

FILED  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF LA

2004 SEP 27 PM 3: 47

LORETTA G. WHYTE  
CLERK

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

LORETTO O'REILLY, Jr.,  
KELLY FITZMAURICE, AND  
HAZEL SINCLAIR,  
*Plaintiffs,*

v.

UNITED STATES ARMY CORPS  
OF ENGINEERS,  
Defendant.

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File Number: 04-0940  
Section: "A"  
Division: 5  
Judge Zainey  
Magistrate Judge Chasez

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

Plaintiffs Loretto O'Reilly, Jr., Kelly Fitzmaurice, and Hazel Sinclair submit this response to Defendant U.S. Army Corps of Engineers' ("Corps") objections to Plaintiffs' bill of costs. For the reasons set forth below, Plaintiffs withdraw the witness fee for Dr. Ivor Van Heerden and the fee for personal service of a subpoena on August J. Hand but reserve the right to seek those fees in their Equal Access to Justice Act petition under 28 U.S.C. § 2412.

On September 9, 2004, Plaintiffs filed a bill of costs pursuant to Local Rule 54. The bill of costs included a witness fee for Dr. Ivor Van Heerden and the fees for personal service on August J. Hand for inspection of premises by Dr. Van Heerden. Dr. Van Heerden submitted a

Fee	_____
Process	_____ <i>AW</i>
<input checked="" type="checkbox"/> Dktd	_____ <i>AW</i>
<input checked="" type="checkbox"/> CiRmDep	_____ <i>AW</i>
Doc. No.	_____ <i>31</i>

declaration in support of Plaintiffs' motion for a preliminary injunction and was prepared to testify at the preliminary injunction hearing on June 30, 2004. At the hearing, the Court questioned the Defendant-Intervenors about entering into a stipulation to prohibit development activities until the Court issued a ruling on the merits. The Defendant-Intervenors agreed and the Court issued an order providing: "It was stipulated that no construction work of any sort will be done until after the trial on the merits." June 30, 2004 Minutes, Docket Entry #17. Therefore, the Plaintiffs obtained the relief sought in their preliminary injunction motion and ultimately prevailed on the merits when the Court entered Judgment for the Plaintiffs on August 11, 2004.

On September 25, 2004, the Corps submitted objections to Dr. Van Heerden's witness fee as well as the subpoena because "[T]he judicial review provisions of the APA provide that review is to be limited to the administrative record." Defendant's Objections, p. 1 (citing Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985)). However, in the context of a preliminary injunction, the record review limitation pertains only to the "success on the merits" prong of the test, i.e., whether the agency acted in compliance with the law. There is no record review limitation prohibiting the submission of evidence to support or refute a party's irreparable harm, balancing, or public interest arguments. Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (recognizing need to allow extra-record evidence at the preliminary injunction stage); American Rivers v. U.S. Army Corps of Engineers, 271 F. Supp. 2d 230, 247 (D.D.C. 2003) (use of "extra-record" declarations is appropriate in context of preliminary injunction); Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1259-61 (10<sup>th</sup> Cir. 2003) (allowing evidence from expert witnesses on the issue of irreparable harm in a record review case); Davis v. Mineta, 302 F.3d 1104, 1115 (10<sup>th</sup> Cir. 2002) (party must make specific showing of irreparable injury); Sierra Club v. U.S. Army Corp of Engineers, 935 F. Supp. 1556, 1568 (S.D. Ala. 1996) (in context of a

preliminary injunction, evidence that goes to irreparable injury rather than the correctness of the agency's decision, will be considered by the court); GTE Sylvania, Inc. v. Consumer Products Safety Comm'n, 404 F. Supp. 352, 368 n.68 (D. Del. 1975) (in record review case, "affidavits submitted by the plaintiffs are essential to establish irreparable harm before a preliminary injunction can be issued"). Because Plaintiffs appropriately relied on Dr. Van Heerden's declaration to establish harm, they are entitled to fees for his expert testimony under the Equal Access to Justice Act and will include his fees in their petition.

Plaintiffs included the witness fee and cost for the subpoena in the bill of costs to ensure that they did not waive the fees. However, Plaintiffs withdraw the fee and costs from the bill of costs based on the 28 U.S.C. 1920's requirement that a court appoint the expert.

Respectfully submitted this 27th day of September, 2004,

TULANE ENVIRONMENTAL LAW CLINIC



Karla Raettig, La. Bar No. 27860  
Tulane Environmental Law Clinic  
6329 Freret Street  
New Orleans, Louisiana 70118  
Telephone (504) 865-5789  
Fax (504) 862-8721

Counsel for Loretto O' Reilly, Jr., Kelly Fitzmaurice, and  
Hazel Sinclair

**Certificate of Service**

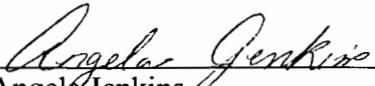
I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by faxing Ms. Lehman and placing same in the United States mail, postage prepaid and properly addressed on the 27<sup>th</sup> day of ~~August~~, 2004, to:  
*September*

Devon M. Lehman  
U.S. Department of Justice  
Environmental & Natural Resources Division  
General Litigation Section  
P.O. Box 663  
Washington, D.C. 20044-0663  
Fax: (202) 305-0506

Lois Godfrey-Wye  
Department of Justice  
Environmental Defense Section  
P.O. Box 23986  
Washington D.C. 20026-3986

Sharon D. Smith  
Assistant U.S. Attorney  
United States Attorney's Office  
Hale Boggs Federal Building  
500 Poydras St., Room B210  
New Orleans, LA 70130

Walter R. Woodruff  
Edward S. Bopp – A Law Corp.  
6725 St. Claude Ave.  
Suite 102  
Arabi, LA 70032

  
Angela Jenkins