GREENBERG TRAURIG, LLP
ATTORNEYS AT LAW
SUITE 700
2375 EAST CAMELBACK ROAD
PHOENIX, ARIZONA 85016
(602) 445-8000

Pamela M. Overton, SBN 009062 (overtonp@gtlaw.com)
Daniel J. Schnee Daniel_Schnee@kindermorgan.com
Colorado Bar No. 38446, (admitted *pro hac vice*)
EL PASO NATURAL GAS COMPANY, L.L.C.
Two North Nevada
Colorado Springs, CO 80903
719.520.4337 (Telephone)
303.984.3307 (Facsimile)
John Voorhees, voorheesj@gtlaw.com
Colorado Bar No. 21730, (admitted *pro hac vice*)
Christopher J. Neumann, neumannc@gtlaw.com
Colorado Bar No. 29831, (admitted *pro hac vice*)
Gregory R. Tan, tangr@gtlaw.com
Colorado Bar No. 38770, (admitted *pro hac vice*)
GREENBERG TRAURIG, LLP
The Tabor Center
1200 Seventeenth Street
Twenty-Fourth Floor
Denver, CO 80202
303.572.6500 (Telephone)
303.572.6540 (Facsimile)

Attorneys for El Paso Natural Gas Company, L.L.C.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

El Paso Natural Gas Company, L.L.C., Plaintiff and Counterclaim-Defendant, v. United States of America; et al. Defendants and Counter-Claimants.	NO. 3:14-cv-08165-DGC **EL PASO NATURAL GAS COMPANY'S POST-TRIAL REPLY BRIEF**

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

I. Introduction

The Domestic Uranium Procurement Program ("DUPP") won the Cold War but created a legacy of uranium waste. Faced with a potentially fatal threat from the Soviet Union, domestic production of uranium became vital to national security. The President and Congress, through the Joint Committee on Atomic Energy, ran the policy, and AEC developed and ran the program, enlisting private industry assistance. Waste rock and protore were the inevitable consequence of this successful effort to defend the Nation.

The government created the program, set up ore buying stations, and contracted the processing mills. To avoid the expense of processing an over-abundance of low-grade ore, the government required miners to sort practically every shovelful of mined material to ensure delivery of only material satisfying AEC's ore grade cut-off. Consequently, the DUPP generated a huge quantity of low-grade waste material, a fact known and intended by the government.

Consistent with AEC direction and contemporaneous mining practices, uranium-bearing waste that could not be sold was left at the Mine Sites. El Paso terminated its leases at the end of mining and the government released its bonds, acknowledging that the Mine Sites complied with lease provisions and applicable regulations. The United States owned the Mine Sites and uranium-bearing waste, and controlled the waste throughout the operation of the program. From the time mining ceased through the reclamations, the federal government, and not El Paso, was in control of the Mine Sites. The reclamations mixed wastes from the Mine Sites with waste from other uranium mines operated by third parties, impacted naturally-occurring outcrops, and utilized imported off-site uranium-containing materials. Tr. 420:1-24, 460:10-15. There is no dispute that the actions of the government increased the volume and footprint of uranium-bearing material now subject to intensive investigation and future remediation.

The government's defense is built on denial and distraction: denying the centrality of the Cold War and the nation's extraordinary efforts to obtain domestic uranium;

denying the government's overarching role and keen interest in stimulating and controlling uranium mining on the Navajo reservation; distracting the court's attention by pointing to the Tuba City Mill which is not part of the CERCLA action; and discounting El Paso's contributions to the DUPP and its efforts with EPA to investigate and clean up the Mine Sites. Most troublingly, in the face of all the contrary evidence, the government argues that the Navajo controlled and was the primary beneficiary of the uranium mining. The government's attempt to re-write history should be rejected by the court.

II. El Paso's Allocation Framework Accounts for the Unique Facts of the Case and Reflects Significant Cold War Benefits to the United States

A. El Paso Has Provided the Only Rational Allocation Framework

El Paso's allocation approach provides a rational and effective method for determining an appropriate allocation of liability. Mr. Low admitted that El Paso's framework was proper, so long as it utilized reliable data. El Paso's equitable allocation is based on historical documentary evidence and mining engineering data. El Paso demonstrated at trial that the data relied on is reliable and is based on reasonable assumptions and sound engineering methodology. Considering this is a historical case involving CERCLA liability, El Paso's reliance on these facts and data more than satisfies standards set forth in applicable CERCLA jurisprudence for developing an equitable allocation.[1]

The government has offered neither a principled criticism nor a rational alternative to El Paso's allocation framework; its primary reproach is that the outcome is unfavorable to the government. Mr. Low's complaints simply reflect a misunderstanding of the framework. Mr. Low opined that by incorporating three phases of waste generation, El Paso's framework assumes "that every … cubic yard of volume … would

[1] *See United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1088 (1st Cir. 1994) ("It is impossible to explain an allocation of liability in minute detail when, as now, the historical record is incomplete."); *United States v. Doe Run Res. Corp.*, No. 15-cv-0663-CVE-JFJ, 2017 WL 4270526, at *7 (N.D. Okla. Sept. 26, 2017) (same); *cf. Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599, 616-18 (2009) (finding available historical data was sufficient to reasonably support CERCLA apportionment of liability determination, even if a complete record could not be recreated).

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

require some level of remediation." Tr. 1321:23-25. That is incorrect. El Paso appropriately utilized available data to estimate the wastes generated during each mining phase and each party's responsibility for the activities generating waste in each phase.[2] This approach does not assume every cubic yard requires remediation but rather logically incorporates available data to weigh each party's contribution. This case is about responsibility for causing the conditions at the Mine Sites, not what the remedy ultimately will be. Mr. Low also failed to grasp how the volume of created waste material was attributable to the reclamation, asserting that it "doesn't exist." Tr. 1324:19-21. The court, however, was quick to correctly comprehend this concept, Tr. 427:24-429:7; 478:22-479:4.[3] Mr. Low also opined that he "didn't think [El Paso's framework] was either necessary or necessarily appropriate in this case," Tr. 1341:4-6, because he views this as "a traditional case [that] lends itself to an analysis of standard equitable factors," Tr. 1343:12-13. He offered only this vague alternative: "I think the method of going through some allocation factors and weighing them one against the other is appropriate, and maybe taking into account some precedent in similar types of cases."

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

[2] El Paso's use of data as a surrogate for each party's contribution to the waste is a well-accepted allocation practice. *See*, *e.g.*, *New York State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 530–31 (N.D.N.Y. 2011) (using production-based approach for CERCLA equitable allocation), *aff'd in part & rev'd in part*, 766 F.3d 212 (2d Cir. 2014); *Yankee Gas Servs. Co. v. UGI Utils.*, 852 F. Supp. 2d 229, 252–54 (D. Conn. 2012) (finding for allocation purposes that "[t]he gas production ratios are tied more closely to operations than any of the other proposed allocation methods. As such, they have the virtue of corresponding, at least roughly, to the cause of the pollution"); *cf. Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1121 (D. Idaho 2003) (basing each party's share of the harm on its share of the tailings production from mining operations); *Horsehead Indus., Inc. v. St. Joe Minerals Corp.*, No. 94-c-98-B, 1996 WL 33415778 at *8 (N.D. Okla. Apr. 2, 1996) (allocating primarily based on annual horizontal retort smelter capacity applicable to each party).

[3] Importantly, Mr. Batson's allocation of the mining waste impacts accounts for the work done to address the mining wastes during the reclamation phase. His method recognizes that that any benefits of addressing mining waste during reclamation go to both parties directly or indirectly responsible for the mining activity, to the extent of their responsibility. In his reclamation allocation, Mr. Batson explained to the court that because he had already allocated the mining waste, he avoided double-counting it by subtracting out mining-phase wastes from the total volumes moved during reclamation, leaving for final allocation to the government only the impacts uniquely associated with the reclamation, which excess volumes increased the scope of the problem that now must be addressed. Tr. 747:2-748:1.

Tr. 1337:19-22. Mr. Low disregards the unique facts and available data in favor of an amorphous and arbitrary approach, and his proposal is therefore of little use to the court.

B. El Paso's Allocation Framework Appropriately Weighs Relevant Equitable Factors

In its post-trial brief, the government complained that El Paso failed to quantify the government's significant Cold War benefits in its allocation framework, then proceeded to misconstrue how and where in the analysis El Paso considered equitable factors. The foundation of the allocation framework is the overriding equitable consideration that the United States developed and comprehensively controlled the procurement of uranium and the corresponding generation of waste to protect the nation. Equitable factors are considered throughout the allocation process to assess a party's involvement in creating the waste. Tr. 740:16-19 (Batson). Thus, a weighing of the equities "moves throughout the process." Tr. 740:14-16 (Batson).

To ensure appropriate consideration of the impacts of activities by the parties that contributed to the need for and scope of future remedial actions, El Paso established an assignment of responsibility for the three types of waste generating activities that occurred over time at the Mine Sites. Tr. 729:10-730:17; 733:24-734:10. This resulted in a three-phase allocation framework.

Equitable allocation factors are particularly applicable during the mining phase when the parties share liability, in contrast to the exploration phase where the U.S. was the only party that generated waste not later subsumed into the Mine Sites, and the reclamation phase where the U.S. was the only party that created the excess waste.

In the mining phase, the baseline allocation percentage first considered the degree of involvement of the parties and the relationship between the parties. The *degree of involvement* begins with recognizing each party's class of CERCLA liability. El Paso considered the United States an owner and arranger, and El Paso an operator.[4]

[4] El Paso established the government's arranger liability based on Ninth Circuit precedent, while the government has defended against it by citing to Tenth Circuit law.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

Continuing the evaluation of *degree of involvement*, El Paso then considered facts and circumstances surrounding each party's involvement with mining operations, including facts relating to AEC as the sole architect and administrator of the DUPP, AEC and USGS as primary earth-movers, BIA as the active owner of the land, and the Cold War benefits derived by the United States from its waste-creating activities. Tr. 737:25-739:5. This analysis resulted in a baseline allocation of: United States (2/3) and El Paso (1/3) in relation to mining-related impacts. El Paso then further considered other equitable allocation factors, including the *benefits to the parties*, and adjusted upward the government's share of equitable responsibility for the mining phase by 10%.

III. The Government Misconstrues *Newmont* and *TDY*

Newmont and *TDY* do not support the government's allocation position.[5] Applying the allocation principles from these cases here compels assignment of a significant allocation of responsibility to the United States.[6] The government stands up *Newmont* for the proposition that the government received a 1/3 share of liability based on a greater degree of involvement at the mine than here. But the government overlooks the significance of the Midnite Mine's Phase II operations to the allocation of liability.

Dawn and Newmont operated the Midnite Mine from 1956 to 1981. Operations under the DUPP ended in 1964 (Phase I), and its remaining operations served commercial demand (Phase II). It was during Phase II that the Midnite Mine generated the greatest volume of waste material which caused the most serious environmental problem: acid rock drainage. *Newmont*, 2008 WL 462566, at *35. Dawn and Newmont's failure to adequately address the problem resulted in the issuance of eleven noncompliance orders.

[5] *See United States v. Newmont USA Ltd.*, No. CV-05020-JLQ, 2008 WL 462566 (E.D. Wash. Oct. 17, 2008); *TDY Holdings, LLC v. United States*, No. 07-CV-787-CAB-BGS, 2019 WL 1012001 (S.D. Cal. Mar. 1, 2019).

[6] Another of Mr. Low's "guideposts" was the San Mateo Mine settlement. This settlement is not a useful reference for the court as it involved very different facts, *e.g.*, underground mine, commercial operations, different environmental impacts and remediation costs, unpatented mining claims, different parties with varying interests, and the settlement occurred before discovery was taken. Even in the face of these less-compelling facts, the government agreed to perform future O&M and forgave $400,000 in response costs, bringing the government share to 33%, not 20%. *See* Ex. 1381.

Id. at *36. The court observed, "[W]hile steps were taken to address pollution issues at the Mine, there was a demonstrated lack of care and recalcitrance in reclaiming the mine site." *Id.* at *61. These issues weighed against and increased Dawn and Newmont's share of the allocation, but are not present here. *Id.* at *61.[7] These issues also warranted a greater degree of involvement by the government, though this type of regulatory oversight does not bear on equitable allocation. *Id.* at *44. ("Dawn and Newmont's own conduct and inaction, as well as critical site conditions, demanded more extensive involvement of the United States.").

Even in the face of egregious conduct by Dawn and Newmont, the *Newmont* court still assigned a 1/3 share of liability to the United States largely based on its active involvement during the period of the DUPP. In particular, the court highlighted the "significant, material" Cold War benefits to the nation, *id.* at *43; that the mine "would not and could not have been developed in the 1950s and 1960s" without the "encouragement and direct involvement of the United States," *id.* at *44; and that the United States authored and specified the terms of Dawn's mining leases, administered them, had authority over the lands, and exercised authority over the operations," *id.* at *44. Notably, the Midnite Mine's operations under the DUPP produced only 11% of its overall production, all of which was sold to the AEC, yet this limited activity largely supported the court's allocation of 1/3 to the United States, despite an apparent reduction of the United States' relative share due to the mine operators' recalcitrance and non-cooperation. A similar approach here would justify a much larger allocation to the United States, given that the AEC purchased 100% of the uranium ore produced from the Mine Sites during the entire period of mining operations, and El Paso has fully cooperated with the USEPA response action.

The government next argues that the recent *TDY* decision provides a useful

[7] At the Cameron Mines, it was the United States that demonstrated lack of care by failing to address, for decades, any environmental hazards that existed or developed after the government released El Paso from responsibility.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

comparison for allocation purposes. *TDY* was on remand from the Ninth Circuit which struck down the district court's initial decision allocating 100% of the liability to TDY, finding error in the court's failure to apply the Circuit's two most "on point" decisions: *Shell* and *Cadillac Fairview*, where the Circuit affirmed 100% allocations to the United States. *TDY Holdings v. United States*, 885 F.3d 1142, 1148 (9th Cir. 2018). The facts of *TDY*, however, are hardly comparable. And, as the Ninth Circuit has observed, "[A]llocation cases generally turn on their facts." *Cadillac Fairview*, 299 F.3d at 1026.

In *TDY*, no facts suggested the government was an active owner, operator, or arranger, *TDY*, 2019 WL 1012001, at *6, nor that the government had the degree of involvement and control present here. As it was required to do, the *TDY* court analyzed the facts of the case in view of *Shell* and *Cadillac Fairview* and, finding that key facts supporting those allocations were not present, allocated 5% to the government. While the present case has few factual parallels with *TDY*, it does have important factual similarities with *Shell* and *Cadillac Fairview* that provide a strong benchmark for the final allocation of liability here.

In *Shell*, the government's wartime need created benzol waste, and the government provided no alternative to dumping at the McColl site due to the extreme circumstances imposed by the war effort. The Ninth Circuit affirmed a 100% allocation to the government based on its arranger liability. In *Cadillac Fairview*, the government owned the land, the plant, raw materials, the waste, and the final product. The government was informed and approved the dumping, directed the operations at the plants, and set policy on waste disposal. Also important to that decision was a contract indemnity granted by the government. As comparable here, the government's release of El Paso's leases and bonds was an acknowledgement that the Mine Sites were in compliance with El Paso's leases and applicable law, and the government therefore assumed the risk of future liabilities. This Ninth Circuit precedent supports a substantial allocation of liability to the government.

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

Respectfully submitted this 13th day of March, 2019.

By: */s/ Pamela M. Overton*
Pamela M. Overton
GREENBERG TRAURIG, LLP
2375 Camelback Road, Suite 700
Phoenix, AZ 85016
602.445.8000 (Telephone)
602.445.8100 (Facsimile)

Daniel J. Schnee (admitted *pro hac vice*)
KINDER MORGAN, INC.
Two North Nevada
Colorado Springs, CO 80903
719.520.4337 (Telephone)
303.984.3307 (Facsimile)

John Voorhees (admitted *pro hac vice*)
Christopher J. Neumann, (admitted *pro hac vice*)
Gregory R. Tan (admitted *pro hac vice*)
GREENBERG TRAURIG, LLP
The Tabor Center
1200 Seventeenth Street
Twenty-Fourth Floor
Denver, CO 80202
303.572.6500 (Telephone)
303.572.6540 (Facsimile)

Attorneys for El Paso Natural Gas Company

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

LAW OFFICES
GREENBERG TRAURIG
2375 EAST CAMELBACK ROAD, SUITE 700
PHOENIX, ARIZONA 85016
(602) 445-8000

CERTIFICATE OF SERVICE

☒ I hereby certify that on March 13, 2019, in accordance with the electronic service agreement between the parties, I emailed the attached document to the following:

Michael C. Augustini
Michael C. Martinez
Samara M. Spence
Sydney A. Menees
UNITED STATES DEPARTMENT OF JUSTICE
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044
michael.augustini@usdoj.gov
michael.c.martinez@usdoj.gov
samara.spence@usdoj.gov
sydney.menees@usdoj.com

/s/ *Tammy Mowen*