. This is NOT a date to-be-mailed-by deadline. The court requires all parties to follow its deadlines, including the DNRC. If you need an extension, ask.

## Tools and Resources – Water Court

The Water Court’s website ([courts.mt.gov/courts/water/](http://courts.mt.gov/courts/water/)) is a great resource for DNRC, but more so for claimants. Under the Legal Resources section of their website, you can find document templates for affidavits, withdrawal forms, verified Motion to Amend forms and a handful of others used throughout the Adjudication process. There is a Notice & Information section that included decree documents and schedules like the DNRC website. You can also find relevant guidebooks, rules, department links, orders, and general legal resources. There are also sections for Contact Information, Enforcement, Public Portal, and Recent Water Court Orders.

While working to resolve issue remarks, it is important to understand how, why, and sometimes when these remarks were added. It is also important to have a basic understanding of the Montana Code Annotated (MCA) often referred to as Statue. For example, the starting point and driver of this entire SOP are §85-2-243, MCA. “Rules” help clarify and define how MCA is to be implemented.

There are two primary sets of rules that guide this process. The Water Right Claim Examination Rules (W.R.C.E.R) is an important resource that everyone should be familiar with. It is the governing rule book for DNRC’s actions. While working with the Water Court in any capacity, it is important to have a basic understanding of the Water Right Adjudication Rules (W.R.ADJ.R). The W.R.ADJ.R outlines the authority of the Montana Water Court and the Adjudication Process as a whole.

Full Court is a subscription-based website where Water Court Orders are searchable. DNRC often uses this tool to help answer general questions from the public and research.

# IV. DEPARTMENT EXPECTATIONS

## PROCEDURES OVERVIEW

### Department Process

For the purpose of this SOP, DNRC processes during the 248 Order process are broken down into four procedures:

- Department Initial Review: It is important to be prepared before meeting the claimant(s). Steps such as 248 Order distribution and assignments, initial review, document preparation, and scheduling meetings are crucial.
- DNRC & the claimant(s) Meeting: Meetings are an essential part of this process. They should be well-organized and on task. Impromptu meetings should be avoided if possible. Make sure the claimant(s) understands what the meeting is about and why it is necessary. Do your best to make the meeting meaningful, and the documents collected or created during the meeting are in scope and clear. Field visits may be necessary at this stage but are uncommon.
- Department Memorandums & Documentation:
- Post-Memorandum Processes: Our role diminishes after a memo is sent to the Water Court but is not entirely gone.

All these processes have one thing in common: documentation, documentation, and when in doubt, more documentation. Take notes during/after conversations, review existing records, compile evidence (maps, county records, etc.), and collect anything that may help support a resolution of issues.

### Technical Assistance to the Court – Department

It is important to remember that this is a Water Court-driven judicial process, not a department-driven administrative process. Our role as a department is to provide assistance and make recommendations within the scope of the order. It's essential to document your findings, support your recommendations with evidence, and respect the Water Court's final decision. Don't take it personally if your recommendations are not accepted.

## Claimant Questions on Orders that DNRC is not a Party–Department

It's common for the public to contact DNRC with questions about cases that we are not a party to. While we can provide general information and direct the claimant(s) to the right resources, we cannot give legal advice. We must be careful not to overstep our role in these cases.

You can look up the order on Full Court if you want to double-check or read the order yourself. It's ok to not know what the order is and direct them toward the proper channels. Typically, if the questions are procedural, the parties can call the administrative staff at the Water Court, if the questions are substantive, they can call the other parties in the case.

## Department Questions for the Water Court – Department

Before contacting the Water Court, try and get your questions answered within DNRC. Always speak with your supervisor and/or Program Manager before contacting the Water Court. If you are directed to contact the Water Court, Water Masters are always happy to speak with DNRC. The Water Court will not hesitate to tell us if they can't speak about something. They are willing to set the guideposts to our discussion. The Water Court cannot discuss any details of any case unless otherwise specified. Please call or email the Water Court if you have questions with an [85-2-248](tel:85-2-248) Order. please2 is different and is used less often than [85-2-248](tel:85-2-248).

All such communication and court response must be in writing with full service upon all persons on the Water Court service list.

## Deadline Tracking, Planning, and Organization – Department

Track every deadline associated with every order. Outlook calendars, shared documents (like Word or Excel), and/or office whiteboards are useful tools. Find what works for you and your supervisor and keep your tracking tools/methods up to date. Make sure your supervisor has access to your tracking tool(s).

These tools will help you plan and prioritize your workloads. You might run into a situation where you have more memos in a single week than you can write. Do not miss deadlines because of a lack of organization and planning. Those scenarios should never surprise you. Reach out early if you know deadlines are going to be tight or not feasible.

There is no standard organizational structure or method for your personal files associated with each case. These files are not typically part of the record, but it is important to organize your documents consistently for you to stay organized. Your records system could be physical files where you print everything or digital where you scan everything. It's not advisable to have a hybrid system because it'll be harder to search for and locate what you are looking for.

## Extensions Requests – Department

The Water Court grants extension requests on due dates, but this should never happen. In the unlikely event, the extension request is denied, have a backup plan. DNRC policy dictates that DNRC should never request multiple extensions on a single 248 Order. The central office can and will assist regional offices when needed, to meet deadlines. All extension requests need to be in writing and cc your supervisor.

## Corrected Orders – Department

Mistakes happen. If you notice or a claimant(s) points out an error in your memorandum, discuss resolutions with your supervisor, and corrected the memo as short and straight to the point as possible.

## TOOLS AND RESOURCES – DEPARTMENT

DNRC has a lot of tools and resources at its disposal during the 248 Order process. Below are a few common ones, but this is not a compressive list.

**Claim File:** Often, the single most important resource in post-decree assistance is the claim file. If the scans are poor quality, you can send a request to records to have the original sent to you. You should not need to request the file very often, but it is an option. The claim file should have documentation to support why the issues were added. There may also be helpful information like examination maps. If the claim file does not have examination maps, check the Adjudication Drive and/or the mylar maps in the Regional Office.

**County Groundwater Filing:** For issue remarks on groundwater claims with priority dates between 1962 and 1973, the scanned County Groundwater (GW) forms are a great resource. These can be found on the DNRC website.

**Water Resource Surveys (books, notes, maps):** The Water Resource Survey (WRS) data and materials were compiled for most counties by the Montana Water Conservation Board from the 1940s through the 1960s. WRS materials consist of field notes, published books, 2" per mile (or greater) mylar maps, and 2" per mile (or greater) aerial photographs. These are fantastic resources when available.

**Outside Programs:** There are a lot of useful resources out there. These resources come and go over time, but as of early 2023, the United States Geological Survey ([USGS](#)) website Earth Explore is a great resource for finding historical maps. The Bureau of Land Management ([BLM](#)) website for the General Land Office Records ([GLO](#)) is a great resource for finding patent deeds and historical land surveys.

**GWIC (Well logs):** The Montana Bureau of Mines and Geology's ([MBMG](#)) website Ground Water Information Center ([GWIC](#)) is a resource where you can look up well logs. You do need an account, but they are free. This resource can be very helpful when resolving issues associated with wells.

**Historical Maps & Aerial Photos:** For the purposes of post-decree assistance, there are no standard mapping formats or programs. Forge is the primary mapping program during examination and reexamination. Converge (both Arc and web) is an extremely useful mapping program for post-decree assistance. Physical historical photos located in regional offices can be useful resources. Earth Explore has historical photos of varying years that are downloadable. All photos are supposed to be pre-1973, but the 1980 series USDA photos are accepted.

When creating maps of any kind, always use map standards including:

- Figure Number/Title (Example: Figure 1)
- Claim Number/Case Number
- Aerial Photograph Number/Date
- Legend and/or Labeled POUs, PODs, conveyance, etc.
- Section, Township, Range, County (Example: Sec 12 Rge 35 Twp 35 Phillips County)
- North Arrow
- Section Corners

**Post-1980 aerial photo (reference purposes):** It is ok to use post-1980 aerial photos for reference purposes. For example, you see a feature in a historical photo, but it's not clear what it is. Using the 2021 photo, that feature is clearly a rock pile. In this example, it is ok to submit both the historical photo and the 2021 photo. Never use a post-1980 photo as a stand-alone source.

**ADJUDICATION Shared Drive:** You can find a lot of resources here from old examination material, summary reports, older examination maps, reexamination review abstracts, basin boundary data, and more.

**Peers:** When in doubt, reach out to your peers. They can be invaluable resources and point you in the direction of some great tools. Your peer may have some great ideas or insights.



# V. DEPARTMENT INITIAL REVIEW

## 248 ORDER DISTRIBUTION AND STAFF ASSIGNMENTS

Water Court orders may be sent to individual adjudication staff, regional offices, and/or central offices. Sometimes orders go to both the central office and the regional office. Regional offices typically run point on all 248 Orders in their region with the central office assisting when needed. Work with your Regional Manager and the Adjudication Program Manager to keep everyone on the same page.

### Initial Review – Department

Read each order thoroughly. The “case caption” is the section of a court order at the top of the first page. It contains the basic name, parties in the case, case number, and claim numbers. Read every order on its own merit. It is important to read each order and know what exactly DNRC is being asked to do. Some orders direct DNRC to resolve all issue remarks and some orders only direct DNRC to resolve specified issue remarks.

Once you know and understand which remarks DNRC has been asked to resolve, review the objection list to determine what the scope of the order is. If you are unclear, consult with your supervisor, or central office staff or ask the Water Master who issued the order.

Look for and determine if the remarks on the order are legal or factual remarks. Sometimes a Master will request that you attempt to resolve all the issue remarks, failing to notice that one or more of the issues involve legal components. Catching this before meeting with Claimant(s) will help keep the meeting on track. As discussed above in the section “Legal vs Factual issue remarks”, DNRC should still collect facts that may help resolve a remark that is more legal in nature.

On anything ownership related, consult with the regional office staff responsible for processing ownership updates. They may have a pending ownership update and/or they will alert you if one shows up during your processing period.

### Document Preparation & Planning

Know what issues you need to resolve and have an idea of how you would resolve them. The best plan of action here is to review the claim file and available resources before meeting with the claimant(s). Your plan could change with new information obtained during the meeting but go into the meeting with questions and ideas. Claimant(s) may get the orders the same day you do, and in those cases where they come in or call immediately, it is ok to say, “I need time to review the order before I can discuss specifics.”

If you are unsure of the best course of action and/or don’t even know why the remark(s) were

added, consult with a colleague or your supervisor. If the claim was examined properly, the issue remark should be explained and documented in the file. If the remark(s) was added during the re-exam process, you may need to check the review abstracts on the Adjudication Drive. You may not always agree with the examiner who added the issue remark. Maybe you don't believe it should have been added in the first place or it was the wrong remark to address the issue. In these cases, discuss the best plan of action with your supervisor.

Have all the documents prepared in such a way that you can access them and understand them during the meeting. It is the claimant(s) responsibility to schedule the meeting. The meeting might be weeks down the road, but having an organized file will go long way to ensuring the meeting is productive and as efficient as possible. Taking notes directly on a copy of the order or abstracts can be a helpful strategy. Pre-meeting notes of any kind are always a good idea.

Maps can be extremely helpful resources for addressing many different issue remarks. Having blank ones, examination maps, and/or claimed maps prepared beforehand could make the meeting much quicker and more informative.

It is a good idea to have water court template documents, such as Affidavit forms, on hand. Neither an Amendment Form nor a Motion to Amend Form is ever required with the 248 Order process. Never fill out documents for the claimant(s) or advise them on what to say. That is not to say you can't help by typing their exact words into a more legible format for them. Just don't give legal advice.

# VI. DEPARTMENT AND CLAIMANT

## MEETING PROCESS

Try to schedule meetings rather than having impromptu ones if possible. Sometimes people may walk in, and you may have to reschedule. Having a prepared and well-organized meeting will reduce mistakes and the need for follow-up calls or meetings. One strategy is to ask them to come back after lunch, or another time, it's okay to work with them to find the best time to return. Always document when someone comes in or calls, and especially document exactly why you didn't meet with them at the time.

If Adjudication staff are not available when someone needs to meet with DNRC, having initial review documents organized will go a long way towards allowing other staff to ask the right questions and collect the right information.

Sometimes people will hand you large unorganized stacks of paper. Multiple Water Court orders may be mixed in decree documents and other water rights-related letters. Be careful to read everything just in case you weren't expecting to know if we should assist or not. Explain to the person what you can and cannot assist with.

### In-Person Meetings vs Digital Meetings

In-person meetings are ideal, but not always an option. Montana is an exceptionally large state and not all claimant(s) live here. Do your best to work with the claimant(s) and collect the information you need the best way you can.

### First and Foremost

Review your notes and prepared documents before each meeting. When the claimant(s) arrive, take the time to explain to them what your goal of the meeting is. Explain what you have, what you need, and how you envision the issues being resolved. Having clear expectations outlined early will help keep the meeting on track and may help ease tension claimant(s) may have.

### Documentation during meeting

Take notes during the meeting. Your notes should include the date of the meeting, who attended, who participated, what documents were reviewed, who submitted/provided any new evidence, and what was discussed in the meeting. The better notes you take, the easier writing the memorandum will be.

### Out-of-Scope Documents

As discussed in previous sections, amendments are never required within the scope of a 248 order. If a claimant(s) chooses to file an amendment outside the scope of the 248 Order at hand, they must send those documents directly to the Water Court themselves. Do not include a copy as supporting documentation with your memorandum. You should inform them that they may be required to engage in more proceedings, including publishing notices at their own expense.

## In Scope Documents

As discussed, neither amendment forms nor a Motion to Amend form is required with the 248 Order process. Affidavits and/or other supporting documentation are encouraged, but also not required.

For numerous reasons, the claimant(s) may elect to reduce or withdraw their claim(s). Withdrawal forms can be helpful when the right is no longer or maybe never has been used but are not always required. Withdrawals should be done using the Withdrawal of Statement of Claim form from the Water Court's website but will be accepted by the Water Court in any form. Reductions should be explained and documented. Affidavits are encouraged in these scenarios. DO NOT draft documents for the claimant(s). DNRC does not give legal advice and drafting documents for the claimant(s) could be considered the practice of law.

Claimant(s)-supplied documents like affidavits, although not required, are usually helpful. Maps are always encouraged when issues involve source, point(s) of diversion, place(s) of use, etc.

Photographs (both current and historical) can be very helpful to understand how systems work. Historical Records and or other information including but not limited to construction bills or records can be helpful. A number of other historical records can be considered on a case-by-case basis.

DNRC Marked Abstract-created edited abstracts that reflect DNRC's recommendations are encouraged and often required by Water Court orders. These abstracts can add clarity to recommendations. Create new maps when necessary to support recommendations. Maps are an effective communication tool when identifying any proposed changes to the place of use, point of diversion, source, etc.

## Field Visits

It is DNRC's responsibility to decide whether field visits are a necessary part of the review. The Water Court does not need to approve the visits for purposes of an 85-2-248 order. DNRC will use field visits sparingly and often relies on the claimant(s) to initiate the visit. If a claimant(s) does initiate and invite DNRC to a field visit, confer with your supervisor before agreeing to go.

## Dealing with Difficult Claimants

Difficult people exist. Most people are intimidated by this process and some people get defensive when they don't understand something. For us, this is everyday business. For claimants, this might be a once-in-a-lifetime event. Most people will calm down and work with you if you explain what is happening, why it's happening, and what needs to happen. If you have a problem coming to a resolution with a claimant on an issue, that is fine. Don't argue with them. Explain what documents and/or sources you are looking at and remind the claimants that they are welcome to submit supporting documentation of their own. If they refuse or are combative, so be it. It is the claimant's responsibility to work with us. If they won't, that's on them.

# VII. DEPARTMENT MEMORANDUM & DOCUMENTATION

## MEMORANDUM ORGANIZATION

Almost all 248 Memorandums should include the following sections:

- **Case caption-** This contains the date of the memo, case heading (case and water right numbers), who the order is to, who the order is from, and who the parties are in the case.
- **Introduction-** This tells a reader what to expect and why.
- **Materials Reviewed-** This tells a reader what evidence and discussions you considered for your recommendations.
- **Discussion-** This is the core, body of the documents. This is where you explain what happened, what was discussed, what the claimants said, what evidence was reviewed, why the evidence was considered important, and/or more importantly what evidence was not considered relevant.
- **Recommendation-** Recommendations should be clear and straight to the point. They don't require a lot of explanation here because your Discussion section should have laid out the groundwork to make this recommendation obvious.
- **Attachments-** Label and organize all attachments in a consistent order. For example, label each attachment something like "Attachment 1" and reference it as such in your memorandum. Organize all attachments in the same they are referenced in the memo.

### Case Caption

The "case caption" is the section of a court order that appears at the top of the first page. If claims are consolidated into a case, then the case number will be listed in the caption, with the pertinent claim numbers underneath. DNRC Memos must include all the information from the case heading. Case headings including the case and claim numbers are used by all the parties and the court to track what is happening in a given set of proceedings. Attorneys frequently tracking a large volume of cases and have difficulty tracking memos to the pertinent proceedings if the case or claim number is omitted, as does the court.

### What should your "introduction" include? Exclude?

Three important things should be addressed in the introduction. First, explain why you are writing this memo. Reference the 248 Orders that you received, when you received them, and

what they directed you to do. Second, what you are going to discuss. If you believe it necessary to explain what you understood the scope to both be and not be. This is a good place to do it. Third, this is also where you outline the contact dates, meeting dates, document submittal dates, and/or anything else relevant. For example, “As of December 6, 2022, no contact has been made by the claimant(s)”. Or “On May 23, 2022, Ray McMullen contacted the Glasgow Regional Office to discuss the issue remark on the above-mentioned claims. On August 16, 2022, attorney, Ed Amestoy contacted the Glasgow Regional Office to discuss the issue remark on the above-mentioned claims.”

### What goes into “Discussion”?

The Water Court wants to know what information you have that can resolve the issue remark(s). If you have maps, photos, and/or other historical documents that help lead to the resolution of an issue remark, this is where you explain how and why. Provide sufficient information so your document can stand alone. No reader should have to resort to other evidence or documents to understand your document.

Separate discussions and recommendations by claim number when multiple claims are being addressed so as not to confuse yourself, or a reader. For example, when addressing multiple claims, identify each claim by its number, purpose, priority date, and source to assist readers in quickly identifying the claim being discussed. Claimants generally refer to their claims this way, rather than by our claim numbers. Cite each remark being discussed so the reader will know specifically what the issues are. Include remark types (Example: Place of Use). Sometimes the context of a remark doesn't indicate the type of remark. Remark codes are useful to the reader (Example: F180).

Utilize specificity (vs. generalities) in discussions. For example, “Here are the water rights for your property.” Without some identification, what are you are talking about? What water rights? Are the files being sent, or just the abstracts? Proof your document as if you know nothing about the case or issues. When dealing with courts, it is preferable to err on the side of being obvious rather than obtuse. Stick to the facts, and your documents will be simple, but professional. If you are clear on what the Court wants of you, this is much easier. We tend to ramble when we are unsure. Occasionally more is needed, but the general rule is - less is better.

Avoid run-on sentences which are the type that when reading the reader has to take a breath before getting to the end of the sentence because readers have a hard time following such sentences and understanding them. See, it's not ideal. Use punctuation correctly. Reading your document aloud is a great way to catch errors.

Consider your audiences. Discuss claims in terms claimants understand. Clarify technical aspects for claimants. What works for claimants will work for the Court. But beware of clarifying legal aspects.

The Water Court wants us to indicate whether the claimant agrees with the recommendations in the memo. If you know the claimant's position or if you're not sure of the claimant's position, tell them that. Ultimately, the Water Court wants to know what DNRC thinks and why. This is where you explain your thought process, the documents reviewed, and the reasoning behind your recommendation.

### What goes into a "Recommendation"?

If you can confidently make a recommendation to resolve the issue remark, do so. Provide a recommendation with all available information to you and tell us why. The Water Court will decide whether the explanation overcomes the prima facie status of the claim.

If we don't have info about why the issue remark was added in the first place, tell the Court. If you don't make a recommendation the Water Court is stuck. The Water Court relies on department recommendations to resolve department issue remarks. You must be able to defend what you put in your 248 Order. Appearances at hearings to testify are rare, but you should imagine that you will have to defend each one you write. Do NOT recommend changes to elements of a claim unless supported by evidence.

Do NOT be conclusionary in your documents. Avoid saying: "The remarks should be removed;" "The elements should be changed;" and "The court should do this (or that)." Instead, make recommendations based on evidence.

Be clear and concise in when you recommend issue remarks be removed or remain unresolved. Reference the discussion section above, but do not reiterate your discussion. Citing the issue remarks using the remark codes (example: F180) in your discussion above is a terrific way to link the discussion and recommendation.

### Attachments – Department

Attachments can add clarity to recommendations. Attachments can also add unnecessary clutter and potential confusion. All attachments should be organized, labeled, and referenced in your memo. Examples of common attachments are aerial photos, maps, affidavits, WRS documents, or other historical documents. You can reverence the original claim files, but you should not attach unedited or unclarified documents from the original claim file. Doing so would add unnecessary clutter. You can be certain the Water Master has reviewed the claim file prior to requesting DNRC assistance.

When working on multiple water rights in a single order, it can help to use different labeling formats for different cases. For Example, have the first water right with "Attachments 1-#", the second water right with "Attachments A-Z", the third "Attachment i-x", and so on. We don't have standard labeling conventions. What is important is that you are clear about what attachment is relevant to what part of your memo. Organize all attachments in the same they are referenced in the memo. Never attach or include documents that are not referenced or explained in your memo.

If the order is outside the scope, do not include a copy as supporting documentation with your memorandum. You should inform the claimant(s) that they will probably be required to engage in more proceedings, including publishing notice at their own expense. Return the document to the claimant(s). When documents are created or submitted as colored copies, black & white copies are not sufficient. When sending color maps, send color copies to everyone on the Service List. Original documents (when available) are sent to the Water Court. DNRC should keep copies of all documents.

### Signatures Guidance – Department

In the legal system, dates and signatures are required for everything. Multiple documents, of the same type and by the same author may be filed in a case. The 2020 Water Court document Amended Local Rule of Electronic Filings written by Chief Water Judge Russ McElyea specifies what kinds of signatures are acceptable. It says “Electronically filed documents shall include either a handwritten signature or an electronic signature. Electronic signatures shall be in the following form: "Isl John Doe" or any other form of electronic signature authorized by law.”

### Service lists guidance – Department

Include a Service List, which tells you who must receive your document. Use the Service List at the end of the Order you are responding to, REMOVE DNRC from that list, and ADD the Water Master or Judge who issued the Order. Your proof that you have sent your document to anyone is on your service list. Do NOT do a Certificate of Service for your document unless specifically requested in the Order you are responding to. A Service List is legally sufficient.

### Electronic documentation submittal – Department

The 2020 Water Court document Amended Local Rule of Electronic Filings specifies how our memos are to be filed. The Water Court accepts electronic filing of documents. Documents may only be filed by emailing them to [watercourt@mt.gov](mailto:watercourt@mt.gov). Documents sent to other email addresses will not be accepted. Emailed documents must be in PDF format. Proposed orders must be in Microsoft Word format. & Electronic filings will not be accepted for emails over 15 MB in size. Emails exceeding the 15 MB limit may be filed by breaking them into multiple filings less than 15 MB in size provided a cover email is submitted to explain that the document is being filed in separate pieces. When a document is filed electronically, a duplicate paper document should not be filed.

Documents may not be filed by facsimile. Parties who submit documents via email shall place a request for delivery receipt on the e-mail. Put simply, all documents including attachments are to be sent as single PDF to the specified email address.

Reminder: deadlines are the date by which a document must be filed or received at the court. Even with digitally submitted documents, this is NOT necessarily the same thing as the send date. DNRC’s expectation is that electronically submitted documents are not sent on the due dates.



## Physical/Paper document Submittal – Department

Electronic document submittal is the preferred method between DNRC and Water Court. All Memorandums should be emailed in PDF format to [watercout@mt.gov](mailto:watercout@mt.gov) following the guidance above.

There may be circumstances where a physical document mailed through the postal service is still preferred. These scenarios should be uncommon. Remember deadlines are the date by which a document must be filed or received at the court.

## Writing tips (dos and don'ts) – Department

Proofreading is an essential part of producing a professional document. While the "Spell Check" and "Grammar Check" functions on your computer can be helpful, do not rely on them completely. They may miss some errors, so it's important to proofread manually as well. Be particularly careful when proofing dates and numbers, especially if you're using a previous memo as a template. Typos and mistakes with numbers can be easy to overlook, but they can drastically alter the meaning of your document. Before sending your document to someone else for review, proofread it from different perspectives, paying attention to content, spelling and grammar, numbers, dates, legal descriptions, and clarity of language. Consider reading your document out loud to catch any awkward phrasing or confusing sentences.

Reviewed by, tells the reader this document is important enough to have had a second set of eyes review it before sending it to the Court. Regional Managers or Program Managers should review and sign all 248 Orders.

## No contact orders – Department

If the claimant(s) do not contact DNRC by the date specified on the order, make the best recommendation you can. Including all the new documentation you are using to influence your recommendation. You don't need to duplicate documents inside the file already. It is ok to "contradict" the examiner when you have new information or a different interpretation. Do your best to root the recommendation in documented facts.

In cases where you are confident the issue cannot be resolved; it is ok to recommend water rights be "dismissed". In cases where you foresee a partial resolution, it is also ok to recommend the water rights be reduced. The documentation you have should support your recommendation. In cases where the issues are fully resolved with information you found or based on your interpretation of the information, recommend the issue be resolved and explain why.

# VIII. Post-Memorandum Processes

## MEMO PROCESS

### Corrected Memo

When documents are sent to the court, they are immediately “Filed” by the court. That is when they receive a File Stamp. Documents become an official and permanent part of the record in a court case. The court cannot disregard memos that are sent to the court for filing for any reason. When the court receives multiple memos in a case with contradicting information, the court is put in a position where an explanation is required for the record and the Water Judge. If the evidence in the multiple memos is contradictory and lacks an explanation, the memos can easily be discredited by the claimant(s) and the court.

Mistakes happen. If you notice or a claimant(s) points out an error in your memorandum, discuss resolutions with your supervisor. Keep the corrected memo as short and straight to the point as possible. Call it a “Corrected Memo,” send it to everyone on the service list, and point out what the corrections or differences are from the original memo.

### Claimant’s Post-Memo Options

If a claimant(s) contact you after your memo is written and sent off disagreeing with your recommendations, inform them that you are only making recommendations. The Water Master has the final say. Order Setting Filing Deadline is issued before a Master reports. Master’s report gives the claimant(s) 10 days to review and either agree or disagree.

In cases where the claimant(s) did not contact DNRC before the memos, inform them that the Water Court issues an Order Setting a Filing Deadline before the Master’s report. They can request an Extension from the WC during the Order Setting Filing Deadline or before Master Report is issued or during. It is outside of our control at this point.