

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

B & D LAND AND LIVESTOCK CO.,
an Iowa corporation,

Plaintiff,

vs.

ED SCHAFER, Secretary, United States
Department of Agriculture,

Defendant.

No. C 07-3070-MWB

ORDER

This matter comes before the court pursuant to the plaintiff's December 16, 2008, Application For Costs, Attorney Fees And Expenses, And Other Fees And Expenses (docket no. 30). The plaintiff seeks fees and expenses pursuant to the Equal Access To Justice Act (EAJA), 28 U.S.C. § 2412, after a favorable disposition of its action for judicial review in an opinion and judgment handed down November 5, 2008. The plaintiff represents that the judgment is now final, that it is a prevailing party, and that the position of the defendant was not substantially justified. The defendant filed a Response (docket no. 31) the same day that the plaintiff's Application was filed, asserting that the Application was premature, because the United States has sixty days to appeal the court's decision, meaning that the decision in question was not "final." The defendant did, indeed, file a Notice Of Appeal (docket no. 32) on January 2, 2009.

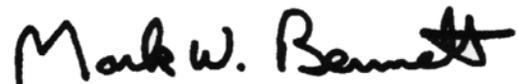
The court finds that the defendant is correct. The EAJA permits an award of attorney fees to a prevailing party if application for such fees is made within thirty days of a "final judgment" and defines a "final judgment" as "a judgment that is final and not appealable." *See* 28 U.S.C. §§ 2412(d)(1)(B) & (d)(2)(G). Pursuant to Rule 4(a)(1)(B),

“When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.” FED. R. APP. P. 4(a)(1)(B). Because the time for appeal had not run when the plaintiff’s Application was filed, and an appeal has now been filed, the judgment in question is not “final” within the meaning of 28 U.S.C. § 2412(d)(2)(G), and the plaintiff’s Application is, consequently, premature.

THEREFORE, the plaintiff’s December 16, 2008, Application For Costs, Attorney Fees And Expenses, And Other Fees And Expenses (docket no. 30) is **dismissed without prejudice** as premature.

IT IS SO ORDERED.

DATED this 16th day of January, 2009.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA