

Water bounds in Nova Scotia*

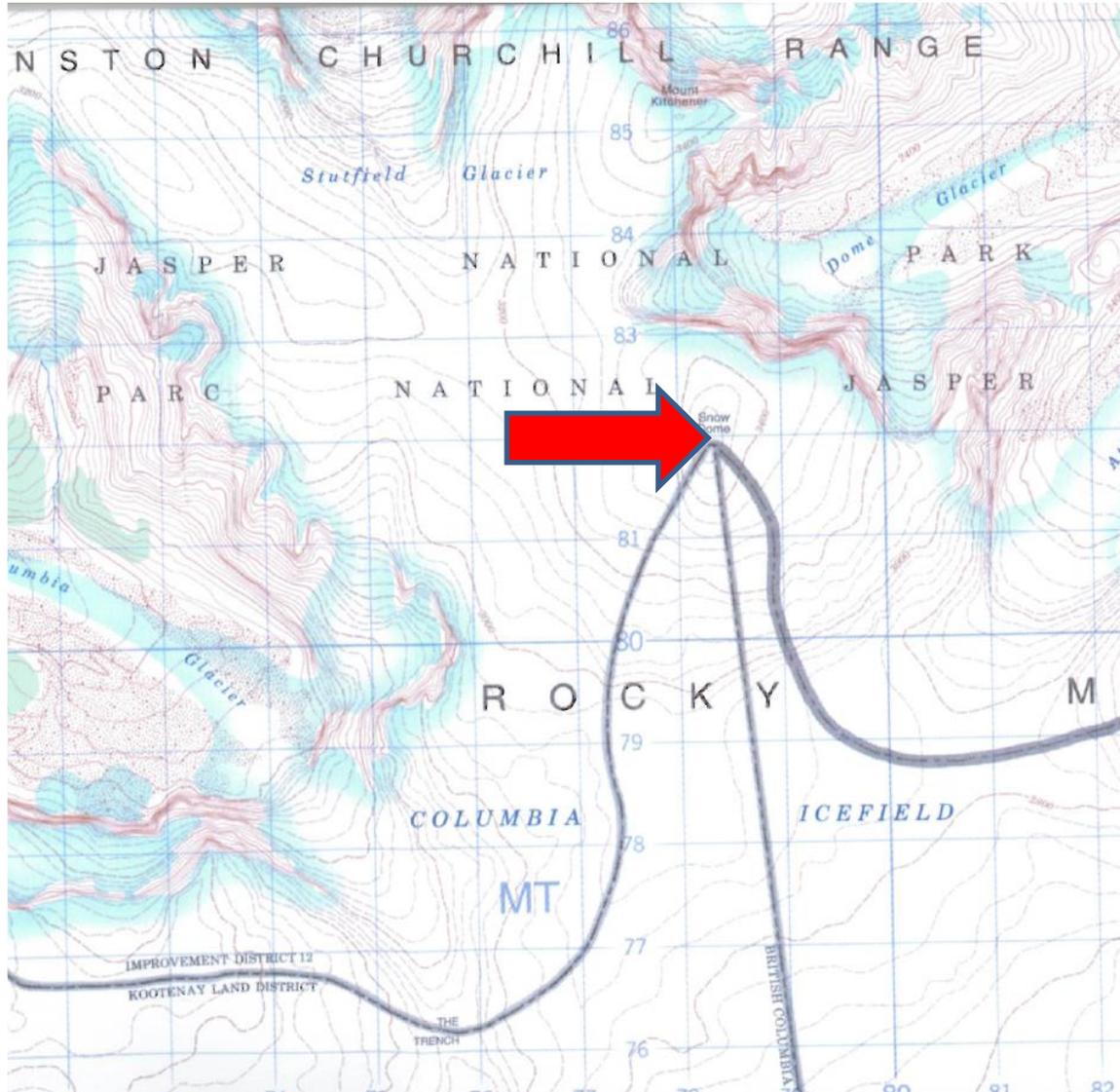
* and elsewhere

ANSLS AGM – October 2016

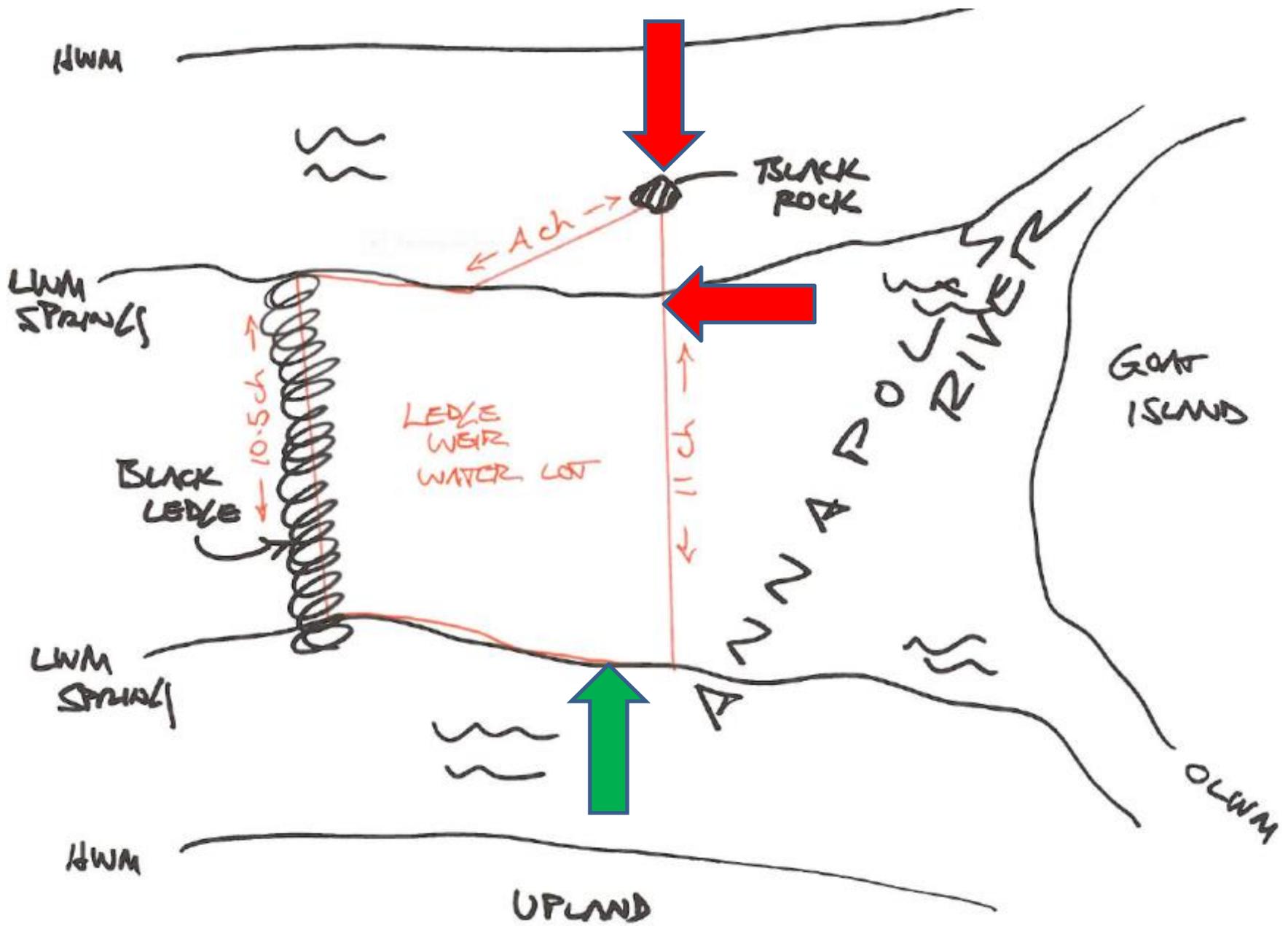
Dr Brian Ballantyne

brian_ballantyne@hotmail.com

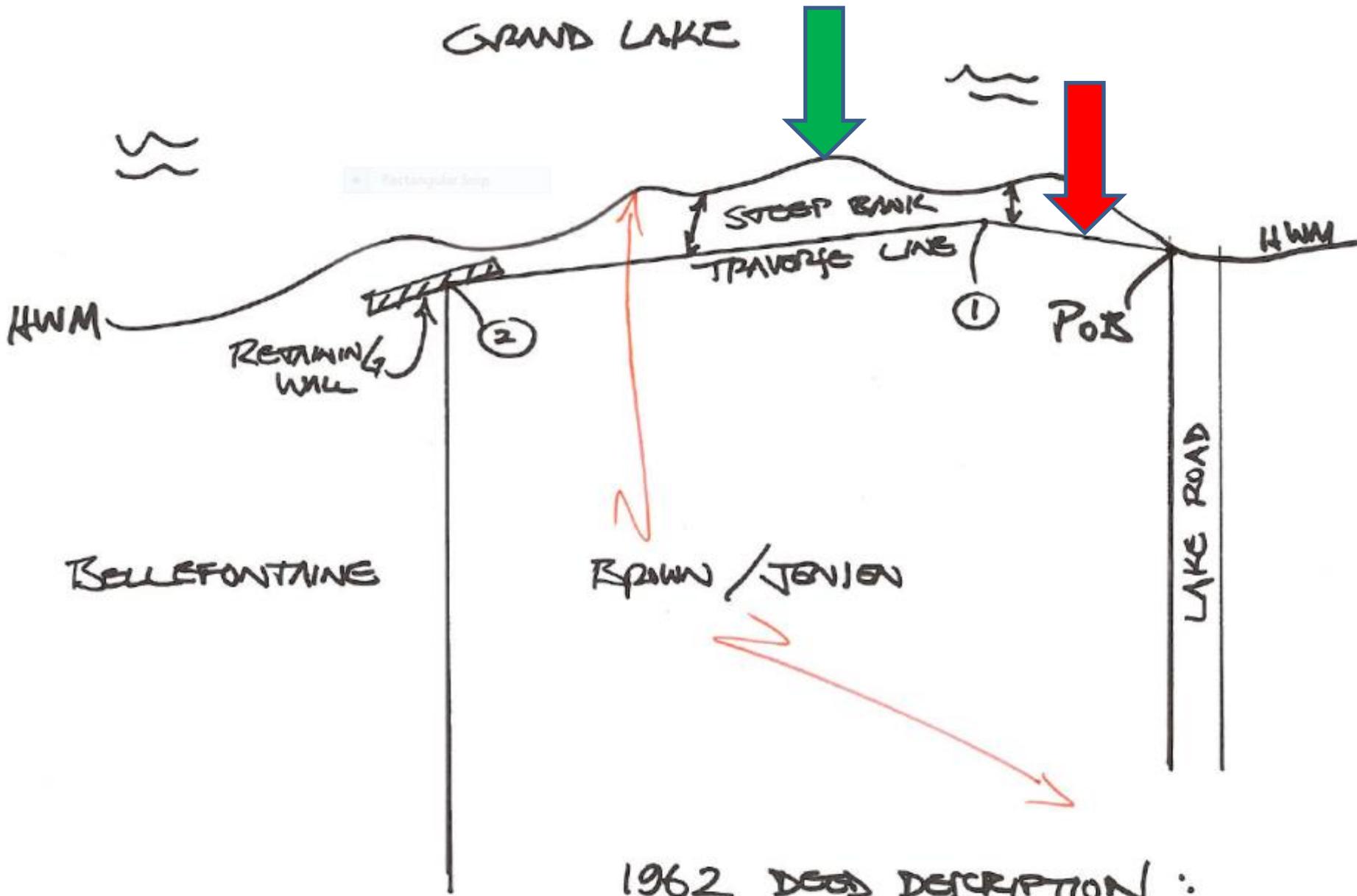
Fundamental: Is it a water bound?







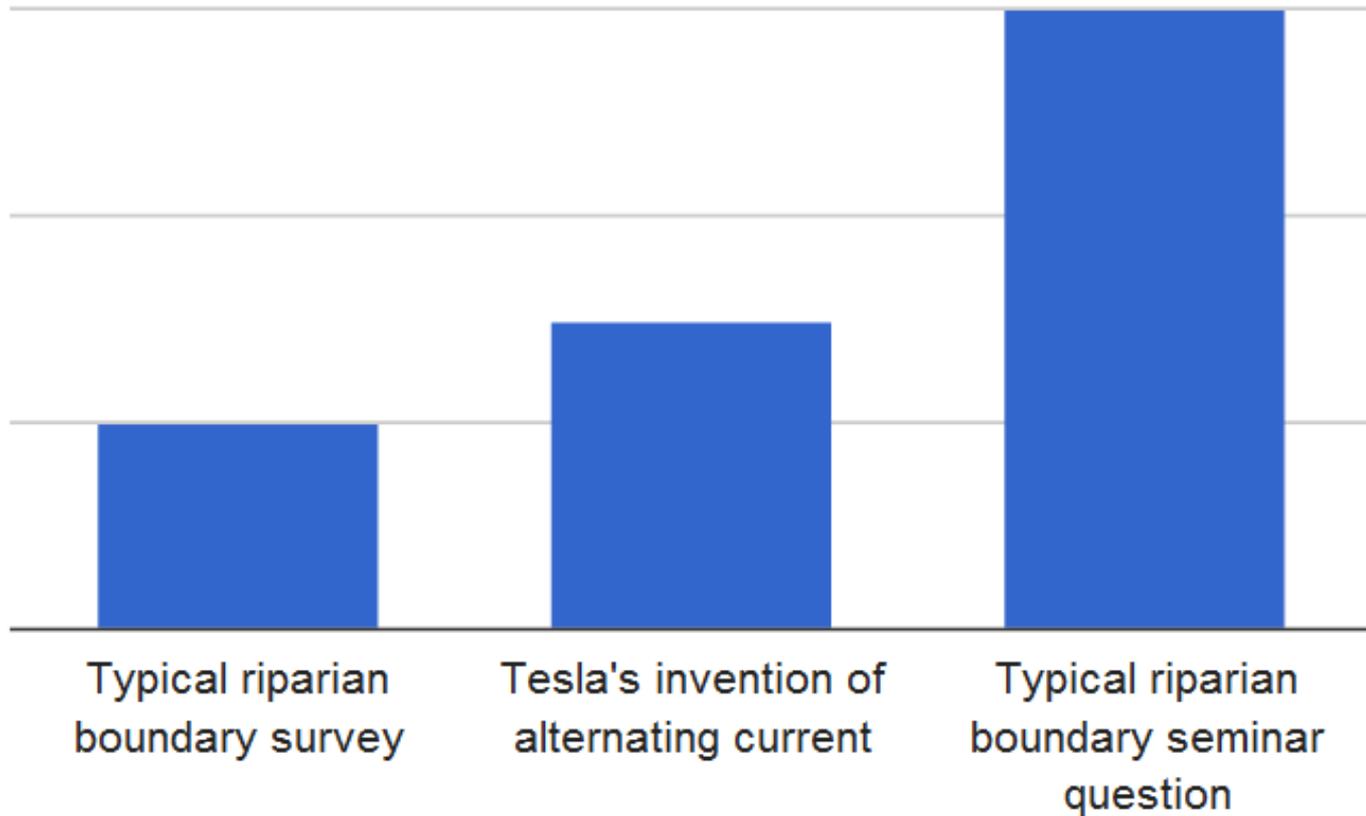
GRAND LAKE



1962 DEED DESCRIPTION:
 INTENTION = WATER BOUND!

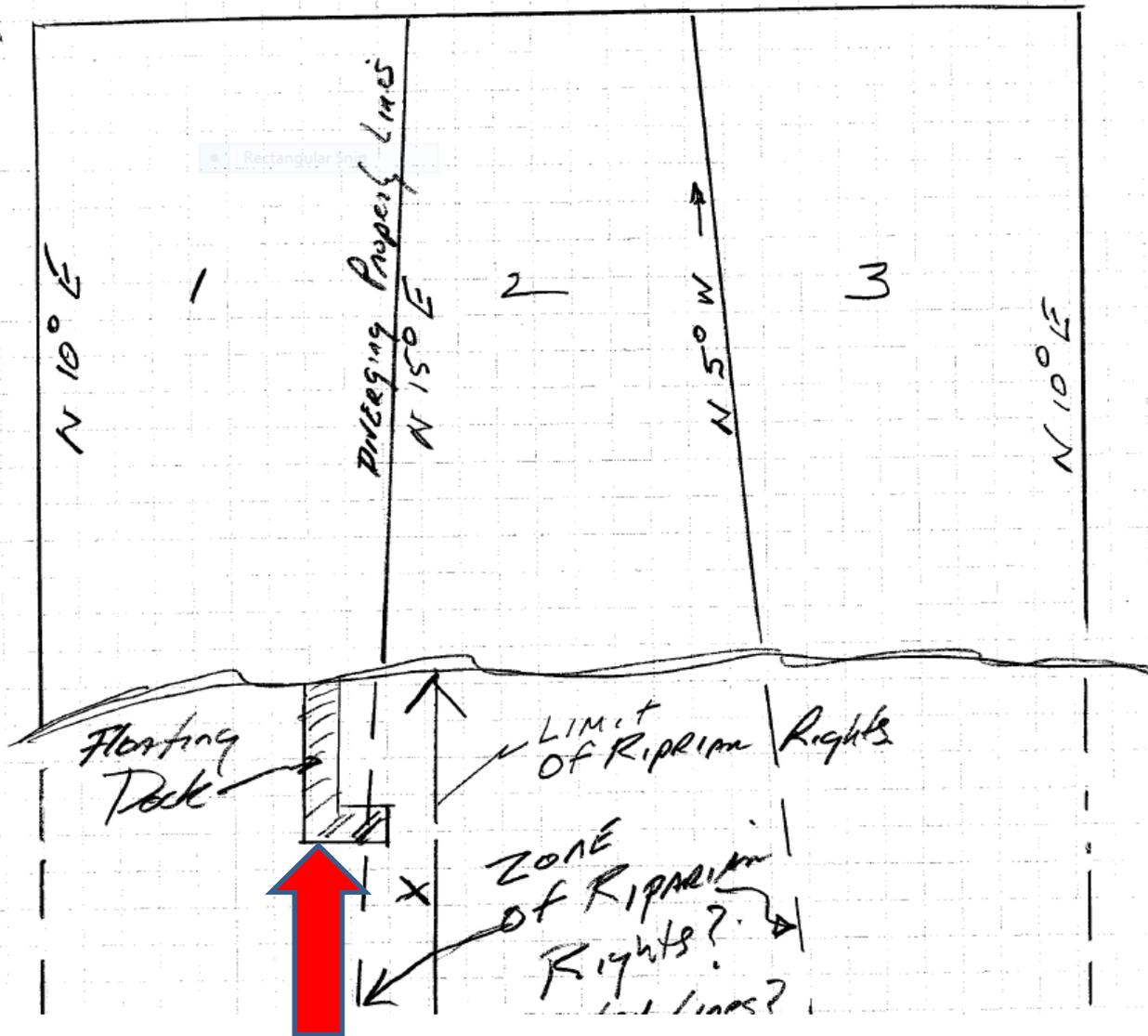


ffs - It's only a water bounds seminar



KOARD

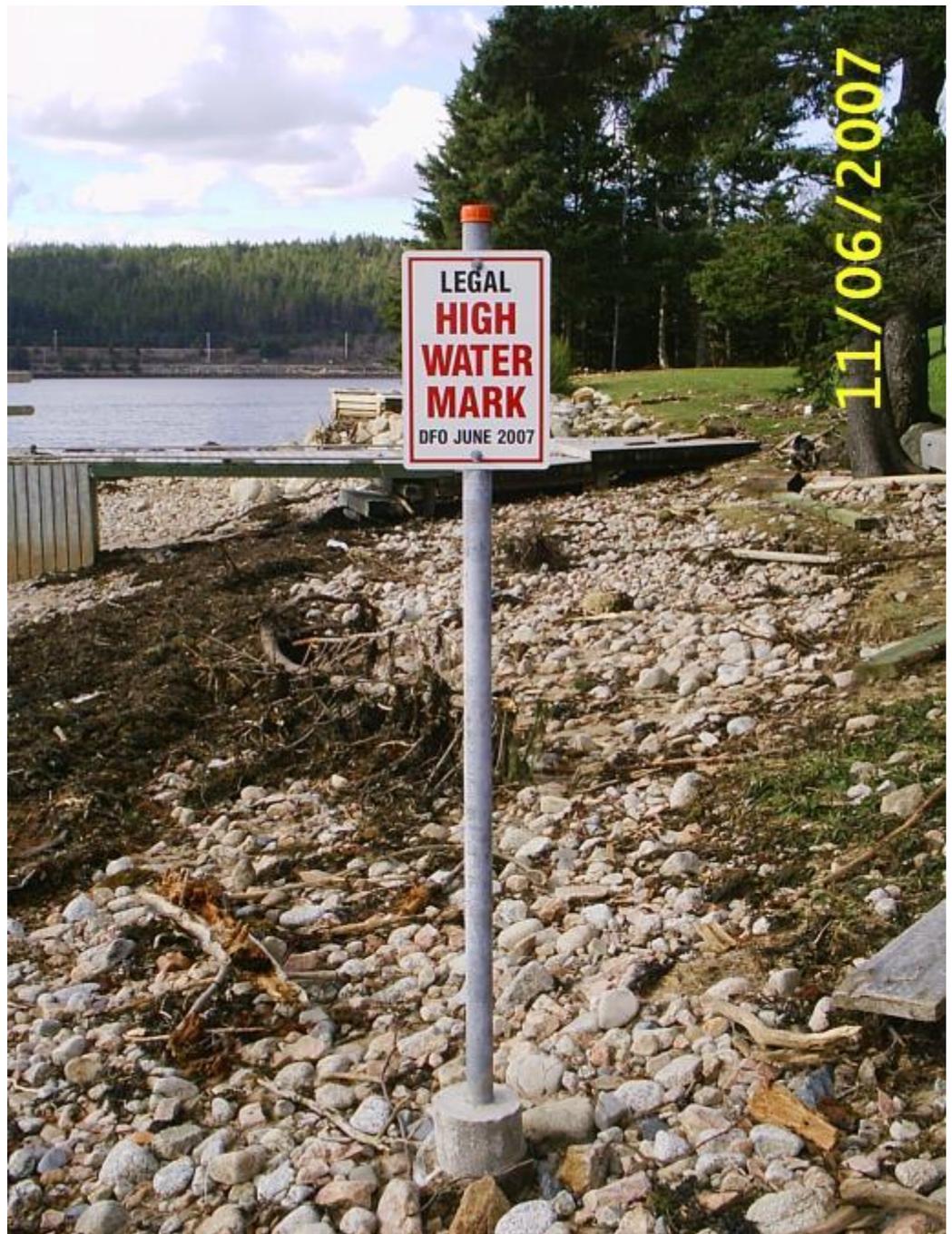
20/11/20



7 answers to 12 questions

- There is no exclusive riparian zone; upland owner's intention is irrelevant.
- Riparian owners have the right to access waters that allow reasonable use (Tidal regime at low tide = boat with a length of 35ft and a draft of 4ft).
- Such access shifts out with accretion and in with erosion.
- *Ad medium filum* applies to Indian Reserves and to fee simple lands acquired by Canada before 1919.
- Showing watercourses on plan is a function of: effort/labour; number/size of streams; use/purpose of survey; ANSLS practice; NS policy; ...
- *Environment Act* (s103) v *Municipal Government Act* (s268B) = Say what?
- OHWM in tidal regime can be located using physical/visible evidence – scoring, marks, driftwood, seaweed, detritus, ...

Spot the error (1)



Spot the error (2)

“It is possible for [now] dry land, that was once the bed of a lake, to be vested in the Crown through ... accretion.”

- *Manawan v. Lutz* (2012 – AB SRB)

11 Nova Scotia-centric principles

- Erosion is a thing (*Dennis v Langille*, 2013)
- Ponds vest in NS (*Silver Sands v NS*, 2010)
- Artificial stuff happens (*Acheson v NS*, 2006)
- Water bounds trump traverses (*Bellefontaine v Brown*, 2000)
- Access along entire bound (*Corkum v Nash*, 1991)
- Navigable = aqueous highway (*Hirtle v Ernst*, 1989)

11 principles (continued)

- Accretion can be assisted (*Canada v Kennings*, 1988)
- Private rights reduced in public interest
(*Cdn Prov Power Co. v NS Power Commission*, 1928)
- Water lot bounds tricky (*Delap v Hayden*, 1924)
- Dyking is not accretion (*Mahon v McCully*, 1868)
- Erosion shifts boundaries (*Esson v Mayberry*, 1841)

s103

- All watercourses vested in NS (since May 16, 1919)!
- Watercourse means the bed/shore of every river, stream, lake, pond, spring, lagoon or other natural body of water ... whether wet or not.
- Inapplicable to:
 - Harbours;
 - Waters that are mostly tidal/brackish;
 - Wetlands (marsh, swamp, fen or bog ...)



Rectangular Snip

LAKE CHARLES

N 63° 24' 54" E 26.654m (TIE LINE)

O.H.W.M. 32.9m ±

Lands Now or
BRENT ALBERT
CHERYL FAY SCO

Boat House

S 30° 13' 16" W 21.162m
1932 Water Boundary

N 64° 15' 22" W 14.637m

BEGIN SM

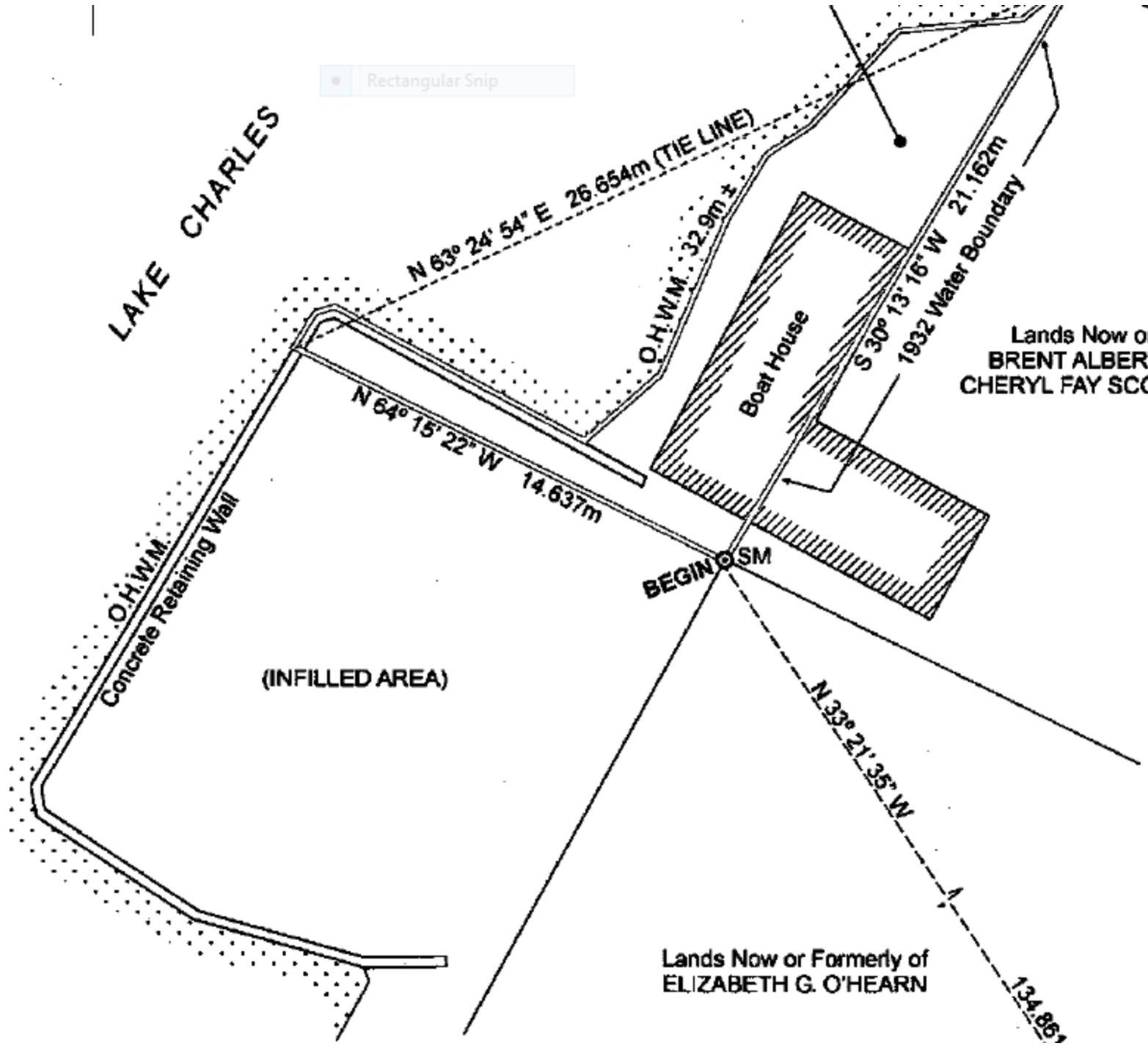
O.H.W.M.
Concrete Retaining Wall

(INFILLED AREA)

N 33° 21' 35" W

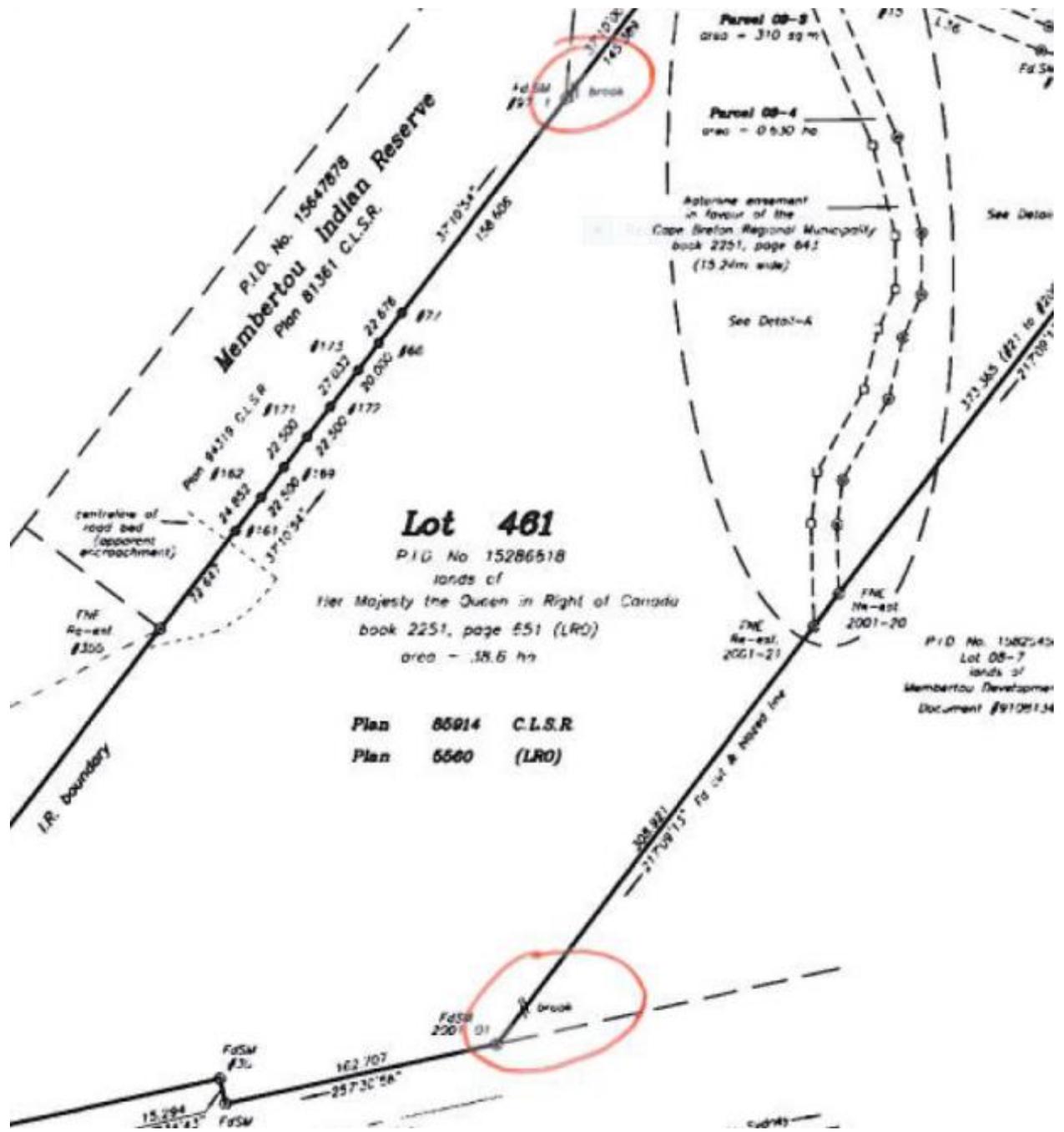
Lands Now or Formerly of
ELIZABETH G. O'HEARN

134.86m



Three plans of same watercourse:

- 2002 – Light lines, bridging arrow
- 2009 – Only across bounds, NS property mapping
- 2013 – Bold lines, separate parcels



Membertou Indian Reserve
 P.I.D. No. 15647878
 Plan 81361 C.L.S.R.

Lot 461
 P.I.D. No 15286518
 lands of
 Her Majesty the Queen in Right of Canada
 book 2251, page 551 (LRO)
 area - .58.6 ha

Plan 85914 C.L.S.R.
 Plan 6560 (LRO)

Parcel 08-3
 area = 310 sq m

Parcel 08-4
 area = 0.50 ha

Adaptive easement
 in favour of the
 Cape Breton Regional Municipality
 book 2251, page 641
 (15.24m wide)

See Detail

See Detail-A

P.I.D. No. 1582545
 Lot 08-7
 lands of
 Membertou Developer
 Document #9109134

I.R. boundary

FA 921
 217°09'15" To cut & narrow line

FNE
 Re-est.
 2001-21

FNE
 NN-est
 2001-20

centreline of
 road bed
 (apparent
 encroachment)

FNE
 Re-est.
 #300

FaSM
 200' 01"

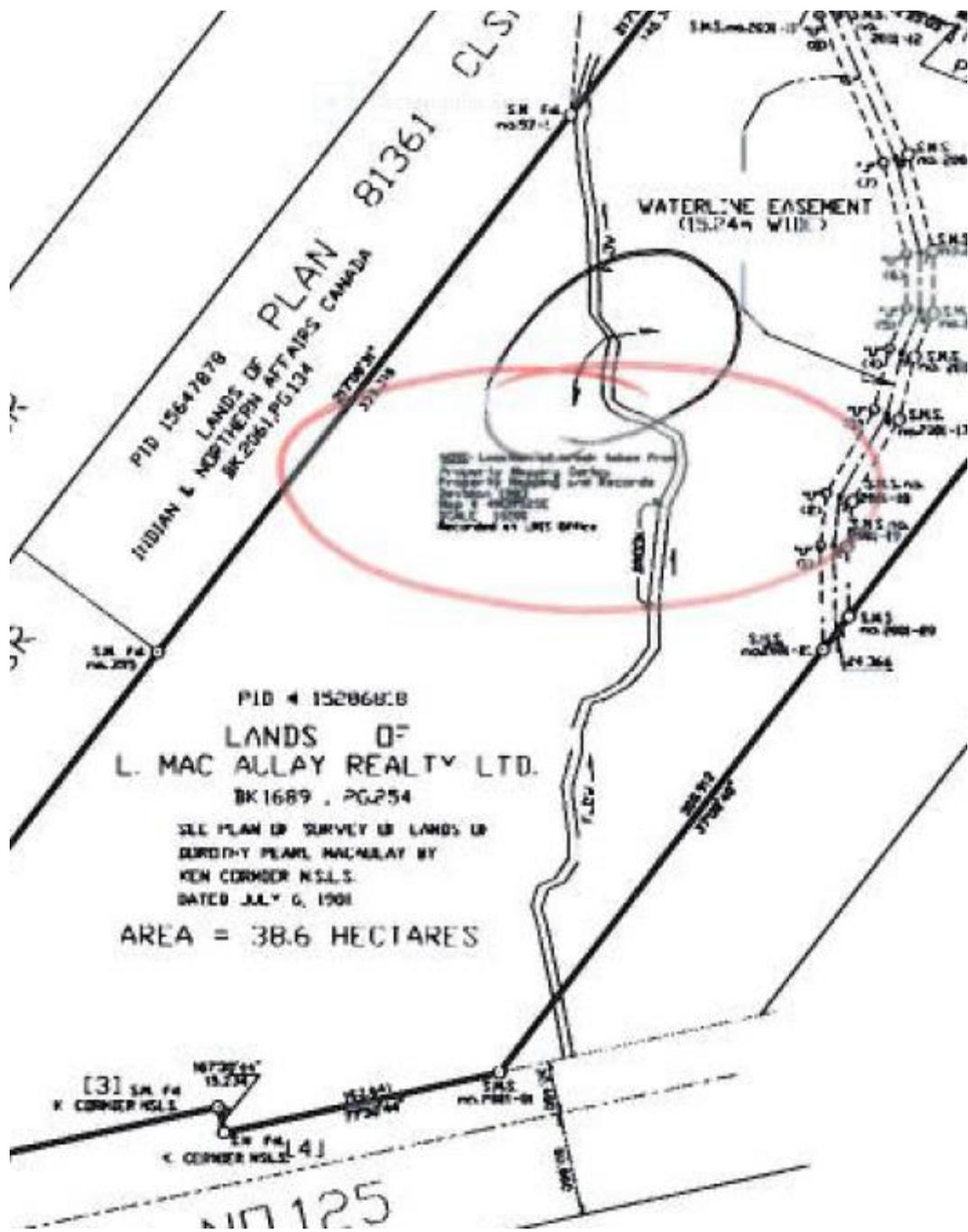
FaSM
 #30

15.294

162.707

257°30'26"

curves



PLAN 81361 C.L.S.
 PID 15647878
 LANDS OF
 INDIAN & NORTHWEST TERRITORIES CANADA
 BK 2081, PG 134

WATERLINE EASEMENT
 (15.74m WIDE)

ALL INFORMATION ON THIS PLAN
 IS THE PROPERTY OF THE
 SURVEYOR GENERAL AND RECORDS
 OFFICE OF THE
 DEPARTMENT OF LANDS AND
 FORESTRY
 REPRODUCED BY LMS OFFICE

PID # 1528682B
 LANDS OF
 L. MAC ALLAY REALTY LTD.
 BK 1689, PG 254

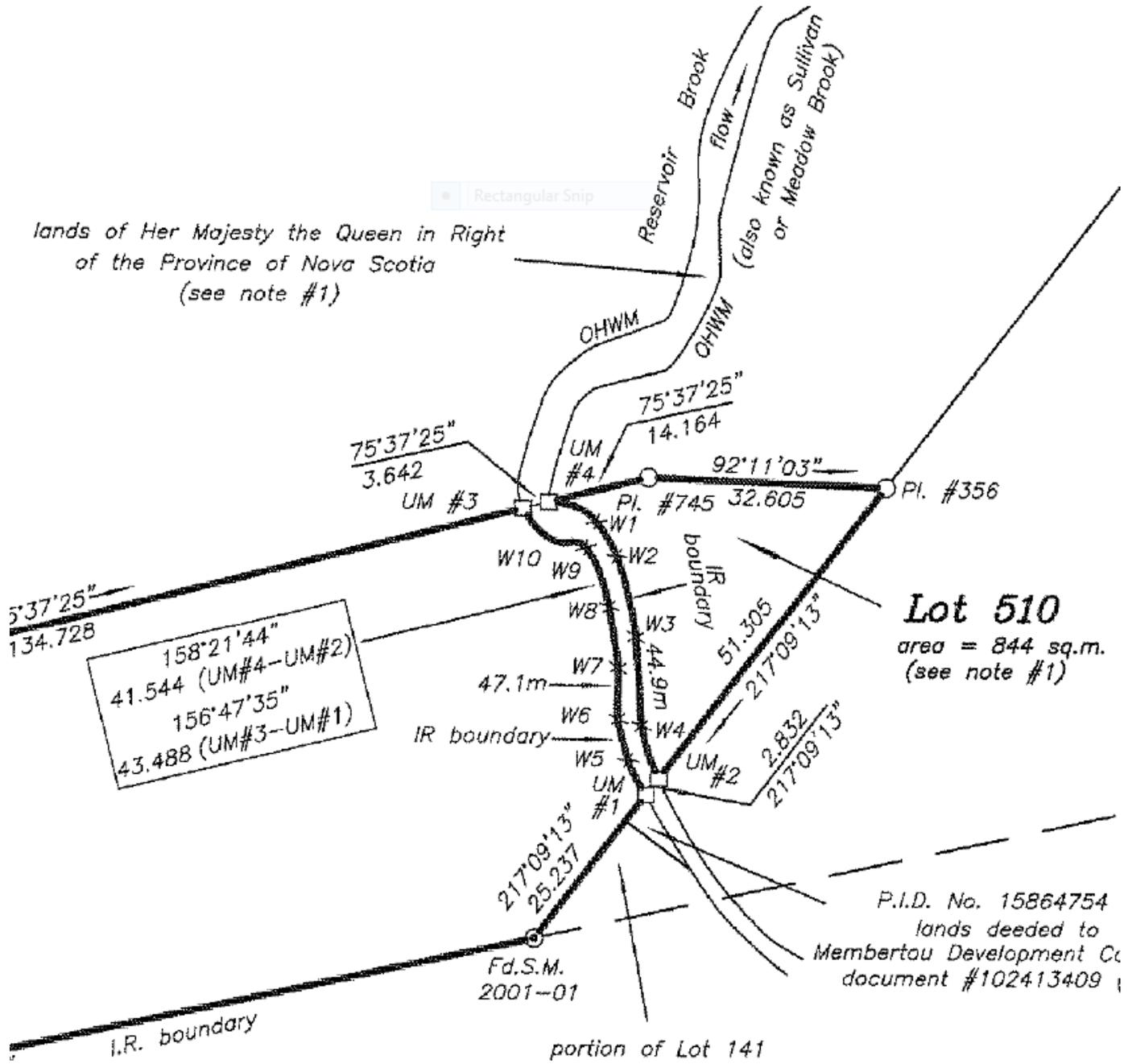
ALL PLAN OF SURVEY OF LANDS OF
 BERTHY PEARL MACALAY BY
 KEN CORNER N.S.L.S.
 DATED JULY 6, 1991

AREA = 38.6 HECTARES

[3] S.M. P. 15.74
 X CORNER N.S.L.S.

S.M. P. [4]
 X CORNER N.S.L.S.

117125



ad medium filum

ES TO THE RIGHT
K OF RUBY CREEK



457	272°39'	73.0
458	278°09'	100.1
459	279°52'	117.7

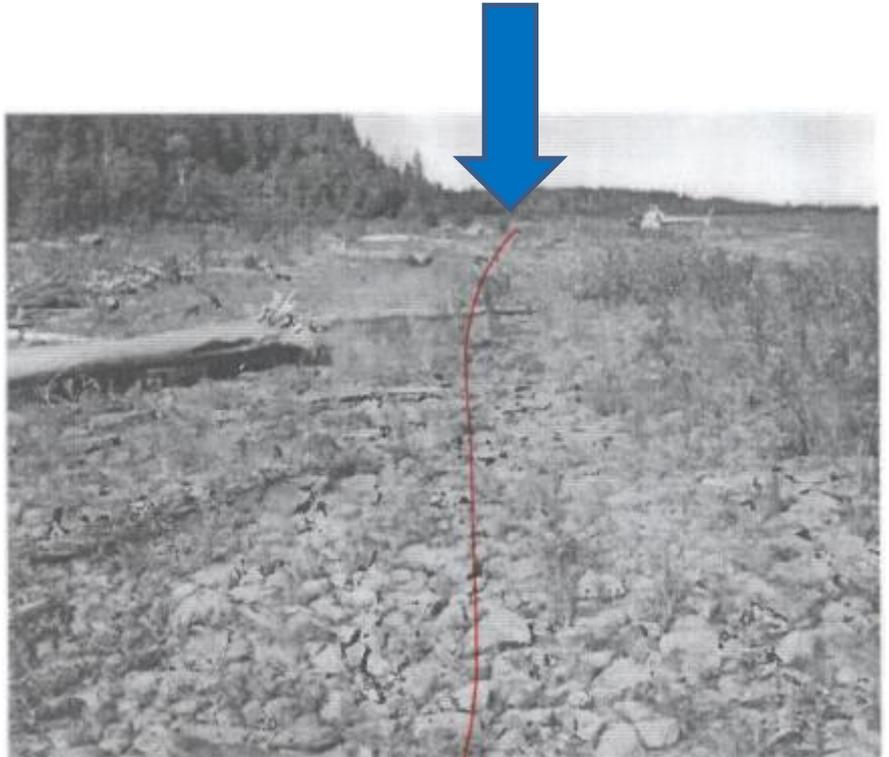
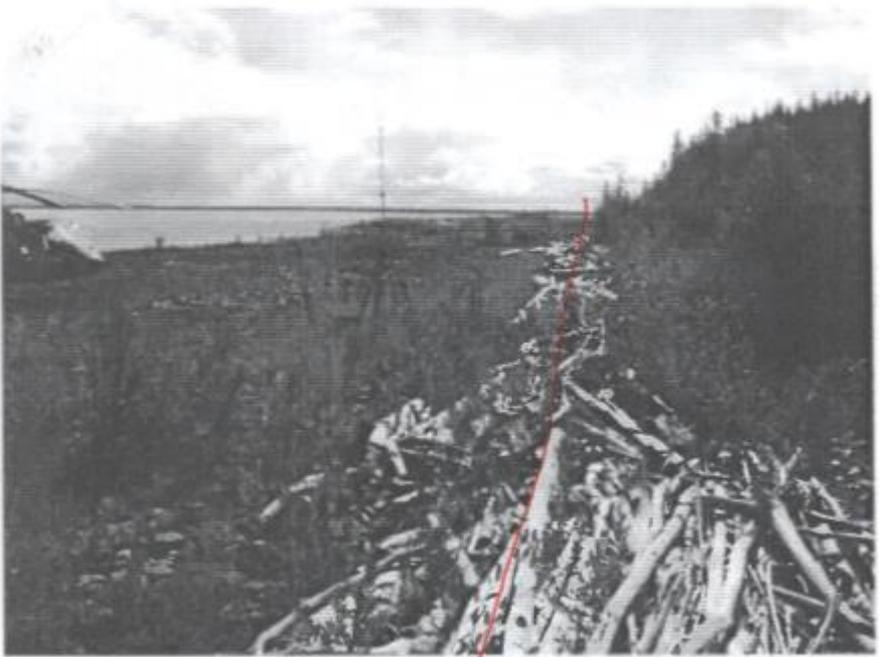


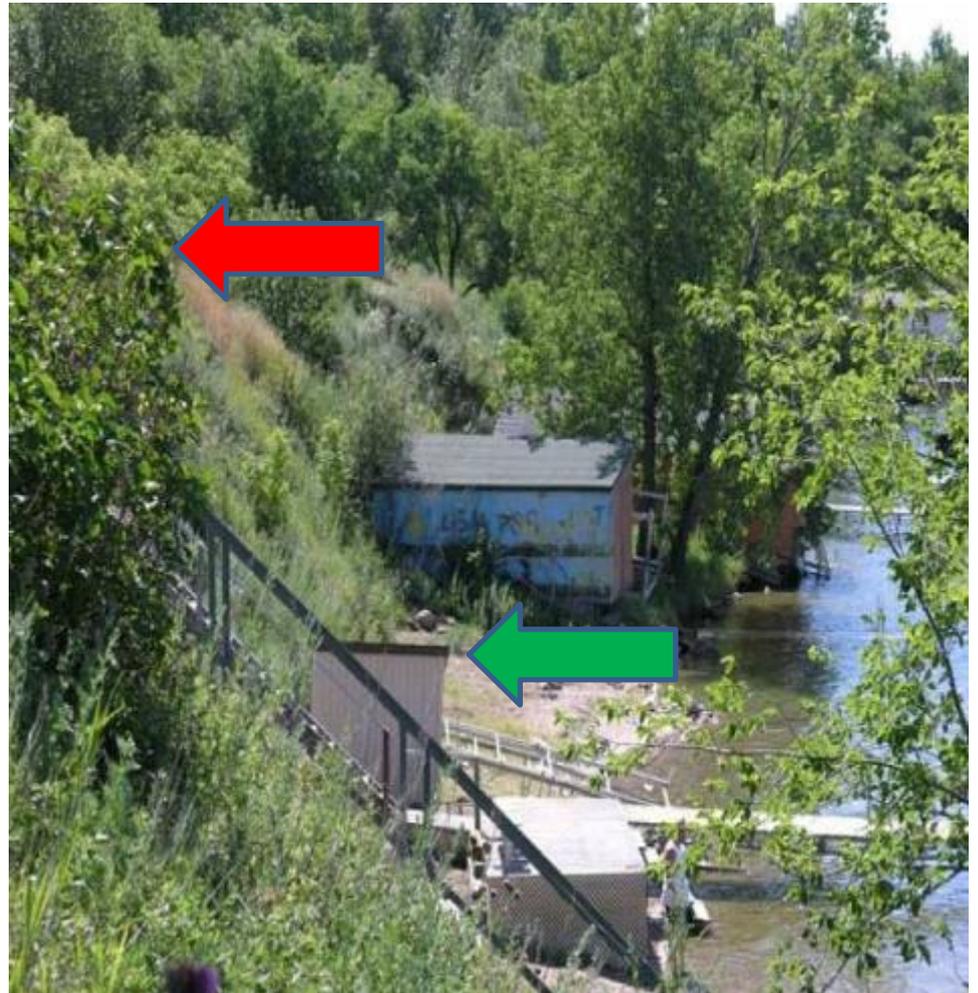
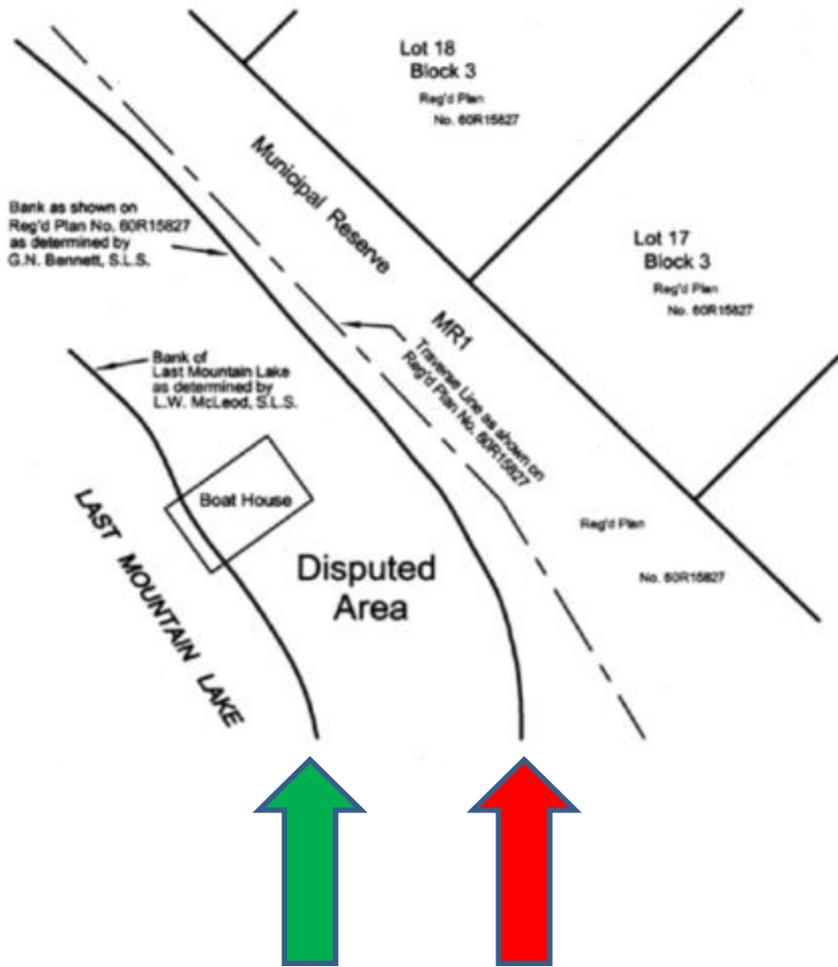
Non-tidal bounds elsewhere



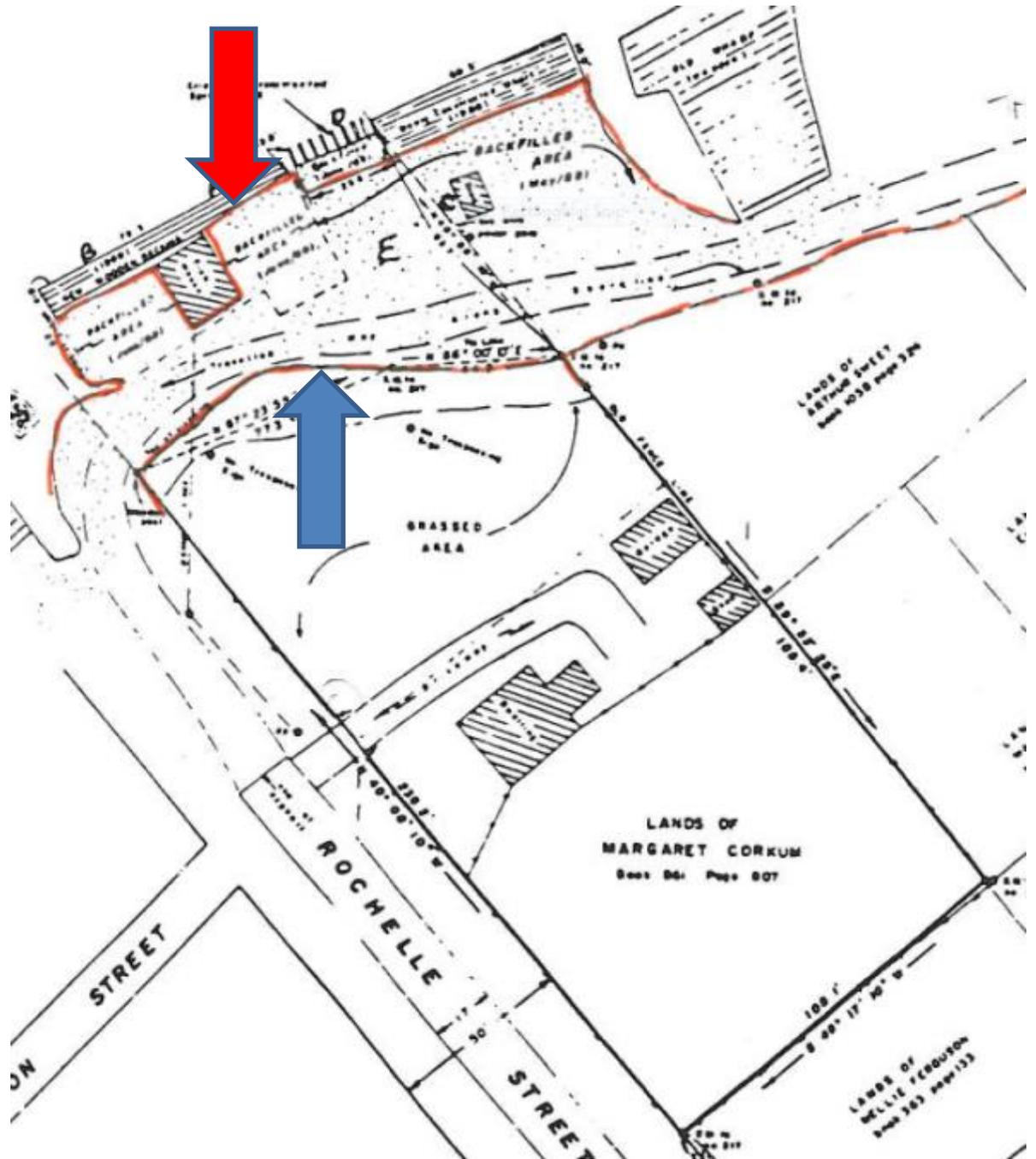


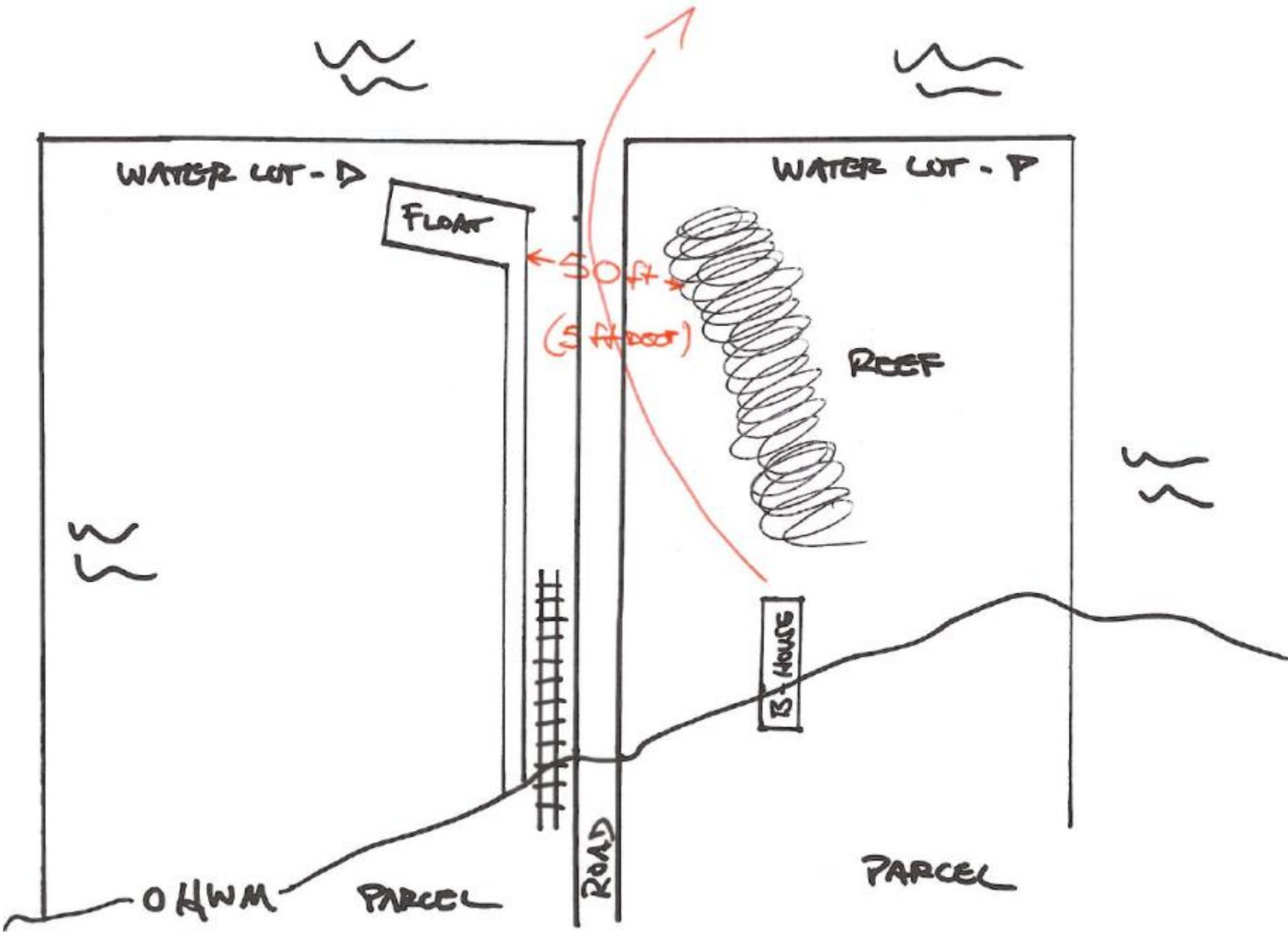






Access





intra fauces terrae

- Generally: Provinces extend to OLWM
- Historical/statutory exceptions: Bay of Fundy
- Harbour exceptions: Vested in Canada in 1867

- Among-the-jaws-of-the-land exception:
 - Does it look a bay/strait?
 - Was it used as if part of the abutting upland?



Rectangular Strip

PARCEL "A" (INFILL)
RONALD V. JOYCE

0.9 HECTARES +/- (2.2 ACRES +/-)

1220m +/-

1188m +/-

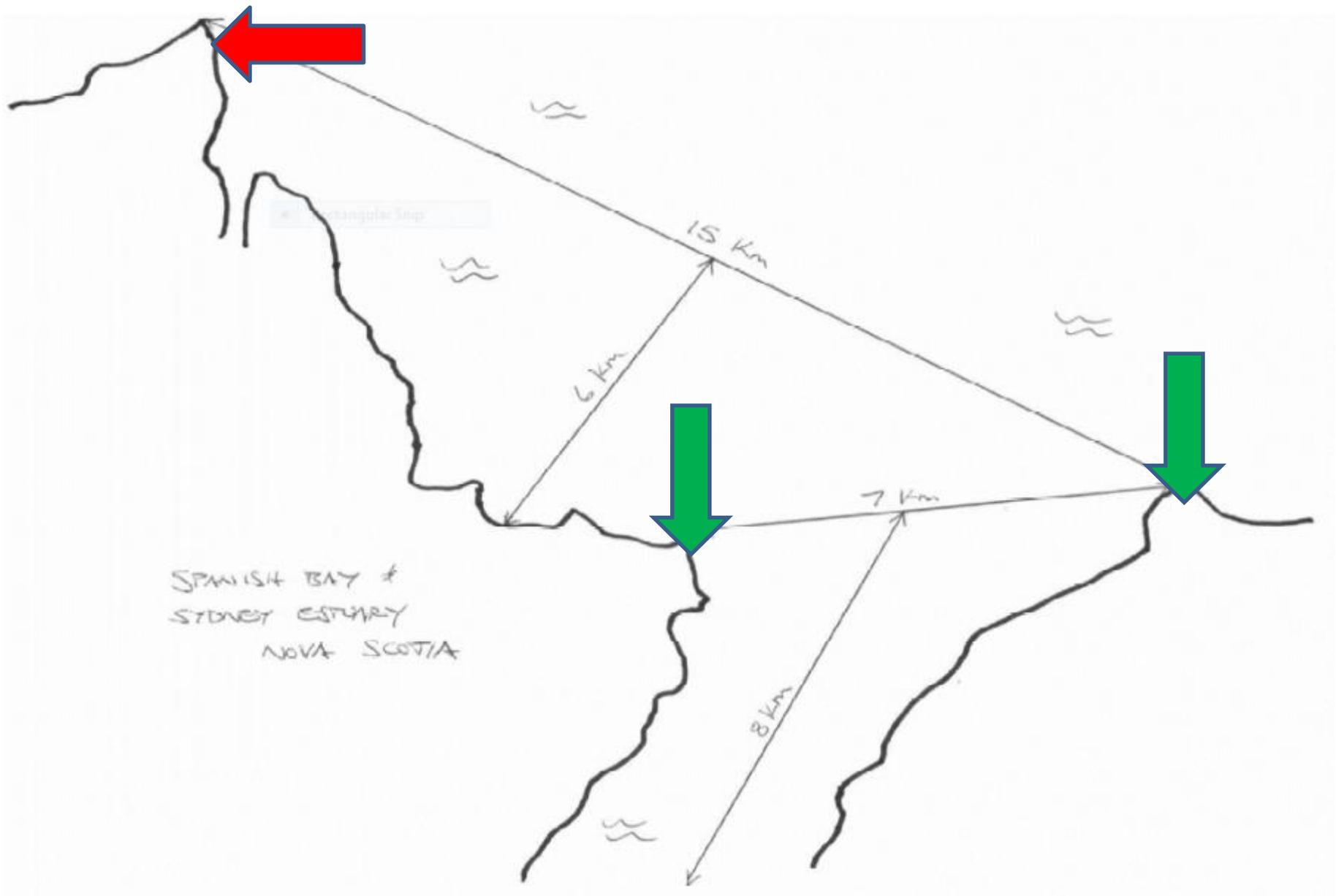
NOW OR FORMERLY LANDS OF
RONALD V. JOYCE

Present
O.H.W.M.

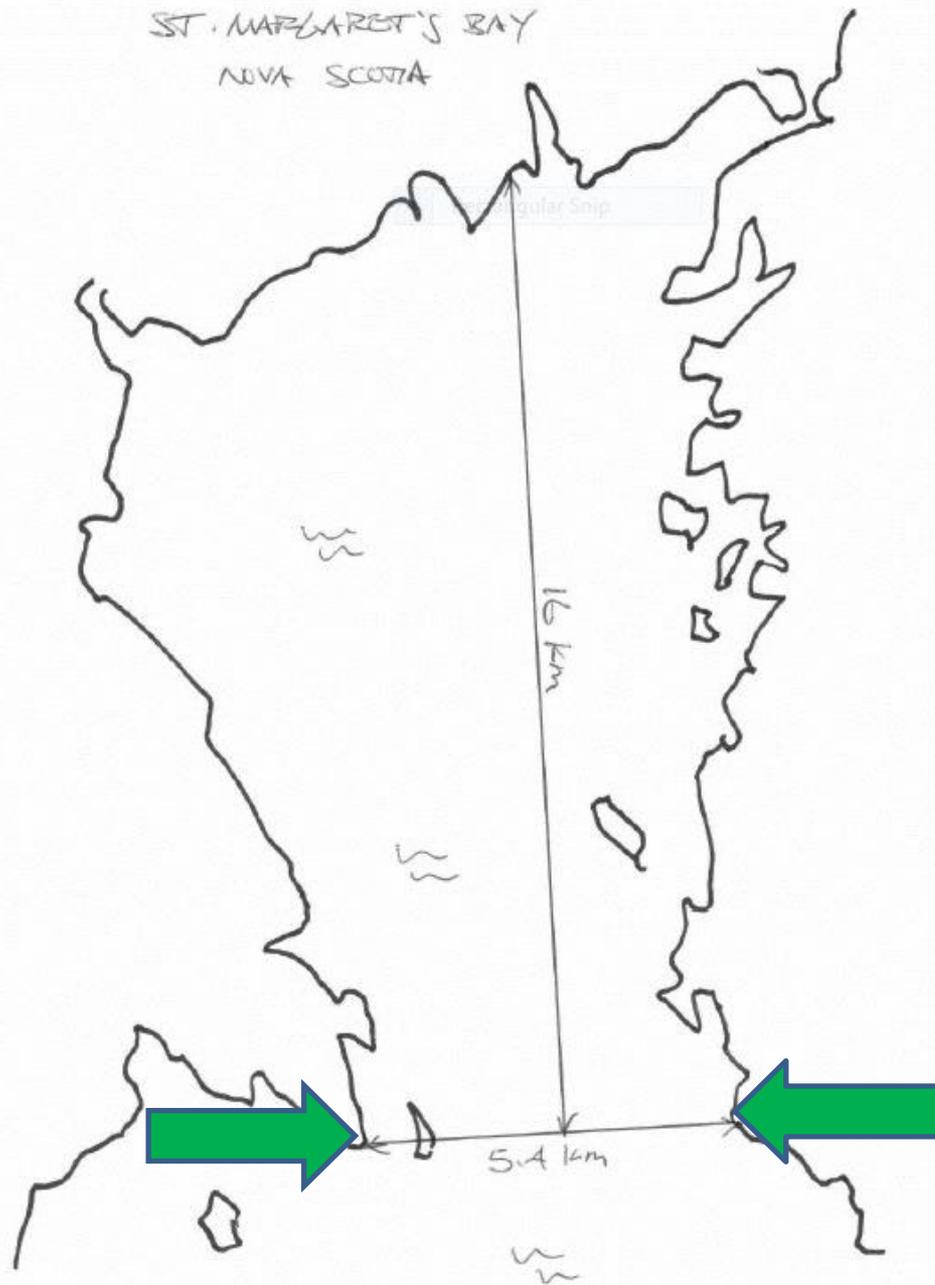
O.H.W.M. PRIOR
TO INFILLING

Northumberland Street

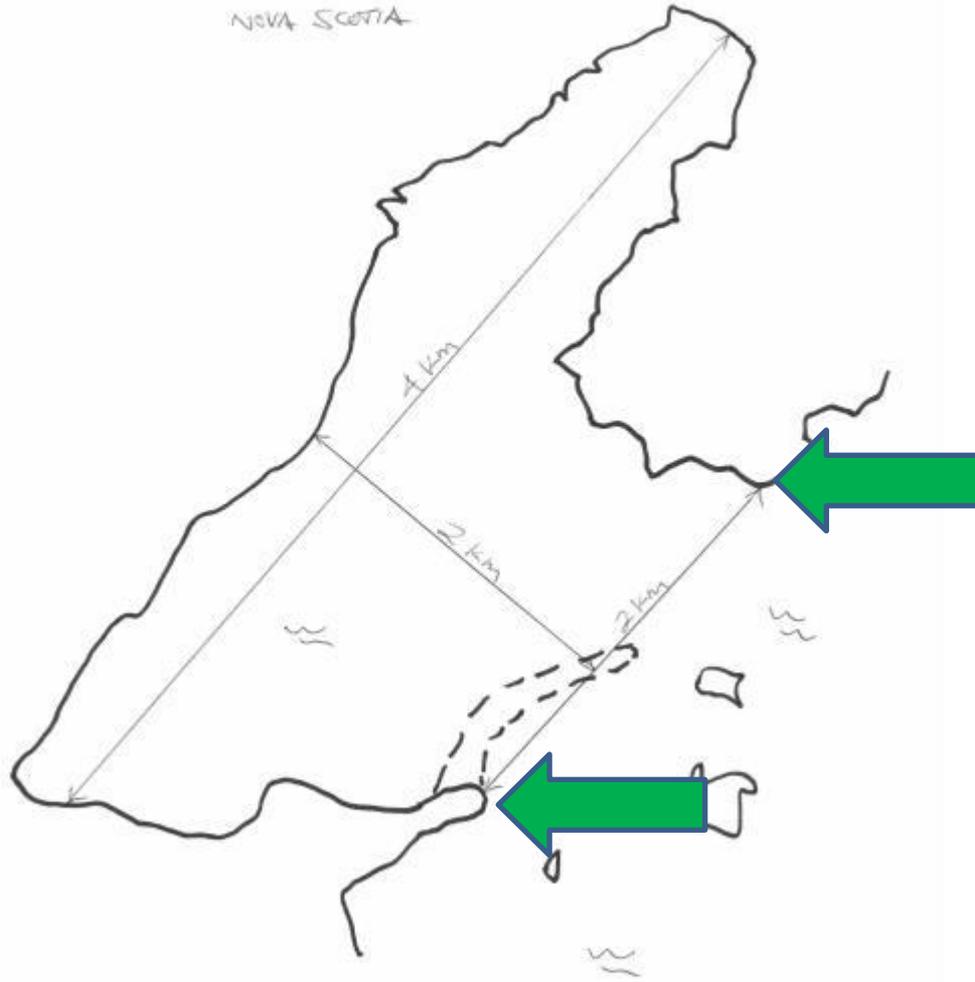
North



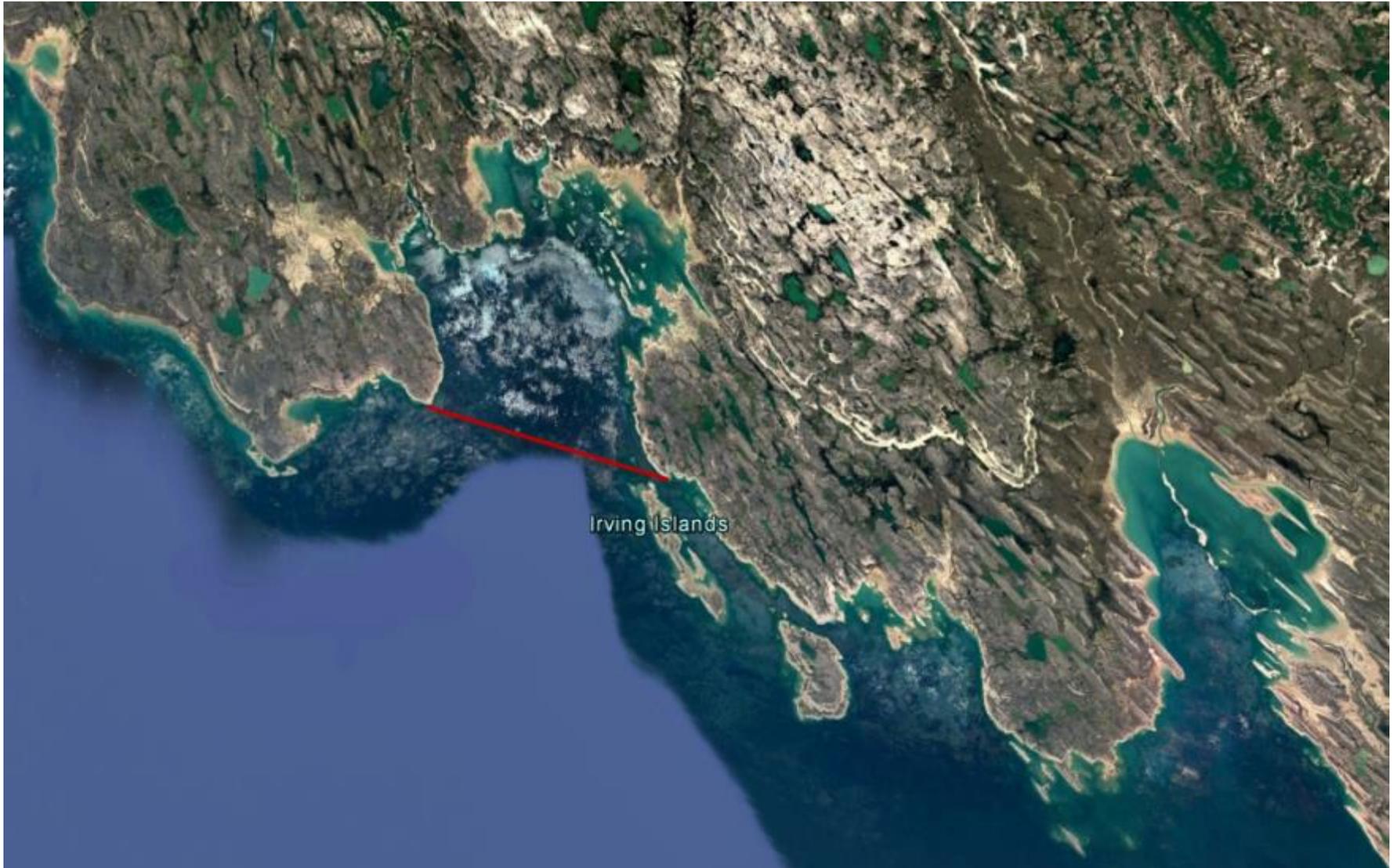
ST. MARGARET'S BAY
NOVA SCOTIA



LOUISBOURG HARBOUR
NOVA SCOTIA



HMS Terror = 8km across; 32km deep



Water bound is ambulatory if:

- It shifts slowly, gradually and imperceptibly
- The shift is incremental (happens at bound)
- The cause is either:
 - natural forces (water or wind), or
 - the inadvertent effect of a structure legitimately constructed (e.g. bridge pilings)



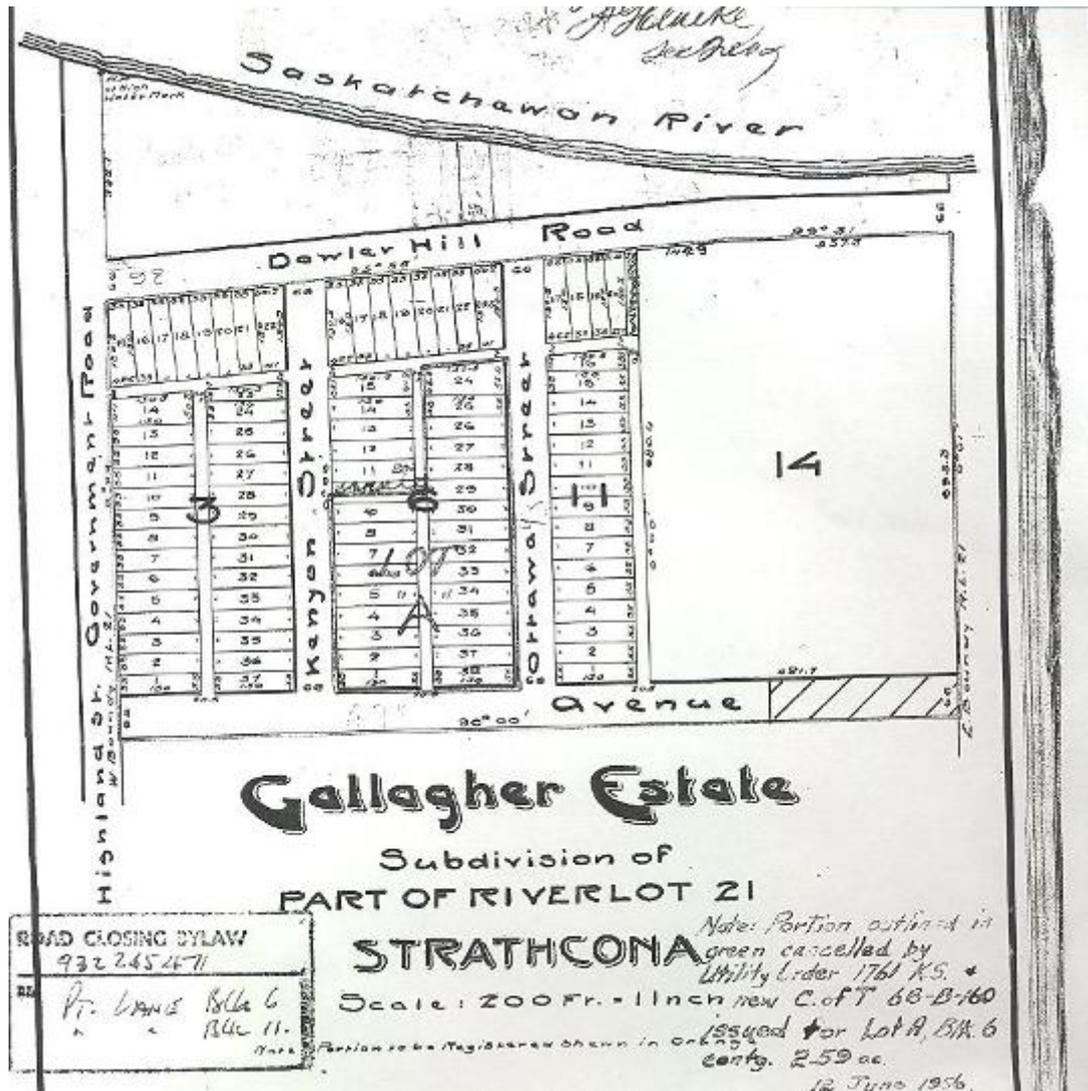
600 m of accretion
over 10 years

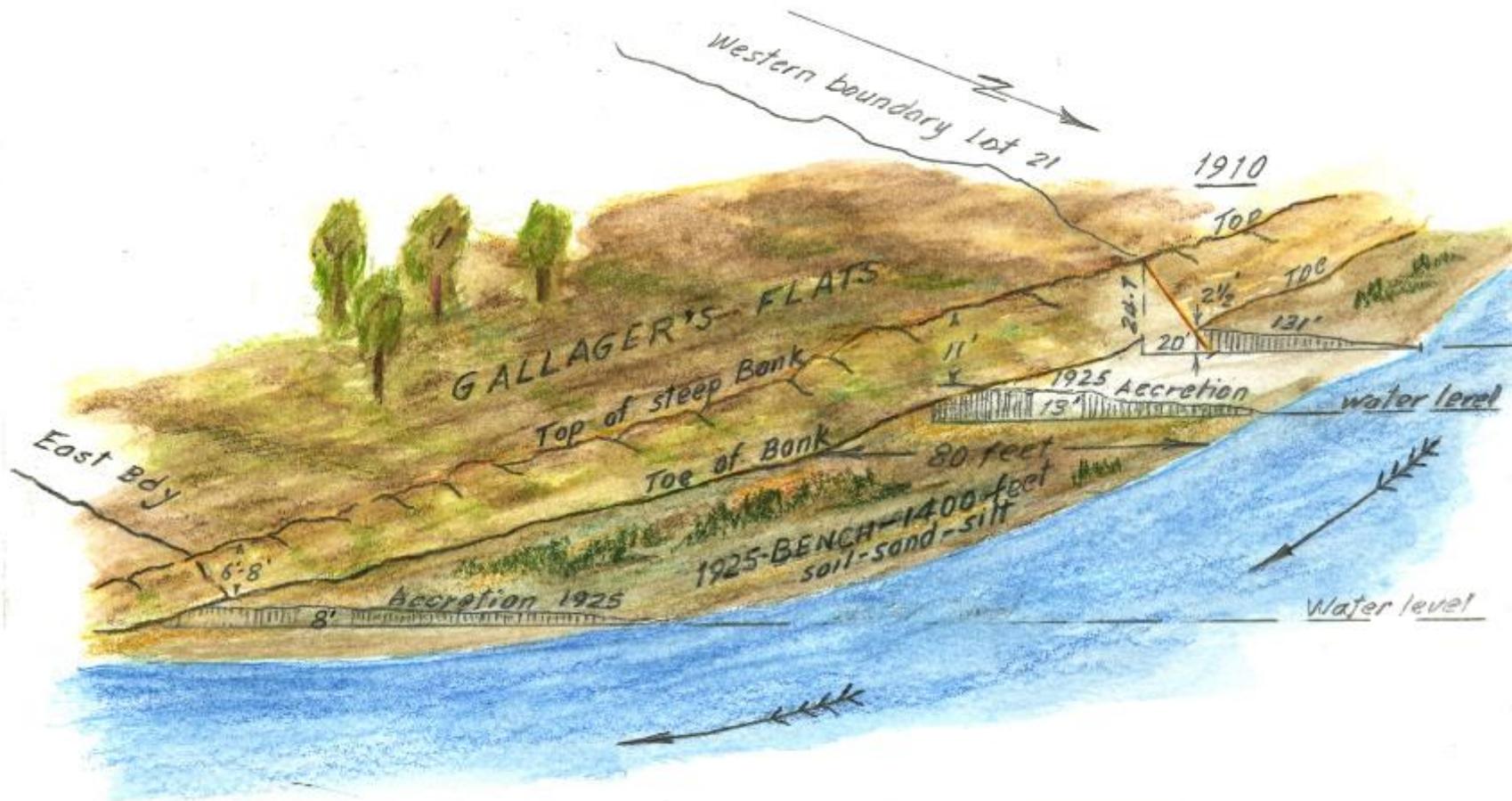


Middle Side Rd

What is accretion and erosion?

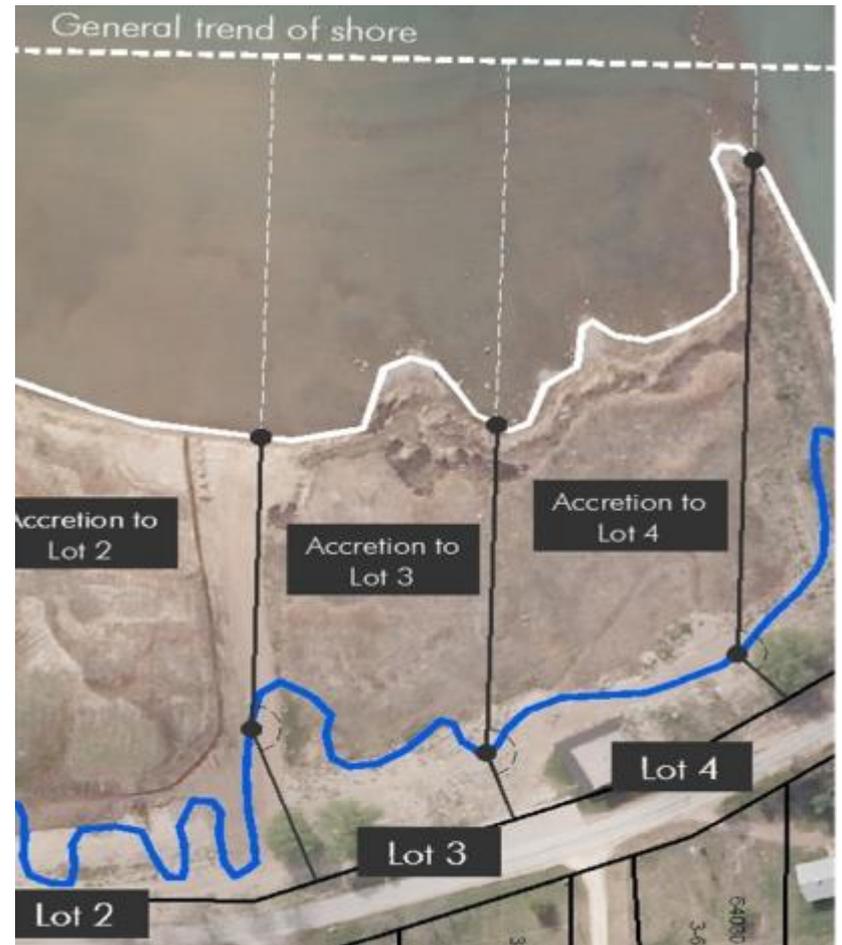
- If the water bound moves out, then accretion has occurred and the parcel increases (reliction, retreat)
- If the water boundary moves in, then erosion has occurred and the parcel decreases (submergence, encroachment)



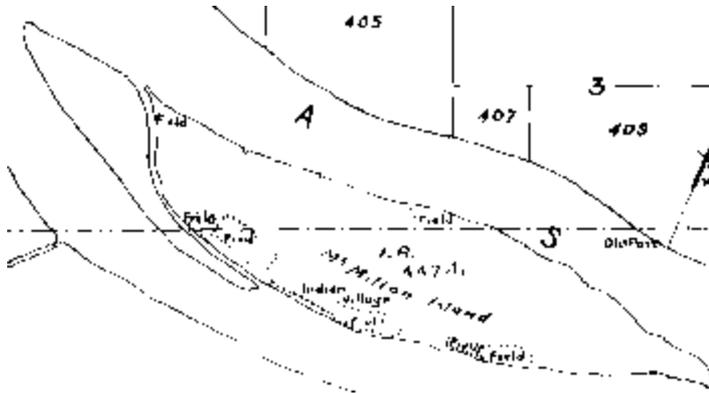


Clarke v. Canada (Attorney General), [1930] S.C.R. 137

How is accretion apportioned?



Re Brew Island (1977 – BCSC)



Time 1 = 2 islands
Time 2 = 1 island

Accretion to both
parcels



Andriet v County of Strathcona (2008 – ABCA)



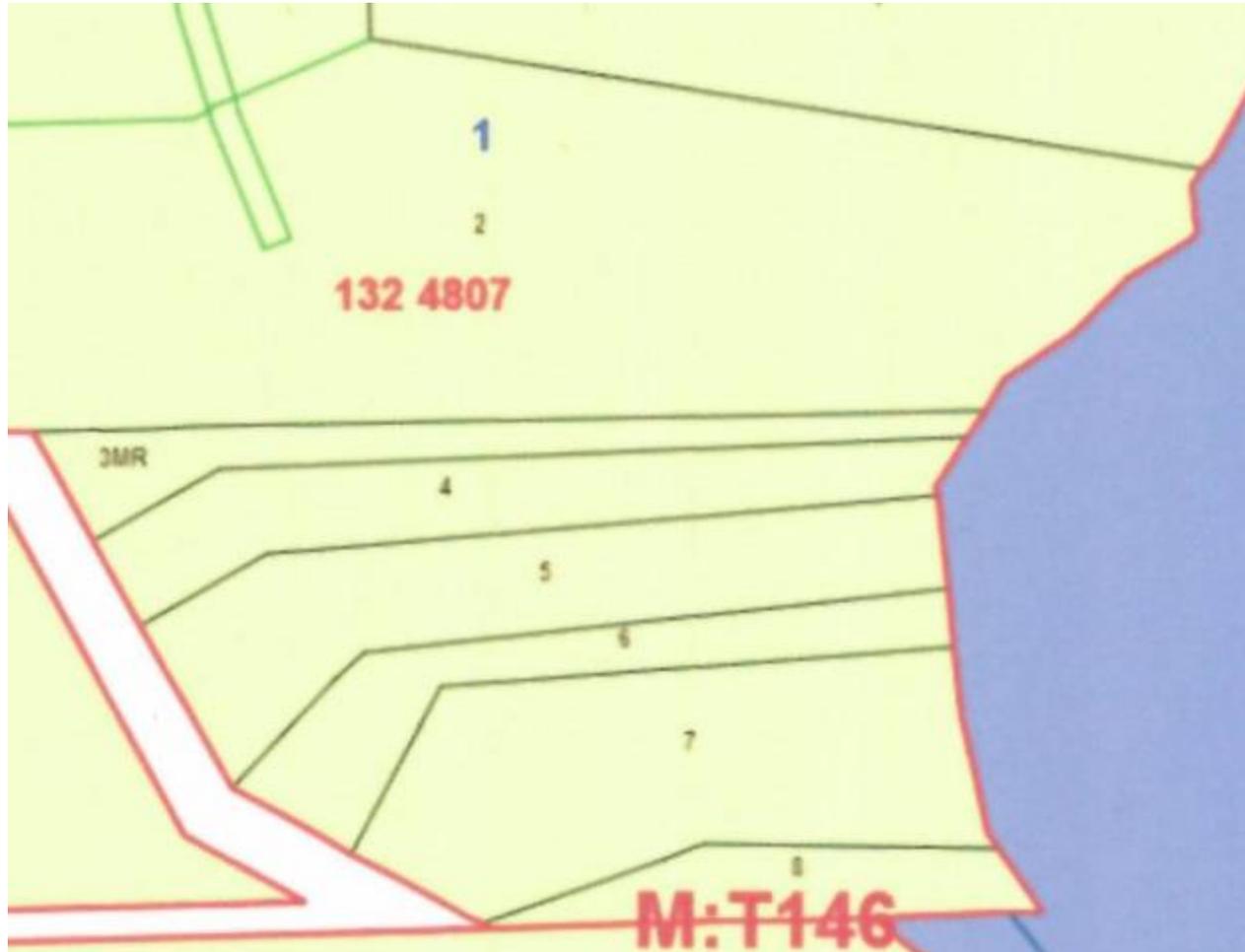
Not to Scale

Overall

- County of Strathcona
- County of Strathcona - Proposed Accretion
- Individual Lots
- Individual Lots - Proposed Accretion

- Lot 1 - Strathcona County
- Lot 5A - William and Frances Johansson
- Lots 6 and 7 - Ken and Pat Schley
- Lots 8,9 and 10 - Brian and Judy Dawson
- Lots 11 and 12 - Peter Todd and Lynn Forsythe

Andriet v County of Strathcona (2010 – ABQB)



Avulsion: If criteria not met

- If water encroaches quickly, then parcel is flooded (submerged);
- If water retreats quickly, then parcel is separated from water;
- Bound is fixed in location at time of encroachment/retreat.

Elbow River: Avulsion over 15 days

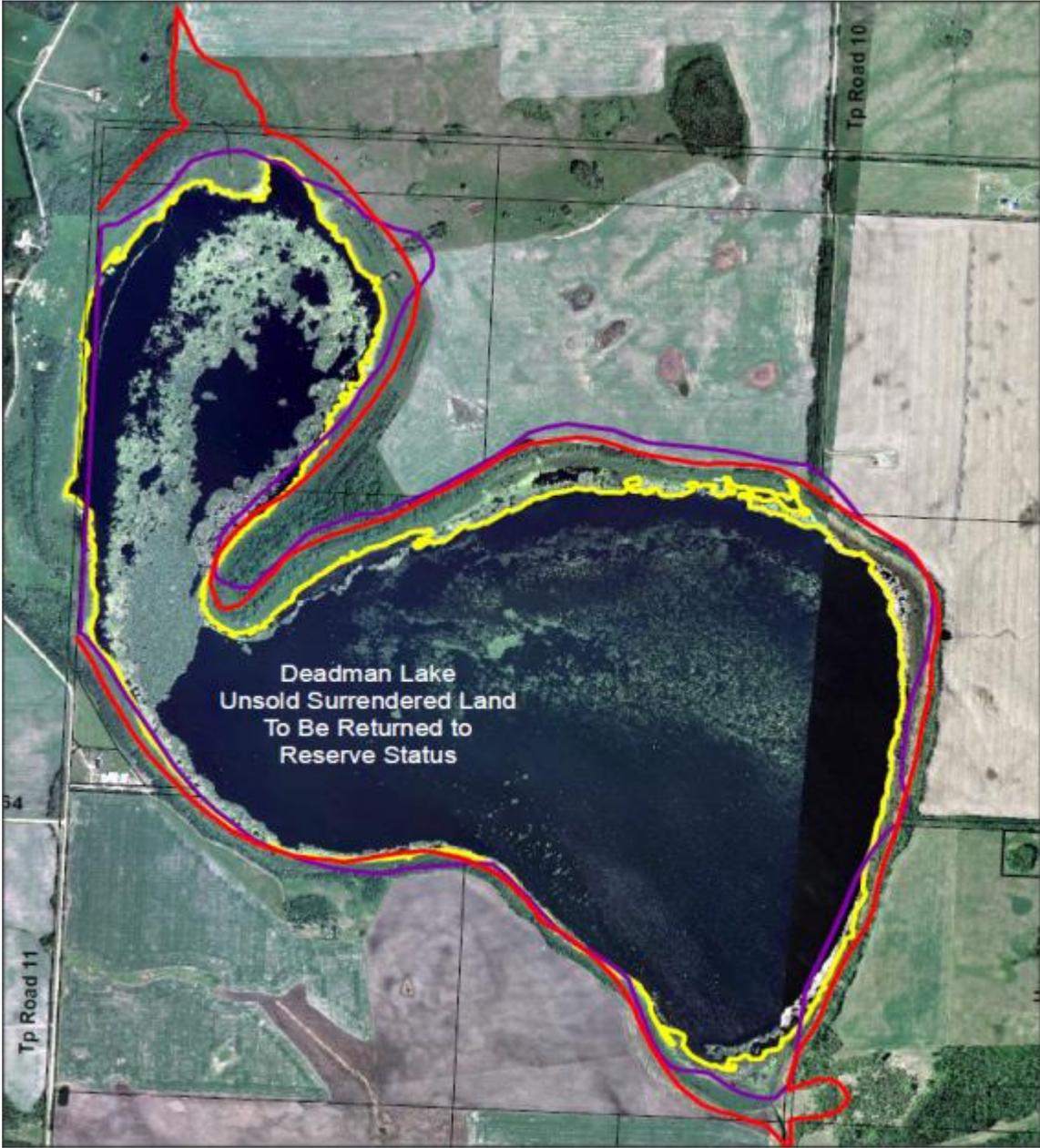


Robertson v. Wallace
(2000 - Alta QB)



Regulated watercourses





A couple o' fallacies

- Permanence – That, if a parcel was established as riparian, then it remains riparian.
- Precision – That, riparian bounds are re-established to the nearest mm.

LOT 55

KINGS COUNTY

PARCEL C

Darrach

Christian

Pond

Marsh and Sand

PARCEL A (Disputed)
(12 acres ±)

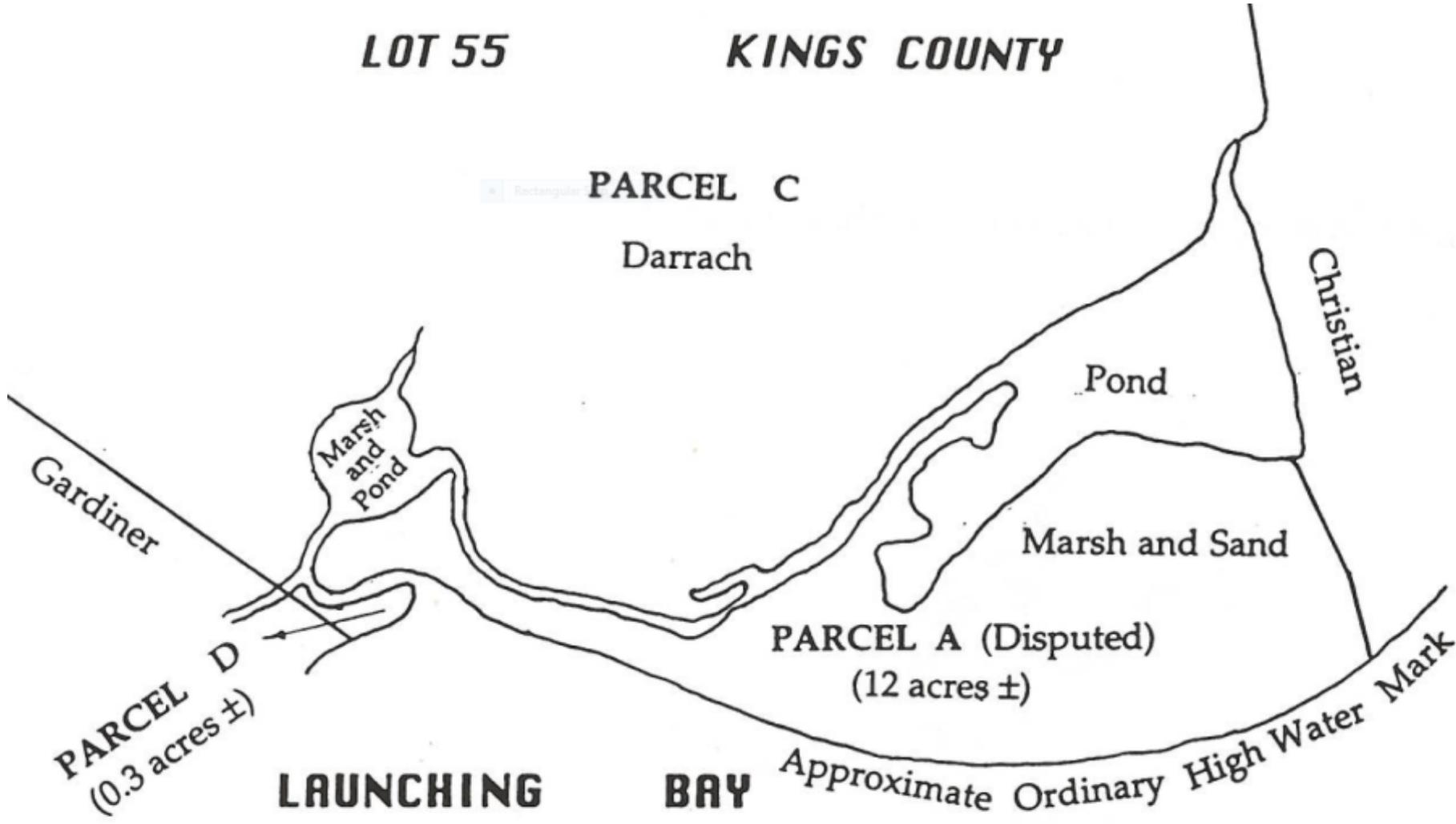
Marsh
and
Pond

Gardiner

PARCEL D
(0.3 acres ±)

LAUNCHING BAY

Approximate Ordinary High Water Mark



Imperfection:

- There “is arbitrariness and opinion involved in deciding exactly where to determine the natural boundary to be.”

Harris v. Hartwell (1992 – BCSC)

- “There is a certain imprecision, and perhaps imperfection.”

Andriet v. Strathcona County (2008 – ABCA)

