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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Blue Appaloosa, Inc., Appellant, vs. North Dakota Industrial Commission, Appellee	Supreme Court Case No. 20210292 Dunn County District Court Case No. 13-2021-CV-00036 NDIC Case No. 27827 NDIC Order No. 31208 OAH File No. 20200284

Appeal from the Order dated August 23, 2021 and Judgment Entered August 25, 2021 Affirming North Dakota Industrial Commission Order No. 31208
Case No. 13-2021-CV-00036
County of Dunn, Southwest Judicial District
The Honorable James D. Gion, Presiding

BRIEF OF APPELLANT BLUE APPALOOSA, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. STATEMENT OF THE ISSUES

A. Whether the Industrial Commission erred by concluding that Blue Appaloosa had commenced construction of a treating plant without a permit and bond in violation of Sections 43-02-03-51 and 43-02-03-51.3, North Dakota Administrative Code?

B. Whether the Industrial Commission erred by concluding that Blue Appaloosa had commenced operations of a treating plant without a bond in violation of 43-02-03-15(6), North Dakota Administrative Code?

C. Whether the Industrial Commission erred by concluding that it had jurisdiction over the subject property prior to the submission of Blue Appaloosa's Application for Treating Plant to the Industrial Commission on March 21, 2019?

II. STATEMENT OF THE CASE

[¶1] This matter relates to an Application for Treating Plant filed by Blue Appaloosa, Inc. ("Blue Appaloosa") with the North Dakota Industrial Commission (the "Industrial Commission") on or about March 21, 2019. After receiving the Application, the Industrial Commission received a telephone call from Shawn Kluver stating that Blue Appaloosa had started construction on its treating plant. On April 22, 2019, Industrial Commission employees Mark Bohrer, treating plant manager, and Jared Thune, engineering technician, traveled to the site to inspect Blue Appaloosa's property and thereafter prepared a written report setting forth their findings.

[¶2] Hearings were held before the Industrial Commission on April 24, 2019 and May 22, 2019 regarding Blue Appaloosa's Application for Treating Plant. No decision has been rendered by the Industrial Commission relating to Blue Appaloosa's Application. Instead, on August 5, 2019, the Industrial Commission commenced an administrative action against Blue Appaloosa alleging that Blue Appaloosa violated N.D.A.C. §§ 43-02-03-51, 43-02-03-15(6) and 43-02-03-51.3 by failing to obtain a treating plant permit and bond when it performed dirt work on its property in October 2018, five months prior to Blue Appaloosa deciding to proceed with the construction of a treating plant and the submission of its application to the Industrial Commission.

[¶3] An administrative hearing was held on December 4, 2020 before Administrative Law Judge ("ALJ") Hope L. Hogan. On January 14, 2021, ALJ Hogan issued her Recommended Findings of Fact, Conclusions of Law and Order. ALJ Hogan concluded that Blue Appaloosa violated N.D.A.C. §§ 43-02-03-51, 43-02-03-15(6) and 43-02-03-51.3 by performing dirt work without a permit and without a bond. The Industrial Commission adopted ALJ Hogan's recommendations in an Order dated January 27, 2021. (*See* App. at pp. 152-160).

[¶4] In accordance with N.D.C.C. § 28-32-42, Blue Appaloosa timely filed a Notice of Appeal in Dunn County District Court on February 25, 2021 appealing the January 27, 2021 Industrial Commission Order. (*See* App. at pp. 161-164). On August 23, 2021, the District Court entered an order affirming Industrial Commission Order No. 31208. (*See* App. at pp. 165-178). The District Court

entered a judgment consistent with its August 23, 2021 order on August 25, 2021. (*See* App. at p. 179). Blue Appaloosa filed a timely Notice of Appeal with the North Dakota Supreme Court on October 20, 2021. (*See* App. at p. 180).

III. STATEMENT OF THE FACTS

[¶5] Blue Appaloosa is an Idaho corporation created on December 15, 1999 whose only shareholders are Gary and Patricia Olsen. Over the years, Mr. Olsen has purchased numerous undeveloped parcels of land throughout the United States including, but not limited, Idaho, Arizona, Montana and North Dakota. (Trans. at p. 151, l. 19-25; p. 152, l. 1-7). During the hearing, Jeff Bennett testified that he was overseeing several such undeveloped parcels for Mr. Olsen including a large development near Watford City, North Dakota called Bypass Properties. *Id*.

[¶6] In or about September 2017, GT Investments created GT Investments Subdivision (the "Subdivision") which was an industrial park located adjacent to Highways 22 and 53 in Western North Dakota. (*See* App. at p. 009). Based on the desirable location of the Subdivision to the oilfields and trucking routes, Mr. Olsen and Mr. Bennett believed the property would be a good investment. Thereafter, on January 12, 2018, Blue Appaloosa entered into a purchase agreement with GT Investments for the purchase of Lot 1, GT Investments Subdivision. (*See* App. at pp. 011-013).

[¶7] Mr. Bennett testified that at the time the purchase agreement was signed, Blue Appaloosa did not have any specific use in mind for Lot 1 but believed that its

location provided a number of potential alternatives including, but not limited to, shops, employee living quarters, service/repair facility, a treatment plant or simply flipping the property with minimal improvement. In particular, Mr. Bennett testified as follows:

> Q. Okay. And at the time of purchase, what was the thought as far as what to do with the land?
> A. Well, the initial thought was, once I got talking to the realtor, is what a great location that the land was and the fact that it had not been developed, you know, other than the planning itself, and where it was centrally located in the oil field where a lot of drilling and stuff goes on, we knew that we had a myriad of options, including one which would have been to level the ground and just sell the property and just flip it, which we've done a number of times in other properties in other states.
> Q. What other -- and let me ask you this. Whenever you acquire a parcel of undeveloped land, do you look at a variety of alternatives or do you simply look at one alternative?
> A. Well, of course you're going to look at a variety. And the first thing that you would do, any time you buy a piece of ground, is you would say, okay, are there any updates? Are there anything that I can do to create value with this piece of ground?
> Well, we had -- in essence, we had a 13-acre piece of unusable ground. When I say unusable, it was unusable in any capacity other than maybe a cow could have grazed on it for a day or two.
> And so the decision was made, is we need to determine how much workable space, what size this lot is going to be. And so we knew that one of the first things that we needed to do before we made the decision on what to do with the property would be to level it to a certain extent and to get an idea of, you know, the layout and what the actual usable portion would be.
> Q. And prior to purchasing land, is it surveyed?
> A. Yes.

(Trans. at p. 152, l. 24-25; p. 153, l. 1-25; p. 154, l. 1-7).

[¶8] According to Mr. Bennett, he sought to gather necessary information to determine which use would have the greatest return on investment and then present the information to Gary Olsen for his consideration. To that end, on or about

January 18, 2018, Mr. Bennett reached out to Mark Bohrer via e-mail to gather information regarding the possible placement of a treatment plant on Lot 1. In particular, Mr. Bennett stated in his January 18, 2018 email to Mr. Bohrer as follows:

> This is Jeff Bennett from EDS and we have just had our offer accepted to purchase some fee ground next to the 1804 injection well and we would like to construct a disposal similar in operation to Little Knife but miles apart as to how it actually functions. To that end I would like to have the NDIC help guide us through the design, construction proper operation of a facility that is doing everything the right way.
> Please let me know when you are available to discuss. I'd like to make sure we don't accidently skip any steps.

(*See* App. at pp. 010, 015-017). Instead of responding by providing Mr. Bennett with some helpful resources, rules, policies or information relating to the construction of a treating plant, Mr. Bohrer simply stated "which swd well? Either file number or location by STR." *Id*. When questioned as to his purpose in reaching out to the Industrial Commission in January 2018, Mr. Bennett testified that his purpose was to open the line of communication so that in the event Blue Appaloosa elected to proceed with the construction of a treating plant it would be constructed and operated as the Industrial Commission required, thereby avoiding unnecessary costs and maximizing efficiencies. (Trans. at p. 156, 1. 6-17). At or about the same time that Mr. Bennett was communicating with Mark Bohrer, Mr. Bennett had also retained the services of Mac Hall with AE2S to have Lot 1 surveyed and to also put together rough plans for the placement of shops and living quarters on the property. (*See* App. at p. 098); (Trans. at p. 156, l. 18-25; 157, 1. 1-15).

[¶9] On or about June 7, 2018, the sale of Lot 1 closed with GT Investments issuing a warranty deed to Blue Appaloosa. (*See* App. at p. 018-019). Pursuant to the January 18, 2018 purchase agreement, GT Investments was required to construct a road outside of Lot 1 and bring power to the edge of Lot 1. (*See* App. at p. 012). Blue Appaloosa, along with its sister company Environmental Driven Solutions, LLC, bid the road construction work and were ultimately awarded the project. While Environmental Driven Solutions, LLC had the trucks to haul the dirt and scoria to construct the road, it lacked the necessary heavy equipment. To perform the heavy equipment work, Mr. Bennett testified that Badlands Energy Services was retained.

[¶10] In late October, 2018, Environmental Driven Solutions, LLC, with the assistance of Badlands Energy Services, cut in the road running along the outer perimeter of Lot 1. While Badlands Energy Services' heavy equipment was onsite, Mr. Bennett asked that it level a specific area which Mr. Bennett believed to be the usable and buildable space on Lot 1. As Mr. Bennett testified, the sole purpose for leveling a portion of Lot 1 was to not only see the total usable space but, in the event it was decided to flip the property, the minimal work in leveling a portion of Lot 1 would increase the Lot's value and allow Blue Appaloosa to generate some gain from the sale of the property:

> Q. Okay. What led to the decision to do site work on lot 1?
> A. We had -- we were contracted to build the two roads that I discussed, none of which were built to our benefit but at the request of the property owner. And I was talking with the gentleman who owned Badlands, as he was getting ready to leave, and I asked him right then what the cost would be just to level that pad so, again, we could find out what our usable space would be and

> determine if there's -- you know, one way or another what we wanted to do with it.
> Q. And based on the leveling of the pad, what was determined as far as the usable space for that lot?
> A. A little over seven acres. I don't remember the exact number but right around seven.
> Q. So the lot altogether is 13 point some acres and the actual usable space is seven acres?
> A. Yes.
> Q. And with that knowledge, are you in a better position to determine what would be most feasible for that property as far as return on investment?
> A. Absolutely. You see, because one of the things we were also looking at, we were looking at putting a mechanic shop up there, we were looking at putting a man camp up there, we were even considering putting an office up there because our current office is about 30 miles away from there.
> And so in order to do a feasible study, the first thing we needed to know is what does the ground look like? How much usable space? How much space or offset are we going to have to have? And so it was with all those different options in mind that we made that decision to level the pad.

(Trans. at p. 158, l. 6-25; p. 159, l. 1-13).

> Q. And you've answered this question, but let me ask you the one you just said. Why disturb the ground?
> A. Because we -- the work that we did do was so we could determine, first of all, usable space. Secondly, it increased the value of the property by approximately 30 to 40 percent. And, thirdly, it would help us determine what, ultimately, we wanted to use the property for.

(Trans. at p. 166, l. 5-12).

[¶11] While Badlands Energy Services did level the lot, Mr. Bennett testified that they went further than he had instructed or requested. According to Mr. Bennett, he told Badlands Energy to only level a certain area of the land and to leave the trees and other areas untouched as they wanted to retain the trees and only level what was deemed usable. Unfortunately, Badlands Energy Services took it upon themselves to take out all of the trees and to level significantly more area than was directed by

Mr. Bennett or that would ultimately be usable by either Blue Appaloosa or a subsequent purchaser. (Trans. at p. 179, l. 5-14).

[¶12] Despite going beyond the work requested, Badlands Energy Services sought to invoice Blue Appaloosa and/or Environmental Driven Solutions for all of the work performed. (Trans. at p. 177, l. 11-13.) Mr. Bennett testified that he objected to the invoices from Badlands Energy Services resulting in adjusted invoices being presented on November 8, 2018. (*See* App. at pp. 20-21).

[¶13] During the hearing in this matter, Mr. Bennett was questioned regarding his decision to level Lot 1 and whether it was for the purpose of placing a treating plant. Mr. Bennett unequivocally testified that a treating plant had nothing to do with the decision to level Lot 1 and never crossed his mind. (Trans. at p. 165, l. 11-17; p. 174, l. 17-25). As Mr. Bennett testified in response to a number of different questions, Lot 1 was leveled for several reasons, none involving a treatment plant: (1) the equipment was on site and to bring the equipment back at a later date would be significantly more expensive, (2) to ascertain the true usable area of Lot 1, and (3) to add value to Lot 1 in case it was decided to simply resell the property.

[¶14] Following the placement of the road and the ancillary leveling of Lot 1, the property sat dormant while Blue Appaloosa decided what, if anything, it was going to do with the property to get the greatest return on its investment. From and after the completion of the initial dirt work on Lot 1, Blue Appaloosa did nothing further with Lot 1. Blue Appaloosa did not and has not placed any tanks, equipment or building materials on Lot 1.

[¶15] While Lot 1 sat empty waiting for a decision to be made as far as developing or selling the property, Mr. Bennett testified that he received inquiries from various individuals about using Lot 1 as a truck staging area. (Trans. p. 163, l. 6-24.) One of the companies that contacted Jeff Bennett employed an individual by the name of Theresa Carlholm. *Id*. Ironically, Mark Bohrer testified that, at the suggestion of Shawn Kluver, he contacted Ms. Carlholm in hopes that Ms. Carlholm would provide evidence of Blue Appaloosa's alleged construction of a treatment plant. (Trans. p. 95, l. 14-24.) While Ms. Carlholm provided no evidence to support the Industrial Commission's claims, she did confirm that her employer at the time had inquired about using Lot 1 to stage its trucks. (Trans. p. 163, l. 6-24.)

[¶16] In addition to inquiries for truck staging, Mr. Bennett testified that numerous individuals he spoke with in late 2018 and early 2019 supported Mr. Bennett's initial idea of placing a treatment plant on Lot 1 due to the lot's geographic location and easy access from Highways 22 and 53. In particular, Mr. Bennett offered the following testimony:

> Q. And why at that time was it decided that the best alternative was to go with the treating plant?
> A. There's a couple of reasons. One is that the -- in talking with customers and potential clients in the area, that the Little Knife Disposal -- which would obviously be greatly affected by our being there, because I think it's a less than maybe seven miles, it might be a hair longer than that, but it's not very far away. Also, it had poor, terrible access. You have to go through (indiscernible) road.
> So the first thing we did is we talked to the customers in the area and asked them, if there was a facility here, would that be something that you would be interested in supporting? And since many clients in that area are driving three hours and sometimes waiting in line for hours to go to secure or to get in Little Knife, whose operations are pretty questionable, they were all in favor.

> Not all of them but a majority of them said they liked the location, and more than anything else, they liked the access where it's right off of Highway 30 there in the middle of everything so...

(Trans. at p. 161, l. 1-22).

[¶17] Based on such comments, Mr. Bennett testified that he went searching for individuals who had knowledge of treatment plants as his knowledge in the area was very limited. According to Mr. Bennett, he needed some experienced individuals who could help him determine if a treatment plant on Lot 1 was feasible and whether such a treatment plant would generate the greatest return:

> Q. Ultimately, the question becomes what's the greatest return on investment for the property. Would you agree?
> A. That is my job, to help the owner determine that, yes.
> Q. And ultimately, you decided that the greatest return on investment for that property would come with the construction of a treating plant; is that correct?
> A. Felt that that had the best potential, yes.

(Trans. at p. 163, l. 25; p. 164, l. 1-8).

[¶18] In late February 2019 or early March 2019, Blue Appaloosa consulted with and then hired John Ryan and Scott Lawrence, both of whom had substantial experience in the area of treating plants. (Trans. p. 160, l. 14-25). Given the excellent location of Lot 1, both John Ryan and Scott Lawrence confirmed that a treatment plant on Lot 1 would be a great use of the property and, if done properly, would be profitable. Based on the recommendations of Mr. Ryan and Mr. Scott, Jeff Bennett and Gary Olsen agreed to immediately proceed with filing an application with the Industrial Commission to construct a treatment plant on Lot 1. *Id*.

[¶19] Scott Lawrence, on behalf of Blue Appaloosa, worked closely with Jared Thune at the Industrial Commission to make sure the application to be submitted to the Industrial Commission was done properly and in accordance with any and all requirements of the Industrial Commission. *Id*. At no time did Mr. Thune or anyone else associated with the Industrial Commission inform Mr. Lawrence or any other representative of Blue Appaloosa that it deemed any disturbance of the soil to be the commencement of a treatment plant.

[¶20] On or about March 21, 2019, Blue Appaloosa submitted its Application for Treating Plant to construct and operate the Blue Appaloosa Dunn Treating Plant. (*See* App. at pp. 022-080). As set forth in Blue Appaloosa's Application for Treating Plant, Blue Appaloosa agreed to post "a bond in the amount specified in the Industrial Commission order authorizing the treating plant. BA understands the bond amount will be based on location, type and capacity of the plant, processing method and plan of operation . . ." *Id*. at p. 024. A review of Blue Appaloosa's Treating Plant Application unquestionably reveals that Blue Appaloosa fully intended to both construct its treating plant and operate its treating plant in accordance with the rules adopted by the Industrial Commission. *Id*.

[¶21] A hearing on Blue Appaloosa's Treating Plant Application was scheduled to be held before the Industrial Commission on April 24, 2019. Unbeknownst to Blue Appaloosa, on April 18, 2019 Jared Thune received a call from Shawn Kluver, the same individual who was being held accountable for his fraudulent actions against Gary Olsen and Environmental Driven Solutions, at which time Mr. Kluver reported

that construction had been started on Blue Appaloosa's treating plant. (*See* App. at pp. 082-085). On April 22, 2019, Mark Bohrer and Jared Thune traveled to Lot 1 to investigate Blue Appaloosa's alleged construction of a treating plant. *Id*. Both Mark Bohrer and Jared Thune testified that the only thing they witnessed with respect to Lot 1 was that dirt had been moved. According to the testimony of Mark Bohrer, there was no permanent or portable treating plant on Lot 1 nor were there any building materials from which a permanent or portable treating plant could be constructed nor were there any tanks on Lot 1 which would typically be a part of a treating plant:

> Q. There were no building materials on site when you visited in April of 2019. Would you agree with that?
> A. There were no building materials on site that I observed.
> Q. Was there electricity to the site?
> A. Not that I observed. . . .
> . . .
> Q. Well, tanks would be required, correct?
> A. You have to have some method of holding the waste, yes.
> Q. Did you see tanks on the site in April of 2019?
> A. No.
> Q. When you visited in October of 2020, I believe you said, did you see any tanks on the site?
> A. There were none.

(Trans. at p. 73, l. 15-21; p. 74, l. 6-13).

[¶22] At the April 24, 2019 Industrial Commission hearing, Mark Bohrer questioned Blue Appaloosa about section 43-02-03-51, North Dakota Administrative Code, and that "[n]o treating plant may be constructed without obtaining a permit from the commission after notice and a hearing." (*See* App. at p. 089). In response to Mr. Bohrer's questioning, Jeff Bennett testified as to the

movement of dirt on Lot 1 and further stated that "[i]t wasn't our intent at that time to open up a disposal plant." *Id.* Mr. Bohrer requested copies of the invoices from Badlands Energy Services for the dirt work on Lot 1 and thereafter continued the April 24, 2019 hearing. *Id.* As requested, Blue Appaloosa immediately provided the Badlands Energy Services' invoices. (*See* App. at pp. 20-21).

[¶23] On May 22, 2019, the continued hearing on Blue Appaloosa's Application for Treating Plant was held before the Industrial Commission. In addition to questions relating to the application itself, Mr. Bohrer again raised questions regarding the dirt work performed on Lot 1. To alleviate Mr. Bohrer's concerns and hopefully put the issue to rest, Mac Hall, an engineer with AE2S was asked to testify. Mr. Hall provided the following testimony:

> MR. SANSTEAD: What was the purpose or idea behind doing that dirtwork?
> MR. HALL: We were contacted by Jeff Bennett, Blue Appaloosa, to provide a grading plan to maximize a pad site for this location. I do believe he was looking at multiple applications for this site.
> MR. SANSTEAD: And what I've heard is that one of the applications was a possible site for parking trucks and trailers, is that correct?
> MR. HALL: That's correct.
> MR. SANSTEAD: To the best of your knowledge, was the site graded, leveled for the specific purpose of putting up a treatment plant?
> MR. HALL: Not at this time.
> . . .
> MR. BOHRER: When was AE2S contracted to develop these plans?
> MR. HALL: We were hired in the Spring of '18. We performed the topographic survey and I have a pad layout around the end of March in that timeframe.
> MR. BOHRER: And that pad layout, what was that for?
> MR. HALL: We were looking at, Jeff contacted me for trying to figure out how much usable land he could have on that parcel. As it was purchased, it was unbuildable with the (inaudible) across it so we averaged a pad size out for multiple uses and one, as mentioned before, would be for a truck facility.

(*See* App. at pp. 98-100).

[¶24] Despite the uncontroverted evidence establishing at the April 24, 2019 hearing and the May 22, 2019 continued hearing that (1) the dirt work performed on Lot 1 was not completed for the purpose of constructing a treating plant and, in fact, the testimony revealed that Blue Appaloosa was looking at a number of alternatives other than a treating plant, and (2) Blue Appaloosa had not constructed or commenced construction of a permanent or portable plant for the purpose of reclaiming, treating, processing or recycling waste, the Industrial Commission nevertheless elected to commence an administrative action against Blue Appaloosa. (*See* App. at pp. 003-005).

[¶25] A hearing on the administrative complaint was held on December 4, 2020 before Administrative Law Judge Hope L. Hogan. On January 14, 2021, ALJ Hogan issued her Recommended Findings of Fact, Conclusions of Law and Order. (*See* App. at pp. 134-146). ALJ Hogan concluded that Blue Appaloosa violated N.D.A.C. §§ 43-02-03-51, 43-02-03-15(6) and 43-02-03-51.3 by performing dirt work without a permit and without a bond. *Id*. The Industrial Commission adopted ALJ Hogan's recommendations in an Order dated January 27, 2021. (*See* App. at pp. 152-160). In accordance with N.D.C.C. § 28-32-42, Blue Appaloosa timely filed a Notice of Appeal appealing the January 27, 2021 Industrial Commission Order.(*See* App. at pp. 161-164). On August 23, 2021, the District Court entered an order affirming Industrial Commission Order No. 31208. (*See* App. at pp. 165-

178). The District Court entered a judgment consistent with its August 23, 2021 order on August 25, 2021. (*See* App. at p. 179). Blue Appaloosa filed a timely Notice of Appeal with the North Dakota Supreme Court on October 20, 2021. (*See* App. at p. 180).

IV. ARGUMENT

A. Standard of Review

[¶26] The standard of judicial review of Industrial Commission orders is set forth in N.D.C.C. § 38–08–14(3), which provides that "[o]rders of the commission must be sustained by the district court if the commission has regularly pursued its authority and its findings and conclusions are sustained by the law and by substantial and credible evidence." *Black Hills Trucking, Inc. v. N. Dakota Indus. Comm'n*, 2017 ND 284, ¶ 10, 904 N.W.2d 326, 330. The "substantial evidence" test is something less than the greater weight of the evidence and the preponderance of the evidence tests, and differs from the usual standard of review for administrative decisions under N.D.C.C. § 28–32–46. *Hanson v. Industrial Comm'n*, 466 N.W.2d 587, 590 (N.D. 1991). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

[¶27] The interpretation of a statute or regulation is a question of law. *Gadeco, LLC v. Industrial Comm'n*, 2013 ND 72, ¶10, 830 NW2d 535 ("Administrative regulations are derivatives of statutes and are construed under rules of statutory construction. . . . Statutory interpretation is a question of law"). The Industrial Commission's decisions on questions of law are fully reviewable on appeal. *See*

Imperial Oil of North Dakota, Inc. v. Industrial Comm'n, 406 N.W.2d 700, 702 (N.D. 1987).

B. Blue Appaloosa Did Not Commence Construction of a Treating Plant

[¶28] The exclusive basis for the Industrial Commission alleging and ultimately concluding that Blue Appaloosa violated N.D.A.C. §§ 43-02-03-51, 43-02-03-15(6) and 43-02-03-51.3 is the fact that Blue Appaloosa conducted some dirt work on Lot 1 in October-November 2018. Upon a review of the relevant rules in place at the time the dirt work was performed, it is clearly evident that Blue Appaloosa did not violate Section 43-02-03-51, 43-02-03-15(6) or 43-02-03-51.3.

[¶29] Sections 43-02-03-51, 43-02-03-15(6) and 43-02-03-51.3 stated, in relevant part, as follows in 2018 when the dirt work on Lot 1 was performed:

> 43-02-03-51. Treating Plant. No treating plant may be constructed without obtaining a permit from the commission after notice and hearing. . . .
>
> 43-02-03-51.3. Treating Plant Construction and Operation Requirements. Before construction of a treating plant begins, the operator shall file with the commission a surety bond or cash bond conditioned upon compliance with all laws, rules and regulations, and orders of the commission.
>
> 43-02-03-15(6). Treating plant bond. Prior to the commencement of operations, any person proposing to operate a treating plant must submit to the commission and obtain its approval of a surety bond or cash bond. . . .

[¶30] The unambiguous language of Sections 43-02-03-51 and 43-02-03-51.3 require that a permit be obtained and a bond posted before <u>construction of a treating plant</u> may be commenced. A treating plant has been defined by the Industrial Commission to have the following meaning:

> 52. "Treating plant" means <u>any plant permanently constructed or portable</u> used for the purpose of wholly or partially reclaiming, treating, processing, or recycling tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production. This is not to be construed as to include saltwater handling and disposal operations which typically recover skim oil from their operations, treating mud or cuttings at a well site during drilling operations, treating flowback water during completion operations at a well site, or treating tank bottoms at the well site or facility where they originated.

N.D.A.C. § 43-02-03-01 (52)(emphasis added).

[¶31] "Administrative regulations are derivatives of statutes and are construed under rules of statutory construction." *Gadeco, LLC v. Indus. Comm'n*, 2013 ND 72, ¶ 10, 830 N.W.2d 535. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. *Great Western Bank v. Willmar Poultry Co.*, 2010 ND 50, ¶ 7, 780 N.W.2d 437. Words and phrases must be construed according to the context and rules of grammar and the approved usage of the language. N.D.C.C. § 1-02-03. Statutes are construed as a whole and are harmonized to give meaning to related provisions. *Stutsman County v. State Historical Society of North Dakota*, 371 N.W.2d 321, 325 (N.D. 1985). Statutes should be harmonized to avoid conflicts between them. *Id*. "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." N.D.C.C. § 1–02–03. The dictionary is a good source to determine the plain, ordinary definition of an undefined term. *Hanneman v. Continental Western Insurance Company*, 1998 ND 46 ¶ 31, 575 N.W.2d 445.

[¶32] Applying the rules of statutory construction to Sections 43-02-03-51 and 43-02-03-51.3, the words "treating plant" are defined in Section 43-02-03-01 (52) but the words "constructed" or "construction" are not defined in the Industrial Commission's regulations. The Merriam-Webster Online Dictionary defines "construct" as "to make or form by combining or arranging parts or elements." Merriam–Webster, http://www.merriam-webster.com/dictionary/construct. Using the meaning of "treating plant" as set forth in the Industrial Commission's regulations and the meaning of construct as defined in the Merriam-Webster Online Dictionary results in the following requirements under Section 43-02-03-51 and 43-02-03-51.3, respectively:

> 43-02-03-51: No plant permanently constructed or portable used for the purpose of wholly or partially reclaiming, treating, processing, or recycling tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production may be made or formed by combining or arranging parts or elements without obtaining a permit from the commission after notice and hearing.
>
> 43-02-03-51.3: Before making or forming by combining or arranging parts or elements of any plant permanently constructed or portable used for the purpose of wholly or partially reclaiming, treating, processing, or recycling tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production, the operator shall file with the commission a surety bond or cash bond conditioned upon compliance with all laws, rules and regulations, and orders of the commission.

[¶33] During the hearing in this matter there was not one single piece of evidence introduced establishing that Blue Appaloosa has ever constructed a permanent or portable plant for reclaiming, treating, processing or recycling oilfield waste. In

fact, both of the Industrial Commission's witnesses, Mark Bohrer and Jared Thune, testified that no structures, parts or elements of any kind which would constitute a treating plant were located on Lot 1. In particular, Mr. Bohrer provided the following testimony:

> Q. That's not my question. My question was: Was there a treating plant located on lot 1, the site that you visited?
> A. There was a site built for a treating plant. However, there was no metal or concrete or anything that you might associate with what I think you're getting at as far as what a treating plant is.

(Trans. at p. 71, l. 19-25).

[¶34] According to the witnesses called by the Industrial Commission at the time of the hearing, the only thing observed on Lot 1 was dirt. The Industrial Commission's Mark Bohrer further testified that he saw no building materials, electricity or tanks:

> Q. There were no building materials on site when you visited in April of 2019. Would you agree with that?
> A. There were no building materials on site that I observed.
> Q. Was there electricity to the site?
> A. Not that I observed. . . .
> . . .
> Q. Well, tanks would be required, correct?
> A. You have to have some method of holding the waste, yes.
> Q. Did you see tanks on the site in April of 2019?
> A. No.
> Q. When you visited in October of 2020, I believe you said, did you see any tanks on the site?
> A. There were none.

(Trans. at p. 73, l. 15-25; p. 74, l. 1-10).

[¶35] Similarly, Jared Thune testified that at the time that he and Mr. Bohrer visited the subject property, there were no physical elements of a treatment plant on the site:

> Q. You saw dirt?
> A. If that's what you want to call it.
> Q. Well, yes or no --
> A. I did not physically see any tanks or equipment or buildings sitting on the site, no.

(Trans. at p. 141, l. 20-24).

[¶36] Despite Sections 43-02-03-51 and 43-02-03-51.3, when viewed under the rules of statutory construction, unquestionably requiring the existence of a physical treating plant or the physical elements related thereto, the Industrial Commission has taken the position that the "construction" requirement is satisfied if the property owner does any amount of dirt work on the property.

[¶37] While the Industrial Commission appeared to assert at the time of the hearing that the inclusion of dirt work was some sort of policy or guideline of the Industrial Commission, the Industrial Commission failed to introduce the existence of such a written policy or written guideline which would have been available to Blue Appaloosa. In fact, a review of the "Policies and Guidance" issued by the Oil and Gas Division of the Industrial Commission is silent as to the inclusion of dirt work in the construction of a treating plant. The failure of the Industrial Commission to offer any evidence of its policy or guideline at the hearing is because no such policy exists. A third-party, such as Blue Appaloosa, cannot be required to abide by an interpretation of an administrative regulation of the Industrial Commission that has

never been published and exists only in the minds of certain Industrial Commission staff members.

[¶38] During the administrative hearing, the Industrial Commission readily admitted that a treating plant can be placed on a piece of land which had been previously disturbed. In particular, Mark Bohrer testified as follows:

> Q. You would agree that it is not against the law to place a treating plant on land that has been developed?
> A. There is no regulation of the Commission's that prohibits a treating plant from being located on developed land. I mean -- and I -- could you define developed, please?
> Q. Sure. Land that initial dirt work has been done.
> A. So it could be in Blue Appaloosa's situation or some type of industrial subdivision somewhere else?
> Q. Certainly.
> A. Yeah. There's no -- there's no – the regulations of the Commission do not prohibit, you know, if land's been developed or not developed. If it's in the middle of a grain field, in the middle of the Badlands, there are no surface type restrictions on it. There are environmental restrictions, but the type of land doesn't matter.

(Trans. at p. 82, l. 6-24).

[¶39] Thus, according to Mr. Bohrer's testimony, the policy of the Industrial Commission to allow treating plants to be constructed on previously disturbed land is in complete accord with the definition of a "treating plant" as adopted by the Industrial Commission as well as the language of Sections 43-02-03-51 and 43-02-03-51.3. Pursuant to the regulations in place in 2018, an entity was only required to obtain a permit and bond for the construction of a treating plant. Allowing the placement of a treating plant on previously disturbed land clearly indicates that what may or may not have been earlier done to the soil was, in 2018, inconsequential. If

the Industrial Commission wanted to change such a policy, it was well aware of the process to be followed to amend Sections 43-02-03-51 and 43-02-03-51.3.

[¶40] In fact, in or about August 2019, the Industrial Commission proposed certain rule changes which included, among others, the following:

> 43-02-03-51. TREATING PLANT. No treating plant may be constructed or site or access road construction commenced without obtaining a permit from the commission after notice and hearing. A written application for a treating plant permit shall state in detail the location, type, capacity of the plant contemplated, method of processing proposed, and the plan of operation for all plant waste. The director shall give the county auditor notice at least fifteen days prior to the hearing of any application in which a request for a treating plant is received.
>
> 43-02-03-51.3. TREATING PLANT CONSTRUCTION AND OPERATION REQUIREMENTS.
> 1. Before construction of a treating plant, treating plant site, or access road begins, the operator shall file with the director a surety bond or cash bond conditioned upon compliance with all laws, rules and regulations, and orders of the commission. The bond amount shall be specified in the commission order authorizing the treating plant and shall be based upon the location, type, and capacity of the plant, processing method, and plan of operation for all plant waste approved in the commission order and shall be payable to the industrial commission. In no case shall the bond amount be set lower than fifty thousand dollars.

(*See* App. at pp. 113-114, 116)(emphasis added).

[¶41] The amendments to Sections 43-02-03-51 and 43-02-03-51.3 were approved in April 2020. However, amended Sections 43-02-03-51 and 43-02-03-51.3, which would now cover dirt work on a site the owner intended to be used for the placement of a treating plant, have absolutely no application in the present matter. When questioned about the amendments to Sections 43-02-03-51 and 43-02-03-51.3,

Mark Bohrer testified that a rule is amended when its not clear or needs to be expanded. In particular, Mr. Bohrer offered the following testimony:

> Q. Okay. And when a rule is not clear or needs to be expanded or otherwise revised, those rules are then amended, correct?
> A. That's the general process, yes.
> Q. Okay. And in 2020, 43-02-03-51 and 43-02-03-51.3 were amended, correct?
> A. I don't have the prior version with me, but I believe that -- that may be accurate.

(Trans. at p. 76, l. 24-25, p. 77, l. 1-6).

[¶42] Furthermore, Mr.Bohrer ultimately acknowledged at the time of the hearing that unlike the amended regulations, there was nothing within Sections 43-02-03-51 and 43-02-03-51.3 at the time the dirt work was performed that required Blue Appaloosa to have a permit or bond in place before performing such work:

> Q. As the rule was currently written, as it was amended, it sets out three different things: Treating plant, treating plant site, or access road. Would you agree that's the way the amended provision is written?
> A. That's the way it reads.
> Q. Okay. And if you go back to Exhibit 4, page Bates stamp 235.
> A. Yes, I'm there.
> Q. Of those three items that are listed in the amended regulation, only one of those items is included in the prior regulation, and that's the construction of a treating plant, correct?
> A. That's the way it reads, yes.

(Trans. at p. 86, l. 2-14).

[¶43] Since the 2020 amendments to Sections 43-02-03-51 and 43-02-03-51.3 may only be applied prospectively, *see State v. Dimmler*, 456 N.W.2d 297, 298 (N.D. 1990), the 2018 versions must be applied in the present matter. As set forth above, the 2018 versions of Sections 43-02-03-51 and 43-02-03-51.3 did not preclude an

owner of property from performing dirt work on the property and then submitting an application to the Industrial Commission to construct a treating plant on such property. The owner is, however, precluded from constructing the treating plant without the required permit and bond. Consequently, since Blue Appaloosa did not construct a treating plant on Lot 1 without a permit or the posting of a bond, Blue Appaloosa should not have been found in violation of Sections 43-02-03-51 and 43-02-03-51.3. Accordingly, the Industrial Commission's January 27, 2021 Order should be reversed.

C. Blue Appaloosa Has Not Commenced Operations of a Treating Plant

[¶44] In addition to alleging that Blue Appaloosa violated Sections 43-02-03-51 and 43-02-03-51.3, the Industrial Commission also contends that by performing dirt work on its property, Blue Appaloosa violated Section 43-02-03-15(6). Section 43-02-03-15(6) states, in relevant part, as follows:

> 43-02-03-15
> 6. Treating plant bond. Prior to the commencement of operations, any person proposing to operate a treating plant must submit to the commission and obtain its approval of a surety bond or cash bond. . . .

[¶45] Applying the rules of statutory construction described above, Section 43-02-03-15(6) requires that prior to a party commencing operations of "any plant permanently constructed or portable used for the purpose of wholly or partially reclaiming, treating, processing, or recycling tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production" must submit to the Industrial

Commission and obtain its approval of a surety bond. The uncontroverted evidence in the present matter unquestionably establishes that Blue Appaloosa has commenced absolutely nothing on the subject property. This fact was confirmed by the Industrial Commission's representative Jared Thune when he testified:

> Q. You saw dirt?
> A. If that's what you want to call it.
> Q. Well, yes or no --
> A. I did not physically see any tanks or equipment or buildings sitting on the site, no.

(Trans. at p. 141, l. 20-24).

[¶46] Since Blue Appaloosa has not constructed a treating plant it certainly has not started operating its non-existent treating plant without the necessary bond. As set forth in Blue Appaloosa's Application for Treating Plant, it is wholly committed to obtaining whatever bond is set forth in the Industrial Commission's order granting its treating plant permit. (*See* App. at p. 024). Such a bond will be provided to the Industrial Commission prior to the construction of a treating plant and the commencement of operations.

[¶47] Given that Blue Appaloosa has not constructed or operated a treating plant on Lot 1, the Industrial Commission's Order finding Blue Appaloosa in violation of Section 43-02-03-15(6) is in clear error and should be reversed.

D. Industrial Commission Lacked Jurisdiction Over Subject Property When Dirt Work Performed

[¶48] Throughout the administrative hearing in this matter, the Industrial Commission readily admitted that it had no jurisdiction over Blue Appaloosa as it

contemplated its intended use of Lot 1 or if it intended to use Lot 1 at all and instead sell Lot 1 to a third-party. As discussed below, neither Chapter 38–08, N.D.C.C. nor any other authority gives the Industrial Commission jurisdiction over an entity or its land as it contemplates using the land for shops, employee living quarters, service/repair facilities, a treatment plant or simply flipping the property with minimal improvement.

[¶49] Chapter 38–08, N.D.C.C., the Act for the Control of Gas and Oil Resources, equipped the Industrial Commission with comprehensive powers to regulate oil and gas development in North Dakota. *Cont'l Res., Inc. v. Farrar Oil Co.*, 1997 ND 31, ¶ 12, 559 N.W.2d 841. "The Commission's powers are continuous ... and are exclusive." *Egeland v. Cont'l Res., Inc.*, 2000 ND 169, ¶ 11, 616 N.W.2d 861 (internal citations omitted).

[¶50] Section 38–08–04, N.D.C.C., provides in part:

> "The commission has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of this chapter. The commission has authority, and it is its duty, to make such investigations as it deems proper to determine whether waste exists or is imminent or whether other facts exist which justify action by the commission. The commission has the authority:
> ....
> 2. To regulate:
> a. The drilling, producing, and plugging of wells, the restoration of drilling and production sites, and all other operations for the production of oil or gas.
> ....
> e. Disposal of saltwater and oilfield wastes.
> (1) The commission shall give all affected counties written notice of hearings in such matters at least fifteen days before the hearing.
> (2) The commission may consider, in addition to other authority granted under this section, safety of the location and road access to saltwater disposal wells, treating plants, and all associated facilities."

[¶51] Blue Appaloosa has and continues to readily acknowledge that pursuant to Section 38–08–04 the Industrial Commission has exclusive jurisdiction to regulate treating plants in North Dakota. *See Envtl. Driven Sols., LLC v. Dunn Cty.*, 2017 ND 45, ¶¶ 9-11, 890 N.W.2d 841, 844–45. After all, Blue Appaloosa filed an Application for Treating Plant with the Industrial Commission on March 21, 2019. (*See* App. at pp. 22-81). Upon the filing of its application, Blue Appaloosa was surrendering itself and Lot 1 to the jurisdiction of the Industrial Commission. However, prior to the filing of said application, neither Section 38-08-04 nor any other statutory authority confers jurisdiction upon the Industrial Commission over Blue Appaloosa and/or its Lot 1. The application submitted by Blue Appaloosa confirmed its intent to utilize the property for oil and gas related purposes which are regulated by the Industrial Commission. Prior to the application's submission, Blue Appaloosa could have, and was contemplating, using Lot 1 for a myriad of purposes unrelated to the Industrial Commission's jurisdiction.

[¶52] The evidence introduced at the administrative hearing in this matter conclusively established that at the time the dirt work was performed on Lot 1, there was no definite intent to construct a treating plant. The uncontroverted testimony of Jeff Bennett revealed that Blue Appaloosa purchased Lot 1 as a speculative investment that Jeff Bennett and Gary Olsen believed would increase in value based upon its favorable geographic location. The testimony of Mr. Bennett revealed that Mr. Olsen has, on numerous prior occasions, purchased undeveloped land and either

fully developed the land or only minimally developed the land based on what would create the greatest return.

[¶53] Mr. Bennett testified that the same intentions existed with respect to Lot 1. After entering into a purchase agreement on or about January 12, 2018 for Lot 1, Jeff Bennett contacted Mac Hall of AE2S to have a topographic survey performed to get a feel of the usable land and also reached out to gather information regarding possible uses for Lot 1 to ascertain what use would generate the greatest return. Among the individuals contacted by Jeff Bennet was Mark Bohrer with whom Mr. Bennett had worked in the past to clean up the messes created by Shawn Kluver. (*See* App. at pp. 010, 015-017). As Mr. Bennett testified, his early efforts to reach out to Mr. Bohrer were merely to gather information just as he reached out to his other contacts to discover what they believed would be a good use for Lot 1. As the evidence revealed, Blue Appaloosa certainly had not decided in January or February, 2018 that it was going to construct a treating plant on Lot 1.

[¶54] As a result of Mr. Bennett's early efforts to contact Mark Bohrer to gather information relating to the possible construction of a treating plant and to ensure that any steps undertaken were in accordance with applicable regulations, the Industrial Commission has argued that Blue Appaloosa intended to construct a treatment plant as early as January 2018 and, therefore, the dirt work performed was in furtherance of said construction efforts. In other words, the Industrial Commission contends that Blue Appaloosa contracted to build a treatment plant in January 2018 or, at the latest, October 2018, when the dirt work was performed.

[¶55] This Court has consistently concluded that "a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer, and a letter intended merely as preliminary negotiation should not be construed as an offer." *Valentina Williston, LLC v. Gadeco, LLC*, 2016 ND 84, ¶ 17, 878 N.W.2d 397, 402–03. At most, the January 2018 email from Jeff Bennett to Mark Bohrer set forth a preliminary negotiation or discussion and did not set forth an absolute obligation on the part of Blue Appaloosa to construct a treatment plant on Lot 1.

[¶56] Furthermore, the uncontroverted evidence established that Blue Appaloosa had not decided what, if anything, it would do with Lot 1 when the dirt work was performed in October-November, 2018. In addition to Jeff Bennett testifying at the December 4, 2020 hearing that a treating plant did not even cross his mind when the dirt work was performed since no decision had been made as to what would be done with Lot 1, Mac Hall of AE2S similarly testified at the May 22, 2019 Industrial Commission hearing that a number of alternatives were being examined by Blue Appaloosa. In particular, Mr. Hall offered the following testimony:

> MR. SANSTEAD: What was the purpose or idea behind doing that dirtwork?
> MR. HALL: We were contacted by Jeff Bennett, Blue Appaloosa, to provide a grading plan to maximize a pad site for this location. I do believe he was looking at multiple applications for this site.
> MR. SANSTEAD: And what I've heard is that one of the applications was a possible site for parking trucks and trailers, is that correct?
> MR. HALL: That's correct.
> MR. SANSTEAD: To the best of your knowledge, was the site graded, leveled for the specific purpose of putting up a treatment plant?
> MR. HALL: Not at this time.

> . . .
> MR. BOHRER: When was AE2S contracted to develop these plans?
> MR. HALL: We were hired in the Spring of '18. We performed the topographic survey and I have a pad layout around the end of March in that timeframe.
> MR. BOHRER: And that pad layout, what was that for?
> MR. HALL: We were looking at, Jeff contacted me for trying to figure out how much usable land he could have on that parcel. As it was purchased, it was unbuildable with the (inaudible) across it so we averaged a pad size out for multiple uses and one, as mentioned before, would be for a truck facility.

(*See* App. at pp. 7-9).

[¶57] Given that there was no intent to construct a treating plant at the time the dirt work was performed on Lot 1, the Industrial Commission had absolutely no jurisdiction over Lot 1. Moreover, the Industrial Commission did not gain jurisdiction over Lot 1 until the time at which Blue Appaloosa submitted its Application for Treating Plant, nearly five months after the dirt work had been performed. Mark Bohrer confirmed this point during his testimony at the administrative hearing when he stated:

> Q. And if no application had ever been submitted and a convenience store or a truck stop had been developed on that property, the Industrial Commission would have no jurisdiction, correct?
> A. I would -- I mean, certainly the Commission does not have jurisdiction over truck stops. But as early as January 2018, Jeff was -- Mr. Bennett and I were in conversations over the building of a treating plant.
> Q. Well, there was nothing set in stone. I mean, companies can certainly change their mind as far as what they want to do with a piece of property, can't they?
> A. They own the property. They can do -- I mean, they can change their mind, yes.

(Trans. at p. 132, l. 19-25; p. 133, l. 1-6).

[¶58] The uncontroverted evidence in this matter unquestionably establishes that at the time the dirt work was performed on Lot 1, the Industrial Commission did not have jurisdiction over either Blue Appaloosa or Lot 1. The dirt work was performed so as to allow Blue Appaloosa to ascertain the best and most profitable use of the property. It was not until late February or early March 2019 that Blue Appaloosa elected to proceed with a treating plant. At the time Blue Appaloosa had decided to move forward with a treating plant, it had been nearly five months since the unrelated dirt work had been completed. Since a treating plant can be placed on previously disturbed or developed land, there was no violation of N.D.A.C. §§ 43-02-03-51, 43-02-03-15(6) and 43-02-03-51.3. Accordingly, the Industrial Commission's January 27, 2021 Order must be reversed in its entirety.

V. CONCLUSION

[¶59] For the foregoing reasons, the January 27, 2021 Order of the Industrial Commission should be reversed in its entirety.

Respectfully submitted this 29th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

[¶60] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(e), that the Brief of Appellant Blue Appaloosa, Inc. was prepared with Times New Roman proportional typeface, 13 pt. font, and complies with the page limitation and consists of 35 pages.

Dated this 29th day of November, 2021.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Blue Appaloosa, Inc., Appellant, vs. North Dakota Industrial Commission, Appellee	Supreme Court Case No. 20210292 Dunn County District Court Case No. 13-2021-CV-00036 NDIC Case No. 27827 NDIC Order No. 31208 OAH File No. 20200284

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the following documents:

Brief of Appellant Blue Appaloosa, Inc; and

Appendix of Appellant Blue Appaloosa, Inc.

were served on November 29, 2021, via electronic mail, upon the following:

David Phillips
Office of the Attorney General
drphillips@nd.gov

Dated this 29th day of November, 2021.

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Blue Appaloosa, Inc., Appellant, vs. North Dakota Industrial Commission, Appellee	Supreme Court Case No. 20210292 Dunn County District Court Case No. 13-2021-CV-00036 NDIC Case No. 27827 NDIC Order No. 31208 OAH File No. 20200284

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the following documents:

Corrected Appendix of Appellant Blue Appaloosa, Inc.

were served on December 2, 2021, via electronic mail, upon the following:

David Phillips
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Dated this 2nd day of December, 2021.

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