# SPENCER FANE
## BRITT & BROWNE LLP

# Colorado Court Sides With Agency in Withholding Documents at Superfund Site

October 31, 2013

Documents sought to be obtained from the Colorado Department of Public Health and Environment ("Department") by watchdog group Colorado Citizens Against Toxic Waste will remain protected pursuant to an Order issued October 22, 2013. Following an *in camera* review, Denver Judge J. Eric Elliff granted the Colorado Attorney General's petition to withhold the documents.

In his review, Judge Elliff noted that the documents constituted notes taken at internal meetings by Department employees or were draft documents which were utilized by the Department in its decision-making processes, all of which contained the "frank views" of Department employees. The Judge commented that the documents appeared intended to hash out process and procedures, and were all predecisional in nature.

In weighing whether disclosure of the documents would discourage frank and open discussion in the Department's decision-making process against the beneficial effects of public scrutiny of the decision-making process, the Court held that exposure of the documents to public scrutiny would "completely stifle" free discussion within the Department.

The petition was filed to oppose production of records under the Colorado Open Records Act relating to Colorado's oversight of the Cotter Canon City Uranium Mill. Although the Attorney General relied on the "deliberative process privilege" and the "common interest privilege," the Court rejected application of the "common interest privilege" specifically with respect to drafts exchanged between the Department and the Environmental Protection Agency because the relationship between the parties was at least partially adversarial in nature. The Court ruled that the drafts would remain protected, however, because the deliberative processes of the Department were apparent in the drafts.

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