COLORADO COURT OF APPEALS

DATE FILED: February 16, 2023
CASE NUMBER: 2021CA1208

Court of Appeals No. 21CA1208
Garfield County District Court No. 19CV30087
Honorable Anne K. Norrdin, Judge

Rocky Mountain Industrials, Inc., a Nevada corporation; and RMR Aggregates, Inc., a Colorado corporation,

Plaintiffs-Appellants,

v.

Board of County Commissioners of Garfield County, Colorado; John Martin, in his official capacity; Tom Jankovsky, in his official capacity; and Mike Samson, in his official capacity,

Defendants-Appellees,

and

City of Glenwood Springs, a Colorado municipal corporation of the State of Colorado,

Intervenor-Appellee.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE DAILEY
Lum and Bernard*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 16, 2023

Garfield & Hecht, P.C., David McConaughy, Christopher D. Bryan, Macklin Henderson, Glenwood Springs, Colorado, for Plaintiffs-Appellants

Arnold & Porter Kaye Scholer, LLP, Colin M. O'Brien, David S. Jelsma, Denver, Colorado, for Defendants-Appellees

Karp Neu Hanlon P.C., Karl J. Hanlon, James F. Fosnaught, Shoshana Rosenthal, Richard Peterson-Cremer, Glenwood Springs, Colorado, for Intervenor-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 In this action concerning a special use permit (SUP) for a mining operation, plaintiffs, Rocky Mountain Industrials, Inc., and RMR Aggregates, Inc. (collectively RMI), appeal the district court's entry of judgment in favor of defendants, the Board of County Commissioners for the County of Garfield and board members John Martin, Tom Jankovsky, and Mike Sampson (collectively BOCC). We affirm.

I. Background

¶ 2 RMI operates a limestone quarry on federally owned land in Garfield County, Colorado. RMI acquired the quarry in 2016, operating under the original mining permits issued to its predecessors by the U.S. Department of Interior's Bureau of Land Management (BLM) and BOCC. BOCC's SUP was issued in 1982 and amended in 2009.

¶ 3 As pertinent here, BOCC's original and amended SUPs included a seasonal restriction on mining operations. That restriction — which was taken from the BLM's original permit — limited the "months of operation, exclusive of truck hauling," to

"April 15th through December 15th of each year."[1] The BLM's purpose for the restriction was to prevent adverse effects on wildlife and "unacceptable disturbance[s] to wintering big game."

¶ 4 In December 2018, following complaints received from the Glenwood Springs Citizens' Alliance, BOCC directed its staff to investigate RMI's operations. At a 2019 public meeting on RMI's compliance with its SUP, BOCC agreed with some of its staff's findings and directed the issuance of a Notice of Violation (NOV) with respect to six matters.[2] One of the matters concerned an allegation that RMI engaged in prohibited activities in violation of the "seasonal restriction" referenced above. RMI, however, produced a 2018 letter from the BLM granting RMI an exception from BLM's seasonal restriction because the "BLM has no data to

---

[1] Although the BLM permit does not appear in the record, the parties do not dispute that the seasonal restriction in BOCC's permits was borrowed from it.

[2] The NOV gave RMI a period of time in which to come into compliance, the failure of which could result in permit revocation, subsequent application denials, suspension of permit, withdrawal of permit, forfeiture of property rights, criminal enforcement, county court civil penalties, or civil lawsuit.

indicate that current level of operation is causing an unacceptable disturbance to wintering big game."

¶ 5 BOCC determined that the BLM's exception did not nullify the seasonal restriction BOCC had imposed in the SUP. And in March 2020, BOCC issued RMI a second NOV regarding prohibited activities during the 2019 seasonal operating restriction.

¶ 6 RMI ultimately pursued an action for judicial review of BOCC's decisions pursuant to C.R.C.P. 106(a)(4), as well as claims for declaratory and injunctive relief under 42 U.S.C. § 1983 for substantive and procedural due process violations. In January 2021, the district court issued a fifty-seven-page order upholding BOCC's determination on four of the violations, including, again as pertinent here, prohibited activities during the seasonal ban.

¶ 7 While discovery was pending on RMI's remaining due process claims, BOCC moved for summary judgment, and RMI, in response, moved for a continuance pursuant to C.R.C.P. 56(f) to conduct discovery.

¶ 8 The district court granted BOCC's motion for summary judgment; denied RMI's Rule 56(f) motion; and denied, as moot, RMI's pending motions to compel discovery.

¶ 9 On appeal, RMI contends (1) BOCC abused its discretion by issuing NOVs for activities permitted by the BLM during the so-called "seasonal ban" (i.e., from December 15th through April 15th); (2) the district court erred in granting BOCC's motion for summary judgment on RMI's due process claims; and (3) the district court abused its discretion in denying RMI's Rule 56(f) motion for continuance to conduct discovery and in denying, on mootness grounds, RMI's motions to compel discovery.

¶ 10 We address each contention in turn.

II. RMI's C.R.C.P. 106 Claim

¶ 11 RMI argues that BOCC erred by issuing NOVs for conducting prohibited activities during a seasonal ban.[3] BOCC erred in this regard, RMI argues, because the BLM's explicit permission to engage in those activities preempted BOCC's seasonal ban on those activities. We are not persuaded.

A. Standard of Review and General Law

¶ 12 "C.R.C.P. 106(a)(4) permits judicial review of a governmental agency action exercising a quasi-judicial role." *Save Our St. Vrain*

---

[3] RMI does not contest the district court's affirmation of BOCC's determination that RMI violated the SUP in three other respects.

Valley, Inc. v. Boulder Cnty. Bd. of Adjustment, 2021 COA 44, ¶ 26. On appeal, we review the governmental agency's, not the district court's, decision. *Id.* at ¶ 27.[4]

¶ 13 "In a Rule 106(a)(4) proceeding, our review is limited to whether the governmental body's decision was an abuse of discretion or was made in excess of its jurisdiction, based on the evidence in the record before that body." *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 7. An "agency abuses its discretion when its decision is (1) not supported by any competent evidence in the record — that is, 'so devoid of evidentiary support' that the decision is arbitrary and capricious — or (2) based upon misconstruing or misapplying the law." *Save Our St. Vrain Valley, Inc.*, ¶ 28 (quoting *Rangeview, LLC v. City of Aurora*, 2016 COA 108, ¶ 16).

¶ 14 "In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014).

---

[4] Consequently, we give no deference to the district court's decision. *See Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 8.

¶ 15 "The doctrine of preemption originates in the Supremacy Clause of the United States Constitution," *Banner Advert., Inc. v. People of City of Boulder*, 868 P.2d 1077, 1080 (Colo. 1994), which provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws or any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

¶ 16 Consequently, "[s]tate law that conflicts with federal law is without effect." *Banner Advert., Inc.*, 868 P.2d at 1080. In this context, "'[s]tate' clearly encompasses both state and local law." *Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 107 (1st Cir. 2015).

¶ 17 "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *accord, e.g.*, *Espinoza v. Hepta Run, Inc.*, 289 Cal. Rptr. 3d 145, 151 (Ct. App. 2022); *see Env't Driven Sols., LLC v. Dunn County*, 2017 ND 45, ¶ 8 (noting that judicial "decisions are clear that a local governing body's actions and decisions may be preempted by state or federal law, or by the actions and decisions of state or federal

agencies"). "[A]gencies may speak to the question of preemption through a variety of means, 'including regulations, preambles, interpretive statements, and responses to comments.'" *Brandt v. Marshall Animal Clinic*, 540 N.W.2d 870, 878 (Minn. Ct. App. 1995) (quoting *Hillsborough County v. Automated Med. Lab'ies, Inc.*, 471 U.S. 707, 718 (1985)); *cf. Colo. Min. Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718, 733–34 (Colo. 2009) (characterizing an earlier decision as finding "implied preemption because the local ordinance banned what the federal agency with administrative authority could authorize").

¶ 18 There is, however, "a presumption against preemption." *Elston v. Union Pac. R.R. Co.*, 74 P.3d 478, 488 (Colo. App. 2003).[5] And

---

[5]

> The presumption is founded on 'respect for the States as "independent sovereigns in our federal system"'; that respect requires courts 'to assume that "Congress does not cavalierly pre-empt state-law causes of action."' [Citation.] The strength of the presumption is heightened in areas where the subject matter has been the long-standing subject of state regulation in the first instance; where federal law touches 'a field that "'has been traditionally occupied by the States,"'" the party seeking to show preemption 'bear[s] the

"[t]he scope of agency preemption, like the meaning of Congressional enactments, is subject to a presumption that preemption of state laws is not intended." *Brandt*, 540 N.W.2d at 877. Consequently, "we can expect that [agencies] will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County*, 471 U.S. at 718.

¶ 19 Federal preemption is a question of law subject to de novo review. *Forfar v. Wal-Mart Stores, Inc.*, 2018 COA 125, ¶ 47.

B. Analysis

¶ 20 RMI contends that the SUP restriction is invalid because it impermissibly conflicts with actions authorized by a federal agency on federal land. BOCC claims that the BLM's purported permission to operate during the seasonal prohibition does not relieve RMI of its obligations to comply with state and local laws.

> considerable burden of overcoming "the starting presumption that Congress does not intend to supplant state law.""

Solus Indus. Innovations, LLC v. Superior Ct., 410 P.3d 32, 41 (Cal. 2018) (quoting *Quesada v. Herb Thyme Farms, Inc.*, 361 P.3d 868, 877 (Cal. 2015)).

¶ 21 Federal laws may preempt state and local regulations in the form of express, field, or conflict preemption. *Fuentes-Espinoza v. People*, 2017 CO 98, ¶ 23. RMI argues only the last form of preemption, i.e., "conflict preemption."

¶ 22 Conflict preemption nullifies a state or local regulation that actually conflicts with a valid federal law. *See id.* at ¶ 26; *Sapp v. El Paso Cnty. Dep't of Hum. Servs.*, 181 P.3d 1179, 1184 (Colo. App. 2008). A conflict exists "(1) when compliance with both federal and state law is physically impossible and (2) in 'those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Fuentes-Espinoza*, ¶ 26 (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)).

¶ 23 RMI does not argue that it is physically impossible to comply with both the BLM and BOCC permits; rather, it maintains BOCC's seasonal use restriction stands as an obstacle to achieving the full purposes and objectives of Congress with respect to the land on which RMI operates.

¶ 24 The Property Clause of the United States Constitution provides that "Congress shall have Power to dispose of and make all needful

Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. "Th[e] [United States Supreme] Court has 'repeatedly observed' that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976)).

¶ 25 In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA) — codified at 43 U.S.C. §§ 1701-1787 — to provide "a comprehensive statement of congressional policies concerning the management of the public lands" owned by the United States. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 737 (10th Cir. 1982). Under the FLPMA, the BLM has the responsibility of managing public lands. *See* 43 U.S.C. § 1701.

¶ 26 In enacting the FLPMA, Congress declared:

> [I]t is the policy of the United States that-- . . . the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic

> animals; and that will provide for outdoor recreation and human occupancy and use; [and] . . . the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands . . . .

43 U.S.C. § 1701(a)(8), (12); *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (recognizing that the FLPMA provides the framework for the federal government's management of federal lands in such a way that balances competing interests between the use of natural resources and the importance of preserving the quality of the environment for scientific, historic, ecological, and other purposes).

¶ 27 Further, the FLPMA ensures that the States' interests in these resources will not be ignored:

> [T]he Secretary [of the Department of Interior] shall . . . coordinate [his plans] with the land use planning and management programs of . . . the States and local governments within which the lands are located. . . . Land use plans of the Secretary . . . shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

43 U.S.C. § 1712(c)(9).

¶ 28 The other relevant federal statute here is the Mining Law of 1872 (Mining Law), now codified at 30 U.S.C. §§ 22-54. The underlying purpose of the Mining Law is "to encourage exploration for and development of mineral resources on public lands." *Brubaker v. Bd. of Cnty. Comm'rs*, 652 P.2d 1050, 1056 (Colo. 1982); *see also* 30 U.S.C. § 22. While the Mining Law clearly confers authority to federal agencies to regulate the prospecting and use of minerals on public lands, it also contemplates functioning in an overlapping manner with state and local authorities. *See* 30 U.S.C. § 22; *see also Bohmker v. Oregon*, 903 F.3d 1029, 1047-48 (9th Cir. 2018) (noting the Mining Law's express incorporation of state regulation of mining activity); *Brubaker*, 652 P.2d at 1056 (observing the Mining Law "leaves room" for operation of state laws not in conflict with the federal law). Indeed, "30 U.S.C. § 26 qualifies the locator's right of possession and enjoyment upon compliance with 'laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States . . . .'" *Id.*

¶ 29 In *Granite Rock Co.*, 480 U.S. 572, the United States Supreme Court held that while local land use planning for federal land is

preempted by the Supremacy and Property Clauses of the United States Constitution, neither those provisions nor the mining or land management laws mentioned above precluded states from adopting reasonable environmental regulations for that land. The Court noted:

> The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable. However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities. . . . Congress clearly envisioned that although environmental regulation and land use planning may hypothetically overlap in some instances, these two types of activity would in most cases be capable of differentiation. Considering the legislative understanding of environmental regulation and land use planning as distinct activities, it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be *per se* pre-empted as an

> impermissible exercise of state land use planning.
>
> . . . This analysis is not altered by the fact that the Coastal Commission chooses to impose its environmental regulation by means of a permit requirement.

480 U.S. at 587-89; *see Brubaker*, 652 P.2d at 1059 ("State and local laws that merely impose reasonable conditions upon the use of federal lands may be enforceable, particularly where they are directed to environmental protection concerns.").

¶ 30 RMI contends that BOCC's enforcement of the seasonal ban is a land use decision rather than an environmental regulation because BOCC prohibits mining operations on the land. The SUP seasonal ban provides:

> The applicant shall maintain mining and processing hours, exclusive of truck hauling, from 7:00 a.m. to 5:00 p.m. Monday through Friday, and shall not mine or process on Saturday or Sunday; and the month of operation, exclusive of truck hauling, shall be from April 15th through December 15th of each year.

¶ 31 It effectively imposes a four-month operational restriction in order to mitigate impacts on wintering wildlife and habitat. Though the SUP restriction permits some operation, including truck

hauling, it prohibits mining and processing, which RMI argues amounts to an impermissible conflict with the operation of federal law.

¶ 32 In *Bohmker v. Oregon*, the Ninth Circuit Court of Appeals concluded that a state law prohibiting a type of in-stream mining that would disturb the salmon population was not preempted by the Mining Law because, in prohibiting only one method of mining, the state law did not pose an obstacle to Congressional purpose. 903 F.3d 1029, 1045–49 (9th Cir. 2018); *see id.* at 1050-51 (noting that the state law was not a "land use" regulation because it only restricted a certain type of mining, and did not amount to a "de facto ban on mining").

¶ 33 To similar effect were the decisions by the California Supreme Court in *People v. Rinehart*, 377 P.3d 818 (Cal. 2016), and the Washington Court of Appeals in *Beatty v. Washington Fish & Wildlife Commission*, 341 P.3d 291 (Wash. Ct. App. 2015). In *Rinehart*, the court concluded that a state-sponsored moratorium on a particular method of mining was not preempted by the Mining Law because (1) the moratorium only prohibited the issuance of new permits for suction dredging operations to protect salmon

habitat, and (2) the "federal statutory scheme does not prevent states from restricting the use of particular mining techniques based on their assessment of the collateral consequences for other resources." 377 P.3d at 829. In *Beatty*, the court concluded that a state agency's denial of a permit pursuant to state regulations prohibiting suction dredge mining to protect salmon populations was not preempted by the Mining Law because other types of mining operations were still permitted with certain restrictions. 341 P.3d at 306-08.

¶ 34 In contrast to *Bohmker*, *Rinehart*, and *Beatty* are decisions like *South Dakota Mining Ass'n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998), and *Brubaker*, 652 P.2d 1050. In *South Dakota Mining Ass'n*, the Eighth Circuit Court of Appeals determined that a county ordinance that prevented the issuance of new or amended permits for existing mining claims was preempted by the Mining Law because the ordinance entirely prohibited any new or altered mining activities in contravention of the Congressional objectives underlying the Mining Act. 155 F.3d at 1008-11. In *Brubaker*, the Colorado Supreme Court held that a county could not enforce a zoning restriction by prohibiting a special use permit for mining

exploration that had received the necessary federal approval under the Mining Law and other regulations. 652 P.2d at 1056-58.

¶ 35 Much like *Bohmker*, *Rinehart*, and *Beatty*, the seasonal restriction does not effect a de facto ban on mining operations. The land use itself does not change — the land is used for mining operations, with most (but not all) of the operations limited to eight months out of the year. BOCC did not deny RMI a permit, or force the mine to close, and while its restriction prohibits mining and processing during a particular season, it allows truck hauling. RMI is still able to operate, and haul limestone during the winter months.

¶ 36 RMI nevertheless maintains that the record does not support the conclusion that the SUP seasonal restriction is a reasonable environmental regulation. Contrary to the position it took at oral argument, however, RMI did not raise this issue at any of the public review meetings prior to the issuance of the first NOV. Indeed, the phrase "environmental regulation" does not appear anywhere in the April 2019 meeting transcript. RMI's presentation at that meeting comprised a total of thirteen sentences, all of which focused on the

BLM's exception to the seasonal restriction and the absence of an exception in the SUP.

¶ 37 Moreover, BOCC's restriction serves the environmental purpose of enhancing the presence and protection of big-game wildlife.[6] The restriction serves a reasonable environmental purpose, is not absolute, and is temporary in effect (effective only from December 15th through April 15th). For these reasons, we conclude that federal law did not preempt BOCC's ability to impose and enforce the restriction at issue here.

---

[6] How can this be, RMI asks, when, in granting the exception to the seasonal ban, the BLM reported that it had "no data to indicate that [the] current level of operation is causing an unacceptable disturbance to wintering big game"? The answer is simply this: what is "acceptable" to the federal government may still be "unacceptable" to the State.

The seasonal operating restriction included in BOCC's SUPs was based, at least in part, on information and recommendation from the Colorado Division of Wildlife. That the BLM did not find data indicating unacceptable disturbance to wildlife does not preclude BOCC from having a different threshold for "unacceptable" and coming to a different conclusion from the same data, or from relying on other data. We perceive no intent on the BLM's part for its conclusions to "serve as both a 'floor' and a 'ceiling,' putting any contrary State regulation at all into conflict with the Federal purpose." *Steel Inst. of N.Y. v. City of New York*, 832 F. Supp. 2d 310, 331 (S.D.N.Y. 2011), *aff'd*, 716 F.3d 31 (2d Cir. 2013).

¶ 38 In so concluding, we necessarily reject, as misplaced, RMI's reliance on that part of the *Brubaker* decision saying that "[t]he federal Government has authorized a specific use of federal lands, and [the county] cannot prohibit that use, *either temporarily or permanently*, in an attempt to substitute its judgment for that of Congress." 652 P.2d at 1059 (emphasis added) (quoting *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979)). The *Brubaker* decision pre-dated the United States Supreme Court's decision in *Granite Rock*, which (1) drew a distinction between impermissible land use restrictions and permissible environmental restrictions and (2) put a stamp of approval on "reasonable" environmental regulations. The restriction at issue here is, in our view, of that nature.

¶ 39 Further, upon a close reading of the BLM's 2018 letter purporting to grant RMI an "exception" to the seasonal restriction, we can find no "actual" conflict between federal and local authorities. The BLM's 2018-19 seasonal prohibition exception explicitly required RMI to comply with the regulations included in

43 C.F.R. §§ 3600, 3715, and 3800 (2021).[7] While these regulations confer authority to the BLM in the management of public lands, they also contemplate overlapping state requirements and direct operators to comply with such requirements. *See, e.g.*, 43 C.F.R. § 3715.5(b), (c) (2021) (federal permittee's use and occupancy of public lands under the mining laws must conform to all applicable federal and state environmental standards); 43 C.F.R. § 3802.4-3 (2021) (directing authorized BLM agent to reconcile conflicts arising between federally approved uses and uses authorized by other laws); 43 C.F.R. § 3809.1(b) (2021) (stating the purposes of subpart 3809 include providing for the maximum possible coordination with state agencies to prevent undue or unnecessary degradation of public lands); 43 C.F.R. § 3809.3 (2021) (directing operators to follow requirements of subpart 3809 in the event of conflict with state laws, but noting no conflict exists if a state law establishes an elevated standard of public lands protection). Importantly, and as observed by the district court, 43 C.F.R. § 3809.3 explains that

---

[7] These sections do not refer to three singular regulations; rather, these are three groups of regulations within the BLM's Minerals Management subchapter. *See generally* 43 C.F.R. §§ 3600, 3715, 3800 (2021).

"*there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart*."

(Emphasis added.)

¶ 40 Put simply, the BLM's "exception" to a seasonal ban controls *so long as* RMI remains in compliance with 43 C.F.R. §§ 3600, 3715, and 3800, which in turn requires compliance with a local environmental regulations such as the BOCC's SUP's seasonal restriction. *See Black Rock City LLC v. Pershing Cnty. Bd. of Comm'rs*, No. 3:12-cv-00435-RCJ, 2013 WL 1795760, at *6-7 (D. Nev. Apr. 26, 2013) (unpublished opinion) (recognizing that a local law does not conflict with federal law where a federal law explicitly accommodates it, and finding no conflict between federal and local law where, as here, the BLM's permit specifically required compliance with local laws, including the county ordinance at issue in the case).[8]

---

[8] In its reply brief, RMI argues that the compliance requirements in the 2018 letter "were with federal standards and had nothing to do with the BOCC's Seasonal Ban." RMI does not, however, explain what these other federal standards might be, nor is the BLM plan of operations/permit in the record for the court to identify other standards. Nor does a report referenced by RMI make any recommendations related to compliance with federal regulations.

¶ 41 Because BOCC's seasonal restriction was not preempted by federal law and there was (and is) no dispute that RMI conducted prohibited activities in violation of that restriction, the district court properly determined that RMI was not entitled to relief on its Rule 106 claim.

III. Due Process Claims

¶ 42 RMI contends that the district court erred in granting summary judgment on its due process claims.[9] We perceive no error.

¶ 43 To set the table for our analysis of this issue, the record shows the following:

Neither counsel's argument nor RMI's references to the record gives this court reason to believe that the 2018 letter does not require compliance with 43 C.F.R. §§ 3600, 3715, and 3800 for purposes of seasonally restricted activities. *See Albrechtsen v. Bd. of Regents of Univ. of Wis. Sys.*, 309 F.3d 433, 436 (7th Cir. 2002) ("Courts are entitled to assistance from counsel, and an invitation to search without guidance is no more useful than a litigant's request to a district court at the summary judgment stage to paw through the assembled discovery material.").

[9] RMI's substantive and procedural due process claims were predicated upon the deprivation of its so-called "Mining Rights," including its interest in mining and processing limestone, that it alleged occurred when BOCC issued its NOVs.

- BOCC's seasonal restriction had been in place for decades before RMI took over the mine;
- RMI was well aware of the restriction;
- RMI was also well aware of the process it could follow to ask BOCC to change the restriction;
- the BLM's written exception to the seasonal ban did not state that it would apply in perpetuity from that time forward; it simply was an exception for a single season; and
- the BLM's written exception did not state that the BLM was preempting or otherwise interfering with BOCC's seasonal restriction.

¶ 44 Yet, despite all this, RMI chose to disregard the process with which it was familiar and to forge ahead and mine during the restricted season, complaining that the process to change the restriction would have been unduly burdensome. This conduct recalls an old proverb: "It's easier to ask forgiveness than to get permission." In this case, it was certainly "easier" for RMI to act without permission, but, by doing so, it ignored its obligations under its agreement with BOCC. And, we note, RMI did not express

any intention of "asking" for "forgiveness" until it was confronted with its violations at the April 2019 public meeting.

A. Standard of Review

¶ 45 We review the district court's decision to grant summary judgment de novo. *Stanczyk v. Poudre Sch. Dist. R-1*, 2020 COA 27M, ¶ 53, *aff'd on other grounds*, 2021 CO 57. "Our task on review 'is to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law.'" *Id.* (quoting *City of Fort Collins v. Colo. Oil*, 2016 CO 28, ¶ 9). A material fact is one that affects the outcome of the case, *Morley v. United Servs. Auto. Ass'n*, 2019 COA 169, ¶ 14, and an issue of disputed fact "cannot be raised by counsel simply by means of argument," *People in Interest of S.N. v. S.N.*, 2014 CO 64, ¶ 17 (quoting *Sullivan v. Davis*, 172 Colo. 490, 495, 474 P.2d 218, 221 (1970)).

¶ 46 To determine whether summary judgment was proper, "a reviewing court must view the facts and the inferences therefrom in the light most favorable to the nonmovant." *Brown v. Silvern*, 45 P.3d 749, 751 (Colo. App. 2001). Because summary judgment is a drastic remedy, it should only be granted "when there is a clear

showing that the applicable standards have been met." *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003).

B. Analysis

¶ 47 RMI maintains that the district court erred by concluding it had not sufficiently established a protected property right to support a due process claim.

¶ 48 No state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. A due process claim under 42 U.S.C. § 1983 requires a plaintiff to demonstrate that "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Hillside Cmty. Church v. Olson*, 58 P.3d 1021, 1025 (Colo. 2002). "In evaluating a due process claim, a court must consider: (a) whether a property right has been identified; (b) whether governmental action with respect to that property right amounts to a deprivation; and (c) whether the deprivation, if one be found, was visited upon the plaintiff without due process of law." *Id.*

¶ 49 While courts have expanded the definition of property to include intangible property, there must be a "legitimate claim of entitlement" to some benefit. *Id.* Whether such a benefit is in fact protected hinges on whether state law creates the requisite entitlement. *Id.* And in the land use decision-making context, the entitlement analysis focuses on the degree of discretion afforded to the decisionmaker, not the probability of the decision's favorable outcome. *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). The absence of a protected property interest precludes further inquiry into a substantive or procedural due process claim. *Id.*; *Sundheim v. Bd. of Cnty. Comm'rs*, 904 P.2d 1337, 1346 (Colo. App. 1995) ("Although the principle of substantive due process may apply to land use decisions by local administrative bodies, an aggrieved party must first possess a property interest protected under the federal due process clause."), *aff'd*, 926 P.2d 545 (Colo. 1996).

¶ 50 RMI asserts that it is the holder of protected property rights and interests in mining limestone at the quarry because it is the holder of mining permits and the lessee of federal land. RMI also argues that the district court erred by only considering property

rights flowing from the SUP and not other federal or state permits. Finally, RMI asserts that BOCC did not have discretion to reach the decision it did regarding the issuance of the NOVs for the seasonal restriction, since BOCC's restriction was preempted by the BLM's grant of an exception.

¶ 51 To successfully resist summary judgment, RMI had to demonstrate a genuine dispute of fact as to the existence of "a set of conditions . . . under state and local law, 'the fulfillment of which would give rise to a legitimate expectation'" that the seasonal restriction in the SUP had to be lifted. *Hyde Park*, 226 F.3d at 1210 (quoting *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991)). As explained above, the terms of the SUP are not in conflict with and therefore not preempted by federal law. *Cf. Rinehart*, 377 P.3d at 825 ("[N]o general federal right to mine, superior to the exercise of state police powers, was intended" by the Mining Law.). Consequently, as a matter of law, BOCC *did* possess discretion regarding application of its seasonal restriction. RMI's securing of federal permission did not guarantee the lifting of the SUP's restriction. With no disputed fact as to the existence of a protected property interest, there are no "sufficient

substantive limitations to invoke due process guarantees." *Hyde Park*, 226 F.3d at 1210 (quoting *Jacobs, Visconsi & Jacobs*, 927 F.2d at 1116). Thus, the district court properly granted summary judgment in BOCC's favor on RMI's due process claims.

IV. Discovery

¶ 52 RMI also maintains that the district court erred in denying its motions (1) for a continuance to permit additional discovery under C.R.C.P. 56(f); and (2) to compel discovery.

¶ 53 "We review a district court's refusal to allow discovery for an abuse of discretion." *City of Aurora v. 1405 Hotel, LLC*, 2016 COA 52, ¶ 20.

A. RMI's Rule 56(f) Motion

¶ 54 The district court denied RMI's Rule 56(f) motion because it found the request to be based on speculation and that the discovery would not elicit facts precluding summary judgment. RMI again argues on appeal that permitting the additional discovery would reveal facts related to the bias, malicious motivations, and conflicts of interest on behalf of BOCC.

¶ 55 However, "[i]t is not an abuse of discretion to deny a C.R.C.P. 56(f) request if a movant has failed to demonstrate that the

proposed discovery is necessary and could produce facts that would preclude summary judgment." *1405 Hotel, LLC*, ¶ 22. As explained above, RMI failed to demonstrate any protected property interest that could sustain the due process claims. Facts related to arbitrary and capricious decision-making, if any, would not preclude summary judgment in this instance because RMI had no property rights protectable by due process.

B. RMI's Motions to Compel

¶ 56 RMI next argues that the district court erred by denying as moot its motions to compel discovery. We review the district court's decision to deny a motion to compel discovery for an abuse of discretion. *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶ 19. "A trial court abuses its discretion if its ruling is 'manifestly arbitrary, unreasonable, or unfair.'" *Id.* (quoting *Hock v. N.Y. Life Ins. Co.*, 876 P.2d 1242, 1251 (Colo. 1994)).

¶ 57 RMI argues that because BOCC was not entitled to summary judgment, the motions to compel are not moot, and it should be permitted to continue with discovery. RMI did not articulate any other basis for its appeal of the district court's ruling on the motions to compel. As we have upheld the district court's grant of

summary judgment, we perceive no abuse of discretion in its denial, as moot, of the motions to compel.

V. Costs on Appeal

¶ 58 Both RMI and BOCC requested costs on appeal pursuant to C.A.R. 39. As we affirmed the district court's ruling on all of the orders contested on appeal, BOCC is entitled to its costs in defending this appeal, as determined by the district court. C.A.R. 39(a)(2), (c).

VI. Disposition

¶ 59 The judgment is affirmed. Pursuant to C.A.R. 39(c)(2), BOCC may request its appellate costs in the district court.

JUDGE LUM and JUDGE BERNARD concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties**: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at **www.cobar.org/appellate-pro-bono** or contact the Court's self-represented litigant coordinator at 720-625-5107 or **appeals.selfhelp@judicial.state.co.us.