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WILLIAM L. WHITTAKER  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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

LILLIAN BLAKE PUZZ, et al., )  
Plaintiffs, )

v. )

UNITED STATES DEPARTMENT OF )  
THE INTERIOR, et al., )

NO. C80-2908 TEH

Defendants. )

ORDER

WILFRED K. COLEGROVE, et )  
al., )

Cross/Counter Defendants. )

This matter comes before the Court on plaintiffs' motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Specifically, plaintiffs seek to delete that portion of our December 21, 1988 order which provides that each party shall bear its own costs. After carefully considering the parties' papers, the Court grants the motion for the reasons set forth below.

As the judgment now stands, the Court's allocation of costs could preclude plaintiffs from establishing prevailing party status for the purpose of obtaining attorney fees pursuant to 42 U.S.C. § 1988 or 28 U.S.C. § 2412. However, as

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1 plaintiffs accurately surmised, this Court did not intend to  
2 determine plaintiffs' eligibility for fees in the context of  
3 its December 21st dismissal order. Accordingly, an amendment  
4 deleting the cost provision is appropriate.

5 Defendants raise three primary objections to the  
6 motion, none of which we find persuasive. Hoopa defendants  
7 argue that plaintiffs, by failing to identify attorney fees  
8 as an issue in their response to this Court's November 15,  
9 1988 order, in effect, waived their right to seek fees now.  
10 The November 15th order, however, only required identification  
11 of issues that would preclude dismissal of the action. The  
12 issue of attorney fees was not relevant to the propriety of  
13 dismissal; on the contrary, the issue of attorneys fees only  
14 becomes ripe once a case is disposed of. Nor can defendants  
15 claim any prejudice from plaintiff's failure to raise the  
16 issue previously. Accordingly, plaintiffs' failure to request  
17 fees in its response is not grounds for denying the instant  
18 motion.

19 Second, defendants emphasize that this Court's  
20 determination that each party should bear its own costs is a  
21 supportable one, and therefore should not be disturbed.  
22 However, defendants' observation, that the Court acted within  
23 its discretion in allocating costs, misses the point. The  
24 Court did not intend to decide the fee eligibility question in  
25 its December 21st order. Thus, even assuming that the Court  
26 acted well within its discretion, there is no reason it should

1 be compelled to continue supporting that action if it is later  
2 shown to have unintended consequences.

3 Finally, defendants argue that the motion should be  
4 denied because plaintiffs could not possibly establish that  
5 they are prevailing parties for the purposes of a fee award.  
6 This issue, however, should be resolved after an opportunity  
7 for briefing on a motion for attorneys fees; it should not be  
8 relegated for decision in the context of the instant motion.

9 The Court wishes to make clear, however, that its  
10 decision to grant plaintiffs' motion should in no way be  
11 construed as an indication of the merits of any fee motion.  
12 If anything, it appears, at first blush, that plaintiffs' task  
13 of establishing eligibility for fees will not be an easy one.  
14 Nevertheless, the issue of attorneys fees is an important one,  
15 and its resolution warrants a full opportunity for briefing.

16 Finally, the Court concludes that it would be  
17 appropriate for any briefing on attorney fees to proceed in  
18 two stages. Thus, plaintiffs' briefs in support of a motion  
19 for fees should initially be limited to issues going to  
20 defendants' liability for fees. In the event liability is  
21 established, either under the Civil Rights Attorney's Fees  
22 Award Act or the Equal Access to Justice Act, further briefing  
23 will be ordered with respect to the calculation of the  
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appropriate amount of fees to be awarded.<sup>1</sup>

Accordingly, and good cause appearing, it is HEREBY ORDERED that:

1. plaintiffs' motion, pursuant to Fed. R. Civ. P. 59(e), to amend the judgment entered in this action on December 23, 1988, is GRANTED.


2. the foregoing judgment is AMENDED to delete that portion which states that "[e]ach party shall bear its own costs."

3. the judgment dismissing this action shall be effective as of the date of the entry of a separate judgment being filed contemporaneously herewith.

4. the initial briefing on plaintiffs' anticipated motion for attorney fees shall be limited to the issues outlined above.

IT IS SO ORDERED.

DATED 3/17/89

  
\_\_\_\_\_  
Judge Thelton E. Henderson,  
United States District Court.

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<sup>1</sup> The Court is aware that 28 U.S.C. § 2412 requires that a party seeking a fee award shall within 30 days of final judgment submit an application which includes the amount sought (based on an itemized statement showing the time expended and the rate at which fees and other expenses are computed). In order to ensure compliance with this provision, plaintiffs should attach to their motion the necessary itemized statement and state the total amount being sought (without briefing the various issues relevant to computation of that amount).

