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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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JAMES FRANCIS,

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No. CV 07-8130-PCT-SMM

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Plaintiff,

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ORDER

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v.

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OFFICE OF NAVAJO AND
HOPI INDIAN RELOCATION,
an administrative agency of the United
States,

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Defendant.

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Before the Court is Plaintiff’s Unopposed Motion and Application for Attorney Fees Under the Equal Access to Justice Act and the parties’ Stipulation for Attorney Fees (Doc. 36). The parties stipulate to an award of fees in the amount of \$4,658.34. After considering the parties’ stipulation, the Court now issues the following Order.

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Plaintiff requests attorney fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1)(A), which provides:

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Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against 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.

1 In granting such an award, the EAJA sets a maximum hourly rate of \$125 per hour
2 for attorney fees “unless the court determines that an increase in the cost of living or a
3 special factor, such as the limited availability of qualified attorneys for the proceedings
4 involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A). To determine the cost-of-
5 living adjustment (“COLA”) allowed under EAJA, courts multiply the basic EAJA rate
6 (\$125 per hour) by the average annual consumer price index for urban consumers (“CPI-
7 U”)¹ for the year in which the attorney performed the work. Thangaraja v. Gonzales, 428
8 F.3d 870, 876-77. The result is then divided by the CPI-U in March 1996, the month
9 when the statutory cap (\$125 per hour) was imposed. Id. at 877.

10 In the parties’ Stipulation, Plaintiff requests \$4,658.34 in fees, calculated based
11 upon 25.4 hours of work at the hourly rate of \$169.62 in addition to a \$350.00 filing fee
12 (Doc. 36). The Court finds this calculation to be incorrect. Counsel for Plaintiff
13 completed the work in 2007 and 2008, and thus, these are the operative years for EAJA
14 fees analysis. Pursuant to Ninth Circuit Rule 39-1.6, the applicable statutory maximum
15 hourly rate under EAJA, including COLA, is \$166.46 for 2007. As the year 2008 is not
16 completed yet, the Ninth Circuit has not determined the 2008 statutory maximum hourly
17 rate, adjusted for COLA. As a result, the Court will use the same \$166.46 rate for the
18 work performed in 2008. Consequently, the fee award requested in the pending case
19 exceeds the statutory rate specified in the EAJA, adjusted for cost of living increases.²
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24 ¹The national CPI-U, rather than the regional CPI-U, is the proper source from which
25 to determine the COLA in this case, given Ninth Circuit case law and the statutory language
26 of the EAJA. See Jawad v. Barnhart, 370 F.Supp.2d 1077, 1080-89 (S.D. Cal. 2005)
(concluding that utilizing the national CPI-U is consistent with the clear language of the
27 EAJA as well as controlling case law).

28 ² The appropriate fee calculation is as follows: 25.4 hours x \$166.46 hourly fee (as
permitted under EAJA) plus \$350.00 filing fee = \$4,578.08.

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Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Application for Award of Attorney's Fees Under the Equal Access to Justice Act (Doc. 36) is **GRANTED in part.**

IT IS FURTHER ORDERED that the Motion is **GRANTED** insofar as Plaintiff will be awarded the full amount of fees as calculated by the Court.

IT IS FURTHER ORDERED that Plaintiff is awarded \$4,228.08 in attorney's fees and \$350.00 in court costs for a total award of \$4,578.08.

DATED this 1st day of December, 2008.



Stephen M. McNamee
United States District Judge