

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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<b>El Paso Natural Gas Company, LLC,</b>	)	
	)	No. CV-14-08165-PCT-DGC
Plaintiff,	)	
	)	
vs.	)	Phoenix, Arizona
	)	February 21, 2019
<b>United States of America, et al.,</b>	)	1:02 p.m.
	)	
Defendants.	)	

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**BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE**

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**TRIAL - DAY 3**

**(Pages 652 through 783)**

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I N D E X

<u>WITNESSES FOR THE</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
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MR. ANDREW WERTH		655	706
MR. DAVID BATSON	709	755	

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>REC'D</u>
257	Letter from C. Tenley to D.L. Foshee	661
280	Memo from Drew Werth	672
5 D	Page from Expert Report of Mr. Beahm	697
9 A	Page from Expert Report of Mr. Batson	721

P R O C E E D I N G S

THE COURT: You may proceed, Mr. Martinez.

MR. MARTINEZ: Good afternoon, Your Honor.

CROSS-EXAMINATION

BY MR. MARTINEZ:

Q. Hello, Mr. Werth. I'm Michael Martinez for the United States.

Mr. Werth, to start off, you didn't submit a Rule 26 expert report for this case, right?

A. Correct.

Q. So earlier you testified about only things that you've seen personally out on the mine sites?

A. Correct.

Q. And not on your specialized knowledge, right?

A. Correct.

Q. Now, Arcadis is El Paso's primary consultant out at the mine site, right?

A. Correct.

Q. And I just want to go through some of the steps. We've heard a lot of different acronyms today, so can you put them in order for us?

First, you would start with an RSE; is that right?

A. What are you referring to, like, since the inception of the 2013 --

Q. Yeah, let's hear from the start of the project to an EPA

1 final remedy. What are the different steps there?

2 A. Okay. Much more general question, but yeah.

3 So the general process for a time critical or non-time  
4 critical removal action is to start with a first inspection or  
5 site inspection. We did not do that. That was presumed to be  
6 done by EPA.

7 Then after that comes a removal site evaluation, then  
8 comes an EE/CA report, Engineering Evaluation/Cost Analysis,  
9 and then public comment, and a final action memo by EPA.

10 Q. Okay. So Arcadis drafts reports that go to EPA?

11 A. Say it again.

12 Q. Arcadis drafts reports that go to EPA?

13 A. Correct.

14 Q. And you drafted some of these documents?

15 A. Correct.

16 Q. Does El Paso have input on what is submitted to EPA?

17 A. Yes. We would review that with our client before submittal  
18 to EPA.

19 Q. And, in your experience, who at El Paso reviews and  
20 comments?

21 A. A number of folks. Specifically, Doug Stavinoha is the  
22 project manager for El Paso. His direct supervisor is Brian  
23 Kelman. Beyond that, I am not sure how high it goes up in the  
24 management chain.

25 Q. Any lawyers?

1 A. On occasion, yes.

2 Q. Who would those be?

3 A. Daniel Schnee.

4 Q. And Mr. Schnee is El Paso's in-house counsel?

5 A. As I understand, yep.

6 Q. Any others?

7 A. We also work with some other consultants that El Paso has  
8 retained.

9 Q. I'm sorry, my question, any other lawyers?

10 A. Oh, any other lawyers? No, not to my knowledge.

11 Q. What types of comments does Mr. Schnee provide for your  
12 drafts that go to EPA?

13 A. As far as comments, I mean, I've been working with  
14 Mr. Schnee for five or six years now. They range from  
15 technical questions, to grammatical corrections. They can  
16 range if he were to review a report.

17 Q. It's not Arcadis's task to attribute causation of any  
18 mining activity to any entity, right?

19 A. Correct. Yeah, we specifically tend to not refer to any  
20 entities. It's just disturbance features out at the sites.

21 Q. And I guess mining activity here, I also want to just make  
22 that clear, it includes exploration, rim stripping, bulldozing,  
23 anything that could happen out at the mine sites, right?

24 A. Correct. Yeah, when I say mining related, it's related to  
25 exploration, mining and reclamation, anything in that three

1 phases.

2 Q. So it's not your task at Arcadis to attribute causation,  
3 including to the United States, for any of these activities?

4 A. Correct.

5 Q. And, for the record, El Paso funds the work Arcadis is  
6 doing out in Cameron, right?

7 A. Absolutely.

8 Q. Would you agree that Arcadis and El Paso speak to EPA with  
9 one voice, meaning Arcadis and El Paso wouldn't present  
10 competing positions to EPA, right?

11 A. Correct.

12 Q. Now, is it fair to say a corporation, given the choice to  
13 pay more or pay less for something, would opt to pay less, just  
14 common sense?

15 A. Given the question, I would say, yes, it would pay less.

16 Q. Do you know if it is one of El Paso's goals to minimize  
17 clean up costs out in Cameron?

18 A. I haven't spoken to them directly on that because there is  
19 a number of contributing factors that go into that. I would  
20 say it ranges from, yes, cost, but stakeholder engagement,  
21 reputation, PR.

22 More broadly, I think any client's objectives is to do  
23 the work as efficiently as possible at remediation sites to  
24 reduce costs.

25 Q. Now, you're aware that Navajo Nation performed reclamation

1 work at the abandoned mines at the Navajo Nation generally,  
2 right?

3 A. Yes.

4 Q. Is it your understanding that El Paso and its predecessors  
5 once operated the mine sites out in Cameron?

6 A. Correct.

7 Q. Now, we've heard a lot of dates in the past few days, but  
8 will you agree that El Paso stopped mining at the mine sites  
9 around 1962, that was kind of the last year they were out  
10 there?

11 A. That's the date range I've seen.

12 Q. And the Navajo Nation reclaimed the mine sites except for  
13 Huskon's 5 and 14 in the 1990s?

14 A. And into the 2000s, correct.

15 Q. All right. So when the Navajo Nation started reclaiming  
16 the mine sites, they were already abandoned, right, there was  
17 no one working on them?

18 A. Correct.

19 Q. And no one operated the mine sites between 1962 and at the  
20 time of the reclamation?

21 A. Not to my knowledge.

22 Q. Did El Paso know about the reclamation projects at the time  
23 they were happening?

24 A. I started on these sites in 2013. I'm not sure what was  
25 happening in 1990.



1 Q. Have you reviewed anything that shows you that they were  
2 aware of the reclamation?

3 A. No.

4 Q. Do you know if El Paso contributed any funds to the  
5 reclamation process?

6 A. I'm not able to answer that. Not sure.

7 Q. Do you know if they were involved at all in the reclamation  
8 process?

9 A. No.

10 Q. You don't know.

11 Would you agree that the levels of radiation present  
12 at the reclaim mine sites today are lower than the levels  
13 during El Paso's mining activities?

14 A. At the surface, yes.

15 Q. And the subsurface is not accessible because there is a cap  
16 on most of the reclaimed areas, right?

17 A. When you say not accessible, what do you mean by that?

18 Q. It's not actually exposed, there is a cap?

19 A. Correct.

20 Q. Would you say that the reclamation reduced radiation  
21 exposure to the people living in Cameron around the mine sites?

22 A. At the surface levels, I want to probably focus on that  
23 particularly, it did reduce the surface levels of radiological  
24 readings.

25 Q. So the modern material was actually -- is under a cap,

1 right, so it's not directly accessible to those living in the  
2 area?

3 A. Correct.

4 Q. So looking forward to 2012, El Paso received a general  
5 notice letter from EPA regarding the mine sites; is that right?

6 A. It sounds right.

7 MR. MARTINEZ: I'm going to ask Mr. Hambrick to pull  
8 up on the screen Exhibit 257.

9 And, Your Honor, I'd like to move this into evidence.  
10 I don't believe it's in yet.

11 Your Honor, we'd like to move Exhibit --

12 THE COURT: Yeah, I heard that.

13 Is there an objection?

14 MR. NEUMANN: Sorry, Your Honor. No objection.

15 THE COURT: All right. It's admitted.

16 BY MR. MARTINEZ:

17 Q. This is a document dated May 17th, 2012. Is this the  
18 general notice letter that you reviewed?

19 A. I've seen this in the past.

20 Q. Is it your understanding that EPA sends a general notice  
21 letter if it finds a potentially responsible party, a PRP,  
22 under CERCLA?

23 A. That's my understanding.

24 Q. At the bottom of the first paragraph there is some  
25 highlighted language. It says, the purpose of this letter is

1 to inform you that EPA considers El Paso Corporation to be a  
2 PRP at the sites.

3 Do you see that?

4 A. I do.

5 Q. So we spoke a second ago about 1962 through the reclamation  
6 process. Do you know if between the end of the mining until  
7 the general notice letter, did El Paso conduct any  
8 environmental investigations at the mine sites?

9 A. I'm not aware of any, but, again, just to qualify that, my  
10 involvement on this project started in 2013.

11 Q. I mentioned earlier Mr. Stavinoha, Doug Stavinoha. Is he  
12 El Paso's internal project manager?

13 A. He is.

14 Q. Are you aware that he was deposed in this case?

15 A. I am.

16 Q. We're going to pull up page 30, lines 3 through 7, of his  
17 deposition. Starting with line 3, it says, up until the time  
18 El Paso received the general notice letter from EPA in 2012,  
19 had El Paso done any environmental investigations at the  
20 Cameron sites? Answer: Not that I'm aware.

21 Do you have any reason to disagree with that?

22 A. No.

23 Q. So El Paso started its environmental investigations in 2012  
24 when it was contacted by EPA, right?

25 A. Well, after the AOC was signed in 2013, that's when they

1 started the investigation.

2 Q. Right, so not until at least 2012, so probably 2013?

3 A. Right.

4 Q. Is that yes?

5 A. Correct.

6 Q. I want to turn to a document you've seen earlier today,  
7 it's 263. And if I refer to this as an AOC, you know what I'm  
8 talking about, right?

9 A. Yep.

10 Q. Do you know if the federal agencies in this case were  
11 signatories to the AOC?

12 A. EPA was.

13 Q. But they're not part of this case, right?

14 A. Oh, I'm sorry, part of this case, sorry. Yes, they were a  
15 signatory to the AOC.

16 Q. Okay. Now, are you aware that El Paso set aside funds,  
17 which they called the reserve, to address the clean up of the  
18 mine sites?

19 A. I am.

20 Q. And do you know what the reserve amount was for the Cameron  
21 mine sites at the time of the AOC?

22 A. I have heard in the range of 30 million.

23 Q. I'm going to pull up a document, Exhibit 1327.

24 MR. MARTINEZ: Can you, please, Mr. Hambrick.

25 It's on page 9 is what I'm -- well, let's start it on

1 the first page, it's July -- sorry, go back to the first page  
2 so I can see the date.

3 BY MR. MARTINEZ:

4 Q. This is a slide -- a slide from Kinder Morgan. Is it your  
5 understanding that Kinder Morgan is the parent company of El  
6 Paso?

7 A. Correct.

8 Q. And this slide is dated July 30, 2013, right?

9 A. Correct.

10 Q. And we're going to flip to page 9. In the highlighted  
11 section it says, EPNG agrees to perform surface assessments for  
12 radioactivity. And this is under a heading of AOC.

13 Do you see the estimate of one million?

14 A. I do.

15 Q. Has the estimate of one million for surface assessment  
16 proven correct? Do you know if that number has been exceeded,  
17 that dollar figure?

18 A. I mean, I'm not sure exactly what they're referring to  
19 here, but certainly they've exceeded \$1 million since the  
20 inception of the AOC in 2013.

21 Q. So it's fair to say that El Paso underestimated the costs  
22 at this time when it was negotiating the AOC for the surface  
23 assessment cost?

24 A. Yeah, I guess I would want to make sure we're on the same  
25 page. The one million talks about surface assessment. That

1 could be one million for scanning the sites, walking around and  
2 collecting the gamma data that we have.

3 As far as the totality of the scope that's been  
4 completed to date, that's exceeded one million, clearly, but  
5 their estimate of less than one million could be appropriate  
6 for surface assessment.

7 Q. While we're on the same slide, it says, efforts continue to  
8 obtain financial contribution to offset some of the costs from  
9 USDOE, Department of Energy.

10 Do you see that?

11 A. I do.

12 Q. Do you know what those efforts were?

13 A. This is the first time I'm seeing this slide. I'm not  
14 sure.

15 Q. Aside from the slide, you don't know what that was?

16 A. No.

17 Q. I want to turn back to Exhibit 263. This is the AOC. And  
18 I'm going to point to page 10. Was the AOC limited only to  
19 investigation?

20 A. Can you repeat that?

21 Q. Was the AOC limited to just investigation only, site  
22 investigation?

23 A. I guess that we also had fencing and signage, Colter  
24 Research Survey, Biological Survey, so I'm not sure if that  
25 would be considered an investigation.

1 Q. That all went under the umbrella of investigation?

2 A. Sure, if we want to do that. I think fencing and signage  
3 would be more of a removal activity though.

4 Q. So what I'm getting to is EPA has not selected a final  
5 remedy for any of the mine sites at this point, right?

6 A. Certainly not.

7 Q. And El Paso has not yet agreed to perform the final remedy  
8 that EPA will one day select, right?

9 A. We're not there yet.

10 Q. But they haven't agreed to do it, no matter what it is?

11 A. Not that I am aware of, no.

12 Q. In the AOC, El Paso did not admit it was liable under  
13 CERCLA, right?

14 A. I believe so. There was a stipulation somewhere in here.

15 Q. Let's turn to page 1, paragraph 4, at the bottom.

16 It says that it does not constitute an admission of  
17 any liability.

18 Do you see that?

19 A. I do.

20 Q. In fact, El Paso retained its rights to challenge EPA's  
21 finding that it's even liable, right? And that goes onto the  
22 next page.

23 A. I'll take your word.

24 Q. Okay. Now, towards the end of the AOC, the scope of  
25 work --

1 MR. MARTINEZ: You can flip to page 35, that's the  
2 cover page of the scope of work, but -- let's go to page 37.

3 BY MR. MARTINEZ:

4 Q. El Paso only agreed to conduct lateral scanning of the  
5 disturbed areas, right, and not vertical scanning?

6 A. In the original AOC, correct.

7 Q. And the AOC does not require El Paso to investigate anyone  
8 else's mines in the Cameron area?

9 A. Correct.

10 Q. And El Paso has not agreed to investigate any other areas  
11 in the Cameron besides certain mine site boundaries that it  
12 once operated?

13 A. I guess that's how it was originally written, as you saw  
14 earlier --

15 Q. We'll get to the amendments later.

16 A. Okay.

17 Q. Now, turning to paragraph 4.4 in the scope of work, I  
18 believe it's page 36.

19 Here it mentions an investigation level of 1.24  
20 picocuries per gram above background, right?

21 A. Correct.

22 Q. Is that a residential standard?

23 A. So that's a historical PRG, so preliminary remediation  
24 goal, calculation result for residential scenario. Though if  
25 you were to use the current calculator, you couldn't recreate



1 that number. I mean, I think it was initially created for  
2 Northeast Church Rock.

3 Q. But this 1.24 picocuries per gram has not been determined  
4 to be the final remediation goal for any future response  
5 action, right?

6 A. Correct.

7 Q. There is still a lot of work that needs to be done to  
8 determine that?

9 A. No decisions have been made on that front.

10 Q. Earlier we looked at Exhibit 268, which is a letter from  
11 EPA. We don't need to get into the actual language, but you  
12 remember this letter, it was one where EPA --

13 A. Yeah, I do remember this.

14 Q. Discussing certain picocuries per gram?

15 A. Correct.

16 Q. Do you know if that discussion was related to investigation  
17 levels or was that related to what the final levels will be?

18 A. So this was related to the original AOC, so it would be  
19 related to the investigation that was --

20 THE COURT: Mr. Martinez, please don't talk when he's  
21 talking. It's very hard for the court reporter.

22 MR. MARTINEZ: Yes, Your Honor.

23 BY MR. MARTINEZ:

24 Q. That has to do with the investigation, right?

25 A. Correct.

1 Q. Do you agree that uranium is ubiquitous on the Navajo  
2 Nation --

3 A. I guess I can --

4 Q. -- everywhere?

5 A. Well, I was going to say specifically to Cameron, it's at  
6 the surface. That's what makes Cameron unique. Ubiquitous  
7 being a depth in places, you know, in New Mexico and others you  
8 can find similar formations and similar concentrations.

9 Q. How does that compare to non Cameron areas? Is uranium  
10 ubiquitous in all soil to certain levels, it's kind of an  
11 element in nature?

12 A. Yeah, it's everywhere. Cameron, as we saw yesterday with  
13 the geological section from Mr. Beahm, it does present itself  
14 at the surface though.

15 Q. But naturally occurring uranium is not the subject of a  
16 CERCLA response action here, right?

17 A. Yeah, naturally occurring is not.

18 Q. Even if it exceeds the clean up level, right?

19 A. So it is probably would two ways that I would want to  
20 respond to that. So norm as a whole, if it's never been  
21 touched by man, it would not be subject to CERCLA action, so  
22 that's where we were drawing the disturbance features in those  
23 black lines we showed earlier.

24 Q. So just norm would be a naturally occurring uranium?

25 A. Correct.

1 Q. And I believe the other term is T norm, technically  
2 modified?

3 A. It is.

4 Just to finish that thought with norm, a background  
5 can then ultimately be factored into the final clean up level  
6 for EE/CA.

7 Q. So only disturbed soil above the clean up level would need  
8 to be addressed?

9 A. So I think I mentioned this earlier to Mr. Neumann. I  
10 think we have two primary drivers of these sites. One is an  
11 action level that people do tend to fixate on. It would make  
12 sense, it does subject how much material may need to be  
13 addressed to get to a lower level of, presumably, an action  
14 level.

15 The other bit though is the erosional piece. So I  
16 think that it's more protecting future land use scenarios, if  
17 it's residential, recreate, or whatever it may be, the erosion  
18 could be an issue.

19 Q. But only disturbed soil, though, above a clean up level  
20 would actually need to be addressed? If it's undisturbed  
21 natural uranium and it's a hotspot, you wouldn't need to  
22 address that?

23 A. Yes, just -- I agree that undisturbed elevated material  
24 would not need to be addressed.

25 Q. That's my question.

1 A. Okay.

2 Q. Now, has a background level or an exceedance level for the  
3 19 mines yet been determined?

4 A. Which one, the background --

5 Q. For the first one.

6 A. So background, I guess per the RSC work plan that's been  
7 approved by EPA, the BSAs or the datasets that we're using, the  
8 background study areas, and those are being used quantitatively  
9 to establish an investigation level, so we're adding 1.24 on  
10 top of that. No final clean up level, though, has been  
11 determined or exceeded.

12 Q. No final. No final, right?

13 A. Correct.

14 THE COURT: No what?

15 MR. MARTINEZ: No final.

16 BY MR. MARTINEZ:

17 Q. And these will be mine-specific, right, so it won't be  
18 uniform across the 19 mine sites?

19 A. I'm not sure.

20 Q. Is it possible that some of the mines will require remedial  
21 action and some may not?

22 A. Entirely possible.

23 Q. And remedial actions may differ from mine to mine?

24 A. They may.

25 Q. That answers my question.

1 Like to turn to Exhibit 280.

2 MR. MARTINEZ: And I don't believe this is yet in  
3 evidence, Your Honor, so I'm going to move to admit 280.

4 THE COURT: Mr. Neumann, any objection?

5 MR. NEUMANN: I'm sorry, Your Honor, no objection.

6 THE COURT: 280 is admitted.

7 BY MR. MARTINEZ:

8 Q. This is a document titled, Draft Background Reference Area  
9 Assessment, and it's from Drew Werth.

10 Do you recognize this document?

11 A. I do.

12 Q. It's dated September 22nd, 2016.

13 You've heard a lot over the past few days sitting here  
14 in court that whether ADC rim stripped at the mine site is a  
15 fact at issue in this case, right?

16 A. I have.

17 Q. Now, earlier you testified that Arcadis does not attribute  
18 causation to any mining activity -- of any mining activity to  
19 any entity, right?

20 A. Correct.

21 Q. I'm going to turn to a table on page 9. And we're going to  
22 see if we can zoom in on those highlighted portions. They're a  
23 bit blurry and hard to read.

24 Here at the top we have a couple of columns, AEC  
25 disturbance, one in the middle from AEC disturbance outside

1 AUM, and over on the right, AEC disturbance again. And we have  
2 two highlighted sections near the middle. No observable  
3 disturbance adjacent to AEC rim stripping, and the same -- a  
4 similar comment right below that.

5 My question is why were these -- why were these  
6 included, these attributions to AEC?

7 A. With the geologists in the field and the trained eye,  
8 they're able to distinguish what type of equipment may have  
9 been used. And through actually working in 2016, as Mr. Beahm  
10 referenced earlier, we did start picking up terms like this,  
11 AEC disturbance, what have you. However, in the more recent  
12 documents, you'll probably see that was stricken from any of  
13 the documents that we had where we just really referred to it  
14 as disturbances.

15 Q. And this is from 2016, right?

16 A. September 2016, correct.

17 Q. So ones from a few months ago, like the RSE draft, would  
18 not attribute causation?

19 A. I think there was one instance in the RSE.

20 Q. We'll get to that.

21 So you said this was based on equipment that was used  
22 and you started using terms like this around that time. Where  
23 did that come from?

24 A. Where did what come from?

25 Q. The tie of equipment to attribution?

1 A. I think probably --

2 Q. Did that come from Arcadis or from El Paso, do you know?

3 A. I think it came really from a joint effort in the field.

4 At that time we were supporting El Paso, and then also we had a  
5 visitor too with Mr. Beahm, so I think our field team out at  
6 the time had adopted similar language, trying to make sure that  
7 we were talking about similar disturbances so we didn't look at  
8 a figure later on and have a misunderstanding of what that  
9 disturbance actually was or wasn't.

10 Q. So the attribution to AEC comes from a joint effort with --  
11 between Arcadis, Mr. Beahm, and El Paso?

12 A. Early on in 2016, I would say that's a fair assessment.

13 Q. And what was the need to attribute causation to the AEC?  
14 Would that affect the final remedy that EPA will one day  
15 choose?

16 A. No. I think what was important on our end is trying to  
17 understand what those disturbance features were. So one of the  
18 figures that we showed earlier, when talking about exploration  
19 features, in particular, we wanted to be able to distinguish  
20 between a large dozer cut and a hand tool that could have been  
21 a rock broken off by a shovel.

22 So as a way to distinguish those disturbance features,  
23 thinking that ultimately that may factor into a final remedy, a  
24 decision making how that material is treated, so that's the  
25 backstory on why we did distinguish certain features from each

1 other.

2 Q. Will El Paso argue to EPA that it shouldn't be responsible  
3 for certain features based on who caused it?

4 A. I'm not sure what El Paso's plan is.

5 Q. Did EPA accept this background study ultimately?

6 A. No. This was the report I had mentioned in my direct where  
7 we didn't receive any comments on this. We actually received a  
8 new work plan that was construed as a revised work plan to our  
9 original October 2013 submittal that was directing us to do  
10 work inconsistent with this report.

11 Q. Now, EPA disagreed with the way the background screening  
12 was performed here, right?

13 A. Among a lot of other technical topics, yes.

14 Q. Looking back to the AOC document, Exhibit 263 on page 40,  
15 you have a table at the bottom, table two, and it lists a  
16 couple of milestone dates.

17 A. Uh-huh.

18 Q. Some 14 days, some 30, some 60. You testified earlier that  
19 Arcadis has never missed a deadline. My question is did you  
20 complete -- did Arcadis complete the work of AOC, all of this  
21 within 60 days from the time it received the AOC?

22 A. Well, to answer the specific question --

23 Q. Is that yes or no? Did you complete it by 60 days?

24 A. That's not what the schedule says, though, but I guess, no,  
25 we did not complete it.



1 Q. You did not complete it in 60 days.

2 Did you request an extension from EPA to complete the  
3 work?

4 A. We've submitted a number of extensions, but the real --

5 Q. How many extensions have you --

6 THE COURT: Please let him finish his answer.

7 THE WITNESS: So early on we actually submitted all  
8 the work plans that are called out here. You can see the top  
9 half of this is AOC plus a certain number of days, so that  
10 those fell -- those deliverables fell within September and  
11 October of 2013.

12 The phase 1 and 2 work plan was finalized sooner  
13 because we received comments sooner from the EPA, but the phase  
14 3 and 4 work plan we did not receive comments until January or  
15 March of 2015, about a year-and-a-half later, and we're not  
16 authorized to go into the field until we have consensus or  
17 approval from EPA.

18 BY MR. MARTINEZ:

19 Q. So just to get back to my question, the work here was not  
20 completed in 60 days? You requested extensions from EPA,  
21 right?

22 A. It was in their court at that time. All the work plans, we  
23 were waiting on comments.

24 Q. So you requested extensions, right?

25 A. I don't remember and I don't think it would be obligated

1 for us to do that if we were waiting on their own comments.

2 Q. Investigations under the AOC are not the same as a removal  
3 site evaluation, right, they're different?

4 A. They're different, correct.

5 Q. Is the purpose of the RSE to investigate the contamination  
6 and risks for mining wastes?

7 A. In general, yes, that's what RSE is for.

8 Q. And an RSE is mine-specific?

9 A. It can be. It could roll in multiple mine sites.

10 Q. They are in the RSE we've seen today right, mine-specific?

11 A. For Charles Huskon Number 12 and 14.

12 Q. Twelve and 14?

13 A. Correct.

14 Q. So to get to a final remedy, will El Paso have to complete  
15 RSEs on all 19 mine sites, likely?

16 A. Yes.

17 Q. And, to date, El Paso has only agreed to perform RSEs at  
18 two of the 19 mine sites, right?

19 A. Correct.

20 Q. And that RSE process for the two mine sites is not yet  
21 complete; is that right?

22 A. We are waiting on comments from EPA, correct.

23 Q. So it's not complete?

24 A. Correct.

25 Q. Go ahead and turn to Exhibit 1325. We saw this earlier

1 today.

2           You were one of the drafters of this draft RSE report?

3 A. I was.

4 Q. Were you the main drafter?

5 A. No.

6 Q. Who was the main drafter here?

7 A. We have a large team that work on these sites, starting  
8 from the folks that work in the field to collect the data, to  
9 the office, to the folks that have Ph.D.s in statistics, the  
10 geologists, the engineers. Could go through specific people,  
11 but I was just one signature as the project manager.

12 Q. Let me ask you this. Did Mr. Schnee comment on this  
13 report?

14 A. Yes, I believe he reviewed it. I can't remember if he  
15 actually provided specific comments or not.

16 Q. Did any other lawyer comment on this report, that you know  
17 of?

18 A. No.

19 Q. Did Mr. Doug Beahm comment on the report?

20 A. No. This was after Mr. Beahm and Arcadis had worked  
21 together. We really stopped in 2016.

22 Q. You've heard Mr. Beahm's expert opinions in this case,  
23 right?

24 A. Yes, I've been listening.

25 Q. Were you familiar with them at the time this report was

1 drafted a few months ago?

2 A. In general, yeah.

3 Q. Now, you're aware that Mr. Beahm identified mining impacts  
4 and calculated soil volumes in his expert report?

5 A. Yes, I understand that.

6 Q. And Arcadis did not consult Mr. Beahm when drafting this  
7 report, you just said, right?

8 A. Correct.

9 Q. So Mr. Beahm's opinions in this litigation do not factor  
10 into El Paso's draft RSE position before EPA; is that right?

11 A. Correct.

12 Q. On page 22 of this document, under vertical delineation at  
13 Charles Huskon 12, it says that the Navajo reclamation data was  
14 used to estimate the Huskon 12 pit depth. My question is did  
15 the availability of data that the Navajo gathered during the  
16 reclamation period decrease the amount of data that Arcadis had  
17 to collect at the mine sites for the draft RSE? Did it assist  
18 you?

19 A. Did the data they collect help us?

20 Q. Yes. You used it, right?

21 A. We used it. I'm not sure if I can --

22 Q. Okay.

23 A. -- play the hypothetical there.

24 Q. Turning to page 25. Huskon 14 was not reclaimed by the  
25 Navajo but Huskon 12 was, right?

1 A. Correct.

2 Q. So Huskon 12 has a soil cap?

3 A. Correct.

4 Q. Now, on this page Arcadis notes that the source of the  
5 cover material for Huskon 12 was a clay material which could be  
6 reused. So there is no radiological problem with that source  
7 for the cover of Huskon 12, right?

8 A. I'm sorry, I'm --

9 Q. At the bottom of this page there is a highlighted section.

10 A. What was your question?

11 Q. It says that the source material can be reused. My  
12 question is there is no radiological problem with that source  
13 material, right?

14 A. So you may be confusing two topics. So the soil cover that  
15 is currently on the site is a gray fill that was secured I  
16 think across Highway 89 on the east side.

17 This figure that's being referenced here, figure 11,  
18 is identifying, I believe, potential other borrow areas that  
19 could be used in a final remedy. That scope was included in  
20 the AOC modification, per USEPA, and we went around trying to  
21 identify additional areas of borrow. So this is separate  
22 material from the soil cover that's currently on CH 12.

23 Q. And I guess that type of material is not inherently  
24 problematic?

25 A. We didn't do any sampling. It was -- if you read the

1 report, it was a qualitative assessment of potential borrow  
2 areas around the area.

3 Q. I want to turn to a page 28. It says -- it's a section  
4 titled, Naturally Occurring Radioactive Materials Assessment  
5 Areas, NAAS, and more acronyms for you.

6 Here Arcadis is locating representative samples around  
7 the mine sites, right, to determine what the background levels  
8 in the mining areas themselves should be; is that correct?

9 A. So the -- I can't use the word background here, because  
10 we've used it too many times. The context around this is we  
11 have background study areas and we have norm assessment areas.  
12 The background study areas are the areas that EPA was pushing  
13 for and were being used in this report. So later on you can  
14 see those are being used to establish investigation levels.

15 The norm assessment areas were included, the data here  
16 included as well, but aren't being used at this time.

17 Q. So we have two numbers here, NAA 1, NAA 2, so I'm going to  
18 focus on 2. And just the highlighted section there, it shows a  
19 sample of 11.1 picocuries per gram.

20 Is it Arcadis's position that the clean up standard at  
21 Huskon 12 should not be below 11.1 picocuries per gram?

22 A. We haven't stated a position in this report on that. This  
23 is for the RSE.

24 Q. Okay. I'm going to go to page 29. It's a similar number  
25 for Huskon 14 -- not a number, a similar assessment.

1           And here we have NAA 1 with a mean of 4.87 picocuries  
2 per gram. So it's the same question that whether -- is it  
3 Arcadis's position that the clean up standard for Huskon 14  
4 should not be below 4.87 picocuries per gram?

5 A. We haven't stated that.

6 Q. Earlier we saw Exhibit 266 when you were being questioned  
7 by Mr. Neumann.

8           MR. MARTINEZ: Can you pull up 266, Mr. Hambrick.

9           We'll go to the next page.

10           Go to the next page. The page with the table.

11 BY MR. MARTINEZ:

12 Q. You remember this document, right, from earlier today?

13 A. I believe so, if we're getting to --

14 Q. It included a table with a series of different mines. Do  
15 you remember this document?

16 A. Yeah. It would be good to actually show it again.

17 Q. Yeah, I guess my -- my question is more general, so you may  
18 not need it.

19 A. It's the last two pages of the exhibit, if that helps.

20 Q. Thank you.

21           Now, you testified earlier that those mines, including  
22 -- included clean up levels around 2 point -- I believe that's  
23 a different page.

24 A. Go up one if you -- one. Yeah. Thank you.

25 Q. You testified earlier that these mines included a clean up

1 action level around 2.24 picocuries per gram, some variation  
2 between -- among some mines; is that right?

3 A. Yeah, the four I mentioned on Navajo Nation.

4 Q. Do you know if these are underground mines or surface  
5 mines?

6 A. I'm not familiar with all of them.

7 Q. If it was an underground mine, would the background level  
8 be lower than a surface mine where the mining is done on the  
9 actual surface?

10 A. I'm not sure. I think what you could say is if -- if the  
11 original area around an underground mine, if a material brought  
12 to the surface, the background area around that could be lower  
13 than a surface mine where you potentially have naturally  
14 exposed outcrops. That could be a final result.

15 Q. Earlier you mentioned the uranium is ubiquitous in the  
16 Cameron area, it's higher than average, would you say?

17 A. Over the entire Colorado Plateau.

18 Q. And something you -- you, Arcadis, have been trying to  
19 determine over the past few years is what the appropriate  
20 background level is, right?

21 A. Correct.

22 Q. Can you compare Cameron's background levels to the  
23 background levels from these locations? You can't, right?

24 A. What do you mean, just a direct comparison?

25 Q. Are they the same?



1 A. We haven't finalized a background value, that's why we're  
2 currently presenting BSAs ranging up to norm assessment areas,  
3 but we're --

4 Q. You don't know --

5 THE COURT: Please don't talk at the same time.

6 Please let him finish his answer.

7 THE WITNESS: So to finish that thought is the BSAs,  
8 the background study areas at the low end are the only ones  
9 we're using at this time.

10 BY MR. MARTINEZ:

11 Q. Okay. On page 33 of the -- sorry, of Document 1325,  
12 Arcadis states that there is bulldozer exploration occurring in  
13 late 1953. Do you know where that attribution comes from or  
14 where that information comes from?

15 A. Not specifically.

16 Q. On number -- paragraph number one, it's titled exploration,  
17 in that it lists a couple of activities, including pick and  
18 shovel work. Do you know why pick and shovel work was  
19 classified as exploration work?

20 A. It was easier to distinguish because we wanted to, in our  
21 world of the CERCLA world, say that the pick and shovel was a  
22 smaller disturbance, so I don't know if there was an actual  
23 reason for putting in the exploration.

24 Q. For the RSE, again, does Arcadis decide whether the  
25 disturbances are exploration or mine related or -- does Arcadis

1 decide that?

2 A. We've had significant oversight from USEPA, nearly a  
3 hundred percent out of the field, so I would say it's a  
4 collaborative effort.

5 Q. Let me refine my question. Does Arcadis decide whether  
6 activity in its reports are exploration or whether they're  
7 classified as mining?

8 A. Yeah, we're the lead author, but there are a number of  
9 stakeholders that are out in the field making and providing  
10 input to the decisions.

11 Q. Does El Paso have input on this is classification, whether  
12 something is exploration or mining?

13 A. For this report, no. It was, I think, largely agreed to at  
14 this point already El Paso had limited comments on this.

15 Q. But you had conferred years before on some of this  
16 terminology, you mentioned; is that right?

17 A. On some of the terminology. The pick and shovel stuff was  
18 added on later in the investigation when we were really trying  
19 to tease apart what was touched and what was not.

20 Q. Would the distinction between exploration work and mining  
21 work have been one of those terms that you discussed earlier?

22 A. Yeah, that would have been probably established somewhere  
23 in the early years and then continued to be refined the past  
24 couple of years.

25 Q. Did those discussions earlier define whether AEC was

1 responsible for exploration work? Is that where it came from?

2 A. So, yeah, if you're referring to the other report now in  
3 2016, that's where we did have some collaboration in the field  
4 with Mr. Beahm, and I assume that's where some of the  
5 terminology stemmed from on AEC disturbances.

6 Q. And that terminology has carried forward in subsequent  
7 reports, right?

8 A. Not necessarily true. There is, I think, one instance in  
9 here where we talk about, potentially, AEC disturbances,  
10 because El Paso has a position that, in this report, it is not  
11 responsible for that, but as far as other dozer cuts, you don't  
12 see any of those labels on any of the figures we reviewed today  
13 already.

14 Q. Do you know if one of the distinguishing factors between  
15 exploration work and mining work is the date it occurred?

16 A. We wouldn't really care on when it occurred, it's more of  
17 just if it was touched or not.

18 Q. So how do you determine whether exploration work is  
19 attributed to the AEC or to work done by El Paso?

20 A. Well, that's reading the literature. I'm not the folks in  
21 the field actually doing the work, but our trained specialists,  
22 geologist, scientists out in the field, knowing the history of  
23 some of these sites, reading the documents about the radial  
24 dozer cuts that the AEC did, the large blades, it is easy to  
25 distinguish in the field.

1 Q. What's the purpose of this attribution if it doesn't matter  
2 for the purposes of EPA's final remedy?

3 A. Well, it does and doesn't. We're not trying to play the  
4 legal game here of who did what on the CERCLA side. We're  
5 trying to understand disturbances. So if you have an AEC dozer  
6 cut, quote, I'll say AEC dozer cut that we know was done with a  
7 larger blade, it helps our field team know what potential  
8 volume was disturbed there. Opposed to hand and pick shovel  
9 work where that disturbance is much smaller, so it does factor  
10 into the cubic yards we estimate in some of these reports.

11 Q. You can't tell if something is exploration just from the  
12 date it occurred, right?

13 A. Just looking at the date?

14 Q. Yes.

15 A. No, that wouldn't -- probably not matter, no.

16 Q. On page 46 of this document regarding Huskon 14, it says  
17 that aerial photography from 1954 shows evidence of rim  
18 stripping prior to documented mining dates.

19 Have you -- I guess, did you draft this attribution,  
20 do you know?

21 A. We have this aerial photo, it's in ePrism. EPrism is just  
22 a visualization tool that we provided to EPA so they can view  
23 the data that we're collecting in near realtime. One of the  
24 layers in that visualization tool is the 1954 aerial, where at  
25 14 it is visible, even to someone who is not trained in aerial

1 photography, that there are some disturbances on the ground.

2 And I think that's just probably a reference here to that. And

3 then we also have, obviously, Chenoweth referenced here as a

4 second line of evidence.

5 Q. So your attribution here comes from Mr. Chenoweth and from

6 ePrism?

7 A. Correct.

8 Q. EPrism is a database under the custody of Arcadis; is that

9 right?

10 A. Yeah. It's in our GIS platform. It houses all of the

11 spatial data that we're collecting, but ePrism itself, when I

12 say that, is just a visualization tool, no different than the

13 touchscreen we have up here. It's user friendly and EPA is one

14 of the stakeholders that has access to it.

15 Q. Does El Paso have access to it?

16 A. Certainly.

17 Q. Does it contribute information that you then use to make an

18 assessment about who did what?

19 A. I guess maybe just to clarify, we don't really care on the

20 CERCLA side who did what. This is, I think, for, potentially,

21 historical context or -- it doesn't factor into our final

22 decisions, though, in what was disturbed and what was not, it's

23 just disturbed or not. That's all we care about.

24 Q. I'm going to turn to the U.S. Demonstrative 16.

25 So you -- the Arcadis report says that there are

1 certain cuts at 14 that date from 1954. Is it your  
2 understanding that cuts continued all through that decade into  
3 the '60s, so that now there are more cuts -- sorry, in 1963  
4 there are more cuts than in 1954?

5 A. I'm not sure if I've seen the '63 in detail. We're more  
6 focused on what the current observations. The historical  
7 aerials are nice to have, but it's really what's disturbed and  
8 can be identified in the field today that matters.

9 Q. Do you disagree that there are more cuts on the photo on  
10 the right than there are on the left?

11 A. I guess the way it's presented, in the few seconds I've had  
12 to look at this, it looks like there appears to be more lines  
13 on the right figure than the left. I'm not sure who created  
14 this.

15 Q. Going back to 1325, I'm going to turn to page 34.

16 It says that scanning of area of dozing southwest of  
17 the boundary is believed to be conducted by the AEC and  
18 unrelated to the RIC. I believe this refers to a figure you  
19 saw earlier with the disturbance to the southwest of the Huskon  
20 12 mine. Would that be accurate?

21 A. Yeah, the disturbance features the southwest of CH 12,  
22 correct.

23 Q. Are you aware that there is a sweat lodge near that feature  
24 outside of the mine boundary?

25 A. I think you're going the other direction, but to the -- oh,

1 excuse me, let's make sure I said that right. Southwest is the  
2 AEC disturbances, southeast is the sweat lodge.

3 Q. And that's outside of the mine boundary?

4 A. I'm not sure. I didn't look at the sweat lodge and the  
5 mine boundary or not. If you could pull it up.

6 Q. Has EPA asked El Paso or Arcadis to identify work outside  
7 of the mine boundaries on any other mines?

8 A. Could you say that one more time?

9 Q. Sure. Has EPA asked Arcadis or El Paso to investigate  
10 disturbances outside of its mine boundaries at any other mines?

11 A. Yes. So across the board, I don't know specific sites, but  
12 remember we have several different boundaries at play here. We  
13 have the AML construction boundary, we have the EPA AUM  
14 boundary, and then we have the mine claim. So in CH 12 we  
15 walked through that example specifically where I believe the  
16 mine claim boundary was at and stuff is outside that we've  
17 investigated.

18 CH 1 is another example I know off the top of my head  
19 where actually the EPA AUM boundary as a starting place is  
20 already outside of the mine claim boundary.

21 Q. Is there any disagreement between EPA and El Paso about  
22 which boundary should be the one that governs here?

23 A. We've been working off the EPA AUM boundary, so the answer  
24 to that question is no.

25 Q. Is it Arcadis's position that dozing areas that are not

1 covered by the RSE -- sorry, that those dozing areas are not  
2 covered by the RSE, the dozing areas that we spoke about next  
3 to Huskon 4 -- sorry, Huskon 12?

4 A. Do you mind just trying that question all over again?

5 Q. Is it Arcadis's position that the dozing areas near Huskon  
6 12 are not covered by the RSE?

7 A. I'm not sure if Arcadis has a position on that. We  
8 reference here an El Paso document where they agreed to scan  
9 those areas as part of the RSE, but I believe that it was  
10 drafted in -- the letter was drafted to say that it wasn't  
11 their responsibility. I don't recall the specifics of the  
12 letter.

13 Q. So it's El Paso's position that those areas are not covered  
14 by the RSE, based on your understanding?

15 A. The letter that we're referencing is El Paso document,  
16 yeah. We just scan the area as part of the RSE.

17 Q. Are you aware that Mr. Beahm includes these areas in his  
18 soil volume analysis?

19 A. I am now after the testimony.

20 Q. If disturbances are not part of the draft RSE, they  
21 wouldn't be part of the final remedy, right, if EPA adopted  
22 your approach?

23 A. If we were to say that this was approved as it currently  
24 stands, your answer -- or the answer to that would be yes. I  
25 think we haven't received comments on this report yet, so I'm



1 not sure the final decision, and I don't think El Paso ever  
2 heard back from EPA on their 2017 letter that's referenced in  
3 this document.

4 Q. So let me ask that again. So if disturbances are not part  
5 of the draft RSE and are not part of the final remedy, then  
6 they wouldn't be part of the final remedy if EPA accepted your  
7 approach? I understand there is a comment period afterwards,  
8 but if EPA accepts your approach, the disturbances not part of  
9 the RSE, would not be part of the final remedy, right?

10 A. I mean, if we're saying that the absolute limits of the  
11 figures we have shown are what's subject to remediation, yes.  
12 I think there is always in CERCLA an opportunity to revisit  
13 those boundaries or what's being addressed.

14 Q. Let me ask this differently then.

15 If you don't include something in the draft RSE and  
16 EPA accepts it, it won't be part of the final remedy, right?  
17 You won't be responsible for it?

18 A. EPA could always comment down on the EE/CA. So if you read  
19 this report, we're very clear that these are preliminary  
20 estimates to be further refined in the EE/CA, so I think that  
21 there is --

22 Q. Yeah, I'll get to the comment period in a second.

23 So the final -- the final disturbances, if your  
24 approach holds, would be lower than those identified by  
25 Mr. Beahm; is that right?

1 A. Visually looking at it, I believe so. I haven't looked at  
2 the numbers.

3 Q. Now, you spoke earlier with Mr. Neumann about washes near  
4 the Huskons 12 and 14; is that right?

5 A. Correct.

6 Q. Now, in the report -- I don't have the page, but I'll see  
7 if you recall -- does it talk about these washes being there  
8 for a long time before the mining period?

9 A. Yeah, absolutely, there are references.

10 Q. There is reference to maybe 10,000 years of erosion going  
11 through these washes?

12 A. That's what I understand from my geologist.

13 Q. Did that erosion that naturally occurred for thousands of  
14 years increase the picocuries per gram in the washes?

15 A. Potentially, yeah.

16 Q. Is it Arcadis's or El Paso's position that that did occur,  
17 that natural erosion increased the picocuries per gram in the  
18 washes?

19 A. I don't know if we have made a statement like that or not.  
20 There is several contributing factors to washes, so what you're  
21 touching on right there is an important one. Natural erosion  
22 has taken place for thousands of years. It was mentioned  
23 earlier that when the mine -- the mining occurred, erosion  
24 could have taken place after that. And then most recently  
25 after reclamation we actually see distinct differences in the

1 material that was used and we're able to map those disturbances  
2 that go down the drainages.

3           So we've got several instance in time that could have  
4 contributed any amount to those drainages and affected those  
5 picocuries per gram.

6 Q. But erosion isn't a cause of the reclamation, right, it's a  
7 naturally occurring thing, erosion?

8 A. Say that again though.

9 Q. Erosion has been naturally occurring there for thousands of  
10 years through those washes. It's not a result of the  
11 reclamation, you're just now able to see the path of the soils?

12 A. I mean, if you're asking if erosion has taken place over  
13 tens of thousands of years, yes. The answer is yes.

14 Q. Now, are these washes part of the RSE?

15 A. They are.

16 Q. Do you know if Mr. Beahm omits these washes from his  
17 calculus -- calculations?

18 A. I believe so. I haven't seen anything to date saying he  
19 included it.

20 Q. Are these washes -- impacts to washes attributed to mining  
21 related activity?

22 A. When we say mining related, from --

23 Q. Exploration.

24 A. -- exploration mining to -- well, it's all of the above.

25 You don't really distinguish at that point.

1 Q. Do you know if Mr. Beahm attributes impacts to washes as  
2 mine-related activity?

3 A. I thought we established he didn't look at the washes.

4 Q. In the RSE there are haul roads, right, mapped?

5 A. Correct.

6 Q. And are impacts to haul roads associated with mining  
7 disturbance?

8 A. There has been a number of comments we received from EPA  
9 and Navajo EPA about the potential for haul roads to be an  
10 issue. I believe they're hearing stories from locals of a  
11 potential haul truck that breaks down and what have you and  
12 leaves its spoils there. We have not seen that, but that's why  
13 bits and pieces of haul roads are mapped in our RSE.

14 Q. Do you know if Mr. Beahm includes these disturbances to the  
15 roads in his report?

16 A. I don't believe he does. I can't say for certain.

17 Q. Now, I think we've touched on this, but just to clarify,  
18 the RSE does not include disturbances outside of El Paso's mine  
19 boundaries, right?

20 A. Say it one more time for me.

21 Q. The RSE does not include disturbances that occurred outside  
22 of El Paso's mine boundaries?

23 A. I think we have to be careful there. So if we were to put  
24 up 12 and 14 with the mine claim boundaries, some of those  
25 drainages may extend off.

1 Q. All right. So I guess a better question would be is it El  
2 Paso's position that they shouldn't be responsible for activity  
3 that's outside of the boundary?

4 A. I'm only aware of one of the positions that they've taken  
5 for the AEC disturbance to the southwest. I think under CERCLA  
6 it's -- the site is where the contamination is or where it's  
7 come to be located, so I don't think they'll be pushing on the  
8 drainages if it's associated with the mining.

9 Q. You said you're aware of one position. What is that  
10 position?

11 A. The one we've already spoken about was the AEC disturbance  
12 to the southwest of CH 12, that letter El Paso had written in  
13 2017. That's the position I'm referring to.

14 Q. And Mr. Beahm does consider disturbed areas outside the  
15 mine boundaries in this litigation, right?

16 A. As I've seen to date, yes.

17 Q. We're going to turn to some maps to compare a few  
18 approaches to Huskon 14, those that are in Arcadis's RSE and  
19 those that are in Mr. Beahm's report. So I'm going to pull up  
20 two figures, one from 1325, page 103, and another one from  
21 Mr. Beahm's report, it's at Exhibit 5 at page 147.

22 MR. MARTINEZ: And, Your Honor, we have not moved that  
23 into evidence yet. We would move to move that one page from  
24 Mr. Beahm's report into evidence.

25 THE COURT: We need to have it designated as a

1 separate exhibit number.

2 MR. MARTINEZ: Yes. And I believe yesterday we had  
3 quite a few from that one, so I think we're on D or E.

4 THE COURT: This is Exhibit 5?

5 MR. MARTINEZ: Yes.

6 COURTROOM DEPUTY: Your Honor, we're on D, as in dog.

7 THE COURT: So what page are you wanting to make  
8 Exhibit 5 D?

9 MR. MARTINEZ: We move to make page -- Exhibit 5, page  
10 147 as Exhibit 5 D.

11 THE COURT: Any objection --

12 MR. NEUMANN: No objection.

13 THE COURT: -- to that admission?

14 MR. NEUMANN: No objection.

15 THE COURT: All right. 5 D will be admitted.

16 BY MR. MARTINEZ:

17 Q. So, Mr. Werth, these are two images of Huskon 14, right?

18 A. Correct.

19 Q. On the left is one included in the RSE; is that right?

20 A. Correct.

21 Q. And on the right we have one from Mr. Beahm's reports; is  
22 that right?

23 A. Yeah, I'll take your word.

24 Q. Now, there are a series of cuts that are in both images; is  
25 that right?

1 A. Yes, interpreted cuts on the right and then ours on the  
2 left.

3 Q. The Arcadis RSE has a boundary, as does the one in  
4 Mr. Beahm's report. And my question is the -- there is a red  
5 boundary on Mr. Beahm's report that extends north of where the  
6 Arcadis one does. Do you see that?

7 A. Yeah, and when we're saying the Arcadis figure, we're  
8 displaying the EPA AUM boundary in our figure on the left.

9 Q. So is it Arcadis's position in this RSE that those cuts  
10 that are to the northwest not included in the boundary should  
11 not be part of the RSE?

12 A. We haven't received comments from EPA yet to determine if  
13 they are going to be included or not. If you remember -- I'll  
14 try and draw on the screen again -- that we scanned this entire  
15 area, and we've scanned, in 2016 started in the AUM boundary,  
16 we stepped out further in 2017, now we're doing the northwest  
17 in 2018. So I, obviously, don't work for EPA, not sure to know  
18 what their determination will ultimately be.

19 Q. But is it El Paso's position that those should not be  
20 included in the RSE?

21 A. We haven't taken a position. We have followed the scope  
22 that was agreed to in EPA approved work plan, the RSE work  
23 plan, and that's -- 150-foot boundary there was included in  
24 that.

25 Q. So if this RSE is approved by EPA, those sections that are

1 now within the boundary, those won't be included in the final  
2 remedy, right?

3 A. You're jumping ahead. So they wouldn't be included in the  
4 final RSE, I'm not sure what the final remedy will entail.

5 Q. Right. There are multiple steps between the RSE and the  
6 final remedy, but if this holds, they won't be part of the  
7 final remedy; is that right?

8 A. Yeah, if you want to play a hypothetical game there, yeah,  
9 on the left, if these things hold, clearly, that does not  
10 include everything to the northwest.

11 Q. Now, on page 1325 -- I'm sorry, page 41 of 1325, that is  
12 the RSE again. I'm going to flip back to that.

13 If we could just remove the highlight. Thank you.

14 I don't have it highlighted, but it says that  
15 Arcadis's areas and volume estimates are a conservative  
16 starting point. Am I correct in that interpretation of the  
17 language?

18 A. Where are you?

19 Q. I may have the wrong page, but is that part of your  
20 assessment that the areas and volumes presented in the RSE are  
21 a conservative starting point?

22 A. To be clear, if we have that language in there, we can pull  
23 -- I would ask you to pull it up to confirm.

24 Q. We can come back to that, if you don't recall.

25 A. So I think when we say conservative, we, when we're mapping



1 these disturbance features, we are conservative in mapping  
2 them. So if we have, just hypothetically, a dozer cut that's  
3 25 feet long -- or, excuse me, wide, we would map it on the  
4 outer end, 26, 27, whatever it is, to make sure that we're  
5 being conservative in that disturbance.

6 That doesn't -- the word conservative does not relate  
7 to the final volume disturbances outside of the mine claim  
8 boundary, all of that, it doesn't include that when we're  
9 referring to conservative.

10 Q. Mr. Hambrick located the section. It's the last sentence.  
11 It says, these areas and volumes are considered to be a  
12 conservative starting point and will be further refined during  
13 the development of the streamline risk assessment and EE/CA  
14 which will be submitted together under a separate cover.

15 So going back to my question, now that we have it up,  
16 the areas and volumes in the RSE are a conservative starting  
17 point, right?

18 A. As I just answered, I would say that's how it stands. We  
19 map these features conservatively. The exact features to be  
20 included or not to include are still to be determined.

21 Q. So it's possible that the actual areas and volumes for the  
22 final remedy will be lower than what you have in the RSE,  
23 right?

24 A. If we want to use the word possibly, sure.

25 Q. I'm going to compare soil and volumes in the RSE versus

1 those in Mr. Beahm's report, so I'm going to bring up U.S.  
2 Demonstrative Number 22.

3 I want to focus only on the gray highlight exploration  
4 volume. There are a couple of columns. The middle one says,  
5 El Paso RSE report quantities, the one on the right says Beahm  
6 estimates.

7 The Beahm estimates for exploration volume on Huskon  
8 12 are larger than those in the RSE, right?

9 A. Yeah. There are a couple differences for why that is, but  
10 yes.

11 Q. And the same is true for the exploration volume for Huskon  
12 14, right, the Beahm estimates are larger?

13 A. And the specific reason I already brought up, the 6,000  
14 should be 12,000, but, yeah, the remaining delta is likely  
15 attributed to we just didn't include the dozer cuts to the  
16 northwest at CH 14 at this time.

17 Q. We could remove the demonstrative.

18 You did mention, though, that the -- that number is  
19 now 12,000 when it was 6,000 in the RSE, and that has to do  
20 with the trench depth. Is that what you mentioned earlier?

21 A. The assumed average trench depth, yeah.

22 Q. Have you notified EPA of this discrepancy?

23 A. Not yet. We're still waiting on comments that would be  
24 included in the revised version back.

25 Q. Once an RSE for a mine is finalized and approved by EPA,

1 the next major step I think we referred to as an EE/CA?

2 A. Correct.

3 Q. The Engineering Evaluation/Cost Analysis?

4 A. Correct.

5 Q. And the EE/CA presents a range of potential response  
6 actions to EPA, right?

7 A. Correct.

8 Q. And that's for each mine, it's mine-specific?

9 A. Correct.

10 Q. So must El Paso complete the RSE process before it can  
11 complete the EE/CA process?

12 A. Well, El Paso has been proactive in that they've already  
13 submitted an EE/CA work plan trying to get buy off on the  
14 approach that we take in the ultimate EE/CA report down the  
15 road. But, yeah, we would have to get consensus on the RSE and  
16 the EE/CA work plan before an EE/CA would be completed.

17 Q. And we don't yet have -- we -- El Paso does not yet have a  
18 complete RSE for either Huskon 12 or Huskon 14, right?

19 A. No. We have not heard back since our October submittals.

20 Q. So in 2018 El Paso agreed to perform EE/CAs but only at  
21 Huskon 12 and 14, right?

22 A. August 2018, yeah. We --

23 Q. And El Paso has not yet committed to performing EE/CAs at  
24 the other 17 mine sites?

25 A. No.

1 Q. I'm going to pull up Exhibit 285, which I believe we've  
2 seen earlier today.

3 This should already be admitted into evidence.

4 Do you know how long it will be until there is a final  
5 EE/CA for just these two mines?

6 A. I do not.

7 Q. When this -- and then this process would be repeated for  
8 the rest of the 17 other mine sites, right?

9 A. Presumably, yep.

10 Q. So even after the EE/CA process is complete, has El Paso  
11 agreed that it will perform the response actions EPA selects?

12 A. No. That's quite a bit a ways down the road.

13 Q. So Arcadis in this document, you mentioned earlier,  
14 includes a range of potential response actions to be evaluated,  
15 right?

16 A. Correct.

17 Q. One of them is a no action, right?

18 A. Correct.

19 Q. It also includes options to leave the mine waste where it  
20 is and just improve the cap, right?

21 A. Correct.

22 Q. And those alternatives will not require excavation of the  
23 mining waste, right?

24 A. Correct.

25 Q. So it's possible that additional clean cover will be the

1 appropriate remedy for at least some of the sites?

2 A. Correct.

3 Q. If there is no mine excavation, will the mine waste volumes  
4 matter or will it just be the area?

5 A. So we talk about alternatives 2 and 3, the capping options,  
6 that would still be some consolidation likely for exceedances  
7 surrounding the site, so I think volumes would matter there.  
8 As far as if the capping is selected, yeah, acres would just  
9 matter for leaving this, the material in place.

10 Q. So if it is just acreage, then the volume won't matter?

11 A. If it -- I guess it just -- I would -- I can repeat my  
12 answer, but, for the most part, the cap, yes, of course is  
13 about acreage. I think their volumes may come into play when  
14 they were talking about exploration features, drainages.

15 Q. Would you say that the Navajo reclamation was a good thing?

16 A. Good thing is a matter of opinion. Could you clarify?

17 Q. Would it have been better to leave the pits as they were in  
18 1962 for the people of the Navajo Nation?

19 A. To answer your question, the Navajo AML reclamation, as I  
20 mentioned earlier, did decrease their radiological levels. So  
21 if the primary concern is radiological levels, it did make  
22 things better, quote.

23 Q. In these alternatives, you mention the no action or the cap  
24 alternatives, and those would just build on work that the  
25 Navajos have already done, right?

1 A. Presumably, I guess there -- probably have to be case by  
2 case. CH 1, Charles Huskon Number 1 is one we probably have to  
3 look at closer, because what they've done is -- I don't know  
4 the exact volumes -- but they've added 100,000 cubic yards on  
5 top of the pit that was there originally. And when you have  
6 now created a mountain -- I don't know if you've been to these  
7 sites -- 40, 50, 60 feet high, that may need to be addressed in  
8 a different way. You can't just throw more on top of it.

9 Q. Let me just reask it.

10 The mining waste was exposed in 1962, is no longer  
11 exposed, right? It was buried?

12 A. Yeah, AML, I think, buried the waste. I can't speak to  
13 every single occurrence of mine waste out there.

14 Q. Has EPA ever communicated to El Paso or Arcadis that it is  
15 not satisfied with the speed at which the work is occurring out  
16 in the mine sites?

17 A. There have been several instances where that's come up.  
18 And I think I mentioned that earlier. We first found out from  
19 EPA that they actually, I think, internally had agreed to  
20 something much more expedited for the RSEs to be completed by  
21 the end of 2018. And that's when El Paso offered up to  
22 actually perform the RSEs in the two priority sites to help EPA  
23 meet their commitment to Congress.

24 Since that time I've heard no comments about the speed  
25 of play. We're normally the ones asking for comments and to

1 move things faster, like we're in the field right now actually  
2 in advance of the other RSEs at the other mines.

3 Q. Did they communicate any -- did EPA communicate any  
4 dissatisfaction with the speed at which the work under the AOC  
5 occurred?

6 A. Same answer I would just give -- had given.

7 Q. Would it be speculation to guess how much mining waste will  
8 need to be addressed and in what fashion at this time?

9 A. Yes.

10 Q. And would it require speculation to guess how much money it  
11 will take to perform any future response actions at the mine  
12 sites?

13 A. It would be speculative. We have a range of alternatives  
14 that --

15 Q. At this point, you don't know?

16 A. At this point, yeah, I clearly don't know the final  
17 outcome.

18 MR. MARTINEZ: That's all I have, Your Honor.

19 THE COURT: Redirect.

20 REDIRECT EXAMINATION

21 BY MR. NEUMANN:

22 Q. Mr. Werth, I just have a few questions.

23 We mentioned the use of the PRG. Tell us again what  
24 that stands for.

25 A. Preliminary remediation goal.

1 Q. Has that been turned into a clean up standard at any sites?

2 A. It has, the four sites I mentioned earlier, Northeast  
3 Church Rock, Quivira Cove, and Tronox sites.

4 Q. And we looked at the letter from Ms. Searles at EPA, and  
5 she was telling you, focus on correlating data between .75 and  
6 5.

7 Do you recall?

8 A. I do.

9 Q. And that's because -- why was that?

10 A. I think the presumption there is the decision will be made  
11 within that range, not above it.

12 Q. And, lastly, I think you described, but I'll have you  
13 clarify, the -- we looked at gamma maps for several mine sites  
14 and they show the colors. And I thought you had said that the  
15 mine sites reclamation caps range from 2 to 25 picocuries per  
16 gram; is that right?

17 A. Yep, correct.

18 Q. So at all the mine sites, they're at roughly 2 to 25?

19 A. Correct.

20 Q. And so, as Mr. Martinez asked you to assume if that level  
21 is picked, does that mean all the materials above the 2 -- if  
22 the level 2 is picked, the materials above 2 are addressed in  
23 some way by cover or excavation?

24 A. Yeah, I think it's safe to assume.

25 Q. And, lastly, although there is some uncertainty around



1 volumes and costs in a particular site, I thought I heard you  
2 say earlier that the same unit costs for the earthwork applies  
3 to those volumes; is that right?

4 A. That is correct. And if I might add just a little bit.  
5 When we're talking about no action, we're saying no remedial  
6 action at the end of the day. I think there would still be a  
7 substantial amount of work in investigation, risk assessment,  
8 and demonstration that no action is needed. So there is also a  
9 unit cost that we could say applies to that alternative as  
10 well.

11 Q. And spend a minute to explain to us the importance of the  
12 grading plan you'll need for any reclamation of the site to  
13 address erosion issues and the footprint that will touch.

14 A. Yeah. I mean, we could talk about probably 12 or 1 again  
15 as good examples of that, but significant regrading is going to  
16 be required in order to create a stable landform at the end of  
17 the day. Building a mountain of material is not stable,  
18 inherently, and so we'll have to probably lessen the slopes,  
19 rework the actual cap material itself to then create that  
20 stable landform that will hold up more than the 10, 15,  
21 20 years it has.

22 Q. So at 12, if I understand you, we looked at the difference  
23 between the Navajo and Beahm estimated pit of 3,000, and then  
24 all the material that had to be dealt with at about 15,000,  
25 you're saying that's the mound that's eroding?

1 A. Correct.

2 Q. And I think I'm hearing you say that can't stay the way it  
3 is because it will continue to erode?

4 A. It would have to be reworked in some fashion. Clearly,  
5 we're not there for designing what a cap may look like, that's  
6 correct.

7 MR. NEUMANN: Your Honor, that's all I have. Thank  
8 you.

9 THE COURT: All right. Thank you. You can step down.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Let's call the next witness.

12 MR. VOORHEES: Your Honor, El Paso calls Mr. David  
13 Batson.

14 DAVID BATSON,  
15 called as a witness herein by the plaintiff, having been first  
16 duly sworn, was examined and testified as follows:

17 COURTROOM DEPUTY: State your name for the record and  
18 please spell your first and last name.

19 THE WITNESS: Certainly. David Batson, that's  
20 D-A-V-I-D, B, as in baker, A-T-S-O-N.

21 COURTROOM DEPUTY: Have a seat up here, sir.

22 THE WITNESS: Thank you.

23 DIRECT EXAMINATION

24 BY MR. VOORHEES:

25 Q. Good afternoon. Would you state your name for the record.

1 A. Yes, David Batson, B, as in baker, A-T-S-O-N.

2 Q. And what is your occupation?

3 A. I am an allocation specialist and mediator focusing on  
4 environmental disputes, primarily hazardous waste.

5 Q. And where are you employed?

6 A. I am employed at AlterEcho, A-T-L-E-R-E-C-H-O, which is a  
7 subsidiary of TechLaw, Inc., in Northern Virginia.

8 Q. And, Mr. Batson, will you tell the Court, what is your  
9 present title?

10 A. Senior Mediator and Allocation Specialist.

11 Q. Have you been retained as an expert for the purposes of  
12 assisting the Court today in terms of doing an allocation in  
13 this case?

14 A. I have, sir.

15 Q. And would you tell the Court, what is your area of  
16 expertise?

17 A. The allocation of the costs of remediating Superfund sites  
18 amongst jointly and severally liable parties.

19 Q. Do you provide services to clients?

20 A. I do -- I do under -- and allocations both under 113 of  
21 CERCLA from the standpoint of assertable risks, as well as 107.

22 Q. And do you also provide services to governments to do the  
23 same thing?

24 A. I do, to the extent that I have parties who are federal  
25 PRPs. I worked for EPA for quite awhile, I have not been for

1 several years, so I cannot say I was working on behalf of the  
2 agency since then.

3 Q. Okay. Will you tell the Court, what is an allocation in  
4 the Superfund or the CERCLA context.

5 A. An allocation, in essence, is a formula, it's a methodology  
6 for how to apply equitable factors and the facts and  
7 circumstances at a particular site to determine what the  
8 relative responsibility of the parties are as you're looking at  
9 the cost of the remediation.

10 Q. Give us your educational background.

11 A. Certainly. I was in high school in Asheboro, North  
12 Carolina, Asheboro High School, graduated there in '71. I was  
13 at the University of North Carolina, East Carolina University,  
14 graduated there with a BA, history. In '76 I was at law school  
15 at Cumberland School of Law in Birmingham, Alabama. In 1979,  
16 cum laude, and --

17 Q. And then we'll stop there, because in 1979 did you go to  
18 work for the EPA?

19 A. I did, in the Office of Enforcement.

20 Q. And how long did you work at EPA?

21 A. I worked at EPA for a little over 35 years, just left March  
22 of 2015.

23 Q. Would you just briefly describe your work for EPA, perhaps  
24 during that period of time from 1970 -- I'm sorry, 1979 to  
25 2015, would you just, basically, briefly describe the jobs you

1 held within the agency during that period of time.

2 A. Certainly. I started out as an enforcement counsel in the  
3 Office of Water, Office of Enforcement. There I worked on  
4 cases from the Clean Water Act 504 actions through to  
5 litigation on the administrative side.

6 I also worked at the Offices of Special Litigation  
7 Division at EPA at that point where I was dealing with the  
8 overlay between RCRA, TSCA, FIFRA issues.

9 I was assigned at that point to start to develop the  
10 agency's ADR program. This was in the mid '80s where we were  
11 beginning to bring mediation, facilitation, allocation  
12 practices into the agency's standard operating practice.

13 At that point, based on the provisions of the ADR Act  
14 of 1990, I was assigned as the dispute resolution specialist by  
15 the administrator to oversee the development of that program  
16 for about a decade, and then moved on to a position as senior  
17 ADR specialist for the agency, originally in the Office of  
18 Enforcement, and finally in the Office of General Counsel.

19 Q. And just to put your career at EPA in context, the statute  
20 known as Superfund, or the Comprehensive Environmental Response  
21 and Compensation Liability Act, was passed in 1980; is that  
22 correct?

23 A. Yes.

24 Q. And the SARA amendments were passed in 1986?

25 A. Yes.

1 Q. Does this period of time that you were working at the  
2 agency from 1979 to 2015 coincide with the agency's education  
3 within -- internally with regard to CERCLA?

4 A. Yes. I mean, I -- during that period of time, I was  
5 assigned as the dispute resolution specialist, both to work on  
6 the development of CERCLA internally, but also to reach out to  
7 the private parties, to the PRPs, to Superfund network, to the  
8 various organizations that were developing the use of  
9 allocation as a practice in the private sector to be able to  
10 bring that knowledge back into the agency through policies,  
11 trainings, consultations with management, so, in fact, the  
12 agency could be in a position to support the effectiveness of  
13 CERCLA.

14 Q. Now, outside the agency did you teach law school during  
15 this period of time?

16 A. I did. I taught at Vermont Law School in the 1990s through  
17 the early 2000s. I taught a course called ADR in the  
18 Environment with Professor Harder (phonetic) up there together.  
19 He taught a section on administrative dispute resolution, I  
20 focused specifically on Superfund practice, negotiations,  
21 mediations, and primarily helping people understand the  
22 allocation process and how to -- how it functioned and how to  
23 serve as a consultant and a counsel when you were at a  
24 Superfund site.

25 Q. Okay. That was Vermont Law School, now what about another

1 law school?

2 A. Yes. And somewhat overlapping the same time, in the first  
3 instance I had been teaching a series of negotiation seminars  
4 with Georgetown Law School in the D.C. area. I currently teach  
5 an advanced negotiation seminar there each year.

6 Q. Okay. Now going back inside the agency. Would you tell us  
7 and describe briefly the primary responsibilities you had with  
8 regard to allocation within the agency. If you could inform  
9 the Court as to what work you did within the agency during that  
10 period of time.

11 A. Certainly. Beginning in the late '80s, moving into the  
12 early '90s, I was tasked with developing procedures and  
13 guidance for the agency to both educate staff at the agency and  
14 the Department of Justice, and other agencies and departments  
15 of the government, about allocation, how to appropriately  
16 function within an allocation process.

17 That led to the agency's allocation report -- much  
18 longer name, actually, but I don't remember the details of the  
19 report itself's name -- it was issued in 1994. During that  
20 process, we went out, through my experience and the experience  
21 of about a dozen other allocation specialists, documented what  
22 the practice of allocation was. Then I was able to take that  
23 information and turn it into a series of trainings that were  
24 given at headquarters, given at other agencies, given at our  
25 regional offices to help educate all of the enforcement staff

1 at that time, later the policy staff, about the Superfund  
2 process and how it worked on the private sector.

3 Q. Okay. Now, in addition to training, did you also perform  
4 services as an agency representative to outside entities such  
5 as PRP groups? Do you want to describe for the Court what you  
6 did in that regard?

7 A. Certainly. I had a rather unique position within the  
8 agency working under a confidentiality agreement with the  
9 administrator and supported by the confidentiality provisions  
10 of the ADR Act of 1990, and subsequently the 1996, which allows  
11 for complete confidentiality and exclusion from the FOIA  
12 provisions for a federal employee serving as a neutral.

13 I was asked to go out and work with -- and a great  
14 majority of my time was spent serving as a convening neutral  
15 allocation specialist working with PRP groups as a consultant  
16 and allocation specialist. So I would go out on a government  
17 salary, I would be paid by the government, all my other  
18 expenses would be paid by the private parties, travel, support  
19 services, scientific services, through direct supplying,  
20 obviously, of that service, so we didn't have to deal with the  
21 wonders of ethics rules. And I worked with, oh, a large  
22 number, scores of different PRP groups as they were organizing  
23 as we went through the early stages of allocations, helping  
24 them both to understand allocation practice, but also  
25 understand how to effectively negotiate that allocation with



1 the government.

2 Q. And PRP stands for what, sir?

3 A. Potentially responsible parties.

4 Q. All right. Is the field of allocation recognized as a  
5 professional area of expertise?

6 A. Yes, it is.

7 Q. And are there published books and articles recognizing  
8 allocation as an area of expertise?

9 A. Yes, sir.

10 Q. Has the field -- has this field of expertise, allocation,  
11 been recognized by any professional authorities or government  
12 agencies?

13 A. It's clearly recognized by the EPA's policy on ADR. It's  
14 listed in the -- several of the national statutes, the ADR Act  
15 as a specialty within that field. It's recognized by the ABA  
16 dispute resolution section. We have a committee that focuses  
17 in on it within the section of environment, energy, and  
18 resources within the ABA. I would say yes.

19 Q. Are there professional journals, conferences devoted to  
20 this subject?

21 A. I don't know of any journals that are only about  
22 allocation. I mean, it clearly is a subject of multiple ABA  
23 conferences. There will be a master class this spring focusing  
24 on it exclusively that the ABA is putting on.

25 Q. Are you a member of any professional organizations or

1 associations?

2 A. I am. I am a member of the ABA. I specifically serve as  
3 co-chair of the committee on Superfund Natural Resource Damages  
4 Litigation, serve as a co-chair of the ADR committee within --  
5 both of those within the section of environment, energy, and  
6 regulation. I also serve as a co-chair and work with the ADR  
7 committee of the dispute resolution section of the Bar.

8 I am a member of the Environmental committee of the  
9 Maryland State Bar Association, formerly served as one of the  
10 members of the ADR counsel for the State of Maryland. Also  
11 serve as a committee member of the Ethics Counsel for Dispute  
12 Resolution committee of the Bar Association.

13 Q. Okay. Have you prepared a report in this case?

14 A. I have.

15 Q. And have you prepared a rebuttal report in this case?

16 A. I have.

17 Q. Okay. And would you tell us what materials you used to  
18 prepare your reports in this case, both the -- the opening  
19 report and the rebuttal report.

20 A. I used various materials that were obtained from counsel,  
21 including the expert reports that we've learned about in this  
22 trial so far.

23 Q. Okay.

24 A. As well as my own knowledge and background and research in  
25 various sundry aspects of allocation practice.

1 Q. And I take it you have conducted an allocation in this  
2 case?

3 A. I have.

4 Q. Okay. Would you inform the Court, please, of the  
5 methodology that you use to conduct the allocation in this  
6 case.

7 A. Certainly. I use the standard methodology that I would use  
8 in designing an allocation for a particular situation. And  
9 with any good allocation design, you start by reviewing the  
10 specific facts and circumstances that you approach for that  
11 specific Superfund site. How you have to design an allocation  
12 for a landfill site, versus a sediment site, versus a mining  
13 site, versus a mining site with 2 versus 100 parties is very  
14 different. It depends on the individual facts to get an  
15 equitable distribution of cost amongst the parties in a way  
16 which is an appropriate analysis.

17 So the first thing I did in this situation was to talk  
18 with counsel, do research and get a sense of what was the  
19 action that was creating waste, what was the waste that needed  
20 to be remediated, how the two of those related to each other,  
21 and what were the facts on the ground that were driving the  
22 ultimate outcome, which is how, in fact, do you set up a  
23 relationship between the parties that is focused on their  
24 impact on the ultimate scope and the cost of a remedy.

25 Q. Have you used the same methodology in other allocations

1 that you performed?

2 A. Clearly have used the same principles and approach, yes.

3 Q. Okay. And will you tell the Court, how many times have you  
4 done an allocation or assisted in allocations in your career?

5 A. Sixty, 70, I mean, I don't know the exact number.

6 Q. By the way, do other allocators use the same methodology?

7 A. Yes. The approach -- the principles that I'm talking about  
8 are the standard that's used across the industry.

9 Q. We have two in this case, don't we?

10 A. We do.

11 Q. And you know Mr. Low who is present in the courtroom?

12 A. I do. I do. We are -- there are not a huge number of  
13 allocation specialists and we tend to know each other for  
14 years.

15 Q. Okay. All right. Has anyone ever questioned your  
16 methodologies or your methods in conducting an allocation?

17 A. Not until now, no.

18 Q. And when you say not until now, are you referring to  
19 Mr. Low?

20 A. I am.

21 Q. I take it it's a small group of allocators, correct?

22 A. Yes. Yeah, clearly.

23 Q. Okay. Do you believe you've used enough information to  
24 perform an allocation in this case?

25 A. Oh, without a doubt.

1 Q. And have you considered alternative theories and  
2 conclusions with regard to your allocation in this case?

3 A. I have. I considered several as I was coming up with my  
4 own decision as to the approach to take, and I clearly  
5 considered Mr. Low's.

6 Q. Did you reject his -- his -- or any part of his theory of  
7 allocation in this case?

8 A. I did. I mean, he laid out his theory and his report and  
9 we've gone back and forth and responsive briefs. I am even  
10 after that point still do not believe it has value for the  
11 Court.

12 Q. Are your methodologies used outside of court for purposes  
13 of conducting allocations?

14 A. They are used for training seminars, presentations. I  
15 mean, they're a specialized methodology specifically for  
16 Superfund, so I don't know if it would be used outside of the  
17 Superfund context, necessarily. But, clearly, it's a subject  
18 that is understood, as I said, there are various classes that  
19 we focused on them. Shall we say there is a heavy interest on  
20 the part of the PRP counsel community as to how the methodology  
21 works and how to effectively advocate within it.

22 Q. Now, have you ever testified in a federal court for  
23 allocation purposes?

24 A. I have never testified in federal court for any purpose.

25 THE COURT: Mr. Voorhees, we'll go ahead and break at

1 this point.

2 MR. VOORHEES: Thanks, Your Honor. It's a perfect  
3 time.

4 THE COURT: We will resume at five minutes to the  
5 hour.

6 THE WITNESS: Thank you, sir.

7 (Recess taken, 2:39 p.m. - 2:55 p.m.)

8 THE COURT: You may continue, Mr. Voorhees.

9 MR. VOORHEES: Thank you very much, Your Honor.

10 El Paso has an exhibit to offer with regard to this  
11 witness. It's already been premarked as Exhibit Number 9 A,  
12 and I believe there is no objection.

13 MR. AUGUSTINI: No objection.

14 THE COURT: 9 A is admitted.

15 BY MR. VOORHEES:

16 Q. Mr. Batson, I want to represent to you that Exhibit Number  
17 9 A is your resumé. And I want to just ask you one question  
18 about it. Does your resumé accurately summarize your  
19 qualifications as an expert witness to provide the Court with  
20 an allocation framework in this cause of action between the  
21 parties with regard to the respective shares of responsibility?

22 A. I believe it does, yes.

23 Q. Mr. Batson, I want to read into the record a quote from  
24 Mr. Low's expert report and ask you a question about it. In  
25 the report dated October 14th, on page 25, Mr. Low says as

1 follows:

2 In my opinion, a general framework of the type  
3 proffered by Mr. Batson can provide a useful basis for  
4 allocation only if the input data and assumptions are reliable,  
5 end quote.

6 Do you remember that statement in his report?

7 A. I do.

8 Q. Okay. The remainder of my examination, Mr. Batson, is  
9 going to focus in on the allocation framework. And I want you  
10 to first describe to the Court how you went about creating an  
11 allocation framework for the purposes of this case.

12 A. Well, and let me -- let me first say, I agree with his  
13 statement. I mean, it is part of the standard allocation  
14 methodology I was referring to earlier, so I -- allocation was  
15 based on that principle.

16 Q. Based on the principle of reliable data?

17 A. Certainly, reliable data, and beyond that the appropriate  
18 application of equitable factors by the court.

19 Q. Okay. So tell us all what is -- what is an allocation  
20 framework?

21 A. As I somewhat touched on earlier, I mean, it is a method, a  
22 way of analyzing the data that's available from the site and  
23 applying the equitable factors that are appropriate for that  
24 situation by the Court to be able to, in fact, determine the  
25 relative shares of the parties for the cost of remediation that

1 they have created the need for.

2 In this situation, I think one of the first things I  
3 found out from looking at the facts and situations on the  
4 ground and relationship between the parties is that on one  
5 level it's a relatively simple process, a relatively simple,  
6 straightforward allocation, much more than many I've worked on.

7 We have a single contaminant --

8 Q. Singling contaminant?

9 A. Contaminant, uranium. We have, basically, only two PRPs,  
10 setting aside some orphans that need to get dealt with in the  
11 process. We have activity actually over three periods of time,  
12 but during those periods of time either singular or common  
13 activity that are leading to the same risk, so there is no  
14 differentiation in the risk. Therefore, having a single risk  
15 that needs to be addressed leads to the outcome that, as was  
16 discussed previously by the previous expert, it's highly  
17 probable that we will have the same type of remedial action  
18 focused on.

19 Given all of that, the concept of what the cost of the  
20 remedy is is not a driving factor. We're able to focus in on  
21 the commonality between the parties and their relative  
22 relationship in creating that common risk by a common activity,  
23 and so it narrows down the focus quite dramatically than a  
24 number of the multi-party or multi-contaminant types of  
25 disputes that many of the allocation specialists and myself



1 deal with.

2 Q. For the record, Mr. Batson, have you been attending the  
3 entire trial here before Judge Campbell?

4 A. I have, very gladly. I mean, it was --

5 Q. So, I take it, you will be able to respond in your answers  
6 to my questions and Mr. Augustini's with information you've  
7 learned during the trial; is that right?

8 A. I hope so, yes.

9 Q. And directing your attention to your report, what was the  
10 date of that report, the initial one?

11 A. September 16 -- September 12th, I believe, of 19 -- of  
12 2016.

13 Q. Okay. And with regard to that report, is there anything in  
14 the report substantively that you would change between the date  
15 that that report was prepared and today's date, other than some  
16 revisions to the --

17 A. Dataset.

18 Q. -- the numbers?

19 A. No. I mean, and one thing that actually I learned today is  
20 that, if anything, the dataset that was used to be able to plug  
21 into the method and formula that is in this may be  
22 conservative. And this is intended to be a conservative  
23 outcome to start with, as we'll talk about as we go through,  
24 but there was some potential data that would be associated with  
25 the creation of waste that I've heard about over the last few

1 days that is not included in these calculations.

2 Q. Okay. Would you present to the Court the list of Gore  
3 factors, I'm certain that we're all familiar with them, but,  
4 for the record, would you describe to the Court the Gore  
5 factors that are commonly used in conducting allocations?

6 A. Clearly. There are -- there are six. I mean, the first  
7 really deals with the distinguishability of your particular  
8 waste amongst the other wastes. That's the simplicity of this  
9 case, we only have one waste with the same risk, so that is no  
10 longer an issue that needs to be dealt with.

11 The amount of the hazardous substance involved in a  
12 relative sense between the parties where they have a  
13 commonality.

14 The degree of toxicity of the waste, and specifically  
15 the differences between the degree of toxicity of different  
16 waste. Again, we don't have to deal with that one here because  
17 we have one risk, one waste product, one driver for this  
18 remedy, as far as the chemical goes.

19 Degree of involvement of the parties across all  
20 different activities and arrangements in the treatment,  
21 disposal, storage of that particular hazardous waste. That's  
22 another.

23 The degree of care exercised by the parties in the  
24 respect of that hazardous waste, both in how it was created,  
25 how it was maintained, how it was handle over the years, and

1 ultimately how it was cleaned up.

2 And, lastly, the degree of cooperation of the parties  
3 relative to each other as it relates to the final remediation  
4 of that hazard that's been created by their activities.

5 Q. Okay.

6 A. Now, I mean, there are other factors, I mean, by -- that  
7 have been created over the years as Superfund has developed and  
8 changed from just a straight landfill program to the more  
9 complex cases we have now, the Torres factors. A lot of  
10 different --

11 Q. For the record, that's T-O-R-R-E-S. And is that referring  
12 to Judge Ernest Torres, District of Rhode Island, who --

13 A. It is. And then there are a number of others. I mean, one  
14 of the things that is clear from the case law is that, for the  
15 Court, there is no exhaustive list nor any prescriptive list of  
16 allocation factors that are appropriate for any particular  
17 case. It is up to the Court's discretion looking at the  
18 situation in the particular Superfund site to apply the  
19 appropriate allocation factors.

20 I know that I have, in the context of this allocation,  
21 selected through research on the case law, factors that I  
22 believe are appropriate for the Court to consider.

23 Q. Okay. Let's go to the subject of determining the baseline  
24 allocation. And, again, I believe you've already started a  
25 discussion of that, but would you tell the Court what the

1 baseline allocation determination is. How does that work in an  
2 allocation?

3 A. Well, the baseline allocation is really a starting point.  
4 It's somewhat a theoretical starting point upon which then you  
5 can apply the various allocation factors. It's split out by  
6 looking at which particular factors you think are appropriate.  
7 In this particular case, what I would suggest to the Court,  
8 given the focus of the singular remedy and singular risk, is  
9 that what's going to be most important is to look at the degree  
10 of involvement between the parties and how they have generated  
11 and dealt with the waste, the benefits that the parties  
12 received from those activities, each of the parties' knowledge  
13 of the risk and how it could impact environment and the public  
14 safety.

15 Also, the degree of control and care that each of the  
16 parties took in respect to that hazardous waste and how it  
17 might impact the communities based on its characteristics.

18 And, finally, the degree of cooperation of the  
19 parties. We get to deal with the, really a level of  
20 involvement analysis here, a level of care analysis given the  
21 circumstances of this case.

22 The first issue you really deal with in determining a  
23 baseline is looking at that type of degree of involvement and  
24 its various aspects in the case, and then you adjust that  
25 baseline over time by using the other equitable factors that I

1 had mentioned.

2 Q. Okay. So directing your attention to your allocation that  
3 you did in this case, you took into consideration relevant --  
4 or, I should say, relevant allocation considerations were  
5 addressed by you in your allocation; is that correct?

6 A. Yes.

7 Q. And would you tell the Court, just briefly, what those were  
8 so we can move to the actual numbers here, but starting with  
9 those --

10 A. Sir, I know the --

11 Q. -- considerations?

12 A. There is an overriding consideration that plays throughout  
13 all the various activities that were involved in the creation  
14 of a waste that needs to be remediated here, very unique to  
15 uranium cases, very unique to this period of time in American  
16 history. It was touched on by several of our experts earlier  
17 in the week. And that is really the fact that, you know, all  
18 activities in the mine sites were conducted in furtherance of  
19 the needs of the United States for uranium to support its  
20 national security concerns.

21 That plays out in several different ways through the  
22 licensing, through the participation and, you know, control of  
23 the domestic uranium procurement program, DUPP, as it has been  
24 referred to earlier, in the way that the mines were located at,  
25 the reason they exist even. I mean, taking a thought from a

1 similar fact situation, in Newmont the Court was looking at it,  
2 you know, with the idea that without the direct involvement,  
3 encouragement of the United States, there would be an issue of  
4 whether or not this mine would even exist at this time. That  
5 type of a, you know, effort is an overriding concern that needs  
6 to be taken into account by the Court.

7 Q. Focus for a second on the -- on the assessment of the  
8 contribution of the parties. Do you -- do you take that into  
9 consideration with regard to allocation?

10 A. Clearly. In this particular situation, we have a very  
11 unique, one of the not simple things about this case, honestly,  
12 despite everything I've said, is that what we have is a series  
13 of different types of activities that have created the common  
14 risk. And it was -- as was mentioned earlier by several of the  
15 experts, in essence, we have three different activities over  
16 time.

17 We start with that period of activity, exploration,  
18 prospecting, as it was mentioned earlier, when you are trying  
19 to be able to define and find whether or not you have a reason  
20 to even think about mining in an area, and then defining that  
21 you have an active source.

22 Then you have the period of activity where you are  
23 actually exploiting the ore, the mining activity, for  
24 simplicity, where you are actually extracting the ore, the  
25 uranium ore, dealing with this placement on site, moving it,

1 taking it to the mill, which is terminated at the end of a  
2 lease.

3 And then you have, as is the case here, uniquely, some  
4 two decades later, another impact on the site reclamation.

5 Q. Okay. So I'm just going to focus your attention,  
6 Mr. Batson, on those three periods. That's what I'm going to  
7 do. We'll start with -- we'll do it in chronological order  
8 with the first period, and the period of exploration.

9 A. Okay.

10 Q. Did you take into consideration the parties' roles in  
11 exploration?

12 A. Yes, I did. And maybe to simplify the overall method that  
13 is inherent in this program, I would suggest that given the  
14 difference in the relationships between the parties during each  
15 of those three time periods, the Court will need to consider  
16 what is the appropriate approach for each time period to  
17 establish an appropriate allocation and then add them together.

18 There is, for example, in that first phase, the  
19 exploration phase, we have a situation from all the evidence  
20 that I've seen that we have operators under Superfund, one, the  
21 miners, the other the United States through the AEC, who are  
22 involved in creating waste through various activities we've  
23 heard about here at the trial, drill rigs, which we're putting  
24 aside for this particular allocation, so I won't touch on it as  
25 a way that waste is generated, because it's not calculated into

1 my formula at this point, as of last night, actually.

2 Q. Right.

3 A. The rim stripping or the exploration by dozer, as we've  
4 heard it, those were conducted at different times by different  
5 parties, and, in this situation, by the mine company and the  
6 United States with the overly of just the ownership of the  
7 land, obviously.

8           During the mining period, we have what is  
9 traditionally a mining allocation. I mean, similar to others  
10 that we know of, and we'll hear about more as we move ahead,  
11 where you have the owner of the land, the United States, the  
12 arranger for the disposal of waste, which I propose is the  
13 United States, and the actual operator who is extracting the  
14 mine, and there is a relationship that you have to think about  
15 for the sake of allocation there.

16           And then in the reclamation phase, there is an  
17 operator, one single operator who is involved in the moving and  
18 creation of waste through those reclamation activities, as we  
19 have heard about, the NAML, as an agent of the United States.

20 Q. Now, are you interested, as an allocator, in the actual  
21 volume of the waste?

22 A. I am, particularly at this point, because it gives us --  
23 the volume or the area, I mean, actually, for the sake of the  
24 Court, I have computed it in both ways so that I would be able  
25 to provide the algorithm that I've laid out and set of formulas



1 to be able to think about the allocation can be done both based  
2 on volume and based on area of disturbance. Honestly, for the  
3 sake of the report, I chose volume because it's somewhat more  
4 conservative.

5 Q. More conservative in the sense that it reduces the share to  
6 the United States?

7 A. Yes.

8 Q. And increases the share to El Paso?

9 A. Yes.

10 Q. And you were here yesterday when other conservative  
11 measures were taken to eliminate the drilling during the  
12 exploration phase as a government share, and shifting that over  
13 to the El Paso Company for purposes of allocation. You were  
14 here for that, were you not?

15 A. Yes. And after trial last night, I mean, I recalculated  
16 the, you know, final outputs of this and will be able to  
17 provide it. Didn't have a chance to print it out just because  
18 of the speed today.

19 Q. At the end of your testimony?

20 A. Exactly.

21 Q. And in addition to the exploration drilling shift, we also  
22 heard yesterday with regard to the Huskon 5, 6, and 9 mine  
23 sites, that they are eliminated by El Paso from -- from the  
24 government's share, and actually shifted over from  
25 responsibility to the El Paso Company, hence, not changing

1 the -- the actual volume, but rather changing the  
2 responsibility.

3           You were here for that, were you not?

4 A. I was, and I took that into account. And, specifically,  
5 you're talking about the volumes that were associated with the  
6 exploration by rim stripping as it was referred to at those  
7 three sites.

8 Q. You were also here, were you not, just to get us on the  
9 same page with -- with our colleagues from the Department of  
10 Justice, you were also here when Mr. Beahm described the  
11 correction that he made to the misidentified Ryan 2 materials  
12 from the AML and how that additional volume was attributed now  
13 to the calculations and made accurate; is that right?

14 A. That is correct. And -- and my open request in putting  
15 together the allocation to Mr. Beahm was if you have more  
16 accurate data regarding the mine site, give it to me. I mean,  
17 I want the most accurate data possible. So, actually, I was  
18 very glad that he was able to make -- you know, professionally  
19 notice and make that change to make it a more accurate data  
20 base along the same lines of Mr. Low's statement.

21 Q. Okay. Now, let's get to the next step, sir.

22           With regard to the exploration phase, did you evaluate  
23 the party-specific activities during exploration?

24           I suppose I should put it more generally. Did you  
25 evaluate the party-specific activity in each phase of these --

1 of the three phases we have in the case?

2 A. I did.

3 Q. Okay. And did you evaluate their responsibility with  
4 regard to the total volume of waste so you could do an  
5 allocation?

6 A. I did. Specifically what I focused on was the activity of  
7 creating waste that would need to be remediated. I looked at  
8 the facts to determine who was responsible for the creation of  
9 that waste through their activities at different mine sites and  
10 then did a compilation of that for each of the time periods.

11 Q. And I'm going to direct your attention to your original  
12 number here with regard to the exploration phase. It's  
13 actually -- it's a fraction how it's portrayed in the report,  
14 but on page 15 -- and we are not introducing this report into  
15 evidence, it's rather better for you to explain this to the  
16 Court. But because there was an alteration yesterday with  
17 regard to the exploration phase, can you -- can you just inform  
18 the Court what that -- what that meant in terms of the  
19 allocation that you performed updating that last night?

20 A. Certainly. Maybe just a bit of background on the basis for  
21 how I developed the numbers. Being able to use the volumes  
22 from Mr. Beahm's chart as to the exploration volumes at each of  
23 the mine sites, I then looked at who was involved in activities  
24 at those mine sites during the periods of time when we had the  
25 creation of waste through exploration activities. Came to the

1 conclusion from looking at those records and looking at the  
2 background data and historical information that there was a  
3 split between who was responsible between the United States and  
4 Rare Metals at that point, as to who should be held responsible  
5 equitably for exploration of waste created at each of the mine  
6 sites.

7 For 15 of the mine sites, which were -- where the  
8 exploration occurred prior to the early 1950s before the mining  
9 company had -- had any heavy equipment to be able to do the  
10 type of activities that would be required, particularly not  
11 having the D7s and primarily focus, as we've heard over the  
12 last couple of days, on a small loader and hand equipment, I  
13 prescribed the share for each, the volume, rather, of each of  
14 those 15 mine sites to the United States.

15 After the 1950s Ramco did, in fact, have -- early  
16 1950s, they did have heavy equipment. I have no information  
17 one way or the other as to whether the United States was  
18 involved in that area continuing to do exploration activities,  
19 rim stripping in this situation. However, for the sake of  
20 equity, I assigned a hundred percent of the volume of those  
21 sites all to the mining company, all to Rare Metals.

22 Q. Okay.

23 A. And then taking those -- taking those volumes, I did two  
24 things. One, I calculated the entire volume that added --  
25 what's added up and associated with the exploration period on

1 the chart from Mr. Beahm's information. I then compared that  
2 to the overall volume of all waste sites and came up with what  
3 the percentage would be for that particular time of activity,  
4 and then compared that against the particular volume of each of  
5 the parties.

6 The numbers have changed as to the full number of  
7 waste that was created during the reclamation -- I mean, the  
8 early exploration period, however -- and, actually, in the  
9 first calculation the United States, in my formulation, had  
10 over 99 percent share for those 15 sites versus the four Ramco  
11 sites. Rare Metals had about a one percent -- had less than a  
12 one percent share.

13 Based on the changes that you mentioned, both the  
14 correction of the -- and the bolstering of the data record, and  
15 the changes made in court yesterday to exclude drilling trails,  
16 any drilling activity, to exclude the rim stripping of 5, 6,  
17 and 9, the new calculations changed that relationship to the  
18 United States being 69.9 percent and Rare Metals being  
19 30.1 percent responsible for the waste created during the first  
20 phase of activity before the mining operations.

21 Q. Okay. Let's move on to the mining phase, Mr. Batson, but  
22 we're going to come back to this in the sum up step that we  
23 take later on.

24 So let's go to the mining phase now. And will you  
25 tell us what you considered in terms of determining the

1 relative shares of responsibility for the mining phase.

2 A. Certainly. As noted earlier, this is where we're looking  
3 at the -- what would be more or less a traditional allocation  
4 that we would see at mining cases where we have the joint  
5 activities of an operator, an owner, an arranger who is  
6 involved over -- involved in a joint action, common practice  
7 toward allowing that ore extraction to occur.

8           You're primarily looking at a degree of involvement  
9 approach, as we talked here, and the various degrees of  
10 involvement that have been associated with the various case law  
11 over the years, look at several things, one look at involvement  
12 and ownership of the land, look at involvement in the actual  
13 exploitation or removal of the ore itself, look at involvement  
14 in the arranging for the disposal, treatment, or release of  
15 that hazardous substance into the environment.

16           So I did an analysis looking at what, in fact, were  
17 the facts that supported those three different levels of  
18 involvement that the United States and the company were  
19 involved in and how my recommendation on what the Court should  
20 consider in making that determination.

21 Q. Okay. And we're not going to go and repeat the evidence of  
22 the case. That's not -- that's not what we're here for with  
23 your testimony. And we're not also going to repeat the  
24 information that you received from the other experts.

25           So I want to move things along with regard to the --

1 determining the actual baseline allocation for the mining phase  
2 though. Will you tell the Court how you -- how you actually  
3 accomplished that?

4 A. Well, I -- I considered what were the facts of the case,  
5 what were the relationships between the party that's actually  
6 dealt with that involvement of the parties that I just  
7 mentioned. And based on that analysis, I established a  
8 relationship to the parties as a starting point for  
9 calculations moving forward. And that baseline was two-thirds  
10 to the United States as owner of the land, as landlord --  
11 active owner of the land and landlord on which the contaminated  
12 activity occurred, and as an arranger for the disposal of the  
13 hazardous substances of the mine site, and one-third to the  
14 mining companies as operator that conducted the ore  
15 exploitation activities.

16 Q. You said active landlord; is that correct?

17 A. I did.

18 Q. Okay.

19 A. Active owner and landlord.

20 Q. Would you just describe to the Court what you mean by that?  
21 For purposes of this case, how does that consideration weigh in  
22 to the allocation that you have prepared for this phase of two-  
23 thirds share to the government and one-third share to El Paso?

24 A. Touched on it briefly earlier in my comments, and that is  
25 the role and proactive actions of the United States government

1 through the AEC on their agencies in running the nuclear  
2 program, or uranium program, and being able to oversee the  
3 mines and creating the desire for the mining operations, a  
4 number of things that have been spoken about by Mr. Herken and  
5 others during this trial.

6 Q. Now, did you consider, shall we say, other factors after  
7 you determined the 66 and two-thirds to one-third relationship  
8 between the parties, were there other factors that entered your  
9 mind with regard to how to appropriately allocate the shares in  
10 the mining phase of this case?

11 A. Clearly. As noted earlier, this is the time when you  
12 really take into account the other equitable factors, as I have  
13 identified them, the relative benefits received from the  
14 contaminating activity by each party; the degree of knowledge  
15 regarding the risks of the contamination and the hazardous  
16 waste that is being dealt with and created here; the degree of  
17 cooperation between the parties; and the degree and control and  
18 care excised by each party in relation to that knowledge that  
19 they have regarding the hazard of the particular contaminant.

20 Q. And let me get to the point here with regard to what is  
21 that -- what's the impact of those four additional factors that  
22 you just recited for the Court. What does that do with regard  
23 to the -- the relative shares between the government and El  
24 Paso?

25 A. The Court would use those to adjust those shares as



1 appropriate based on the application of the facts of that  
2 situation, the facts and type of activity of the two parties in  
3 relation to those equitable factors. It would move them up, it  
4 would move them down, I mean, it would depend on the Court's  
5 discretion on how to apply those factors.

6 Q. Okay. And I can just hear the question that's going to  
7 come on cross-examination.

8 A. Go for it.

9 Q. You're not double dipping, are you, Mr. Batson, with regard  
10 to any of those factors, those adjustments?

11 A. No.

12 Q. Will you explain to the Court why that is -- why that's not  
13 occurring here?

14 A. The concept of how an allocation specialist and allocator  
15 or the Court would be looking at the equitable factors moves  
16 throughout this process. It is a -- it's a pathway to be able  
17 to determine whether or not an activity impacted the way that  
18 approach -- an activity was conducted should be weighted more  
19 heavily than the other. In this situation, how do you weigh  
20 the history of the uranium program, the fact of its urgency and  
21 the desire for uranium, along with the desire of a company to  
22 be able to, obviously, make a profit in mining uranium while  
23 under the controls of a government program.

24 I, honestly, and I have laid out my thoughts on how  
25 that might be conducted, how I would suggest it be conducted,

1 but I leave that totally to the discretion of the Court to make  
2 those calls and determinations. I just offer a method and a  
3 pathway to be able to hopefully ensure that it's done in an  
4 appropriate way.

5 Q. When you did that additional consideration with regard to  
6 the mining phase and 66 and two-thirds and the one-third --

7 A. Certainly.

8 Q. -- did that result in a -- in a change in those  
9 proportions?

10 A. It did. I -- I am recommending that the share of the  
11 United States be increased by 10 percent, and obviously the  
12 share of the company be reduced based on the relative benefits,  
13 involvement, care that was involved.

14 Q. Okay. And not to steal anyone's thunder, but we are going  
15 to hear testimony after in the government's case about the  
16 benefit to El Paso. El Paso got a benefit, didn't it?

17 A. Clearly. I mean, they -- they were in business. They  
18 continued to mine through that period. I assume that means  
19 they were at least making enough money to continue in that  
20 operation and so they voluntarily came in.

21 The issue is under what restrictions, what controls  
22 they were allowed to, in fact, profit in that situation, and  
23 whether or not the hazard would have been created but for the  
24 program under which they were operating.

25 Q. Okay. So did you weigh that benefit to El Paso with the

1 benefit to the United States of America for obtaining uranium?

2 A. Clearly.

3 Q. Okay.

4 A. In the same way that I weighed my understanding of the  
5 knowledge of the -- the knowledge of the risk that was being  
6 graded that was held by the United States at that time and the  
7 company at that time, the same way that I weighed the other  
8 factors.

9 Q. I want to shift to another topic, also in the mining phase,  
10 so we can complete the mining phase and go right into  
11 reclamation. But with regard to mining, Mr. Batson, there is  
12 the subject called the orphan share.

13 Now, without giving us a legal opinion on the orphan  
14 share, will you just briefly describe to the Court what the  
15 orphan share is and how did you calculate the responsibility  
16 here during the mining phase for the orphan shares that exist  
17 in this case?

18 A. Right. I mean, orphan share is -- or analysis of orphan  
19 share is required just by the practical reality, as is in the  
20 situation here, where you may have some PRPs, some parties who  
21 were involved in an activity creating the common waste,  
22 creating a uranium waste that needed to be cleaned up here as  
23 miners that are just no longer in existence. They are out of  
24 business, defunct, bankrupt, and therefore are not available  
25 to, in fact, provide funding toward the ultimate remediation

1 with the group of PRPs.

2 Here we have a group of five entities that had gone  
3 bankrupt, UTCO -- UTCO Uranium, Cameron Mining, B.C.  
4 Associates, Domino Company, and H.F. Rodgers, R-O-D-G-E-R-S,  
5 that had been involved in mining activity during this same  
6 period of time but are no longer in existence.

7 The practical thought is how do you best ensure that  
8 that share which cannot be paid by those now defunct companies  
9 is appropriately assigned to the two remaining parties here.

10 The courts take two basic approaches for how to be  
11 able to consider that as a concept, or the allocation field has  
12 picked up two basic approaches. One is the assignment to the  
13 viable parties in relation to their overall allocation share.  
14 For example, if I was looking at that earlier two-thirds, one-  
15 third, then the allocation share, whatever it calculated to be,  
16 would be split two-thirds, one-third between the parties.

17 The other is to look very specifically and more  
18 strategically at the business relationship between the parties.  
19 The mining -- in this situation, I would be looking at the  
20 mining company and the subsequent mining company to see whether  
21 or not there was a relationship between the two that could be  
22 used as a basis for the Court or the allocation to say they  
23 should be responsible for the subsequent mining.

24 That's the approach I decided to take here, because we  
25 do have a business relationship that can be easily identified,

1 and that is operation under a lease. There were several of the  
2 sites here where, I think it was Rare Metals at the time, I  
3 suppose, held the lease. They decided to hold onto the lease,  
4 and, in essence, to get someone else to mine for them under the  
5 same lease. So the activity continued under the same lease  
6 held by the mining company. In that situation, equitably, I  
7 think that the -- that additional waste should be assigned back  
8 to the leaseholder, the mining company for whom someone is, in  
9 essence, doing business under the same lease.

10 On the other hand, where a mining company, as was the  
11 case here, terminated their lease, stopped all business  
12 relationship under that lease, and another company came in,  
13 picked up a new lease and started mining directly with the  
14 United States, the relationship is a business relationship, a  
15 legal relationship between the company and the United States,  
16 and the United States should pick up that portion of the share.

17 Q. Okay. So for our orphans here, I take it you allocated how  
18 many to the United States and how many to El Paso?

19 A. The -- there were nine sites in the first category at which  
20 Rare Metals ceased operations prior to the ultimate closure of  
21 that site, but were picked up under their own permit, their own  
22 license, and so Rare Metals continued to hold it, so I assigned  
23 nine of the volumes from nine of the mines, rather, to Rare  
24 Metals.

25 Q. Those are volumes from those nine mines to Rare Metals?

1 A. For the orphan share that would continue to be graded.  
2 There were four mines, and this was Huskon 4, 5, 8, and 9,  
3 where -- the second category where Rare Metals terminated their  
4 lease, their legal relationship with the United States for  
5 running the mines, and another company came in and picked up by  
6 -- you know, asking for and getting the permission from the  
7 United States to mine those sites apart and separate from Rare  
8 Metals.

9 Q. So just to recap, Your Honor, and to keep us going, the  
10 allocation that you did on the mining phase between the United  
11 States and El Paso, with the equitable adjustment of, I believe  
12 you said 10 percent, and the allocation of the 13 mining sites,  
13 nine to El Paso and four to the government, that is the  
14 volumes?

15 A. The orphan sites, right.

16 Q. The orphans. What do we come out with when we do that  
17 second of the three allocations, or the three allocation  
18 phases?

19 A. Clearly there was a calculation of what the total amount  
20 was that was orphan created waste that then was split along the  
21 lines that I discussed. In total, that came out to an increase  
22 in the share to the United States by 4.41 percent, and  
23 obviously a decrease in the mine operators of 4.1 percent when  
24 I did that calculation as a percentage of the overall volume.

25 Q. Okay.

1 A. But that was trued up to 100 percent. It came down to  
2 4.4 percent.

3 Q. And I think you skipped over the 10 percent up for the  
4 government, 10 percent down for El Paso, but what is that? Do  
5 you have a figure there that you have in mind for those three?

6 A. Well, based on the original baseline allocation share, the  
7 equitable adjustment and the assignment of orphan shares, I  
8 have 8107, just over 81 percent to the United States, and just  
9 under 19 percent to El Paso.

10 Q. And, for the record, that's -- so we'll be able to see how  
11 this is adjusted, 18.93 percent for El Paso?

12 A. Yes, that's correct, for the mining period.

13 Q. Okay. Let's go to reclamation so we complete the three  
14 phases of the allocation. I think you've mentioned that there  
15 are three allocations themselves that then get summed up, so  
16 we've done two, we're going to the third.

17 A. This is the simplest from an equitable standpoint. We only  
18 had one operator during the reclamation phase, we have the  
19 United States, through its agents, doing the reclamation. That  
20 reclamation, as we have heard, created waste which was added to  
21 the volume and area of the original mine sites. Therefore,  
22 100 percent of that volume associated with the reclamation --  
23 and I'll get back to that in just a second -- was assigned to  
24 the United States as the operator, and as the owner of the land  
25 that allowed that material to stay unremedied after the

1 termination of the leases for over two decades.

2           The critical part of this particular aspect of the  
3 calculation is determined, since the wastes are commingled by  
4 the reclamation, how to, in fact, equitably divide what volume  
5 of waste should be assigned as a volume that was created during  
6 the mining phase, and what volume should be assigned equitably  
7 as having been created or added to that volume during the  
8 reclamation phase.

9           For equitable purposes, the way I did that was  
10 relatively simple. It was actually -- part of it was put up on  
11 a chart earlier by the United States. That was to accept the  
12 volume of waste for reclamation purposes, that was moved, that  
13 was contracted for by the -- during the reclamation phase by  
14 the NAML. And I subtracted from that the total volume that was  
15 calculated as having been the volume that was in the mine pits  
16 taken out, expanded by a percentage to take -- to take care of  
17 the fact that it, in fact, is no longer compacted soil, and  
18 removed from that any ore that was taken out, i.e., what waste  
19 was created by the mining operations.

20           And by doing that, in essence, taking the doughnut  
21 hole out of the doughnut, if you look at it from an area  
22 standpoint, the doughnut hole itself being that waste that was  
23 created during the mining period, I wanted to be sure to  
24 equitably not double count and charge either the United States  
25 or the mining companies inappropriately for waste that had been



1 commingled.

2 Q. You heard today some testimony about the relative size of  
3 the sites and the reclamation that had been done by the Navajo  
4 tribe --

5 A. Yes.

6 Q. -- and the expansion of that, the growing larger of the 19  
7 mine sites, or some of them. Did you hear that testimony?

8 A. I did. I mean, in two ways, one of which could potentially  
9 have an aspect with the allocation, the other which, honestly,  
10 is not relevant, that is the migration of some of the waste  
11 from on-site to other areas.

12 In this particular allocation, the ultimate  
13 determination of the cost of the remedy is not applicable. If  
14 you have the same relationship, with the same risk, with the  
15 same contaminant, it doesn't matter exactly what the final  
16 remedy is as long as it is common across all the sites, which  
17 appears to be the case here to me. It's just a matter of  
18 setting out the relationship between the parties for whatever  
19 the ultimate cost might be.

20 The second was information that I had not heard  
21 before, which was that there was additional layering of  
22 reclamation waste on top of what I calculated as the original  
23 reclamation volume from the AML records, that there may be, in  
24 other circumstances, additional waste that were brought onto  
25 the reclamation lands that I was not aware of that just weren't

1 included in my calculations. But that's -- I mean, the only  
2 thing that would do is potentially weight the total volume as a  
3 percentage of the reclamation higher than some of the others by  
4 a fraction. It doesn't sound like it would have a major  
5 impact.

6 MR. VOORHEES: Okay. Let's go to the -- the last  
7 subject matter here, Your Honor, and that is the calculation of  
8 the recommended equitable allocation. This is a formula. And  
9 I want to -- I want to go over this somewhat carefully with  
10 Mr. Batson so we get this right.

11 BY MR. VOORHEES:

12 Q. I'm sorry, it's late in the day for this, but we have a  
13 mathematical formula here, do we not, Mr. Batson?

14 A. We do. And we've had several throughout the entire  
15 process.

16 Q. Okay. Will you just, as clearly as you can, explain for --  
17 for the parties and for the Court, most importantly, what is  
18 the actual allocation formula that results in a shared  
19 allocation for the case, one part for the El Paso Company, and  
20 one part for the United States?

21 A. For simplicity sake, it, in essence, is determining what an  
22 individual share would be trued up to 100 percent for each  
23 party for each time frame and then adding the three together.

24 In essence, for example, for the exploitation period,  
25 you determine what the share is. You take the share that you

1 have already determined which is associated with each of the  
2 parties for that activity, and you multiply it by the share  
3 assigned to that party from an equitable standpoint. You come  
4 up with a percentage. They are added together to come up with  
5 a total allocated share for the entire three activity periods.

6 I mean, here the activity periods as a baseline were  
7 determined, and this -- this will shift slightly based on  
8 changes that have been made, particularly last night that we  
9 talked about earlier, but in a relative sense, it's about the  
10 pre-ore exploitation phase comes out to be somewhere around 9  
11 percent of the overall waste that was created, the ore  
12 exploitation phase --

13 THE COURT: You called that -- you called that, the  
14 first phase exploitation.

15 THE WITNESS: I'm sorry, the pre-ore exploitation is  
16 what I had written in the record. We were going to call it the  
17 exploration phase. I apologize, Your Honor.

18 The exploration phase about 9 percent, the ore  
19 exploitation phase, the mining phase, is somewhere around  
20 50 percent, and the delta of 30 -- 40 percent, basically, is  
21 reclamation. And I am estimating what the current figures are,  
22 I'm sorry. I will have to provide those with the calculations  
23 last evening.

24 Using those then as the multiplier against the share  
25 of each party during each period of time, you come up with --

1 with the formulation for their ultimate share.

2 BY MR. VOORHEES:

3 Q. And that changed yesterday, right, with the adjustments  
4 that we made?

5 A. It did.

6 Q. And so I want to -- I just want to get this in the record  
7 so we have a clear -- clear record of this, but when we -- when  
8 we did this back in September of 2016, your allocation was  
9 89.87 percent to the United States and 10.13 to the  
10 government -- I'm sorry, to El Paso?

11 A. That is correct.

12 Q. And we heard yesterday, with regard to the Ryan 2  
13 adjustment based on Mr. Beahm's discovery of the mistaken  
14 identification of Ryan 2, that there was -- there was a change  
15 then?

16 A. And that -- that was the -- the bolstered database in June  
17 of 2018, if I remember right. I ran the calculations at that  
18 point through the -- through the formula, through the  
19 algorithm. It shifted so that the El Paso share was increased  
20 to 11.16 and the United States was reduced to 88.84.

21 Q. Okay.

22 A. By that change.

23 Q. And we did that, I take it, right after that discovery was  
24 made and the government was informed of the Ryan 2 mistake, I  
25 guess, or the clarification?

1 A. Right.

2 Q. And then yesterday for the further adjustment?

3 A. Right.

4 Q. What is the --

5 A. Last night I took into account, as was mentioned  
6 previously, pulling back out of the dataset as a question and  
7 placing on the responsibility of the mining company the volumes  
8 associated with the drill trails and the rim stripping from  
9 mines 5, 6, and 9, I recalculated, and it changed the final  
10 outcome again to the El Paso being responsible for  
11 13.23 percent and the United States being responsible for  
12 86.77 percent.

13 MR. VOORHEES: Okay. I have one more matter, thank  
14 you, Colleagues, for this.

15 BY MR. VOORHEES:

16 Q. Now, we have heard that the United States would like a  
17 couple of credits in assessing allocation. And the big one,  
18 I'll start with that, is the Tuba City mill. And in our  
19 opening we heard that the government wanted a credit of -- it's  
20 on the demonstrative, U.S. Demonstrative 24 -- now, here's the  
21 figure \$130,858,413, and this is for the money that the  
22 government has spent with the prior remediation of the Tuba  
23 City mill and the future operations and maintenance of the Tuba  
24 City mill, which actually they refer to as future groundwater  
25 costs.

1           And, Mr. Batson, I want you to comment on this so we  
2 can get this out in the open. Obviously, El Paso is opposing  
3 this. Would you -- would you inform the Court whether or not  
4 in your experience as an allocator for EPA, and, you know,  
5 since leaving the agency, have you ever had a situation like  
6 this where -- and we'll start with an UMTRCA mill was credited  
7 to the United States government for cleaning up the mill?

8           A. No, I have not.

9           Q. And is that -- there is probably going to be some legal  
10 reasons for that, but I just want to ask you just practically,  
11 I don't want you to give an opinion to the Court on the law or  
12 anything, but have you ever heard of anything like that?

13           A. You know, I have not. And I have a major concern from an  
14 allocation practice, as an allocation practitioner and  
15 consultant regarding that. In that, the concept of an  
16 allocation, the intent and purpose of an allocation practice,  
17 as it has been developed within the Superfund industry and by  
18 the courts, is specifically to allow a method to equitably  
19 distribute the costs of a remedy at a Superfund site amongst  
20 the parties who created that risk.

21                       Here we have a clear relationship between the parties  
22 that we've been discussing that created a common risk which is  
23 going to be remediated at this Superfund site on the Cameron  
24 Plateau.

25                       The concept of somehow crediting a cost which is not

1 associated with the remedy, an activity that's not driving the  
2 remedy, is completely outside the concept of an allocation that  
3 has been developed under Superfund practice and by the courts.  
4 I mean, it's as if we were saying that a -- someone who runs a  
5 well field on the Gulf of Mexico and put it in a pipeline and  
6 took it to New Jersey where the refinery was is somehow  
7 supposed to be responsible under CERCLA for the clean up under  
8 a different statute for the refinery in New Jersey. I mean, it  
9 just defies logic as we approach it from a straight Superfund  
10 allocation method, and so I -- I can't accept that as something  
11 that the Court should consider.

12 Q. Okay. And another thing, I know it's coming, so I might as  
13 well bring it up now, yesterday we were -- we were listening to  
14 a cross-examination of Mr. Herken -- I'm sorry, Mr. Beahm,  
15 which clearly indicated that the state of Wyoming produced more  
16 uranium than Arizona and -- 100 times more. And would you ever  
17 consider the value of 100 times the volume of ore in Wyoming as  
18 a factor in determining the benefit, I'm asking about benefits  
19 now, to -- to the -- to the parties, would you ever consider  
20 that the -- the --

21 A. No, I wouldn't. And, in this particular situation,  
22 specifically, I would not want to do that or see the Court do  
23 that, in that we have the United States clearly seeking  
24 uranium, paying a unit price for that uranium across all  
25 sectors, receiving that uranium and using it as part of their

1 national defense program, regardless of where it's received.

2 The fact that a higher percentage happens to be  
3 received from a domestic source other than these mines, or  
4 received from a foreign source, is not relevant to the  
5 allocation of the responsibility for the risk that's created by  
6 the activity at this specific site in any way.

7 MR. VOORHEES: Okay. Your Honor, with that, I'll turn  
8 over the witness.

9 THE COURT: Cross-examination.

10 MR. AUGUSTINI: Your Honor, is the plan to go to 4:30  
11 today?

12 THE COURT: Yes.

13 MR. AUGUSTINI: Thank you.

14 CROSS-EXAMINATION

15 BY MR. AUGUSTINI:

16 Q. Good afternoon, Mr. Batson.

17 A. Good afternoon.

18 Q. Before I forget, I wanted to start with something that you  
19 mentioned on your direct testimony with counsel. You stated  
20 that in your Rule 26 reports you chose to articulate your  
21 opinions based on the soil volume methodology, correct?

22 A. That I chose the soil volume as the exemplar instead of the  
23 area because I thought it was more conservative, yes.

24 Q. More conservative. And the difference was, with respect to  
25 the soil volumes --



1 A. They're very close, very close. That was one -- actually,  
2 one thing that thought -- that allowed me to think that the  
3 system I had set together was working very well because they  
4 were very close.

5 Q. Right. So --

6 A. A couple hundredths off.

7 Q. Just let me ask the questions, please, and pause before you  
8 answer.

9           So being conservative, the numerical difference  
10 between the two approaches, soil volume and area, was 89 to  
11 90 percent?

12 A. Very close.

13 Q. Yeah.

14 A. Yeah.

15 Q. You took the one percent off?

16 A. I didn't take anything off. I selected the one that, in  
17 fact, was a slightly higher percentage on the side of the  
18 United States. I made no change between them. They were run  
19 independently.

20 Q. Either way, you're saying El Paso should pay no more than  
21 10 percent of the costs, correct?

22 A. The calculation, as I ran the algorithm, came out with that  
23 result, yes. I leave the discretion to the Court as to how he  
24 applies the details of the method.

25 Q. Okay. And just to confirm, although you're an attorney,

1 counsel already mentioned, you're not going to offer any legal  
2 opinions or conclusions --

3 A. No.

4 Q. -- in support of your opinions, correct?

5 A. None whatsoever. Recommendations, suggestions, yes, no  
6 legal opinions.

7 Q. The Court's free to disregard your opinions in their  
8 entirety and simply make an equitable determination within the  
9 Court's own discretion, correct?

10 A. Clearly.

11 Q. Now, with respect to your experience, Mr. Batson, I'd like  
12 to spend a few minutes going through some of the cases that you  
13 have listed on your resumé which was marked and admitted as  
14 Exhibit 9 A.

15 Turning to the second page, which is marked with the  
16 number 0090034, you've listed a number --

17 A. I'm sorry, in this -- in this book?

18 Q. I received it as a separate exhibit from El Paso's counsel.

19 A. Okay. Thank you.

20 Q. And is this a copy of your resumé from your Rule 26 report,  
21 sir?

22 A. That it is.

23 Q. You see on the second page starting with the Tennessee  
24 Products Site in Tennessee?

25 A. Yes.

1 Q. Then there is a matter below that, Yosemite Slough  
2 Superfund Site, California?

3 A. Yes.

4 Q. In that matter you were a convening neutral, correct?

5 A. I was convening neutral but assisted the parties with their  
6 early issues around designing a process for allocation,  
7 assisting them in selecting an allocation neutral that would  
8 undertake that design to process, and help them with some of  
9 their early allocations just for operating costs, that type of  
10 a thing, yes.

11 Q. Right. So, to sum up, you assisted the parties in bringing  
12 in someone else to perform an allocation, correct?

13 A. No. I assisted the parties in designing an allocation  
14 process that they used to higher another party that then went  
15 on with the parties to conduct that process and helped them  
16 with the allocation of their earlier cost issues.

17 Q. So you did not perform the allocation, someone else did?

18 A. I performed an allocation, I did not perform the ultimate  
19 allocation in that case. It's not unusual for Superfund sites  
20 to have a series of allocations --

21 Q. Mr. Batson, just answer my questions. I don't want to  
22 interrupt you, but let's stick to what I'm asking. Okay?

23 A. Okay. I will just note where I'm not able to answer then.

24 Q. Very good. So with respect to the Lower Passaic River  
25 Superfund Site in New Jersey --

1 A. Yes.

2 Q. -- same situation there, you were involved initially, and  
3 then you assisted the parties bringing in someone else to  
4 perform allocation steps, correct?

5 A. At the Passaic River?

6 Q. Yes.

7 A. I am currently retained by the PRP group to perform an  
8 allocation on their behalf.

9 Q. And that happened since 2016 then?

10 A. I am currently doing it. I've been continuously doing it  
11 since 2016.

12 Q. So you didn't testify at your deposition then that someone  
13 else was brought in to do that?

14 A. At the -- at the Passaic -- there is two phases of the  
15 Passaic case. Actually, there is three phases to the Passaic  
16 case. There was the phase that I was involved in as a  
17 convening neutral and someone that provided an allocation for  
18 the initial cost for that site, and that was back in, what, 10  
19 years ago, 15 years ago. I forget the exact time.

20 At that point I went in, assisted the parties in  
21 dealing with their initial allocation of operating costs,  
22 worked with the parties as a convening neutral, assist them in  
23 hiring a party that did PRP searches. Actually, I helped --  
24 the agency helped to pay for part of those neutral services for  
25 PRP search purposes, and to go on to perform their first

1 allocation.

2 I have been employed since mid 2015 as a full-time  
3 neutral working with the now current PRP group to do their  
4 final allocation as it relates to the full two billion dollar  
5 remediation.

6 Q. So you haven't issued your opinion yet, correct?

7 A. I am in the process of working the parties. As you may  
8 know, from the period of time for some of these allocations as  
9 complex as Passaic, can be several years.

10 Q. Now, with respect to the next, which I'm going to refer to  
11 as Saginaw Bay Superfund Site, Michigan, again, that was a  
12 sediment case, correct?

13 A. This is the Upper Trenton?

14 Q. It's called Tittabawsee, if that's how you say it.

15 A. Tittabawsee/Saginaw, yes.

16 THE COURT: Would you spell that for the court  
17 reporter, please?

18 MR. AUGUSTINI: Yes, Your Honor.

19 T-I-T-T-A-B-A-W-S-E-E, River, slash, Saginaw Bay.

20 BY MR. AUGUSTINI:

21 Q. Mr. Batson, that was another sediment case involving  
22 dioxin, according to your resumé, correct?

23 A. It was, yes.

24 Q. You performed no allocation in that matter, correct?

25 A. I served as an allocation neutral assisting the parties in

1 mediating their early disputes and assisting them in finding a  
2 party to continue to assist them as a mediator.

3 Q. So that's a no, correct?

4 A. I did not conduct an allocation in that case.

5 Q. Now, on the Portland Harbor Superfund case, another  
6 sediment case in Portland, Oregon, correct?

7 A. Uh-huh, PDX.

8 Q. Again, you had some involvement assisting the parties in  
9 the early stages, right?

10 A. Yes. I worked as a convening neutral and assisted them in  
11 their first allocation of how they were going to cover their  
12 costs and bring in another allocation specialist that I assist  
13 them in finding, selecting, and hiring.

14 Q. So the plan with respect to Portland Harbor was also to  
15 bring in another person to deal with the allocation issues?

16 A. After the design of the allocation, yes.

17 Q. Next matter on your resumé, Exhibit 9 A, Kalamazoo River  
18 Superfund Site, Michigan, another sediment dioxin case?

19 A. Yeah.

20 Q. I understand from your deposition testimony, similar model  
21 there. You were brought in to assist the parties in the  
22 initial stages, and then another mediator was selected for the  
23 remedial design, remedial action phase, correct?

24 A. This goes back to my role when I was at the agency where I  
25 was serving as an expert in allocation provided by the agency

1 to parties to assist in the designing an allocation process,  
2 and at many of the sites to assist them in designing the  
3 allocation process, using that as the basis of finding,  
4 retaining specialists that would work with them just so I could  
5 go on to work for another site and not spend the, you know, two  
6 or three years to run the actual allocation, yes.

7 Q. So the short answer is yes, correct?

8 A. Exactly as I described it, yes.

9 Q. All right. Next matter on page 3 of your resumé, maybe an  
10 interesting one, it involves a uranium mine, the Midnite Mine.  
11 That's the Newmont mining case that's a matter of reported  
12 decision, CERCLA context, correct?

13 A. Right. There I was serving as a mediator. I was not  
14 involved in the allocation process at all.

15 Q. So you're not drawing from any experience that you gained  
16 with respect to your limited role at that time in the Midnite  
17 mine case?

18 A. I like to think that as an allocation specialist I'm able  
19 to draw from a number of different experiences. I did not  
20 conduct an allocation there.

21 Q. Okay. I'm going to skip down to the Kelly Air Force Base  
22 Texas matter you've listed on your resumé, appears to involve a  
23 U.S. Air Force Base in Texas?

24 A. Yes. Again, I was serving as a mediator in that case, both  
25 -- sort of on two levels, one, mediating the issues between the

1 air force base and the local community, but also serving and  
2 assisting the local community and public involvement activities  
3 with the agency.

4 Q. Was that a CERCLA case?

5 A. No, it was not.

6 Q. Underneath that matter, Baton Rouge SIP, capital S-I-P.

7 A. That was a water case. Oh, the SIP, no, that was -- Baton  
8 Rouge was an air case. It was a dispute between a local  
9 environmental group, city of -- EPA, it had the city of Baton  
10 Rouge and the Louisiana State Department involved and  
11 Environmental Protection involved.

12 Q. That's not particularly relevant here as well, correct, air  
13 pollution case?

14 A. I like to think that mediating between state, federal  
15 governments and environmental groups is something you can learn  
16 from, yes, though it isn't relevant to the allocation, no.

17 Q. Underneath that you have another reference to a mine, the  
18 Barrick, B-A-R-R-I-C-K, Cortez, C-O-R-T-E-Z, mine. And where  
19 was that located, sir?

20 A. The mediation I was involved in actually occurred in the  
21 D.C. area. I don't remember the actual mine. I don't know  
22 where the location of the mine was, I apologize. I don't  
23 remember. That was many years ago.

24 Q. Okay. That was a gold mining case, or operation, according  
25 to your CV?



1 A. Yes, it was.

2 Q. And at your deposition you told me, if I recall, and we can  
3 check if we need to, that you performed no allocation there?

4 A. As is noted here, I served as a mediator of the  
5 negotiations between the EPA and corporation.

6 Q. And there were RCRA and EPCRA?

7 A. EPCRA.

8 Q. EPCRA, not CERCLA claims?

9 A. Correct.

10 Q. Underneath that the U.S. v. Texas Eastern Gas Pipeline  
11 matter. Does not appear to involve any CERCLA allocation  
12 issues, correct?

13 A. No. In that particular situation I was actually serving as  
14 a negotiator for the agency.

15 Q. Okay.

16 A. Same with the last one, I was serving as a negotiator for  
17 the agency, the US v. Olin Chemical in Alabama. I did start my  
18 career there.

19 Q. Now, when you were at EPA, from the enforcement  
20 perspective, allocation issues are not normally at the top of  
21 EPA's mind due to its enjoyment of joint and several liability;  
22 is that correct?

23 A. Actually, no. The reason that I existed in the agency and  
24 the reason I have the unique position I had, was the agency's  
25 interest in ensuring there was effective allocations occurring

1 in the private sector.

2 The agency was much more interested in having a  
3 completely allocated PRP group speaking as one voice when they  
4 entered negotiations for RI/FSS for RD/RAs, instead of having  
5 to negotiate or litigate against individual parties. And so I  
6 was provided to the private sector specifically to assist them  
7 in the allocation efforts.

8 Q. Sure. If cooperation occurs between PRP groups, that's in  
9 EPA's interest, right?

10 A. Oh, clearly. It's in the self-interest of the government  
11 just from a litigation efficiency effort and nothing more.

12 Q. Now, you mentioned during your direct that no one has ever  
13 questioned your opinions before, correct?

14 A. No one has questioned my opinions in a litigation regarding  
15 the concept of an allocation proposal. Clearly -- clearly, any  
16 allocation specialist works with parties and shares ideas to  
17 create allocations.

18 Q. Sure. But the context says this is the first case you've  
19 ever submitted a Rule 26 report in on allocation, correct?

20 A. Clearly.

21 Q. You expect to be questioned if you submit a Rule 26 report  
22 in active litigation, right?

23 A. I assume there will be a difference of opinion between the  
24 parties, yes.

25 Q. You mentioned as well you never testified in a CERCLA

1 allocation case before, either at EPA or up to the present,  
2 right?

3 A. Never testified in a case, period, before.

4 Q. Before El Paso retained you for this matter, you had never  
5 worked on a CERCLA case involving a site in Arizona; is that  
6 right?

7 A. Not in Arizona.

8 Q. But you do know that the Cameron area falls within the  
9 jurisdiction of EPA Region 9, right?

10 A. I do.

11 Q. And EPA Region 9 is based in San Francisco, California,  
12 correct?

13 A. Yes.

14 Q. When you were an EPA employee, you sometimes worked with  
15 staff from EPA Region 9, right?

16 A. Worked with staff from all the regions, including the San  
17 Francisco office, yes, at various times.

18 Q. And you understand that here, from the testimony of  
19 Mr. Werth and others, that Region 9 is responsible for  
20 overseeing El Paso's investigation of the Cameron mines, right?

21 A. I do not know the details of that arrangement. In theory I  
22 understand that relationship.

23 Q. Do you know who the current EPA project manager is for the  
24 mines?

25 A. I don't.

1 Q. Do you know the names of any of the project managers that  
2 have been in place at EPA or Region 9 dating back to the time  
3 of the AOC in 2013?

4 A. Not that I have a memory of. I'm bad at names. I  
5 apologize.

6 Q. You never talked to any of the project management staff in  
7 EPA Region 9 in connection with forming your opinions in this  
8 case?

9 A. Not that I have any memory of.

10 Q. Same question with respect to the potential response  
11 actions that may be relevant at the mines, you've never  
12 received any information from anyone at EPA about that,  
13 correct?

14 A. I've never discussed with anyone at EPA in any regional or  
15 headquarters office my activities under this particular matter.  
16 As an allocation specialist, I question whether that would even  
17 be appropriate. I don't know.

18 Q. It just wasn't something that you even considered doing,  
19 correct?

20 A. I have not spoken with anyone about that, no.

21 Q. You're aware that El Paso has not agreed to perform any  
22 response actions at the mine sites in the future, correct?

23 A. Again, I don't know the details of that. That is my  
24 understanding from what I've heard here at the trial.

25 Q. That was the testimony of Mr. Werth from Arcadis, correct?

1 A. I honestly don't remember the details of exactly whose  
2 voice I was listening to at the time, but that's the concept I  
3 have received.

4 Q. And if El Paso does not perform the response actions,  
5 that's, obviously, going to affect the costs that should be  
6 allocated, yes?

7 A. The allocation would be focused on a number of factors, one  
8 of those would be cooperation. I assume the Court will  
9 undertake that into consideration in how to apply the  
10 cooperation factor, yes.

11 Q. And it would also -- if El Paso is able to extricate itself  
12 from the situation, does nothing, all the volumes are zero,  
13 correct?

14 A. If by extricate you mean that there is a ruling by the  
15 Court they're not liable under CERCLA, then it's not relevant  
16 to the allocation.

17 I'm not exactly sure what you're asking.

18 Q. Well, you're still allocating some pass costs, correct?

19 A. Try -- try the question again. I'm sorry. I don't exactly  
20 know what you're asking me to respond to.

21 Q. Well, you're relying on soil volume and area impact  
22 estimates, correct?

23 A. As well as the application of equitable factors, yes.

24 Q. That assumes those areas, or some areas will actually be  
25 implicated in a response action?

1 A. As I mentioned during my testimony, what specific parts of  
2 this combination of sites gets remedied and what the ultimate  
3 full cost of that remedy is is not relevant to the calculation  
4 of the relative share between the United States and the company  
5 as it relates to their work together creating waste, singular  
6 waste that has a common risk that is going to be having, most  
7 probably, a common type of remedy, similar type of remedy.

8 Q. Sure. So you're certainly not attempting to predict what  
9 response actions will be performed at the sites?

10 A. No. I'm just saying it's not relevant.

11 Q. You don't have any information about what those costs will  
12 be, whatever the unit costs may be, correct?

13 A. I have no information about the cost of the sites. But,  
14 again, the cost is irrelevant, for the sake of the allocation.

15 Q. To be more specific, you don't know what the costs of the  
16 various options are?

17 A. I have no information about the cost of the options.  
18 Again, I believe they are irrelevant to the concept of an  
19 allocation in this case.

20 Q. You testified that the unit costs are the same, so it's all  
21 the same to you, but you don't know what those unit costs are,  
22 correct?

23 A. Again, we can keep -- we can keep saying the same  
24 questions, I'm just saying that cost -- a unit cost and how  
25 that's multiplied into an overall cost is not relevant to

1 whether or not an allocation can be done in this case.

2 Q. So whether the unit cost is one dollar or a million  
3 dollars, not important, right?

4 A. It's not relevant to whether an allocation can be done in  
5 this case.

6 Q. Other than your law degree, I wanted to get at any other  
7 training that you may be bringing to the table here. You're  
8 not a geologist, correct?

9 A. Correct.

10 Q. Not an engineer, correct?

11 A. Correct.

12 Q. No expertise in hard rock mining, correct?

13 A. Correct.

14 Q. No expertise in other types of mining, correct?

15 A. Correct.

16 Q. You're not an expert on the United States relationship as a  
17 matter of the tribal trust with the Navajo Nation, correct?

18 A. Correct.

19 Q. In preparing your reports, you relied on a set of documents  
20 that was compiled by El Paso's counsel, correct?

21 A. For the most part, yes.

22 Q. You reviewed the documents that counsel provided to you?

23 A. I did.

24 Q. And like the other El Paso experts, you did not have free  
25 access to the complete set of documents both El Paso and the

1 United States produced, right?

2 A. I cannot speak to what access other experts had. I can --  
3 I'll rephrase your question.

4 Q. Fair enough.

5 A. I did not, you know, have free access to any documents. I  
6 did request documents at times. I did request different types  
7 of information in addition to what I have received initially,  
8 but I have no idea what the full record is.

9 Q. Well, you testified at your deposition you did not do  
10 independent research into the facts beyond the materials that  
11 El Paso provided. Is that incorrect?

12 A. I did not do field research and check and run those numbers  
13 myself. I did take the numbers, QC them, make sure that, in  
14 fact, they were appropriately calculated, make sure they were  
15 appropriately tabulated, did background to make sure that I  
16 could rely on the numbers that were provided to me and the  
17 method of which they were calculated, yes.

18 Q. So you're referring specifically to the soil volume and  
19 area inputs that came from Mr. Beahm?

20 A. Yes, I am.

21 Q. But in terms of the other historical facts that you're  
22 relying on as the basis for your equitable opinions, the set of  
23 facts that you relied on were provided by El Paso, right?

24 A. They were.

25 Q. And that included El Paso's expert reports, correct?



1 A. Clearly.

2 Q. But because you've been here at trial, you know that there  
3 are some facts that you didn't know about when you formed your  
4 opinions, correct?

5 A. I mentioned a few earlier, yes.

6 Q. For example, El Paso never told you about the Neztosie  
7 lawsuit?

8 A. No.

9 Q. That El Paso had been sued in a tort litigation by a local  
10 Navajo family relating to the open pits in the Cameron area in  
11 the 1990s?

12 A. No. I have no knowledge of that lawsuit or its details.

13 Q. You had no knowledge of the deposition testimony by Nancy  
14 Prince, El Paso's former environmental project manager, in the  
15 1990s?

16 A. No, I do not.

17 Q. So you weren't aware of the company's level of knowledge  
18 about the potential risks associated with the mine sites in the  
19 1990s?

20 A. 19 -- that their knowledge in the 1990s?

21 Q. Correct.

22 A. Their knowledge in the 1990s I don't believe is relevant to  
23 the basic allocation here.

24 Q. So it's not relevant that El Paso knew that local Navajo  
25 were using the pits for recreational or livestock purposes?

1 A. I believe the knowledge of the hazard created by the risk  
2 during the time of mining was relevant, but not at the time  
3 that they had already terminated the lease, turned over the  
4 land to the United States, could not access the land because it  
5 was United States property.

6 Q. So your opinion based on knowledge of the risks does not  
7 include consideration of those facts?

8 A. It does not include consideration of the relative risk and  
9 understanding of the risk in the 1990s, that's correct, between  
10 the United States and the company.

11 Q. Now, you also did not speak with El Paso's project manager  
12 currently, Mr. Stavinoha?

13 A. That's correct.

14 Q. And he's the person on the El Paso side who is managing the  
15 investigation, right?

16 A. I do not know. It's beyond my knowledge.

17 Q. You also did not speak to Mr. Werth from Arcadis before you  
18 rendered your opinions, correct?

19 A. That is correct. Did not speak personally, no.

20 Q. And you heard his testimony that he's been involved in  
21 these projects since 2013/14?

22 A. I was in the courtroom and listened to his testimony, yes.

23 Q. Now, at your deposition you testified that El Paso's other  
24 retained experts were essentially the primary references that  
25 you were using for your understanding of the facts; is that

1 correct?

2 A. And the -- a number of the background documents upon which  
3 their experts would base which are in the listing of expert  
4 reports that we exchanged. So I looked at the source documents  
5 that were related to some of their testimony.

6 Q. So other than going back and reviewing some of the source  
7 documents, there is no other independent analysis that you  
8 performed to understand the facts, correct?

9 A. No additional research other than that, no.

10 Q. Some of the facts that you assumed have turned out to be  
11 incorrect, right?

12 A. I could not necessarily agree with that. What specifically  
13 are you talking about? I would be glad --

14 Q. Exploration drilling?

15 A. I would be glad to respond to an --

16 Q. Let me be more specific.

17 A. Yeah, please.

18 Q. Exploration drilling. You assumed based on Mr. Beahm's  
19 opinions set forth in his reports that the United States was  
20 responsible for all exploration drilling, correct?

21 A. I believed, in looking at the information that I had, that  
22 but for the Ramco sites, the United States was responsible,  
23 yes.

24 Q. So you --

25 A. Not for all of it. I mean, the Ramco sites, they had heavy

1 equipment. The exploration and both the drilling versus the  
2 United States was different.

3 Q. So you simply accepted Mr. Beahm's statements regarding  
4 that in performing your allocation?

5 A. I accepted with -- with, you know, checking out the details  
6 of who I thought Mr. Beahm was and the accuracy of his  
7 information, details and information that was provided by him,  
8 yes. For, you know, purposes beyond that, and we could go  
9 through each of them, whatever the numbers were for the  
10 different activity stages, his approach made sense.

11 Q. Same with respect to the rim stripping allegations.  
12 Mr. Beahm rendered his opinions and you adopted them and  
13 incorporated them into your analysis, right?

14 A. The information and how it was produced was logical and  
15 made sense to me. I adopted that data.

16 Q. And with respect to the mining waste volume estimates, it  
17 never occurred to you to question the volumes that Mr. Beahm  
18 estimated in his reports, correct?

19 A. I re-ran a few of them to make sure they were accurate, and  
20 once I had a sample that showed that the methodology seemed to  
21 be accurate, I accepted the rest, yes.

22 Q. Whatever changes he made in between his initial and his  
23 rebuttal report, you also accepted all of those changes,  
24 correct?

25 A. I asked for an explanation so I could understand it and

1 make sure it was appropriate. Once I understood it, I did  
2 accept those changes, yes.

3 Q. And the 67 percent increase in the mining waste impact that  
4 has occurred as a result of the Ramco 20, 22, Ryan 2 error is  
5 also being incorporated into your analysis, at least as of  
6 yesterday evening?

7 A. What specifically are you referring to?

8 Q. Mr. Beahm's testimony that he is -- he had to increase the  
9 mining impacts that he estimated in his Rule 26 reports after  
10 discovering that he had made a mistake with respect to the  
11 Ramco sites, correct?

12 A. That is correct. And as was noted, that was the reason,  
13 due to that change, that the relationship between the United  
14 States changed substantially during that time period.

15 Q. And other than those changes which have been described in  
16 the last few days in court several times, you're still  
17 accepting everything else Mr. Beahm has said, correct?

18 A. For the sake of this allocation, yes, I am. I will leave  
19 it to the Court's discretion what data they should use in  
20 putting this information into their own calculations.

21 MR. AUGUSTINI: Your Honor, I can continue until 4:30  
22 or this might be a reasonable break. Would you like me to  
23 continue?

24 THE COURT: Let's go to 4:30.

25 MR. AUGUSTINI: Yes, sir.

1 BY MR. AUGUSTINI:

2 Q. With respect to your opinions regarding the reclamation  
3 impacts --

4 A. Yes.

5 Q. -- I believe the volumes worked out to be, you didn't have  
6 the current numbers and that's -- that have been revised since  
7 last night, but you said in your direct that the total amount  
8 or volume of disturbance that's now being attributed to the  
9 Navajo reclamation is about 30 to 40 percent of total impacts.  
10 Does that sound about right?

11 A. Approximately. And I can get the specifics for you so you  
12 can have it tomorrow morning. I actually can put this  
13 together, if the Court would like, into a new calculation that  
14 could be explained with the methodology used and the outcome  
15 numbers.

16 Q. That's fine for today, Mr. Batson, the approximate ranges  
17 to have in mind, but the point about this piece of your opinion  
18 is that there is no equitable factors being considered  
19 whatsoever, correct?

20 A. In this -- in that particular piece, given the fact that  
21 there was one operator involved, I assigned -- equitably dealt  
22 with the division of the waste created and that is the  
23 allocation that's being suggested.

24 Q. So it's 100 percent U.S.?

25 A. It's 100 percent U.S. for the additional volume that was

1 created by the U.S. during the reclamation period.

2 Q. And your testimony was that the United States is an  
3 operator with respect to reclamation?

4 A. That is my recommendation, yes.

5 Q. So if the Court -- you're not rendering an opinion on  
6 liability, however, correct?

7 A. I am not making a legal opinion anymore than I am for any  
8 of the other classifications.

9 Q. And if the Court disagrees with that conclusion, that  
10 impacts your analysis, correct?

11 A. I leave it to the Court's discretion to make their own  
12 legal determinations, yes.

13 Q. I believe you mentioned that --

14 A. And I -- I mean, I would assume, I mean, if the Court  
15 decided that the United States was not an operator in some way,  
16 that as a matter of allocation practice, then the Court would  
17 have to decide how to deal with what, in essence, is an orphan  
18 share, given there would have been no one responsible for  
19 having created the wastes.

20 Q. You testified that the Navajo Nation was acting as an agent  
21 for the United States. That's -- that's your opinion, sir,  
22 isn't it?

23 A. That is the basis for the allocation, yes.

24 Q. So you don't believe that the Navajo Nation was acting in  
25 its sovereign capacity consistent with its role to protect the

1 health and people of the Nation?

2 A. I'm sure they had many different aspects involved to their  
3 approach and their desire to protect their people. I'm  
4 suggesting that there was a relationship between the United  
5 States and the Navajo that should be considered as an equitable  
6 fashion to assert the responsibility of the United States in  
7 equity for that share of the waste that was created.

8 Q. But by agency do you mean that the United States in the  
9 traditional legal sense control the Navajo Nation's activities?

10 A. As I said previously, I'm not suggesting a legal  
11 determination for the Court. I am stating the relationship  
12 between the United States, the Navajo, as a matter of equity.

13 Q. Well, the Navajo Nation -- you've heard Mr. Beahm's  
14 testimony, correct -- the Navajo Nation performed the risk  
15 assessments as part of the process leading up to the  
16 reclamation, correct?

17 A. Correct, under -- yeah, under a SMCRA grant, yes.

18 Q. Well, the assessments came first; isn't that true?

19 A. I don't have the details of how the SMCRA process was  
20 evaluated or put through. I'm just looking at the overall  
21 relationship.

22 Q. The Navajo Nation's insignia is on all of the technical  
23 specifications for the project, correct?

24 A. Maybe. I don't know.

25 Q. The Navajo Nation applied for grant funding to the United



1 States, right?

2 A. They were provided a SMCRA grant, yes.

3 Q. So the agency comes from the fact of funding, is that your  
4 opinion?

5 A. I'm sorry, is that a question?

6 Q. Yes.

7 A. Would you repeat, please?

8 Q. Your opinion that there -- an agency relationship existed  
9 between the United States and the Navajo Nation, does that come  
10 from the funding of the project?

11 A. There was, as we heard today, and as I reviewed from both  
12 reports and background documents, there clearly was much more  
13 of a relationship between the United States, EPA, and all  
14 aspects of decisions that were made regarding establishing the  
15 final clean up level for the site, how the money would be  
16 spent. Under SMCRA there had to be a determination by the  
17 United States that it was appropriate. I mean, there is many  
18 aspects of the relationship between the two beyond just a  
19 banker that is providing money to the Navajo.

20 Q. There is a tribal trust relationship between the United  
21 States and the Navajo Nation, correct?

22 A. I am not saying there is not. Of course there is. The  
23 courts have looked at that --

24 Q. Doesn't EPA -- I'm sorry. I didn't mean to talk over you.

25 Doesn't EPA coordinate with state governments and

1 tribes all the time on environmental issues?

2 A. For many purposes, I'm sure they do.

3 Q. With respect to the implementation of the projects, the  
4 Navajo Nation issued the contracting bids, correct?

5 A. Beyond my expert knowledge.

6 Q. Navajo Nation selected the contractors for the reclamation,  
7 correct?

8 A. My general understanding, yes.

9 Q. Navajo Nation oversaw all the day-to-day management of the  
10 reclamation project at the mine sites, correct?

11 A. I can't answer yes or no to that because that's outside of  
12 my specific knowledge.

13 Q. No question that the reclamation, per Mr. Beahm's testimony  
14 and others, was directly related to the mining disturbance that  
15 occurred during El Paso's mining operations, right?

16 A. Understand that the SMCRA grant was awarded to deal with a  
17 physical hazard, yes, that was created by the mine sites.

18 Q. You take no issue with the way the Navajo Nation performed  
19 the reclamation, I take it?

20 A. I have no opinion on how they performed the reclamation.

21 Q. And you can't dispute Mr. Beahm's and Mr. Werth's testimony  
22 that the reclamation provided a benefit to the public,  
23 specifically to the Navajo people, correct?

24 A. Again, I have no personal opinion on that. They seem to  
25 have experience that I would rely upon, yes, in that regard.

1 THE COURT: All right. We're going to break at this  
2 point.

3 Mr. Augustini, Counsel, give me just a minute to  
4 calculate time and we'll talk about when we're going to start  
5 tomorrow.

6 You can step down.

7 THE WITNESS: Thank you, sir.

8 THE COURT: Mr. Batson.

9 All right. Counsel, the time as of the end of the day  
10 is El Paso has used ten hours and 58 minutes, the government  
11 has used six hours and 42 minutes.

12 You'll recall we need to break at noon tomorrow. I  
13 think we should go ahead and start at nine. We're about an  
14 hour ahead of schedule in terms of our overall timing, so I  
15 think that should give us enough time. So let's be here at  
16 nine, we'll break at noon for the day.

17 MR. NEUMANN: Just a matter of housekeeping, Your  
18 Honor, we have one last edit to address on our agreement with  
19 the government on our documents to stipulate in. We'll have  
20 that for you tomorrow morning.

21 THE COURT: Okay. Fine. All right. See you in the  
22 morning.

23 (Proceedings concluded at 4:33 p.m.)

24 \* \* \*

25

C E R T I F I C A T E

I, CHRISTINE M. COALY, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 22nd day of February, 2019.

/s/ Christine M. Coaly  
Christine M. Coaly, RMR, CRR