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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BESS BAIR; TRISHA LEE LOTUS;
BRUCE EDWARDS; JEFFREY HEDIN;
DAVID SPREEN; ENVIRONMENTAL
INFORMATION PROTECTION
CENTER, a non-profit corporation;
CENTER FOR BIOLOGICAL
DIVERSITY, a non-profit corporation; and
CALIFORNIANS FOR ALTERNATIVES
TO TOXICS, a non-profit corporation,

No. C 14-03422 WHA

**ORDER DENYING MOTION
FOR ATTORNEY’S FEES
AND VACATING HEARING**

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION; MALCOLM
DOUGHERTY, in his official capacity as
Director of the California Department of
Transportation,

Defendants.

_____ /

INTRODUCTION

In this follow-on litigation to a NEPA action, plaintiffs seek attorney’s fees against a California state agency under the Equal Access to Justice Act. For the following reasons, the motion is **DENIED**.

STATEMENT

Previous orders in the underlying environmental-impact litigation recount the facts of this case in detail (Dkt. No. 146, Case No. C-10-4360-WHA). In brief, plaintiffs filed their complaint in the underlying NEPA action to prevent the widening of a portion of United States Highway 101 that runs through Richardson Grove State Park, a forest of old-growth redwood trees. The undersigned judge ordered defendants California Department of Transportation and Director Malcolm Dougherty (collectively, “Caltrans”) to take steps to comply with relevant laws governing environmental-impact review. The underlying case ended and the parties

1 resolved their attorney's fees and costs after mediation and a judicially-supervised settlement
2 conference in late 2012. *See Bair v. California Department of Transportation*, No. C-10-4360-
3 WHA, 867 F. Supp. 2d 1058 (N.D. Cal. Apr. 4, 2012).

4 State-court litigation ensued. Then, plaintiffs concluded that Caltrans had not complied
5 with the undersigned judge's order in the underlying NEPA action and filed this follow-on
6 action. Caltrans moved to dismiss the first-amended complaint. Plaintiffs filed nothing in
7 response. Two weeks later, the parties stipulated, and the undersigned judge then ordered,
8 dismissal of this follow-on action without prejudice under Rule 41. Plaintiffs now file their only
9 motion in this case, a motion for \$125,299.35 in attorney's fees and \$1,433.35 in costs, under the
10 Equal Access to Justice Act. This order follows full and supplemental briefing
11 (Amd. Compl. ¶¶ 104, 114; Dkt. Nos. 31–38).

12 ANALYSIS

13 This order denies plaintiffs' motion for attorney's fees for the following reasons.

14 *First*, plaintiffs cannot recover fees from a state agency under the EAJA.

15 A court may award fees under 28 U.S.C. 2412(d)(1) (emphasis added):

16 in any civil action (other than cases sounding in tort), including
17 proceedings for judicial review of agency action, ***brought by or against***
18 ***the United States*** in any court having jurisdiction of that action, unless
the court finds that the position of the ***United States***, was substantially
justified or that special circumstances make an award unjust.

19 Here, plaintiffs did not bring claims for relief against the United States, its agencies, or its
20 officials. Rather, plaintiffs brought claims for relief against a California agency and official.

21 No federal court has ever held that the EAJA authorizes an award of fees in an action
22 against a state, state agency, or its officials. The undersigned judge requested that the parties
23 provide on-point authority on just this issue (Dkt. No. 56). In response, plaintiffs filed a six-page
24 brief and supporting declarations and exhibits — in disregard of a request limiting supplemental
25 briefing to five pages and disallowing attachments — in which plaintiffs cited neither binding
26 precedent nor on-point authority. Plaintiffs cite to dicta from a Kentucky district court decision.
27 The Kentucky decision provides little guidance because a federal agency was a named party to
28 the action there. Courts do not, and this order does not, award fees against a state agency under

1 the EAJA when the United States is not a named party. *See, e.g., Sierra Club, Inc. v. Electronic*
2 *Controls Design*, 909 F.2d 1350, 1356 (9th Cir. 1990).

3 Nevertheless, to be as fair to plaintiffs as possible, the Court, on its own, reviewed more
4 than 600 EAJA decisions. No federal court (or state court) has ever awarded EAJA fees against
5 a state agency. In these circumstances, there is simply no authority to order the relief sought.

6 *Second*, plaintiffs' motion is untimely. To be timely, a party must request fees within
7 thirty days of final judgment. 28 U.S.C. 2412(d)(1)(B). A judgment is final when the time to
8 appeal has expired. *Arulampalam v. Gonzalez*, 399 F.3d 1087, 1088 (9th Cir. 2005). For
9 purposes of the EAJA, a stipulation of voluntary dismissal without prejudice is final, not
10 appealable, and triggers the thirty-day clock. *See Bryan v. Office of Personnel Management*,
11 165 F.3d 1315, 1320–21 (10th Cir. 1999). A plaintiff may not appeal a voluntary dismissal
12 without prejudice. *Coursen v. A.H. Robins Company*, 764 F.2d 1329, 1342 (9th Cir. 1985),
13 *amended by Coursen v. A.H. Robins Company*, 773 F.2d 1049 (9th Cir. 1985). Therefore, the
14 thirty-day clock begins to run from the time of dismissal.

15 The undersigned judge approved the parties' stipulation and dismissed the action without
16 prejudice on December 4, one day after the parties filed their stipulation. Nonetheless, plaintiffs
17 did not request fees until March, two months after the time for requesting fees, January 5, 2015,
18 passed (Dkt. Nos. 35–36, 38).

19 Even assuming *arguendo* plaintiffs' claim that a stipulation of voluntary dismissal
20 without prejudice could be appealed, plaintiffs' motion is untimely. Plaintiffs argue that “under
21 Fed. R. App. Pro. (4)(a) the deadline for anyone to appeal the Stipulated Order was
22 February 2, 2015” (Reply at 6). Not so. Rule 4(a) only extends the time to appeal to sixty days
23 if the United States, its agencies, or its officials are parties to the suit. The named parties to this
24 action do not include the United States, a federal agency, or a federal official. Plaintiffs had
25 thirty days, not sixty days, to appeal. They should have then filed their motion by February 4.

26 Finally, plaintiffs submit no evidence that they met and conferred prior to filing their
27 motion for attorney's fees. This is an additional reason that counsels against awarding fees in
28


1 this matter. *See Ibrahim v. Department of Homeland Security*, No. C-06-00545-WHA,
2 2014 WL 1493561, at *5 (N.D. Cal. Apr. 15, 2014) (collecting cases).

3 **CONCLUSION**

4 Plaintiffs' motion for attorney's fees is **DENIED**. The hearing on **APRIL 9** is **VACATED**.

5
6 **IT IS SO ORDERED.**

7
8 Dated: March 31, 2015.

9 
10 _____
11 WILLIAM ALSUP
12 UNITED STATES DISTRICT JUDGE