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May 23, 2013

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This is Exhibit "I" referred to in the Affidavit of Daniel Stuckless Sworn before me this 4th day of September A.D. 2013
T. R. [illegible]
A Commissioner for Oaths in and for the Province of Alberta
TARLAN RAZZAGHI
BARRISTER & SOLICITOR

Dear Counsel:

Re: Application No. 1673682
Applicant: Dover Operating Corp.
Reasons for April 18, 2013 Decision on Notice of Questions of Constitutional Law

This letter provides the reasons of the Energy Resources Conservation Board Panel considering the above-noted matter (the "Panel") for its decision provided to the parties in a letter dated April 18, 2013 regarding the Fort McKay First Nation's Notice of Questions of Constitutional Law.

On March 28, 2013, the Fort McKay First Nation ("FMFN") submitted to the Energy Resources Conservation Board ("Board/ERCB") a Notice of Questions of Constitutional Law ("NQCL") with regard to the above noted application (the "Application"). The NQCL was also served on Dover Operating Corp. ("Dover"), the applicant in this matter, and upon the Minister of Justice

and Solicitor General and the Attorney General of Alberta ("Alberta") and the Attorney General of Canada ("Canada").

In the NQCL, FMFN provided notice that it intended to raise the following questions of constitutional law:

1. Would approvals sought by Dover Operating Corp. in Application #1673682, if granted, constitute a *prima facie* infringement of the rights guaranteed by Treaty 8, s. 35 of the *Constitution Act, 1982* and the *Indian Act*, so as to be of no force or effect or otherwise inapplicable by virtue that the Province of Alberta has no jurisdiction over Indians and Lands Reserved for the Indians under s. 91(24) of the *Constitution Act, 1867* ("Interjurisdictional Immunity Argument")?

2. Has the Crown discharged its duty to consult and accommodate Fort McKay with respect to adverse impacts arising from the proposed project upon the rights guaranteed to Fort McKay pursuant to Treaty 8, s. 35, and the *Natural Resources Transfer Agreement* ("Inadequate Consultation Argument")

In its NQCL, FMFN characterized Question #1 as the "Interjurisdictional Immunity Argument" and Question #2 as the "Inadequate Consultation Argument". It indicated that the answer to Question #1 was "yes" and the answer to Question #2 was "no".

On April 3, 2013, Alberta wrote to the Board requesting direction with regard to the timing for filing submissions to address the validity of the NQCL and for a determination from the Panel on that issue as a preliminary matter.

On April 9, 2013 the Panel advised FMFN, Dover and Alberta that, prior to the commencement of its hearing to consider the Dover Application, the Panel would assess the issue of its jurisdiction to consider the questions posed in the NQCL. Canada had previously indicated that it would not be intervening in the Dover proceeding.

Submissions on the Board's jurisdiction to consider the NQCL were received from Alberta and from Dover on April 11, 2013. Both of those parties submitted that the Board did not possess the jurisdiction to consider FMFN's constitutional questions. On April 16, 2013, FMFN provided the Board with its reply submission indicating that the Board has the clear jurisdiction to determine FMFN's two constitutional questions.

On April 18, 2013, the Panel issued its decision on the question of the Board's jurisdiction in relation to the questions posed in the NQCL. It indicated that the Board does not have the jurisdiction to consider those questions and for that reason the NQCL was dismissed.

The following are the Panel's reasons for the above decision.

1. The Issue

There is no dispute that the ERCB has the jurisdiction to consider constitutional questions. FMFN, Dover and Alberta are in agreement that the ERCB, pursuant to the provisions of the

Administrative Procedures and Jurisdiction Act (the *APJA*) and its associated regulations,[1] has the authority to decide such questions. The disagreement between the parties relates to whether that authority applies to the two questions posed by FMFN in this matter.

2. Relevant Legislation

a) The *Energy Resources Conservation Act*

The ERCB's enabling statute is the *Energy Resources Conservation Act* ("*ERCA*"). Section 2 of the *ERCA* sets out that act's purpose as being:

a) to provide for the appraisal of the reserves and productive capacity of energy resources and energy in Alberta;

b) to provide for the appraisal of the requirements for energy resources and energy in Alberta and of markets outside Alberta for Alberta energy resources or energy;

c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;

d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;

e) to secure the observance of safe and efficient practices in the exploration for, processing, development, and transportation of the energy resources of Alberta;

e.1) to secure the observance of safe and efficient practices in the exploration for and use of underground formations for the injection of substances;

f) to secure the observance of safe and efficient practices in the exploration for and use of underground formations for the injection of substances;

g) to provide for the recording and timely and useful dissemination of information regarding the energy resources of Alberta;

h) to provide agencies from which the Lieutenant Governor in Council may receive information, advice and recommendations regarding energy resources and energy.

Section 3 of the *ERCA* provides for consideration by the Board of the public interest. It states:

> Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to

[1] Sections 10 (c) and (d), *Administrative Procedures and Jurisdiction Act*, RSA 2000 c. A-3; Schedule 1, Designation of Constitutional Decision Makers Regulation AR 69/2006 (Consolidated up to 254/2007)

whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.

b) The *Oil Sands Conservation Act*

The Application was made pursuant to section 10 of the *Oil Sands Conservation Act* (*"OSCA"*). Section 3 of the *OSCA* provides the following purposes of that Act:

a) to effect conservation and prevent waste of the oil sands resources of Alberta,

b) to ensure orderly, efficient and economical development in the public interest of the oil sands resources of Alberta,

c) to provide for the appraisal of Alberta's oil sands resources,

d) to provide for appraisal of oil sands, crude bitumen, derivatives of crude bitumen and oil sands product requirements in Alberta and in markets outside Alberta,

e) to assist the Government in controlling pollution in the development and production of the oil sands resources of Alberta,

f) to provide for the recording and for the timely and useful dissemination of information regarding the oil sands resources of Alberta, and

g) to ensure the observance, in the public interest, of safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of oil sands, discard, crude bitumen, derivatives of crude bitumen and oil sands products.

Section 10 states that:

(1) No person shall

a) construct facilities for a scheme or operation; or

b) commence or continue a scheme or operation for the recovery of oil sands or crude bitumen, unless the Board, on application, has granted an approval in respect of the scheme or operation.

(2) The Board shall, on receiving an application referred to in subsection (1), make any investigation or inquiries and hold any hearings that it considers necessary or desirable in connection with the application.

(3) The Board may, with respect to an application referred to in subsection (1)

a) if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council, grant an approval on any terms and conditions that the Board considers appropriate,

b) refuse to grant an approval,

c) defer consideration of the application on any terms and conditions that the Board may prescribe, or

d) make any other disposition of the application that the Board considers appropriate.

(4) An authorization of the Lieutenant Governor in Council is subject to any terms and conditions prescribed by the Lieutenant Governor in Council.

c) The *Administrative Procedures and Jurisdiction Act*

Pursuant to the provisions of the *APJA* and its associated regulations, the Board has the authority to decide "all questions of constitutional law" which are defined in section 10 (d) as:

> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights,* to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
>
> (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights.*

3. The Board's Jurisdiction Regarding Question #1

The first question posed by the FMFN in its NQCL is:

> Would approvals sought by Dover Operating Corp. in Application #1673682 if granted, constitute a *prima facie* infringement of the rights guaranteed by Treaty 8, s. 35 of the *Constitution Act, 1982* and the *Indian Act* so as to be of no force or effect or otherwise inapplicable by virtue that the Province of Alberta has no jurisdiction over Indians and Lands Reserved for the Indians under s. 91(24) of the *Constitution Act, 1867*?

a) Position of the Parties

i) Fort McKay First Nation

FMFN submitted in its NQCL that the ERCB has, by virtue of s. 11 of the *APJA* and the associated regulations, the jurisdiction to determine "all questions of constitutional law". It submitted that, as the Board has the authority to decide questions of law, it has the authority to answer constitutional questions.

FMFN described Question #1 as the "Interjurisdictional Immunity Argument". Interjurisdictional immunity is a constitutional doctrine wherein certain heads of federal power have an "unassailable core" that is immune from interference by provincial laws or actions. FMFN submitted that Canada's exclusive jurisdiction over "Indians and lands reserved for Indians"[2] is one of the federal powers to which interjurisdictional immunity applies and treaty

[2] s. 91(24) of the *Constitution Act, 1867*

rights fall within the core of that federal head of power. Provincial laws of general application cannot impair treaty rights and *prima facie* infringement of those rights cannot be justified. Any provincial action that constitutes a *prima facie* infringement of a treaty right is ineffectual by the operation of the doctrine of interjurisdictional immunity and s. 88 of the *Indian Act.* To determine if there is a *prima facie* infringement of a treaty right, it is necessary to consider the nature and scope of the right and whether there is interference with that right.

FMFN submitted the exercise of determining the scope of the treaty right must be done by using principles of treaty interpretation, considering historic, expert opinion, and elder evidence, and by drawing analogies from the common law. It also submitted that it is necessary to determine if, on the balance of probabilities, there has been a "meaningful diminution" of a treaty right. FMFN further submitted that the doctrine of derogation[3] should be applied in informing the question of whether the Treaty Right to Reserve Lands has been, or may be, infringed.

FMFN submitted that, as the evidence will establish, approval of the Project as applied for will create a *prima facie* infringement of the FMFN's Treaty Rights because it will take away the prerequisites to enjoying Reserve Lands and Alberta does not have the jurisdiction to approve or authorize actions which will infringe Treaty Rights.

In its reply submission, FMFN submitted that Dover's submission on the Board's jurisdiction does not in fact address jurisdiction; it goes to the merits of Question #1, the interjurisdictional immunity argument, and whether FMFN would be successful on that question.

Finally, it submitted that with Question #1, FMFN is actually seeking to have its right to non-interference with Reserve Lands by provincial action or approval determined and that such a determination requires the ERCB to assess the magnitude of the effects of the proposed Project on its Reserve Lands and this assessment is clearly within the ERCB's mandate.

ii) Dover

Dover submitted that the *APJA* specifies which administrative tribunals in Alberta have the jurisdiction to consider issues of constitutional law; however, the *APJA* does not expand the jurisdiction of those tribunals to consider matters beyond their mandate. The Board has no authority to make any order or give any direction that is not specifically authorized by the *OSCA*, without the prior approval of the Lieutenant Governor in Council.

Dover submitted that consideration of Question #1 will require the Board to undertake consideration of matters which are outside its authority. Question #1, the "Interjurisdictional Immunity Argument", requires the Board to determine if the *OSCA* comes within the "basic, minimum and unassailable" content of the federal head of power over Indians and Indian Lands and whether that enactment "impairs" the exercise of that federal power.[4] This would require the Board to consider the scope of federal jurisdiction over Indians and lands reserved for Indians and whether the *OSCA* impairs the exercise of that jurisdiction. Further, Dover submitted that as

[3] "...a grantor ... must not seek to take away with one hand what he has given with the other...[it is]an independent rule of law" *Edmonton Regional Airports Authority v North West Geomatics Ltd.* , 2002 ABQB 1041 at para 55.
[4] *Canadian Western Bank v. Alberta,* 2007 SCC 22 at para 37

the FMFN submissions on Question #1 make reference to the infringement of the FMFN's treaty rights, consideration of the first question will require the Board to interpret the intent of Treaty 8 to determine if infringement of Treaty rights will occur, and also assess the Crown's justification for infringing those rights. Dover submitted these are fundamental legal and policy questions that extend beyond the Board's authority to determine if the Project is in the public interest.

iii) Alberta

Alberta acknowledged the Board's jurisdiction to answer questions of constitutional law under the *APJA*; however, it submitted that Question #1 is not a question of constitutional law. The *APJA* grants the Board the authority to consider 1) a constitutional challenge to the validity or applicability of a legislative enactment, or 2) the determination of a right. Alberta submitted that as Question #1 challenges the approvals sought by Dover, rather than any legislative enactment, it is not a question of constitutional law and the Board has no authority to consider it.

Further, Alberta submitted that Question #1 is not asking the Board to determine a constitutional right within the meaning of the *APJA*. While FMFN asks the Board to "acknowledge the scope of [its] Treaty Right to Reserve Land", as the challenge to the approvals is not a question of constitutional law, there is no reason for the Board to make such determination. Additionally, Alberta submitted that the ERCB does not possess the jurisdiction to determine the scope of treaty rights as that would fall outside its statutory mandate.

Alberta noted the Supreme Court of Canada's caution that defining the scope of treaty rights is better conducted via litigation rather than a regulatory process not designed to address such issues.[5]

Finally, Alberta submitted that defining the scope of FMFN's treaty rights should not occur within the context of a constitutional challenge to pending ERCB approvals over which challenge the ERCB has no jurisdiction because that challenge is not a question of constitutional law under the *APJA*.

b) The Board's Analysis

FMFN, Alberta and Dover are in agreement that the Board has the authority to consider constitutional questions pursuant to the provisions of the *APJA*. FMFN says that jurisdiction includes the authority to consider the questions posed in its NQCL. Alberta and Dover say it does not, though for somewhat different reasons.

Administrative tribunals have only the authority given to them by the legislature and must confine their analysis and orders to the ambit of the questions properly before them on a particular application. Questions over which the Board does not have jurisdiction cannot be properly before the Board.

It is clear the ERCB has the power to decide constitutional questions. However, as the Board has indicated in previous decisions[6] it does not necessarily have the authority to decide all

[5] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para 11

constitutional questions posed to it. Only those matters, constitutional or otherwise, that fall within the parameters of the Board's mandate are ones which the Board is authorized to consider and decide. The fact the Board must exercise its decision-making functions in accordance with the Constitution and has the ability to consider constitutional questions pursuant to it, does not extend the scope of subjects over which the ERCB has jurisdiction.

It is the Panel's view that Question #1, the "Interjurisdictional Immunity Argument", is not a question of constitutional law within the meaning of the *APJA* and for that reason the Board is not authorized to consider it.

Questions of constitutional law are defined as:

> (i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
>
> (ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*. [emphasis added]

It is clear on the face of Question #1 that the question is not a constitutional challenge to the validity of an enactment. Rather, Question #1 asks this Board to find that the approval sought by Dover is, by virtue of the Constitution of Canada, of no force or effect. Board approvals are not enactments of the legislature. FMFN itself did not suggest Question #1 is a challenge to any enactment; it made a point of stating that provincial "actions" come within the purview of the doctrine of interjurisdictional immunity. The Board can have no jurisdiction over Question #1 pursuant to section 10(i) of the *APJA*.

Further, the Panel is satisfied that Question #1, the challenge to the applied for approvals, does not ask the Board to make a declaration of a constitutional right within the meaning of s. 10(ii) of the *APJA*. Within its legal argument supporting its NQCL, FMFN asks the Board to "acknowledge the scope of its Treaty Rights to Reserve Land." However, as the challenge to the sought approvals is not a question of constitutional law and therefore the Board has no jurisdiction with regard to it, the scope of the rights need not be determined.

The Panel is also satisfied that its mandate, as set out in the sections of the *ERCA* and the *OSCA* cited above, does not in this case extend to determining the meaning and scope of Aboriginal rights, including the right to reserve lands. The Board's mandate, in the context of considering applications made to it, is to consider, having regard to the purposes set out in section 2 of the *ERCA* and section 3 of the *OSCA*, if energy matters meet the Board's technical requirements and are in the public interest having regard to any social, economic or environmental impacts which

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[6] Osum Oil Sands Corp. Taiga Project, ERCB Application No. 1636580, Reasons for July 17, 2012 Decision on NQCL issued August 24, 2012 (*Osum*); Jackpine Mine Expansion Project, Joint Review Panel CEAR Reference Number 10-05-58540; ERCB Application No. 1554388, Reasons for October 26, 2012 Decision on Notices of Questions of Constitutional Law (*Jackpine*)

may emanate from these matters. Neither part of this mandate, whether the technical review or considering impacts, encompasses defining the extent of Aboriginal rights.

In its reply submission, FMFN stated that Question #1 asks for a determination of FMFN's rights. However, examination of that question discloses that even if a determination of treaty rights is embedded in Question #1 and the Interjurisdictional Immunity Argument, that determination is not the only question being asked. Question #1 asks the Board to find that if Dover were granted the approval it seeks, that approval would be of no force or effect because it would interfere with the federal power relating to Reserve Lands and Alberta does not have the jurisdiction to interfere with that federal head of power. As noted above, the Board has no power to undertake that enquiry regarding the approval and therefore has no authority over Question #1.

If the Panel is mistaken in the above analysis, the Board is still of the view that it does not possess the authority to consider Question #1. The submissions make clear that to consider the Interjurisdictional Immunity Argument, the Board will have to determine what the "basic minimum unassailable core" of the federal power over "Indians and lands reserved for Indians" is and whether either the *OSCA* (as asserted by Dover) or approval of the Application (as asserted by FMFN) will impair the exercise of that power.

As indicated above, the Board's power to decide constitutional questions is limited to matters within its legislated mandate. There is nothing in its mandate, described above, which cloaks the ERCB with the authority to determine the "basic minimum unassailable core" of a federal head of power or to determine if the exercise of that core is impaired. As the Board does not have the jurisdiction to make the enquiries required to answer Question #1, it cannot have jurisdiction over that question.

The Panel notes that the authority for the proposition that Crown "actions" can trigger the doctrine of interjurisdictional immunity has been called into question by Dover and Alberta; however, for the purposes of deciding its jurisdiction, it is unnecessary for the Panel to decide if interjurisdictional immunity applies to "actions" or if its application is limited to legislation.

4. The Board's Jurisdiction Regarding Question #2

The second question posed by FMFN in its NQCL is:

> Has the Crown discharged its duty to consult and accommodate Fort McKay with respect to adverse impacts arising from the proposed project upon the rights guaranteed to Fort McKay pursuant to Treaty 8, s. 35, and the *Natural Resources Transfer Agreement?*

As a preliminary matter, it should be noted that whether the Crown owes a duty to consult and accommodate FMFN with regard to the Dover Project was not disputed.

To put the submissions of the parties and the Panel's consideration of Question #2 in context, it should be noted that the Board has dealt with very similar, if not identical, questions of constitutional law in two other instances. In those matters,[7] the Board[8] determined that it did not

[7] *Osum, supra* and *Jackpine, supra*

have the jurisdiction to decide the constitutional questions regarding the adequacy of Crown consultation posed to it by First Nations.

In the first matter, *Osum,* the Board determined that its mandate does not grant it jurisdiction to assess Crown consultation when the Crown is not the proponent. It noted that having the jurisdiction to consider constitutional questions does not extend the scope of its jurisdiction beyond its statutory mandate. Assessment of Crown consultation adequacy does not fall within the ERCB's specialized jurisdiction. Further, as the Board's own process is part of the broader provincial consultation process, a decision on Crown consultation adequacy at this stage would be premature. Finally, the Board noted that the ERCB does not have the authority to supervise or compel Crown consultation or accommodation, nor can it give the relief sought which is a declaration that consultation and accommodation were inadequate.

In *Jackpine,* similar reasoning was used with regard to the jurisdiction to consider the adequacy of consultation. In that matter, the Board, in its capacity as the Joint Review Panel, noted that it had no inherent jurisdiction; the application had to be considered in accordance with its statutory mandate. Further, the Crown decisions that trigger the duty to consult on the project were not before the Board. It also noted that it did not have the ability to grant any remedy that would require the Crown to fulfill its constitutional obligations and that a decision on adequacy would be premature as consultation will continue after the hearing.

In the present matter, the parties provided extensive submissions regarding Question #2, the majority of which were the same or very similar to those made in *Osum* and in *Jackpine.* The Panel finds that Question #2 is virtually identical to the constitutional questions raised in *Osum* and *Jackpine.*

The Panel acknowledges that it is not bound to follow the reasoning in *Osum* or *Jackpine.* However, it does note the desirability of having consistency and certainty in decisions made by it in its proceedings. Like courts, tribunals such as the ERCB should make consistent decisions on the same legal issue. Predictability in the regulatory process is a good thing.

The Panel finds nothing in this matter that would justify it departing from its decision and reasoning on jurisdiction in *Osum* or in *Jackpine.* The legislation was the same in these matters as in the matter at hand and the questions of law were similar. No events have occurred such as the issuance of decisions or changes to legislation that would justify the ERCB taking a different position regarding its jurisdiction to consider Question #2. Further, the Panel is of the view that the reasoning in those decisions is correct. Accordingly, in regard to Question #2, the Board adopts the reasons given in *Osum* and in *Jackpine.*

With regard to FMFN's assertion that *Osum* was wrongly decided, the Panel disagrees with that view. The submissions in this matter are very similar to those in *Osum*; the Panel has considered the submissions in this matter, and has reached the same conclusion it reached in *Osum.* It does not consider *Osum* to be wrongly decided.

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[8] In *Jackpine* the ERCB was acting in its capacity as the Joint Review Panel Considering the Jackpine Mine Expansion and so the decisions were issued by the Joint Review Panel

The Panel notes the suggestion made by FMFN that *Jackpine* is distinguishable because in that matter there was an agreement creating the Joint Review Panel which indicated that the Panel, of which the Board was a participant, was not required to determine the adequacy of Crown consultation. It is true that in this matter there is no such agreement applicable to the Board. However, the Panel's decision in *Jackpine* did not rely upon the agreement and it is the reasoning of the Joint Review Panel which this panel adopts.

The Panel also notes the submission made by FMFN that there is no evidence regarding the timing of Crown consultation upon which the Panel can conclude that Crown consultation is not complete. With respect, this is incorrect; the Board is not bound by the rules of evidence and regularly considers and relies upon submissions of counsel and other unsworn information/evidence to arrive at decisions. The Panel is satisfied that its process forms part of the consultation process. The submissions of Alberta regarding other provincial approvals[9] which Dover will be required to obtain before the project proceeds persuade the Panel that there will be other opportunities for Crown consultation.

In summary and for the reasons set out in more detail in *Osum* and *Jackpine*, the Panel is satisfied that:

- The Board is a statutory creation. Its authority to consider constitutional questions does not extend its specialized jurisdiction to matters outside its statutory mandate.
- The Board's mandate does not allow it to assess or supervise Crown conduct, including consultation with First Nations. That mandate requires it to assess social, environmental and economic impacts and the technical merits of a proposed project;
- The Board's process forms part of a much broader consultation process in which the Crown is engaged. The Board acts constitutionally when it allows First Nations to participate in its proceedings and present their concerns and evidence of impacts to the Board.
- It would be premature for the Board to consider the adequacy of Crown consultation because other Provincial authorizations, including from the Lieutenant Governor in Council, are necessary for the Dover project to proceed. These other authorizations provide opportunities for further consultation. The decision(s) which would trigger the consultation duty are not before the Panel.
- The Board does not have the authority to grant a remedy that would require the Crown to fulfill its constitutional obligations, including with regard to Crown consultation.
- In this matter, where the proponent is not the Crown or a Crown agent and thus does not owe the constitutional duty to consult and accommodate, the ERCB's public interest mandate does not extend to assessing the adequacy of Crown conduct (consultation) which has yet to be completed.

[9] *Environmental Protection and Enhancement Act, Water Act,* and *Public Lands Act*

5. Conclusion

For the above reasons, the Panel concludes that it does not have the jurisdiction to consider the constitutional questions posed by FMFN in its NQCL and on that basis it has been dismissed from the Dover proceeding.

G. Eynon, P. Geo.
Presiding Member

R.E. McManus, M.E. Des.
Board Member

Terry Engen
Board Member

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