

006F00001013  
**BEFORE THE HEARING OFFICER PANEL**  
**STATE OF OREGON**  
for the  
**WATER RESOURCES DEPARTMENT**

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Water Watch of Oregon, Inc.; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement District; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Modoc Lumber Co.; Bradley S. Luscombe; Randy Walthal and Inter-County Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC; Horsefly Irrigation District; Langell Valley Irrigation District; Pacificorp; and Peter D. Mostow, Contestants

**PROPOSED ORDER**

Hearing Officer Panel Case No. 006

Claim No. 376

Contest Nos. 2061, 2884, 3242, 3623, 3991

v.

United States of America Bureau of Land Management, Claimant

**HISTORY OF THE CASE**

This proceeding under the provisions of ORS Ch. 539 is a general stream adjudication to determine the relative rights of the parties to various streams and reaches within the Klamath Basin. The United States of America, Bureau of Land Management (United States), originally filed a claim on behalf of water rights claimed in and for the Upper Klamath Wild and Scenic River. On October 1, 1999, the United States filed an amended claim for the same water right.

On October 4, 1999, the Adjudicator for the Klamath Basin Adjudication, Richard D. Bailey (Adjudicator), published a Preliminary Evaluation of Claim No. 376 which granted the claim in part and denied the claim in part based on information available as of August 3, 1999, and which did not evaluate the amended claim.

The United States filed a contest to the Adjudicator's Preliminary Evaluation, Contest *United States of America (BLM)*  
Proposed Order - Page 1 of 9

No. 3991, contesting the Preliminary Evaluation to the extent it did not approve the claim as filed and amended. The United States appeared throughout this proceeding through its attorneys, Bruce Bernard and Barbara Scott-Brier. Other contests, described below, were filed against the Adjudicator's Preliminary Evaluation, the claim/amended claim, or both on or before May 8, 2000.

Contestant WaterWatch of Oregon, Inc., filed Contest No. 2884 regarding the Adjudicator's initial determinations and in support of the claim and appeared throughout this proceeding through its attorney Robert G. Hunter.

Contestant PacifiCorp filed Contest No. 2061 regarding the Adjudicator's initial determinations and the right claimed and appeared throughout this proceeding through its attorneys David E. Van't Hof and Greg D. Corbin.

Contestants Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Co., Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement District, Pine Grove Irrigation District, Pioneer District Improvement Co., Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Modoc Lumber Co., Bradley S. Luscombe, Randy Walthall and Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Co. and Collins Products LLC (collectively, Klamath Project Water Users) filed Contest No. 3623 regarding the Adjudicator's initial determinations and the right claimed and appeared throughout this proceeding through their attorneys Paul S. Simmons, Andrew Hitchings, William M. Ganong, Michael P. Rudd, Richard Fairclo, Richard M. Glick, B.J. Matzen, Michael Ratliff, and James R. Uerlings. Don Vincent and Berlva Pritchard were Contestants in the original Contest (No.3623) filed by Klamath Project Water Users *et al.*, however, these parties informed the Adjudicator through their attorney Scott L. Shapiro that they had sold their property and were withdrawing from participation in the Klamath Project Water Users' Contest. *See* November 28, 2000, and June 24, 2001, notices from Scott L. Shapiro to Richard D. Bailey, Adjudicator, withdrawing, respectively, Don Vincent and Berlva Pritchard, from inclusion in the Contest; letter from Paul Simmons to William D. Young, Administrative Law Judge, May 7, 2002, and Corrected Amended Statement of Contest of Claim and/or Preliminary Evaluation of Claim #376, May 7, 2002 (Ref. No. 006F00050007); Notice of Hearing, July 12, 2002, at note 1 (Ref. No. 006F00000007); and Order Granting Motion to Vacate Hearing and Provide Time to Finalize Settlement, September 5, 2002 at note 1 (Ref. No. 006F000000010).

Contestants Horsefly Irrigation District and Langell Valley Irrigation District filed contest No. 3242 regarding the Adjudicator's initial determinations and the right claimed and appeared throughout this proceeding through their attorneys, Laura Schroeder and Christopher D. Schwindt. Medford Irrigation District and Rogue River Valley Irrigation District were identified as Contestants in the original Contest (No. 3242) filed by Horsefly Irrigation District, *et al.*, however, those two parties subsequently withdrew their contests. *See* Voluntary Withdrawal of Contest by Medford and Rogue River Valley Irrigation Districts, May 15, 2002 (Ref No. 006F00060003); Notice of Hearing, July 12, 2002, at note 1 (Ref. No. 006F00000007); Order Granting Motion to Vacate Hearing and Provide Time to Finalize Settlement, September 5, 2002, at note 1 (Ref No. 006F0 0000010).

*United States of America (BLM)*  
Proposed Order - Page 2 of 9

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FEB 13 2003  
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SALEM, OREGON

Leonard Baio, Gary Strong, Flynn Brothers, Robert Bartell, Margaret Jacobs, Carolyn Obenchain, Rodney Z. James, Newman Enterprise, Douglas Newman, Francis Loving Trust, Hilda Francis, Trustee, John Briggs, Peter M. Bourdet, Vincent Lee Briggs, Thomas William Mallams, Thomas I. Bentley, Thomas E. Stephens, and David Cowan, successor-in-interest to contest of William I. Rust and Ethel J. Rust, filed Contests Nos. 48, 282, 517, 750, 987, 1222, 1456, 1805, 2257, 2493, 4245, 4479, 4712, 4953, 5188, and 5421 regarding the Adjudicator's initial determinations and the right claimed and appeared initially in this proceeding through their attorney, Ronald S. Yockim; however, these parties subsequently withdrew their contests, and those matters have been referred to the Adjudicator for final disposition. *See* Motion to Withdraw of Contestants Leonard Baio, et al, from All Contests to Claim 376, December 7, 2001; OWRD Motion to Dismiss Contests of Leonard Baio, et al., February 6, 2002 (Ref No. 006F00020006); December 10, 2001, Order Dismissing Contests 48, 282, 517, 750, 987, 1222, 1456, 1805, 2257, 2493, 4245, 4479, 4712, 4953, 5188, and 5421, February 11, 2002 (Ref No. 006F00000003); Notice of Hearing, July 12, 2002, at note 1 (Ref. No. 006F00000007); and Order Granting Motion to Vacate Hearing and Provide Time to Finalize Settlement, September 5, 2002, at note 1 Ref. No. 006F000000 10).

The Oregon Water Resources Department (OWRD) participated in the hearing to help develop the hearing record and appeared throughout this proceeding through its attorneys, Walter Perry and Justin Wirth.

### LEGAL RULINGS

On March 25, 2002, following briefing of legal issues by the claimant and contestants, I published a Ruling on Motions for Summary Judgement in which I made the following rulings:

1. The state adjudication process under ORS Chap. 539 is the correct process for determining federal reserved water rights with claimed priority dates after 1909 and the OWRD has jurisdiction to adjudicate them.
2. The claim to be determined in this proceeding is the United States' amended claim number 376 filed October 1, 1999.
3. Designation of the Upper Klamath River as a Wild and Scenic River pursuant to the Wild and Scenic Rivers Act, 82 Stat. 906, 16 U.S.C. §§ 1271, et seq., created an express federal reserved water right with a priority date of September 22, 1994, the date of designation.
4. The purposes of the express federal reserved water right for the Upper Klamath Wild and Scenic River are preservation of the river in its free flowing condition and preservation of its outstandingly remarkable recreation (whitewater boating and fishing), wildlife, fish, prehistoric, historic, scenic resources, and Native American traditional uses.
5. The standard for determining the quantity of the express Wild and Scenic River reserved water right is the amount of water reasonably necessary to meet the purposes of the reservation.

6. The United States is entitled to a federal reserved water right for the primary purposes of the reservation, including supporting commercial whitewater uses.
7. The United States' claim is legally sufficient. The United States was not required to demonstrate that unappropriated water was available on the date of the Upper Klamath River's designation as a Wild and Scenic River.
8. The United States' federal reserved water right is not categorically subordinate to future claims of the Klamath Project Water Users.
9. The Klamath River Basin Compact does not require the United States' federal reserved water right to be subordinated to future water rights for domestic use and irrigation in the upper Klamath basin.

### THE HEARING

On October 4, 2001, I issued a Prehearing Order informing the parties that this matter was set for a contested case hearing on September 9-20, 2002, and of the dates that written direct and rebuttal testimony was required to be filed. Pursuant to the Prehearing Order, on May 15, 2002, the United States submitted written direct testimony supporting its Claim No. 376 from five witnesses: Larry Frazier (Ref. No. 006E00010002); Scott Snedaker (Ref. No. 006E00010003); Jim Henriksen (Ref. No. 006E00010004); Grant Weidenbach (Ref. No. 006E00010005); and R.W. "Noah" Hague (Ref. No. 006E00010006); together with Exhibit Nos. Unites States' exhibits 1-10 (Ref. No. 006E00010008 through Ref. No. 006E00010017). On October 29, 2001, OWRD filed OWRD's Exhibit 1, which constitutes OWRD's record of the documents officially filed with OWRD in this matter. Langell Valley and Horsefly Irrigation Districts each filed a written direct testimony and PacifiCorp filed a rebuttal testimony. The Klamath Project Water Users, WaterWatch and OWRD did not file any written direct or rebuttal testimony. The United States and the Langell Valley and Horsefly Irrigation Districts also listed witnesses to be cross-examined, and OWRD reserved the right to cross examine witnesses called by others.

Before the scheduled evidentiary hearing, the United States reported that the parties had negotiated settlements to resolve the adverse contests and, with the approval of all participants, moved for an order vacating the hearing and providing 30 days to finalize settlement of this matter. *See* Motion to Vacate Hearing and Provide Time to Finalize Settlement, September 5, 2002 (Ref. No. 006F00010008). As a result, on September 5, 2002, I vacated the evidentiary hearing and provided the parties 30 days to finalize settlement of this matter. Subsequently, the United States filed three stipulations to resolve the adverse contests to the United States' claim. *See* October 4, 2002, letter from counsel for the United States to William D. Young, Administrative Law Judge; Stipulation between the United States and the Klamath Project Water Users (Ref. No. 006F00010009); Stipulation between the United States and PacifiCorp (Ref. No. 006F000 10010); and Stipulation between the United States and the Langell Valley and Horsefly Irrigation Districts (Ref. No. 006F00010011).

Further, all the contestants with positions adverse to the United States' Claim No. 376 have withdrawn their contests. *See* Withdrawal of Contest 3623 Against Claim 376 by Klamath Project Water Users, *et al.*, October 7, 2002 (Ref. No.006F00050008); PacifiCorp's Voluntary

*United States of America (BLM)*  
Proposed Order - Page 4 of 9

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SALEM, OREGON

Withdrawal of Contest [No. 2061] and Rebuttal Testimony, October 4, 2002 (Ref. No.006F00040005)<sup>1</sup>; and Conditional Voluntary Withdrawal of Contest [No. 3242] by Horsefly and Langell Valley Irrigation Districts, October 3, 2002 (Ref No.006F00060009),<sup>2</sup> PacifiCorp's withdrawal included the withdrawal of its rebuttal testimony. See PacifiCorp's Voluntary Withdrawal of Contest and Rebuttal Testimony, October 4, 2002 (Ref. No. 006F00040005).

FEB 13 2003  
WATER RESOURCES DEPT.  
SALEM, OREGON

### PROCEDURAL AND EVIDENTIARY RULINGS

Contestants Klamath Project Water Users, PacifiCorp, and Langell Valley and Horsefly Irrigation Districts have withdrawn their contests pursuant to stipulations among the parties that are part of the record of this case. I have previously determined that when a contestant withdraws a contest, I have no jurisdiction over matters raised by those contests. See *City of Salem v. Salisbury*, 168 Or. App. 14, 20 (2000); see also ORS 539.100.<sup>3</sup> Contests Nos. 2061, 3242, and 3623 are dismissed and referred to the Adjudicator for final disposition and entry of a final order consistent with the stipulations of the parties and the findings and conclusions of this case.

Contestants Don Vincent, Berlva Pritchard, Rogue River Valley Irrigation District and Medford Irrigation District were among the Contestants against this claim, but withdrew from further participation in this contested case. Because they were not the sole contestants in the contests in which they participated, they were unable to withdraw the contests in their entirety. It is appropriate that those cases proceed by default based upon their written. I retain jurisdiction over this claim by means of the contests filed by these Contestants, by WaterWatch and the Claimant, the United States.

On December 3, 2002, OWRD filed the Motion to Admit the Affidavit and Testimony of Teri Hranac and Oregon Water Resources Department Exhibit 1. See Motion to Admit the Affidavit and Testimony of Teri Hranac and Oregon Water Resources Department Exhibit 1 (Ref. No. 006F00020009). Ms. Hranac is the OWRD Adjudication Specialist who prepared OWRD Exhibit 1, which constitutes OWRD's record of the documents officially filed with OWRD in this matter and which was filed by OWRD on October 29, 2001. On February 4, 2003, I granted that Motion and admitted the Affidavit and Testimony of Ms. Hranac and OWRD Exhibit 1 into evidence.

On January 9, 2003, the United States filed the Correction to Affidavit and Testimony of

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<sup>1</sup> PacifiCorp's withdrawal of its contest and rebuttal testimony was conditioned on the United States' filing a stipulated settlement agreement between PacifiCorp and the United States. That stipulation was filed on the same day as the withdrawal, October 4, 2002.

<sup>2</sup> Horsefly and Langell Valley Irrigation Districts' conditional withdrawal was conditioned on the entering of a stipulated settlement between the Districts and the United States. That stipulation was filed on October 4, 2002, the day after the withdrawal.

<sup>3</sup> Withdrawal of a contest in a water rights adjudication under ORS Ch. 539 differs from withdrawal of a request for hearing against an agency's action contemplated under ORS Ch. 183 in that the contest may be against the claim itself and may even support OWRD's original decision. The default processes of ORS Ch. 183 and OAR Ch.137, Div. 003, are generally inapplicable to situations in which a contestant withdraws a contest filed under ORS Ch. 539, thereby relieving the hearing officer and OWRD of authority over the contest.

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FEB 13 2003

WATER RESOURCES DEPT.  
SALEM, OREGON

R.W. "Noah" Hague (Ref No. 006E00010018) and its Unopposed Motion to Admit Affidavits, Testimony and Exhibits, requesting that the Affidavits and Testimony of the United States' witnesses, together with Exhibit Nos. US 1-10, be received into evidence and that the United States' witnesses be recognized as experts qualified to offer testimony in the form of opinion. *See* United States' Unopposed Motion to Admit United States' Affidavits, Testimony and Exhibits into Evidence (Ref. No. 006F00010012). On January 24, 2003, I granted that Motion and accepted the referenced Affidavits, Testimony and Exhibits into evidence and recognized each of the United States' witnesses as an expert in their identified field of expertise, qualified to offer testimony in the form of opinion.

On January 9, 2003, the United States filed the United States' Unopposed Motion for Ruling on the Record as Submitted by the Parties and for Entry of Proposed Order concerning United States' Upper Klamath Wild and Scenic River Claim. *See* United States' Unopposed Motion for Ruling on the Record as Submitted by the Parties and for Entry of Proposed Order concerning United States' Upper Klamath Wild and Scenic River Claim (Ref. No. 006F00010013). The United States attached to that Motion the [United States' Suggested] Proposed Order on United States' Upper Klamath Wild and Scenic River Claim. WaterWatch of Oregon, Inc., the only remaining Contestant herein, and OWRD both concurred in the United States' Motion and in entry of a Proposed Order consistent with the [United States' Suggested] Proposed Order on United States' Upper Klamath Wild and Scenic River Claim. On February 6, 2003, I granted the United States' Motion and ordered that this matter be submitted on the Record as filed by the United States and OWRD and that a Proposed Order concerning the United States' Upper Klamath Wild and Scenic River Claim be entered based on the Record.

**ISSUE**

Does the United States have a federal reserved water right as claimed in Claim No. 376 and, if so, what is the amount of that water right?

**FINDINGS OF FACT**

Based on the Record herein including the above-referenced motions and filings, I enter the following:

(1) The Upper Klamath River was designated as a Wild and Scenic River pursuant to the Wild and Scenic Rivers Act, 82 Stat. 906, 16 U.S.C. §§ 1271, et seq., on September 22, 1994.

(2) Claim No. 376 is for the instream (nonconsumptive) use of water in the Upper Klamath Wild and Scenic River.

(3) The period of use for Claim No. 376 is as follows: year-round for fish life and fish habitat, specifically April 1 through June 15 for 625 cfs for fish life and fish habitat, and June 16 through March 31 for 525 cfs for fish life and fish habitat; and Memorial Day through September 30 for 1500 cfs for recreation (boating and scenic enjoyment).

(4) The Upper Klamath Wild and Scenic River's instream water uses include preservation of the river in its free flowing condition and preservation of its outstandingly remarkable recreation (whitewater boating and fishing) wildlife, fish, prehistoric, historic, scenic *United States of America (BLM)*

resources, and Native American traditional uses values.

(5) The Upper Klamath Wild and Scenic River's total instream water use includes:

1500 cfs for recreation (boating and scenic enjoyment) Memorial Day through September 30;  
625 cfs for fish life and fish habitat April 1 through June 15;  
525 cfs for fish life and fish habitat June 16 through March 31;

These flows are not additive.

(6) The place of use of the Upper Klamath Wild and Scenic River is the Klamath River in Oregon from upstream river mile 220.4, *i.e.*, from the J.C. Boyle dam powerhouse, to downstream river mile 209.3, *i.e.*, to the Oregon-California border.

(7) On November 28, 2000 Scott L. Shapiro, attorney for Contestant Don Vincent, informed the Adjudicator that Mr. Vincent had sold his property and that his inclusion in this claim should be withdrawn. On June 24, 2001 Scott L. Shapiro, attorney for Berlva L. Pritchard, informed the Adjudicator that she had sold her property and that her inclusion in this claim should be withdrawn. Contestants Rogue River Valley Irrigation District and Medford Irrigation District withdrew from their contests on May 15, 2002.

### CONCLUSIONS AND REASONS

The United States has an express reserved water right as claimed in Claim No. 376 with a priority date of September 22, 1994.

### OPINION

When the United States reserves water through a federal reserved water right the water is reserved as of the date of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The express water right under the Wild and Scenic Rivers Act reserves the amount of water reasonably necessary to meet the purposes of the reservation.

Enactment of the [Wild and Scenic Rivers Act] would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the reservation. Specifically, only that amount of water reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with this bill.

Conference Committee Report on the Wild and Scenic Rivers Act, 114 Cong. Rec. 28310, 13 (1968).

There being no evidence to the contrary, I relied upon the direct testimony and exhibits received from the United States and OWRD. On this record, the greater weight of the evidence establishes that the United States has an express reserved water right for the Upper Klamath Wild and Scenic River in Oregon with a priority date of September 22, 1994, for the amounts claimed. The greater weight of the evidence establishes that the amounts claimed under the

*United States of America (BLM)*  
Proposed Order - Page 7 of 9

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FEB 13 2003

WATER RESOURCES DEPT.  
SALEM, OREGON

express reserved water right is the amount of water reasonably necessary to fulfill reservation purposes which include: preservation of the river in its free flowing condition and preservation of its outstandingly remarkable recreation (whitewater boating and fishing), wildlife, fish, prehistoric, historic, scenic resources, and Native American traditional uses. The quantities claimed and approved represent the amounts reasonably necessary to fulfill the reservation purposes for the claim.

### PROPOSED ORDER

I recommend that the Adjudicator for the Klamath Basin Adjudication enter an order dismissing certain contests, defaulting certain contestants, and approving Claim 376 as follows:

1. Contests Nos. 2061, 3242, and 3623 are dismissed
2. Contestants Don Vincent, Berlva Pritchard, Rogue River Valley Irrigation District and Medford Irrigation District have withdrawn from participation in this contested case and an Order of Default is entered based on the hearing record in this contested case.
3. Claim No. 376 as amended is approved, as follows:

Basis of Right: Federal reserved water right.

Source: Upper Klamath River within the boundary of the Upper Klamath Wild and Scenic River.

Use: Recreation: boating (commercial and noncommercial) and scenic enjoyment; fish; and fish habitat.

Quantity:

- 1500 cfs for recreation (boating and scenic enjoyment), Memorial Day through September 30;
- 625 cfs for fish life and fish habitat, April 1 through June 15;
- 525 cfs for fish life and fish habitat, June 16 through March 31;

These flows are not additive.

Periods of Use:

- Memorial Day through September 30 of each year for 1500 cfs for recreation (boating and scenic enjoyment);
- April 1 through June 15 of each year for 625 cfs for fish life and fish habitat;
- June 16 through March 31 of each year for 525 cfs for fish life and fish habitat.

Priority Date: September 22, 1994.

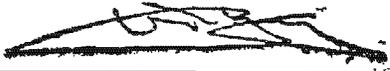
Place of Use: Upper Klamath Wild and Scenic River from upstream river mile 220.4, i.e., from the J.C. Boyle dam powerhouse, to downstream river mile 209.3, i.e., to the Oregon-California border.

Point of Diversion: Not applicable.

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Dated: February 12, 2003

William D. Young, Administrative Law Judge  
Hearing Officer Panel

**NOTICE TO THE PARTIES:** If you are not satisfied with this Order you may:

**EXCEPTIONS:** Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Hearing Officer. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dick Bailey  
Klamath Basin Adjudication  
Oregon Water Resources Dept  
158 12th Street NE  
Salem OR 97301

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2003, I mailed a true copy of the following:  
**PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon  
97309, with first class postage prepaid thereon, and addressed to:

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Case No.: 006, Claim No.: 376

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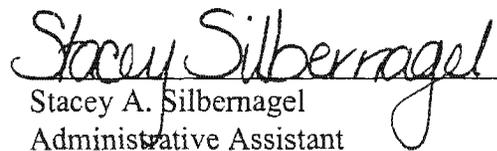
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Administrative Assistant

Case No.: 006, Claim No.: 376

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