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SUMMARY
February 9, 2023

2023COA15

No. 21CA1021, *Fontanari v Colo Mined Land* — Energy and Environment — Mining — Colorado Mined Land Reclamation Board — Colorado Division of Reclamation, Mining and Safety — Procedures for Seeking Release of Performance Bond — Colorado Surface Coal Mining Reclamation Act — Release of Performance Bonds or Deposits — Adjudicatory Hearing

A division of the court of appeals holds that a rule adopted by the Colorado Mined Land Reclamation Board addressing the time for appealing a proposed decision of the Colorado Division of Reclamation, Mining and Safety to the Board conflicts with section 34-33-125(6), C.R.S. 2022, and is therefore void.

COLORADO COURT OF APPEALS **2023COA15**

Court of Appeals No. 21CA1021
Mesa County District Court No. 20CV30077
Honorable Brian J. Flynn, Judge

Rudolph Fontanari, Trustee of the Fontanari Family Revocable Trust,

Plaintiff-Appellant,

v.

Colorado Mined Land Reclamation Board; Colorado Division of Reclamation, Mining and Safety; and Snowcap Coal Company, Inc.,

Defendants-Appellees.

APPEAL DISMISSED IN PART AND JUDGMENT AFFIRMED

Division II
Opinion by JUDGE J. JONES
Brown and Kuhn, JJ., concur

Announced February 9, 2023

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¶ 1 This case concerns an administrative agency board's jurisdiction to hear a proceeding before it and that board's authority to determine whether it has jurisdiction. Appellant, Rudolph Fontanari, sought review (an adjudicatory hearing) by the Colorado Mined Land Reclamation Board (Board) of a proposed decision of the Colorado Division of Reclamation, Mining and Safety (DRMS) releasing part of a reclamation performance bond posted by a mine permittee, Snowcap Coal Company, Inc. (Snowcap). On Snowcap's motion, the Board determined that it lacked jurisdiction over Fontanari's request for review because he submitted it too late, and therefore the DRMS's proposed decision had become final and unreviewable as a matter of law.

¶ 2 The Board so concluded because, it reasoned, (1) the relevant statute, section 34-33-125(6), C.R.S. 2022,[1] requires that the request for an adjudicatory hearing "be received within thirty days of *issuance* of the proposed decision" (emphasis added); (2) Fontanari's counsel submitted the request for review to the Board

[1] Section 34-33-125(6), C.R.S. 2022, is part of the Colorado Surface Coal Mining Reclamation Act (the Act), §§ 34-33-101 to -137, C.R.S. 2022.

thirty-five days after the DRMS issued the proposed decision; and (3) Colorado Mined Land Reclamation Board Rule 3.03.2(6)(a), 2 Code Colo. Regs. 407-2 (the Rule), which provides that the request must be received within thirty days "of the *first publication* of the proposed decision" (emphasis added), conflicts with section 34-33-125(6) and is therefore void.

¶ 3 Fontanari sought review of the Board's decision with the district court under section 34-33-128(1), C.R.S. 2022, and sought an award of costs and expenses, including attorney fees, under section 34-33-128(4). The district court upheld the Board's decision and determined that Snowcap was entitled to an award of attorney fees.

¶ 4 We conclude initially that the Rule plainly conflicts with section 34-33-125(6) and is therefore void. This means the Board lacked jurisdiction over Fontanari's request for review. And we reject Fontanari's contentions that the Board lacked authority to refuse to apply the void Rule and that the Board's failure to apply the void Rule violated his right to due process. We therefore affirm the district court's judgment, including its denial of Fontanari's request for an award of attorney fees. But we dismiss that portion

of Fontanari's appeal seeking review of the district court's award of attorney fees to Snowcap; that issue isn't yet appealable because the district court hasn't yet determined the amount of the fees.

I. Background

¶ 5 Snowcap has a permit to mine coal under land owned by Fontanari. That permit requires Snowcap to reclaim the mine as required by a reclamation plan approved by the Office of Mine Reclamation under section 34-33-111, C.R.S. 2022.[2] Snowcap filed a performance bond with the DRMS to insure compliance with the reclamation plan. *See* § 34-33-113, C.R.S. 2022.

¶ 6 Snowcap applied for a partial release of the performance bond after completing certain reclamation work. *See* § 34-33-125(9).[3] The DRMS inspected the land three times, considered Fontanari's comments on Snowcap's request, and held an informal conference on the application at Fontanari's request. On September 16, 2019, the DRMS delivered its proposed decision approving Snowcap's

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[2] The Office of Mine Reclamation is a "type 2 entity" housed in the DRMS. § 24-1-105(1)(c), C.R.S. 2022 (defining a "type 2 entity"); § 34-32-105(1), C.R.S. 2022 (creating and describing the office). We therefore refer to the DRMS when referring to actions by that office.

[3] The DRMS referred to Snowcap's release request as "SL11" because it was the eleventh such request Snowcap had filed.

request to Fontanari. The DRMS's letter accompanying the proposed decision said that the DRMS "has issued a proposed decision"; that the proposed decision would be published in *The Daily Sentinel* "as soon as possible"; and that Fontanari, "as an interested party," could request an adjudicatory hearing with the Board "under Rule 3.03.2(6)." It also said that "[t]he request [for an adjudicatory hearing] must be received within thirty days of the first publication of the proposed decision in *The Daily Sentinel*."[4]

¶ 7 Four days after the DRMS delivered its proposed decision to Fontanari, the notice of the proposed decision was published in *The Daily Sentinel*. It was again published in *The Daily Sentinel* seven days later.

¶ 8 Fontanari's counsel submitted a request for an adjudicatory hearing to the DRMS on October 21, 2019 — thirty-five days after the DRMS transmitted its proposed decision to Fontanari and Snowcap and thirty-one days after notice of the proposed decision was first published in *The Daily Sentinel*.[5]

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[4] The proposed decision itself contained similar language.

[5] Under section 2-4-108(2), C.R.S. 2022, because the thirtieth day after "first publication" fell on a Sunday, the period for requesting a hearing under the Rule was extended to the thirty-first day.

¶ 9 Snowcap moved to dismiss Fontanari's request for an adjudicatory hearing, arguing that the Board lacked jurisdiction because Fontanari didn't file his request within thirty days of the issuance of the proposed decision, as required by section 34-33-125(6). Fontanari opposed the motion, as did the DRMS. The DRMS didn't take a position on whether the Rule conflicts with section 34-33-125(6) or what the effect of any such conflict would be. Rather, it only invoked the Rule and "principles of [e]quity" as reasons to deny the motion, acknowledging that it had cited the deadline set forth in the Rule in its proposed decision and its letter transmitting the proposed decision to Fontanari.

¶ 10 Following a hearing, the Board granted Snowcap's motion. It concluded that the Rule conflicts with section 34-33-125(6) and that the latter controls. Because Fontanari's request for an adjudicatory hearing wasn't received within thirty days of issuance of the DRMS's proposed decision, that decision became final under section 34-33-125(5), and the Board could not review it.

¶ 11 As noted, Fontanari sought review of the Board's decision in the district court under section 34-33-128. He made essentially the same arguments he had made before the Board. This time,

however, the DRMS joined Snowcap and the Board in taking the position that the Board's decision — including its conclusion that the Rule conflicts with section 34-33-125(6) — was correct. Snowcap also requested an award of attorney fees. The district court agreed with Snowcap, the DRMS, and the Board. And it granted Snowcap's request for attorney fees under section 34-33-128(4), concluding that (1) Fontanari's appeal of the Board's order was "frivolous" because "no credible argument can be made that [the Rule] is valid and that the Board is authorized to expand its jurisdiction beyond the [Act's] express limitations"; and (2) such an award was "equitable" because "Fontanari needlessly forced Snowcap, the [DRMS] and [the] Board to relitigate a correct administrative order."

II. Discussion

¶ 12 Fontanari contends that (1) the Rule doesn't conflict with section 34-33-125(6); (2) the Board couldn't "invalidate" the Rule without going through the formal rulemaking procedures of the State Administrative Procedure Act (APA), sections 24-4-101 to -204, C.R.S. 2022; (3) the Board violated his right to due process by not applying the Rule; (4) the district court erred by denying his

request for attorney fees under section 34-33-128(4); and (5) the district court erred by awarding Snowcap attorney fees under the same statute. We reject Fontanari's first four contentions and conclude that we lack jurisdiction over the fifth.

A. The Rule Conflicts With the Statute, the Rule is Therefore Void, and the Board Therefore Lacked Jurisdiction Over Fontanari's Request for an Adjudicatory Hearing

¶ 13 The threshold issue in this case is whether the Rule conflicts with section 34-33-125(6). If it does, it is void. If it does not, it would follow that the Board erred by dismissing Fontanari's request for an adjudicatory hearing. We conclude that the Rule conflicts with the statute. And because the Rule conflicts with the statute, the Rule is void and the Board lacked jurisdiction over Fontanari's request.

1. Standard of Review and General Principles of Statutory Interpretation

¶ 14 We must determine the meaning of the word "issuance" in section 34-33-125(6) and whether the Rule conflicts with the statute.[6] These are questions of law. *See Boulder Cnty. Bd. of*

[6] There is no dispute as to the meaning of "first publication" in the Rule. It means the first time notice is published in a local

Comm'rs v. HealthSouth Corp., 246 P.3d 948, 951 (Colo. 2011).[7] We consider an agency's interpretation of a statute to which it is subject, but, ultimately, we decide questions of law de novo. *Id.*; *see BP Am. Prod. Co. v. Colo. Dep't of Revenue*, 2016 CO 23, ¶ 15 (though we "may consider and even defer to an agency's interpretation of the statute," we "are not bound by the agency's interpretation"). Likewise, we review de novo an agency's determination of its own jurisdiction. *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1115 (Colo. 2003); *Emmons v. Colo. Dep't of Revenue*, 2020 COA 17, ¶ 32.

¶ 15 In interpreting section 34-33-125(6), we must, of course, determine and give effect to the General Assembly's intent. *Hassler v. Acct. Brokers of Larimer Cnty., Inc.*, 2012 CO 24, ¶ 15.

> We look first to the statutory language, giving the words and phrases used therein their plain and ordinary meanings. We read the language in the dual contexts of the statute as a whole and the comprehensive statutory scheme, giving consistent, harmonious, and sensible effect to all of the statute's language.

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newspaper. *See, e.g.*, §§ 34-33-118(2), -119(4), -125(3), C.R.S. 2022; *see also* Black's Law Dictionary 1483 (11th ed. 2019).

[7] If an agency's order is "contrary to law," that is one basis on which we may set it aside. § 24-4-106(7)(b)(IX), (11)(e), C.R.S. 2022.

Krol v. CF & I Steel, 2013 COA 32, ¶ 15 (citations omitted); *see Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010); *BP Am. Prod. Co. v. Patterson*, 185 P.3d 811, 813 (Colo. 2008). If, after doing this, we determine that the statute isn't ambiguous, we will enforce it as written without resorting to other rules of statutory interpretation. *Krol*, ¶ 15. But if we conclude that the statute is ambiguous — that is, susceptible of more than one reasonable interpretation — we may consider other indicators of legislative intent. *Ford Motor Co. v. Walker*, 2022 CO 32, ¶ 19; *see* § 2-4-203, C.R.S. 2022 (listing such indicators that we may consider "[i]f a statute is ambiguous").

2. Analysis

¶ 16 Fontanari posits that because the term "issuance" isn't defined in the statute and has more than one reasonable meaning, it is ambiguous, and the Rule merely resolves that ambiguity by defining "issuance" as "first publication." His argument fails for a number of reasons.

¶ 17 First, the fact that a term in a statute isn't defined therein doesn't render the term ambiguous. *Montezuma Valley Irrigation Co. v. Bd. of Cnty. Comm'rs*, 2020 COA 161, ¶ 20; *Stoesz v. State*

Farm Mut. Auto. Ins. Co., 2015 COA 86, ¶ 13; *cf. In re Title, Ballot Title & Submission Clause & Summary Approved April 6, 1994, and April 20, 1994, for Proposed Initiative Concerning "Auto. Ins. Coverage*," 877 P.2d 853, 857 (Colo. 1994) (terms "separated" and "collection points" in documents prepared by the Initiative Title Setting Board weren't ambiguous though they were undefined, broad, and "perhaps capable of more precise definition"). This is particularly so where "the statutorily undefined term has a commonly understood meaning." *Stoesz*, ¶ 13 (concluding that the undefined term "payment" wasn't ambiguous).

¶ 18 And the term "issuance," as used in this context, has a commonly understood meaning: "[t]o send out or distribute officially." Black's Law Dictionary 996 (11th ed. 2019) (defining "issue" when used as a verb and tying this definition to the corresponding noun "issuance"); *see also id.* at 995 (defining "issuance" as "[t]he practice or an instance of putting, sending, or giving something out to the public, to subscribers, etc.; a promulgation or distribution"); Webster's Third New International

Dictionary 1201 (2002) (defining "issue," as relevant in this case, as "the act of officially putting forth or getting out").[8]

¶ 19 Second, there isn't any indication in the statute that the General Assembly intended the term "issuance" as used therein to carry anything other than its plain, ordinary meaning. Quite the contrary. The General Assembly used that term, or the terms "issue" or "issued," in other related statutes without seeing a need to define it. *E.g.*, § 34-33-123(2)-(8), C.R.S. 2022 (concerning issuing certain notices of violations to the mine operator); § 34-33-124(1)(a), C.R.S. 2022 (allowing an operator to request review by the Board of a notice or order "issued" under section 34-33-123 "within ninety days after the issuance of the notice or order"); § 34-33-124(2) (directing the Board to "issue a written decision" following a hearing on request for review and requiring the Board to "issue" the written decision within thirty days of the request for review); § 34-33-124(3) (directing the Board to "issue an order or decision" on a request for temporary relief from any notice

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[8] In determining the plain, ordinary meaning of statutory terms, we frequently consider dictionary definitions. *E.g.*, *Gomez v. JP Trucking, Inc.*, 2022 CO 21, ¶ 35; *Capital One, N.A. v. Colo. Dep't of Revenue*, 2022 COA 16, ¶ 17.

or order expeditiously); § 34-33-124(4) (providing that "[f]ollowing the issuance of an order to show cause as to why a permit should not be suspended or revoked," the Board shall hold a public hearing after giving notice of the hearing to the permittee and "shall issue and furnish to the permittee and all other parties to the hearing a written decision"). Indeed, neither section 34-33-123 nor section 34-33-124 even mentions publication. And section 34-33-123(4), which addresses how notices under section 34-33-123 are "issued," says that the notice or order "shall be served in a timely fashion on the operator . . . in person or by certified mail." All this indicates an intent that "issue" carry its commonly understood meaning and that "issue" mean something different from "publication."

¶ 20 Third, the General Assembly's use of the terms "issuance" and "publish" or "publication" in section 34-33-125 itself clearly indicates that those terms mean different things.

- Subsection (1) says that when a permittee seeks release of all or part of a performance bond, the permittee must request "publication" of its request for release "for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. Such

publication" is considered part of the bond release application and must contain specified information. In addition, the permittee must give advance "written notice" of the intent to seek release of all or part of the bond to "adjoining property owners and appropriate" government entities.

- Subsection (3) says that "[a]ny person with a valid legal interest which might be adversely affected" by release of the bond, among other entities, may file written objections or comments with the DRMS "within thirty days after the last publication of the notice required in subsection (1)."
- Subsection (4) says that the DRMS must "provide written notification to the permittee of its proposed decision" *and* must "*further* publish written notice of its proposed decision once a week for two successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation" *and* must "*immediately* provide written notification of its proposed decision by certified mail to the board of county commissioners of the

county in which the surface coal mining operation is located." (Emphasis added.)

- Subsection (6) says that the Board must hold an adjudicatory hearing, regardless of who requests it, if that request is "received within thirty days of issuance of the proposed decision." Before the hearing, the Board must "inform all interested parties of the time and place of the hearing *and* shall publish" information about the hearing in a local newspaper. (Emphasis added.)

¶ 21 Thus, the statute distinguishes between publication and notification by other means, depending on the type of notice required and the intended recipient of notice. The General Assembly mandated publication as notice to interested persons and entities other than the permittee and the local board of county commissioners. And despite doing so, it didn't tie the time for requesting an adjudicatory hearing with the Board to publication; instead, it tied that time limitation to "issuance" of the proposed decision. We presume, absent some contrary showing, that the General Assembly intended these two different terms to mean different things. *Bd. of Cnty. Comm'rs v. City of Woodland Park*,

2014 CO 35, ¶ 10; *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1010 (Colo. 2008).

¶ 22 Fourth, and relatedly, when the General Assembly intends the time for taking action to be triggered by "publication" rather than "issuance" of a proposed decision by the DRMS, it has said so. Section 34-33-116(5), C.R.S. 2022, for example, provides that any request for a hearing on a proposed decision by the DRMS on an application for a technical revision of a mining permit "must be received in writing by the [DRMS] within ten days after . . . publication." And sections 34-33-118 and 34-33-125(3), C.R.S. 2022, likewise use "publication" as the triggering event for interested parties to take certain actions.[9] Again, this use of a term different from "issuance" means that publication and issuance aren't the same thing under the Act.

¶ 23 Fifth, that the General Assembly intended "issuance" and "publication" to mean different things is supported by section 34-33-119, C.R.S. 2022, which closely parallels section 34-33-125.

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[9] Section 34-33-118(3) also provides that certain government entities must be "notif[ied]" of certain permitting decisions "[o]n or before the time of first publication," indicating that such notification occurs other than by publication.

Section 34-33-119 concerns issuance and appeals of permit application decisions by the DRMS. It says that the DRMS must "issue" its proposed decision on a permit application within a certain timeframe. § 34-33-119(1). It then provides that "[t]he proposed decision of the [DRMS] under subsection (1) . . . shall . . . be furnished to the applicant and all persons who have objected to or submitted comments on the application." § 34-33-119(3). The DRMS must *also* "publish notice of the proposed decision in a newspaper of general circulation in the locality." § 34-33-119(4). This indicates that the DRMS "issue[s]" its proposed decision when it "furnishe[s]" it to the applicant and persons who objected to or commented on the application. Publication is a separate, different act.

¶ 24 We therefore conclude that "issuance" as used in section 34-33-125(6) isn't ambiguous and doesn't mean "publication." It means sending or distributing written notice of the proposed decision to the permittee and any others entitled to such notice. It follows that the Rule conflicts with section 34-33-125(6) because publication may occur, as it did in this case, after written notice of the proposed decision is sent to those entitled to receive such

notice. The Rule is therefore void. § 24-4-103(8)(a), C.R.S. 2022 ("Any rule . . . which conflicts with a statute shall be void."); *Hanlen v. Gessler*, 2014 CO 24, ¶ 35 ("A rule that conflicts with a statute is void." (citing § 24-4-103(8)(a))); *Colo. Consumer Health Initiative v. Colo. Bd. of Health*, 240 P.3d 525, 528 (Colo. App. 2010) (same); *see also* § 24-4-103(4)(b)(IV) ("No rule shall be adopted unless . . . [t]he regulation does not conflict with other provisions of law . . . .").

¶ 25 We aren't persuaded otherwise by Fontanari's assertion that interpreting "issuance" to mean sending out or distributing officially will lead to an "absurd outcome" because the DRMS could preclude "public participation" by waiting to publish notice of its proposed decision in a local newspaper until more than thirty days after issuance of the proposed decision.

¶ 26 We first note that members of the general public, as such, don't have a right to request an adjudicatory hearing before the Board. In addition to the permittee, such a hearing may be requested only by a "person with a valid legal interest which might be adversely affected by the proposed decision" or by the "head of any federal, state, or local government agency which has jurisdiction by law or special expertise with respect to any

environmental, social, or economic impact involved in the operation or which is authorized to develop and enforce environmental standards with respect to such operations." § 34-33-125(6). This substantially limits the universe of persons and entities entitled to request an adjudicatory hearing. And those persons and entities, such as adjoining property owners like Fontanari, will already have received notice that the permittee is seeking a release of all or part of the performance bond, either by "publication" or "written notice," *see* § 34-33-125(1); Rule 3.03.02(1), 2 Code Colo. Regs. 407-2, and will have had opportunity to file written objections to or comment on the permittee's request, § 34-33-125(3). Such persons and entities therefore will have notice of the proceeding, as well as the time limit for the DRMS to act on the permittee's request, and notify the permittee, *see* § 34-33-125(4), and can therefore monitor the progress of the proceeding.[10]

[10] To the extent any such person or entity receives allegedly insufficient notice of the proposed decision through publication, that person or entity could raise that issue before the Board. We don't take any position on how the Board, or a district court on review, should resolve any such issue.

¶ 27 We also note that in this case the DRMS promptly acted to have notice of its proposed decision published, and Fontanari presented no evidence of any person with a valid legal interest that might be adversely affected or any interested person, entity, or relevant government agency receiving inadequate notice of any DRMS decision on a request under section 34-33-125(6). Indeed, he received written notice of the proposed decision the same day the DRMS issued it.

¶ 28 As well, we note that, as discussed, under the Act, the General Assembly provided different deadlines for different things. Under section 34-33-119(4), an interested person (as defined therein) must request a hearing before the Board on a proposed decision by the DRMS to grant or deny a permit application "within thirty days of *first* publication" of the DRMS's proposed decision. (Emphasis added.) Under section 34-33-125(3), interested persons have thirty days after "*last* publication" under subsection (1) to file written objections and comments to the DRMS. (Emphasis added.) This indicates that the General Assembly consciously considered the appropriate timelines for affected or interested persons to take action and concluded that those timelines should differ depending

on the nature of the decision at issue. The General Assembly's setting of a deadline based on "issuance" rather than "publication" of a proposed decision on a permittee's request for release of a performance bond is consistent with that considered judgment. We don't see anything absurd about the General Assembly's use of a different act to trigger the beginning of a time period in section 34-33-125(6), and it isn't our role to second-guess the General Assembly's policy judgments. *City of Montrose v. Pub. Utils. Comm'n*, 732 P.2d 1181, 1193 (Colo. 1987); *State ex rel. Coffman v. Vaden L. Firm LLC*, 2015 COA 68, ¶ 25.

¶ 29 Section 34-33-125(5) provides that "[i]f no request for an adjudicatory hearing as provided in subsection (6) of this section is received within the time periods specified therefor, the proposed decision of the [DRMS] shall be final." The Board didn't receive Fontanari's request for an adjudicatory hearing within the time period specified in section 34-33-125(6). Therefore, the DRMS's proposed decision on Snowcap's request for partial release of the performance bond became final. Once that proposed decision became final, the Board lacked jurisdiction to consider any challenge to it. *See Emmons*, ¶¶ 28-29; *Speer v. Kourlis*, 935 P.2d

43, 48 (Colo. App. 1996) ("Statutory provisions which define the authority of an administrative agency are deemed jurisdictional . . . ."); *Colo. Div. of Emp. & Training v. Indus. Comm'n*, 665 P.2d 631, 633 (Colo. App. 1983).[11]

B. The Board Properly Recognized that It Lacked Jurisdiction

¶ 30 Next, Fontanari contends, apparently in the alternative, that because the Rule was "duly promulgated," the Board couldn't "invalidate" or "repeal" it without going through the APA's formal rulemaking procedure. That contention is meritless.

¶ 31 As discussed, under the APA itself, any rule that "conflicts with a statute shall be *void*." § 24-4-103(8)(a) (emphasis added); *see Hanlen*, ¶ 35; *Colo. Consumer Health Initiative*, 240 P.3d at 528. An agency rule that is void is deemed to have never been in effect: it is as if the rule never existed. *See First Nat'l Bank of Telluride v. Fleisher*, 2 P.3d 706, 714 (Colo. 2000) ("[A] void judgment 'is one which, from its inception, was a complete nullity and without legal

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[11] Fontanari doesn't contest that the Board didn't receive his request for an adjudicatory hearing until more than thirty days after the DRMS transmitted its proposed decision to him. Nor does he contest that the applicable time limit for requesting a hearing before the Board is jurisdictional.

effect.'" (quoting *Luben v. Selective Serv. Sys. Loc. Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972))); *Colo. State Bd. of Pub. Welfare v. Champion*, 141 Colo. 375, 381, 348 P.2d 256, 258 (1960) (affirming district court's judgment finding agency regulation "void and of no effect"); Black's Law Dictionary at 1885 (defining "void" as "[o]f no legal effect; to null" and "an absolute nullity").[12]

¶ 32 Thus, the premise of Fontanari's argument — that the Board invalidated or repealed the Rule — is incorrect. The Board instead recognized that the Rule is void — that is, never valid. Nothing in any of the authorities on which Fontanari relies suggests that an agency must comply with a void rule or regulation until such time as it repeals the rule or regulation through formal APA rulemaking. To the contrary, the law is clear that in the event of a conflict between a rule or regulation and a statute, an agency must comply

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[12] At oral argument, Fontanari's counsel asserted that because section 24-4-103(8)(a), C.R.S. 2022, says that a rule that conflicts with a statute "shall be void," such a rule is merely *voidable* and isn't *void* until the agency repeals it through formal rulemaking under the ADA or a court declares it so in a separate proceeding. We decline to read such language into the statute or construe it in a way that is contrary to the plain meaning of the words used and case law. *E.g.*, *Hanlen v. Gessler*, 2014 CO 24, ¶ 35 ("A rule that conflicts with a statute *is* void." (citing § 24-4-103(8)(a))) (emphasis added).

with the statute. *Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 2015 COA 11M, ¶ 40 n.8 ("[W]here an administrative regulation directly conflicts with its enabling statute, the enabling statute controls."); *Colo. Div. of Emp. & Training*, 665 P.2d at 633 ("Administrative agencies . . . are without power to act contrary to the law or clear legislative intent or to exceed the authority conferred upon them by statute."); *cf. Dunafon v. Krupa*, 2020 COA 149, ¶ 18 (agency rule that purported to confer jurisdiction on district courts over nonfinal actions conflicted with statute and was therefore void).[13]

¶ 33 Fontanari's assertion that Snowcap was required to challenge the Rule in a separate court proceeding fails for the same reasons, and others. To be sure, Snowcap could have filed such an action, but Fontanari doesn't cite any authority holding that an administrative tribunal lacks jurisdiction to determine whether it has jurisdiction if that question turns on the validity of an agency rule. Put simply, an agency isn't required to act in excess of its

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[13] Fontanari makes much of the presumptive validity of the Rule. But any such presumption isn't conclusive. And as discussed, that presumption has been rebutted by the showing that it conflicts with section 34-33-125(6) and is therefore void.

jurisdiction until such time as a court in another proceeding says it has done so. *See Speer*, 935 P.2d at 48 ("Statutory provisions which define the authority of an administrative agency are deemed jurisdictional, and thus, the question of their applicability may be raised at any time.").[14]

¶ 34 In sum, we reject Fontanari's assertion that the Board was required to act in excess of its jurisdiction until it repealed the Rule through formal APA rulemaking or Snowcap successfully challenged the Rule in a separate court proceeding.

C. Fontanari Wasn't Denied Due Process

¶ 35 Fontanari contends that he was denied due process because he relied on a "forty-year-old" rule and the DRMS itself cited the Rule in telling him he had thirty days from the first publication to request an administrative hearing.[15] We disagree.

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[14] Moreover, had the Board declined to consider whether it had jurisdiction, Snowcap could have raised the jurisdictional issue in the district court in this case. *See* C.R.C.P 106(a)(4) (providing that a party may seek review in district court to determine whether "any governmental body . . . exercising judicial or quasi-judicial functions has exceeded its jurisdiction").

[15] Contrary to Fontanari's assertion, the current version of the Rule containing the "first publication" language wasn't adopted in 1980. The original version of the Rule promulgated in 1980 said,

¶ 36 First of all, Fontanari's assertion that an agency "must follow" a longstanding rule is — at least in this context — incorrect. As discussed, if, as in this case, the rule at issue is void, the agency must *not* follow it.

¶ 37 To the extent Fontanari asserts that he relied on the DRMS's statements in the notice and accompanying letter to him, we conclude that he didn't preserve that issue. In his opposition to Snowcap's motion to dismiss before the Board, he argued he had relied on a longstanding regulation but he didn't argue that the DRMS's notice and accompanying letter had affirmatively misled him or that he had relied on the notice and letter.[16] We don't address arguments raised for the first time on appeal. *See Est. of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992); *Colo. Div. of Ins. v. Statewide Bonding, Inc.*, 2022 COA 67, ¶ 73.

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consistent with the enabling statute, that "[t]he request for an adjudicatory hearing . . . must be received within thirty (30) days of *issuance* of the proposed decision by the [DRMS]." Rule 3.03.02(6)(a), 2 Code Colo. Regs. 407-2 (1980) (emphasis added). The Rule was amended effective January 1988 to change "issuance" to "first publication." Rule 3.03.02(6)(a), 2 Code Colo. Regs. 407-2 (Jan. 1988). The reason for the amendment may be lost to history.

[16] Nor did he so argue in the district court.

D. Fontanari Isn't Entitled to an Award of Attorney Fees

¶ 38 The district court denied Fontanari's request for an award of attorney fees against Snowcap under section 34-33-128(4), which says that "[a]t the request of any party to a proceeding under this section, the court may assess costs and expenses, including attorney fees, against any party, as the court deems just and proper." The district court concluded that such an award to Fontanari wouldn't be "just and proper" because, in its view, "Fontanari's decision to appeal the Board Order is frivolous under the undisputed facts. In fact, no credible argument can be made that [the Rule] is valid and that the Board is authorized to expand its jurisdiction beyond the Act's express limitations." Given our resolution of Fontanari's substantive challenges to the Board's order, we are hard pressed to disagree with the district court's assessment. So, whatever the meaning of "just and proper" under section 34-33-128(4), we can't conclude that the district court abused its discretion by denying Fontanari's request for fees.

E. We Lack Jurisdiction to Review Fontanari's Appeal of the District Court's Award of Attorney Fees to Snowcap

¶ 39 The district court granted Snowcap's request for an award of attorney fees under section 34-33-128(4). But the court hasn't yet determined the appropriate amount of those fees. Therefore, we don't have jurisdiction to review Fontanari's challenge to the award, and we dismiss this part of his appeal. *Axtell v. Park Sch. Dist. R-3*, 962 P.2d 319, 322 (Colo. App. 1998).[17]

F. Snowcap Isn't Entitled to an Award of Its Reasonable Attorney Fees Incurred on Appeal

¶ 40 Snowcap requests an award of its reasonable attorney fees incurred on appeal under C.A.R. 39.1. Though it argues that Fontanari's arguments on appeal are frivolous, it doesn't invoke any particular rule or statute allowing for an award of fees. C.A.R. 39.1 expressly provides that "[m]ere citation to this rule" doesn't satisfy the requirement of stating a legal basis for the request. As that is

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[17] We don't know why the district court hasn't yet determined the amount of Snowcap's attorney fees. Fontanari's notice of appeal didn't deprive the district court of jurisdiction to determine the amount. We urge the district courts to make such determinations expeditiously so as not to delay the resolutions of cases.

all Snowcap has done, we deny its request. *In re Marriage of Evans*, 2021 COA 141, ¶ 76.

III. Conclusion

¶ 41 We dismiss that part of Fontanari's appeal challenging the district court's award of attorney fees to Snowcap. We affirm the district court's judgment.

JUDGE BROWN and JUDGE KUHN concur.