

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

FILED  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF LA  
2004 SEP 24 PM 3:34  
LORETTA G. WHYTE  
CLERK

LORETTO O'REILLY, Jr., )  
KELLY FITZMAURICE, AND )  
HAZEL SINCLAIR )  
Plaintiffs, )  
v. )  
UNITED STATES ARMY CORPS )  
OF ENGINEERS )  
Defendant. )

File Number: 04-0940  
Section: "A"  
Magistrate: 5

**DEFENDANT'S OBJECTIONS TO PLAINTIFFS' BILL OF COSTS LODGED WITH THE CLERK OF THE COURT**

On September 9, 2004, Plaintiffs filed an application seeking costs in the amount of \$360.65. *See* Bill of Costs. Defendant Army Corps of Engineers ("Corps") objects to this application. Specifically, the costs for the service of summons and subpoena on August J. Hand and the fees for Dr. Ivor Van Heerden should be denied because this is a record-review case under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701.

Plaintiffs' request for costs for witnesses and for service of summons and subpoena to inspect the premises must be denied because this case is an APA case. The judicial review provisions of the APA provide that review is to be limited to the administrative record. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Id.*

Fee \_\_\_\_\_  
Process \_\_\_\_\_  
X Dktd \_\_\_\_\_  
CtRmDep \_\_\_\_\_  
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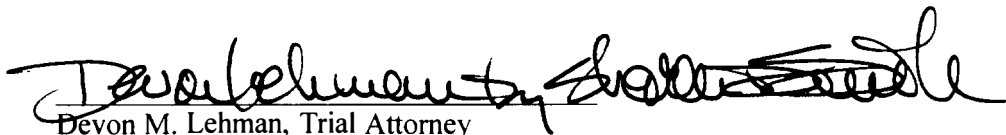
Plaintiffs' request for costs for \$115.00 for witness fees for Dr. Ivor Van Heerden should not be taxed for several reasons. First, Dr. Van Heerden did not testify in this case, nor was he deposed. While § 1920 permits the compensation of witnesses and court-appointed experts, parties are not required to compensate witnesses who do not testify. *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5<sup>th</sup> Cir. 1993) (approving the decision not to tax fee for witness who attended trial but did not testify because of a directed verdict). Second, in any event, Dr. Van Heerden would not have been allowed to testify because such testimony would have been outside the record and, therefore, the provisions of the APA. Third, § 1920 provides for expert witness fees only when such experts are court-appointed. Dr. Van Heerden was not a court-appointed expert. Thus, his fee should be disallowed.

Likewise, the fees for service of summons and subpoena, which Plaintiffs' bill of costs indicates was for "personal service of subpoena on August J. Hand *for inspection of premises* pursuant to Federal Rule of Civil Procedure 45," should not be taxed. *See* Bill of Costs, Itemization of Costs at 1 (emphasis added). Again, the APA does not allow for introduction of evidence outside the record, so any information gleaned from inspection of the property could not have been introduced into evidence. Further, no evidence from this subpoena was used in the parties' briefing. Defendant asserts, upon information and belief, that Plaintiffs sought the summons and subpoena in order to allow Dr. Van Heerden to inspect the property. Because Dr. Van Heerden did not testify and could not have testified under the APA, this cost was not incurred for any use in the proceeding and should be disallowed.

In conclusion, Plaintiffs' cost application should be reduced in regards to the service of summons and subpoena for inspection of the premises and the fees for Dr. Van Heerden.

Respectfully submitted this 24th day of September, 2004.

THOMAS L. SANSONETTI  
Assistant Attorney General  
United States Department of Justice



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**CERTIFICATE OF SERVICE**

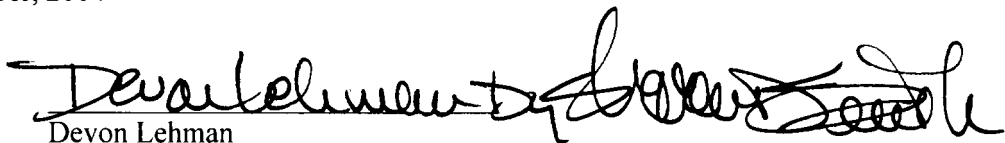
I hereby certify that I served the foregoing **DEFENDANT'S OBJECTIONS TO PLAINTIFFS' BILL OF COSTS LODGED WITH THE CLERK OF THE COURT**

on:

Karla Raettig  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, Louisiana 70118

Attorneys for the Plaintiff, by causing a full, true and correct copy thereof to be sent, on the date set forth below, by mailing in a sealed, first class postage prepaid envelope, addressed to the last known mailing address of the attorney and deposited with the United States Postal Service at Washington D.C. A courtesy copy was also sent by facsimile to Ms. Raettig at (504) 862-8721.

DATED this 24th day of September, 2004

  
Devon Lehman