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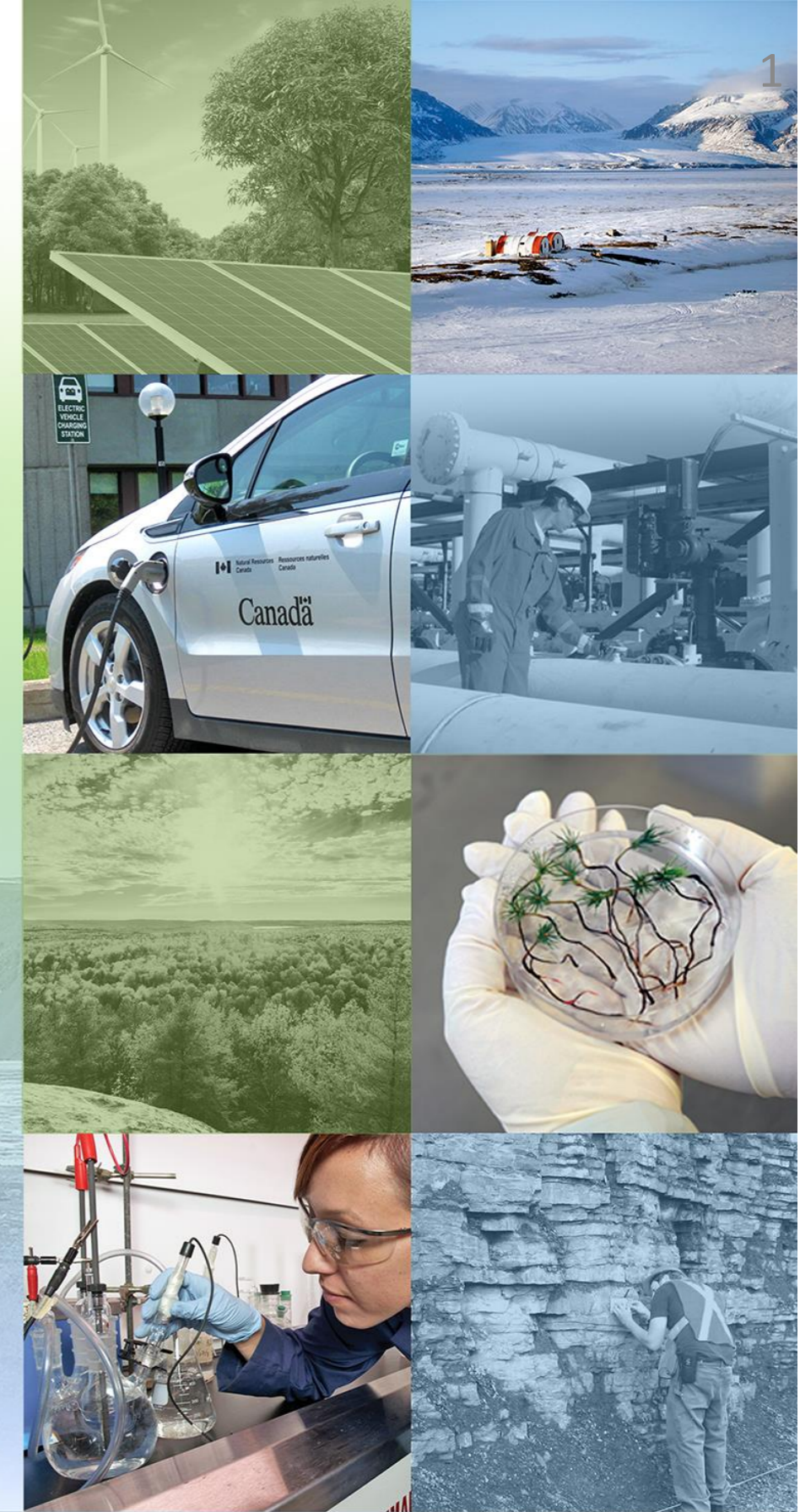
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Walking the walk: Reconciliation & BDRU

SLSA – June 12, 2019

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Reconciliation – Context

- Rooted in:
 - *Constitution Act 1982, s35* (Aboriginal/treaty rights affirmed = inherent)
 - RCAP (October 1996)
 - UNDRIP (Sept 2007 & May 2016) – 46 Articles
 - TRC Calls to Action (June 2015) – 92 Calls
 - *Bill 262: To ensure that laws are in harmony with UNDRIP*
 - May 30, 2018: 3rd Reading, House of Commons
 - May 31, 2018: 1st Reading, Senate

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Reconciliation vis-à-vis resolving boundary disputes (#1)

Article 34 of UNDRIP:

“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs...”

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Reconciliation vis-a-vis resolving boundary disputes (#2)

Principles respecting Government of Canada's Relationship with Indigenous Peoples (DoJ - 2018):

Principle 1: Recognition and respect for the right to self-determination.

Principle 3: Crown must act with honour, integrity, good faith and fairness in all its dealings with Indigenous peoples.

Principle 6: Crown will look for creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together.

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Reconciliation vis-à-vis resolving boundary disputes (#3)

Attorney General of Canada's Directive on civil litigation involving Indigenous peoples (2019):

- Advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation.
- Trust and good faith allow collaborative processes, including facilitation, mediation and negotiations, to be the primary means of resolution.
- Recognition of the inherent jurisdiction and legal orders of Indigenous nations.
- Use alternative methods of dispute resolution.

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Indigenous parcels

- 1631: “Very exact and punctual in the bounds of their lands ... I have known them to make bargain and sale for a small piece of land” (Riley, 2013).
- 1700’s: Innu demarcated parcels of 4 sq leagues (32 sq km) for trapping (Demsetz, 1967).
- 1764: First Nations were “perfectly well acquainted with boundaries.” Six Nations knew fee simple, leasing, severing, transferring and registering rights in land (Riley, 2013).
- 1850: *Robinson-Huron Treaty* – Whitefish Lake First Nation defined its parcel using nine monuments: From “the place of high cranberries,” to Keecheemenessing (“Great Island”), to “an island where there stands a tree having a spreading top,” to ... (*AG v Francis*, 1889).

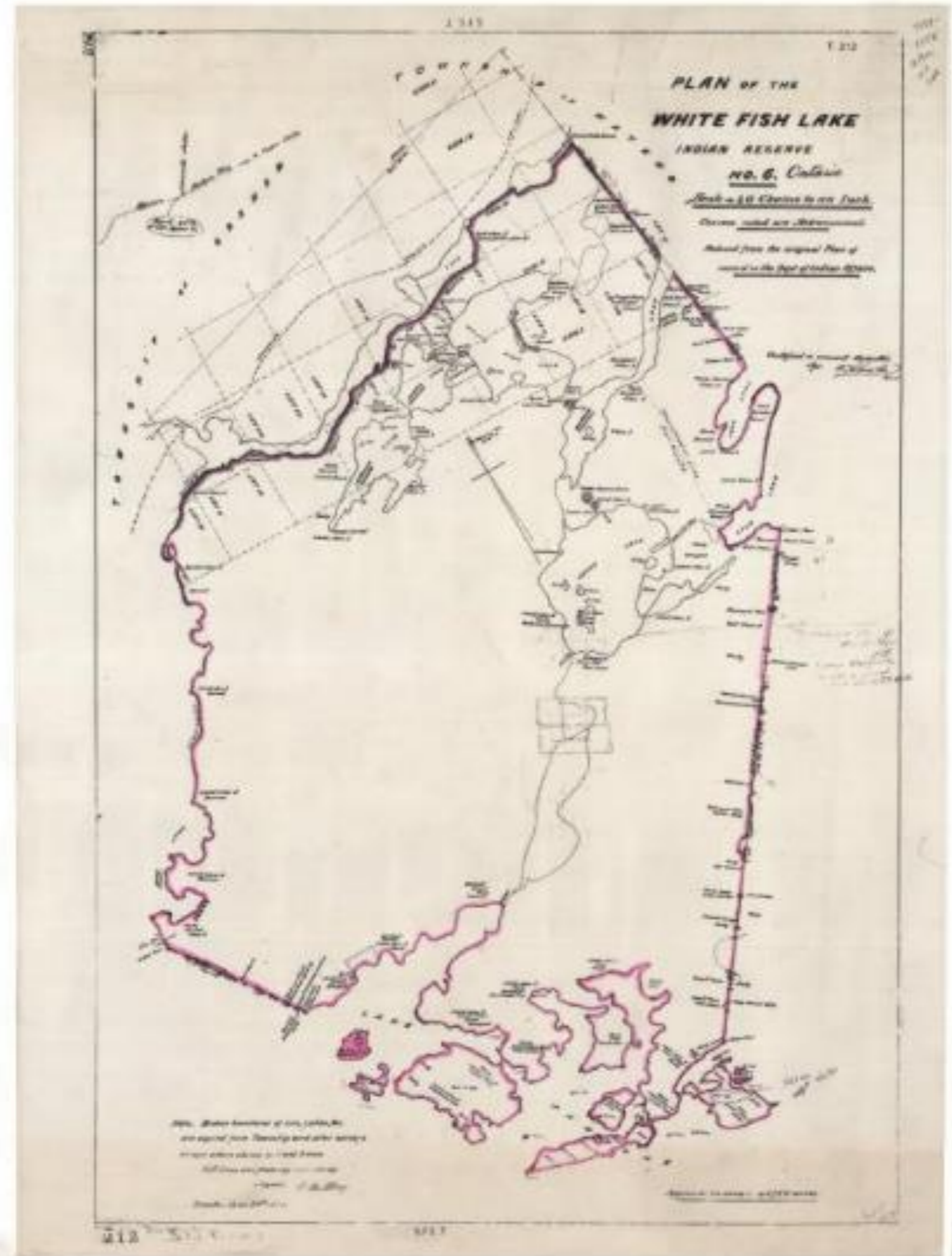
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Honour of the Crown

- Relationship founded on good faith, trust, cooperation, openness, fairness, consultation and reasonableness
 - (*Roger Earl of Rutland's case*, 1608)
- Rooted in persuading Indigenous peoples that their rights were best protected by the Crown
 - (*Haida Nation v BC*, 2004)

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What is BDRU?

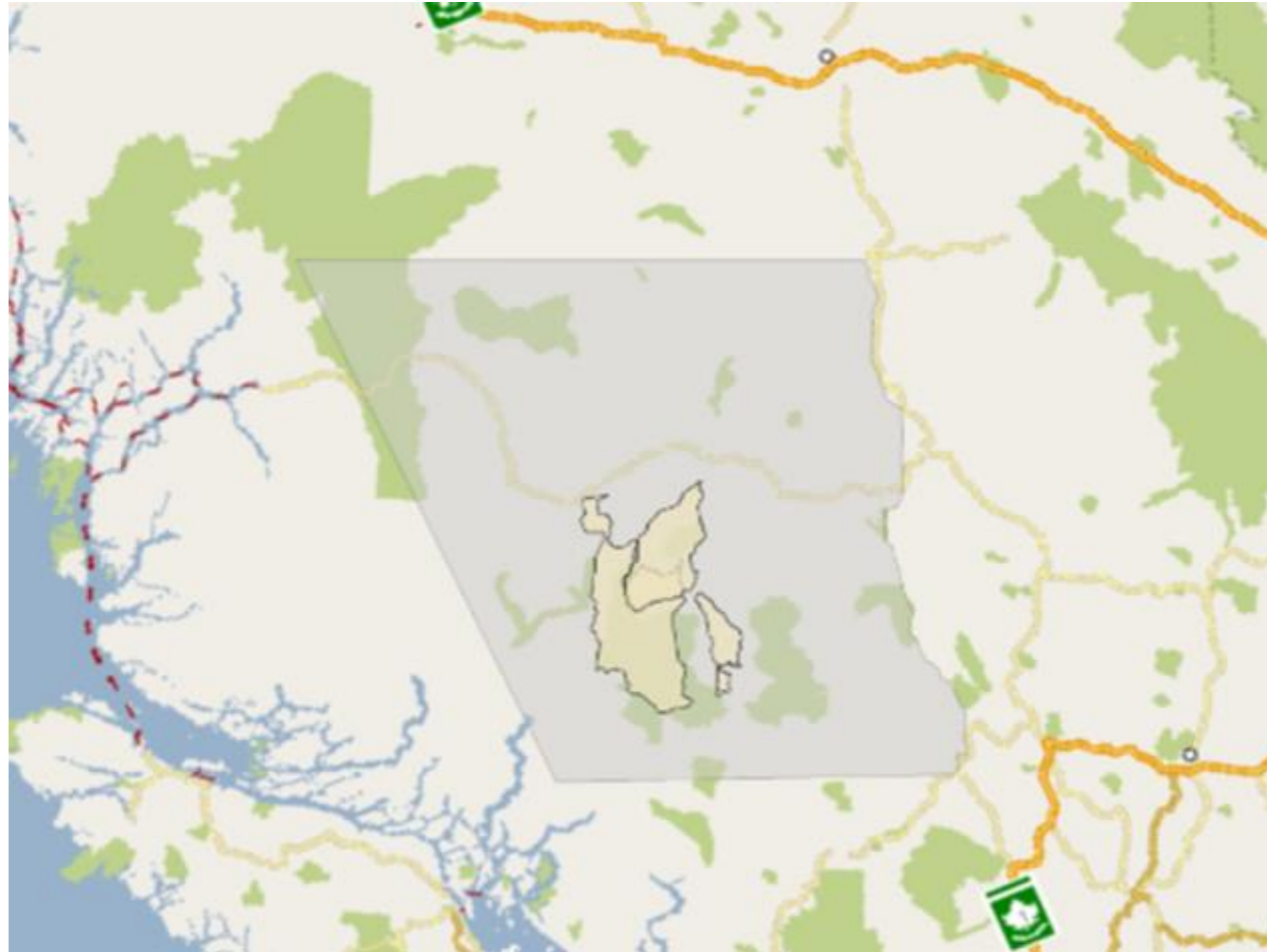
- Budget 2018 announced the expansion of the FNLM programme for 5 years and a total investment of \$143M

Supporting the Expansion of the *First Nations Land Management Act* and the Successful Participation of First Nations Under the Act

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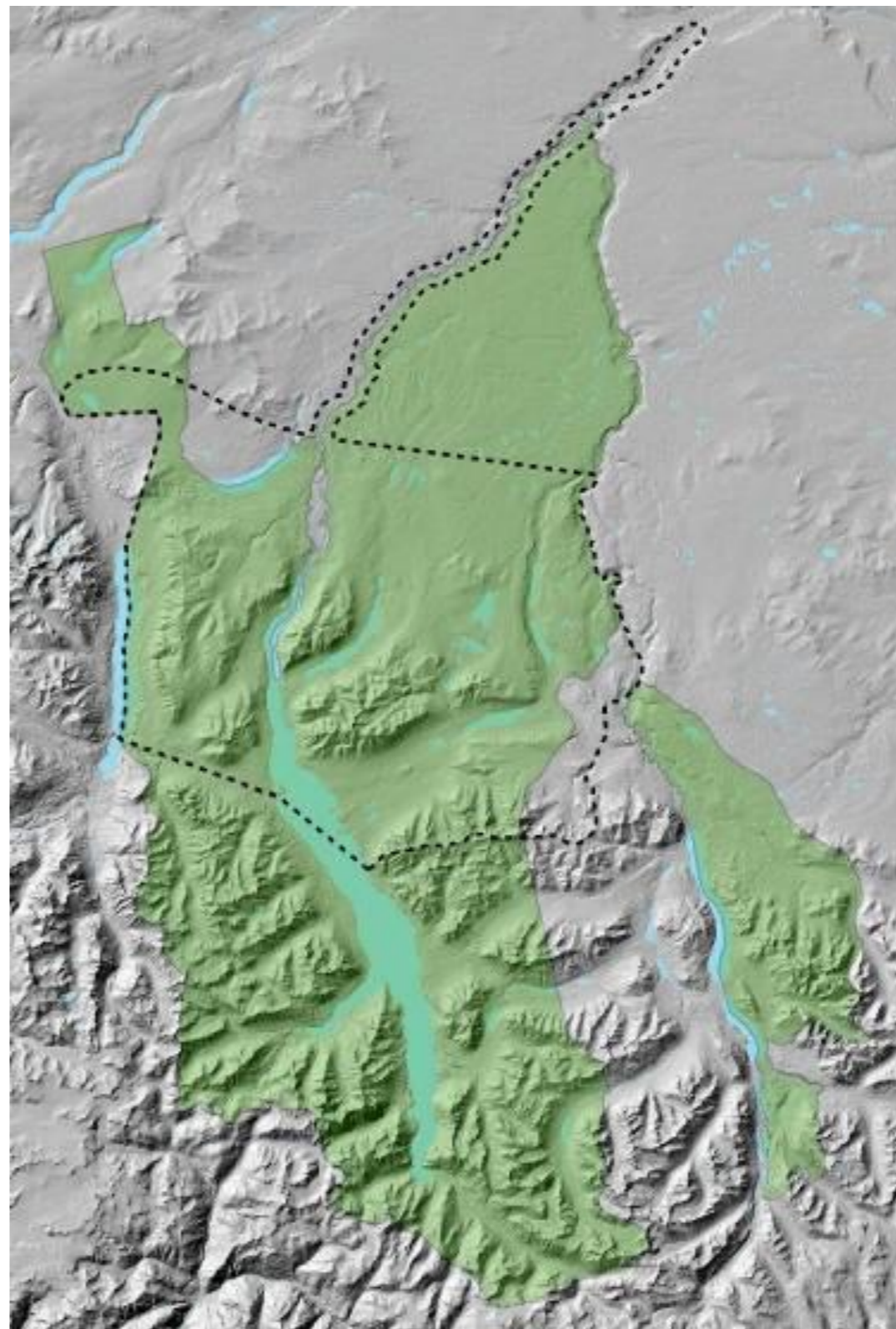
- Boundary dispute resolution highlighted as an area to investigate, thus: SGB Boundary Dispute Resolution Unit – BDRU (Sept 2018)
- Two precedents for BDRU

Tsilhqot'in v BC (SCC - 2014) = 88,000 sq km of traditional territory



Green: Area claimed
(4,200 sq km)
5% of traditional territory

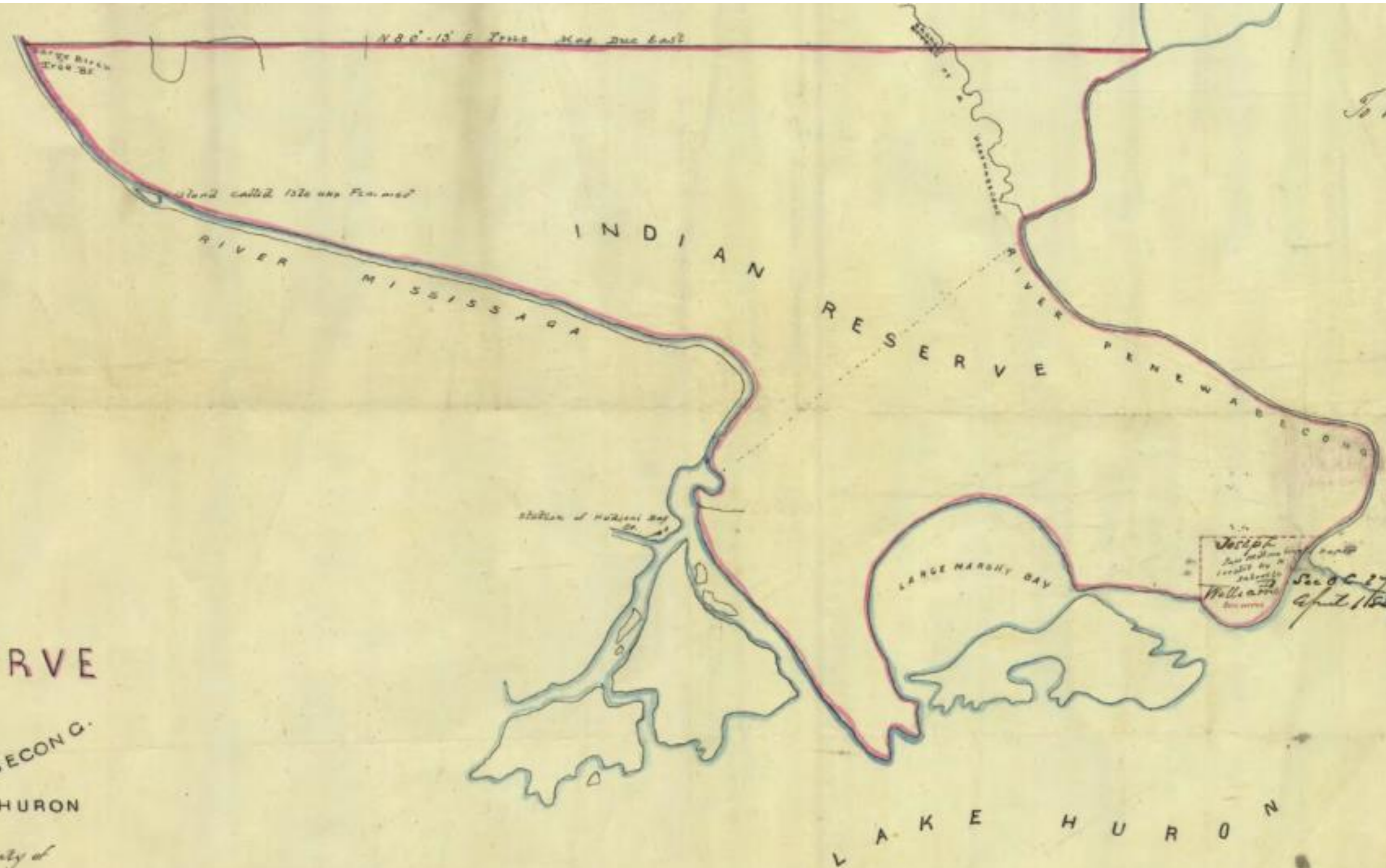
Dashed: Area affirmed
(1,900 sq km)
Some sites in/some sites out



ON – Impartial fact-finding

- 1850 Treaty reserved “the land contained between the River Mississaga and the River Penebewabecong, up to the first rapids.”
- Parcel was defined (i.e. bounded)
- Survey to mark the bounds on ground & show the bounds on plan

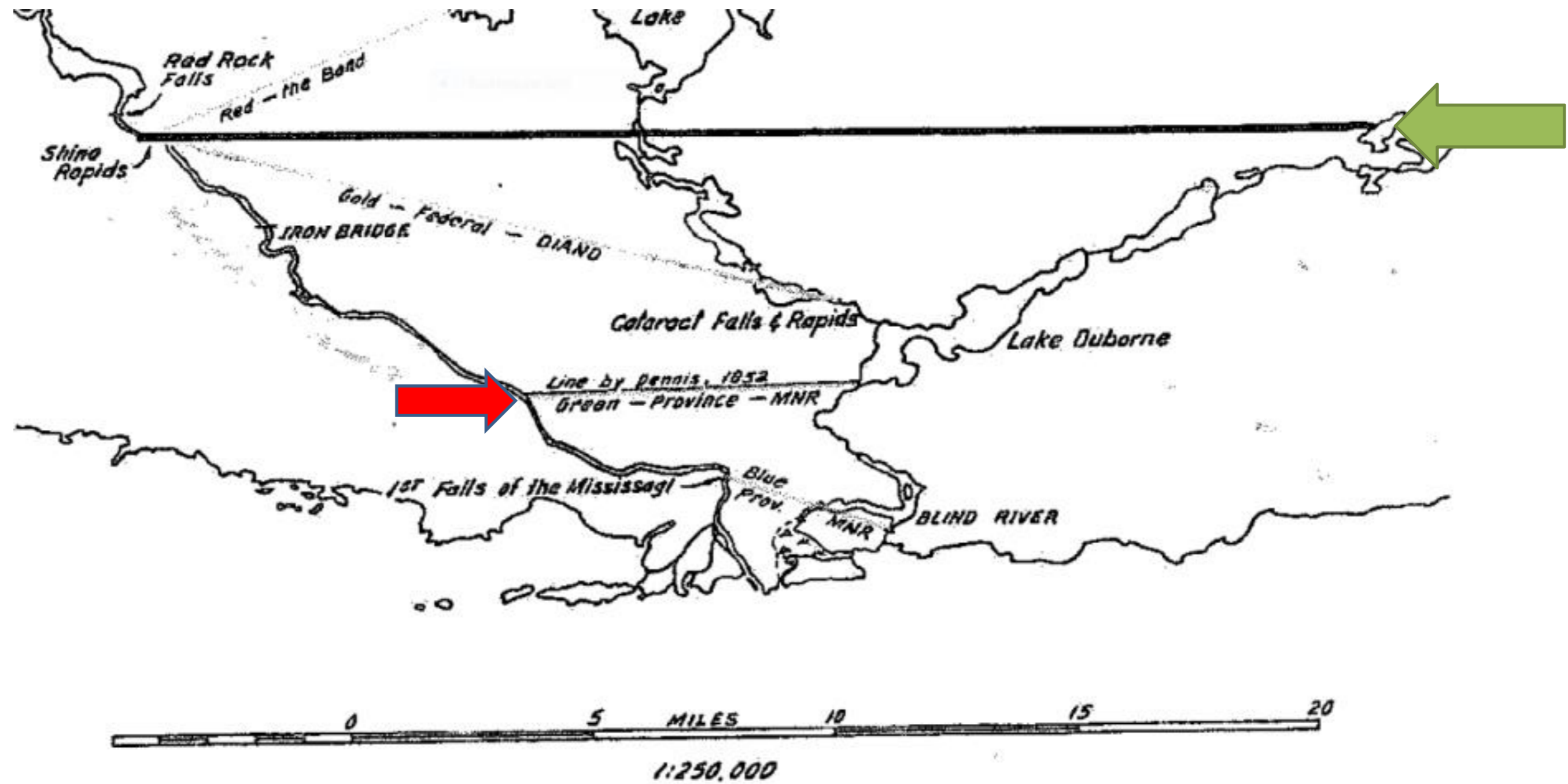
*E. H. Mearns
Com.*



RESERVE
PENEBAWBECONG R.
LAKE HURON
Treaty of

*Joseph
for the
W. H. Mearns
Sept 27
1857*

OIC: 1994-1109 (Settlement) & 2010-426 (ATR)



BDRU: What was the starting point in Sept 2018?

(i.e. What was the plan for 2018/19?)

1. Partnering/engaging with First Nations, Indigenous institutions, Tribal Councils and others to determine what boundary dispute resolution practices best address the needs and desires of communities.
2. Examining/comparing boundary dispute resolution practices domestically and internationally.
3. Building an inventory of known boundary issues.

Partnering/engaging goals over 12 months

1. To gauge interest in boundary dispute resolution and in BDRU.
2. To assess how a hybrid resolution process (integrating Indigenous practices with other dispute resolution techniques) is to be crafted.
3. To identify Indigenous experts and institutions who wish to participate.
4. To compile an inventory of known disputes (number, type, difficulty).

Partnering/engaging #1

NRCan - Policy on Aboriginal engagement & consultation (2010)

- NRCan
 - Promotes engagement with Aboriginal groups on departmental activities
 - Engagement/consultation are vital to building trust and enduring relationships with Aboriginal groups: good faith, transparency, respect, understanding
 - Engagement is strongly encouraged to garner Indigenous interest/expertise
 - Engagement must incorporate considerations put forward by Aboriginal groups
 - Indigenous groups are encouraged to offer solutions/approaches to resolve issues.

Partnering/engaging #2

NRCan - Aboriginal engagement & consultation guidebook (2011)

- Building relationships with Aboriginal groups based on:
 - Good faith: Earned trust
 - Knowledge sharing & understanding: Good solutions need everybody's wisdom
 - Respect for different perspectives: The “truth” of any situation is multi-faceted
 - Transparency: Access to information and open communication

Guided by the courts - Two recent decisions

- *Tseil-waututh Nation v Canada*, 2018 FCA 153 (Trans-Mountain pipeline)
- *Gitxaala Nation v Canada*, 2016 FCA 187 (Northern Gateway pipeline)

- Give notice of project & engagement framework (purpose, goal, timelines)
- Fund Indigenous workshops (to offset costs of engagement)
- Encourage written & oral/traditional evidence – questioning throughout
- Revise the engagement framework to accommodate concerns
- Allow for reasonable deadlines – organic, guided by discussion

Engagements in 2018/19

- 16 engagements with First Nations
- 9 engagements with Indigenous organizations
- 8 meetings with non-Indigenous organizations (academia, private sector, professional associations)
- 1 Workshop for First Nations in BC, partnering with an Indigenous organization

6 generalities from engagement

1. First engagement is an introductory chat to start the conversation; “engagement” = “partnering.”
2. Workshops are ideal venues for engaging/partnering.
3. Resolving boundary issues = restorative justice, so the community progresses without winners/losers.
4. There is much diversity across communities in types of disputes and in capacity to address disputes.
5. Most communities do not have a system for addressing boundary disputes.
6. Interest in partnering with BDRU is high (e.g. “I think that it’s great – Nov 14; “Humdinger” – Dec 18; “I’m on-board 100%” – Jan 30). An impartial third-party will be “invaluable” – Nov 17.

Types of boundary issues identified

(from engagements)

- disputes between lessees
- traditional holdings
- disputes between families
- shared parcels
- unregistered surveys
- houses straddling bounds
- access issues
- road widenings
- unsurveyed roads
- feuding parties
- encroaching structures

BDRU: Internal boundary issues (p1)

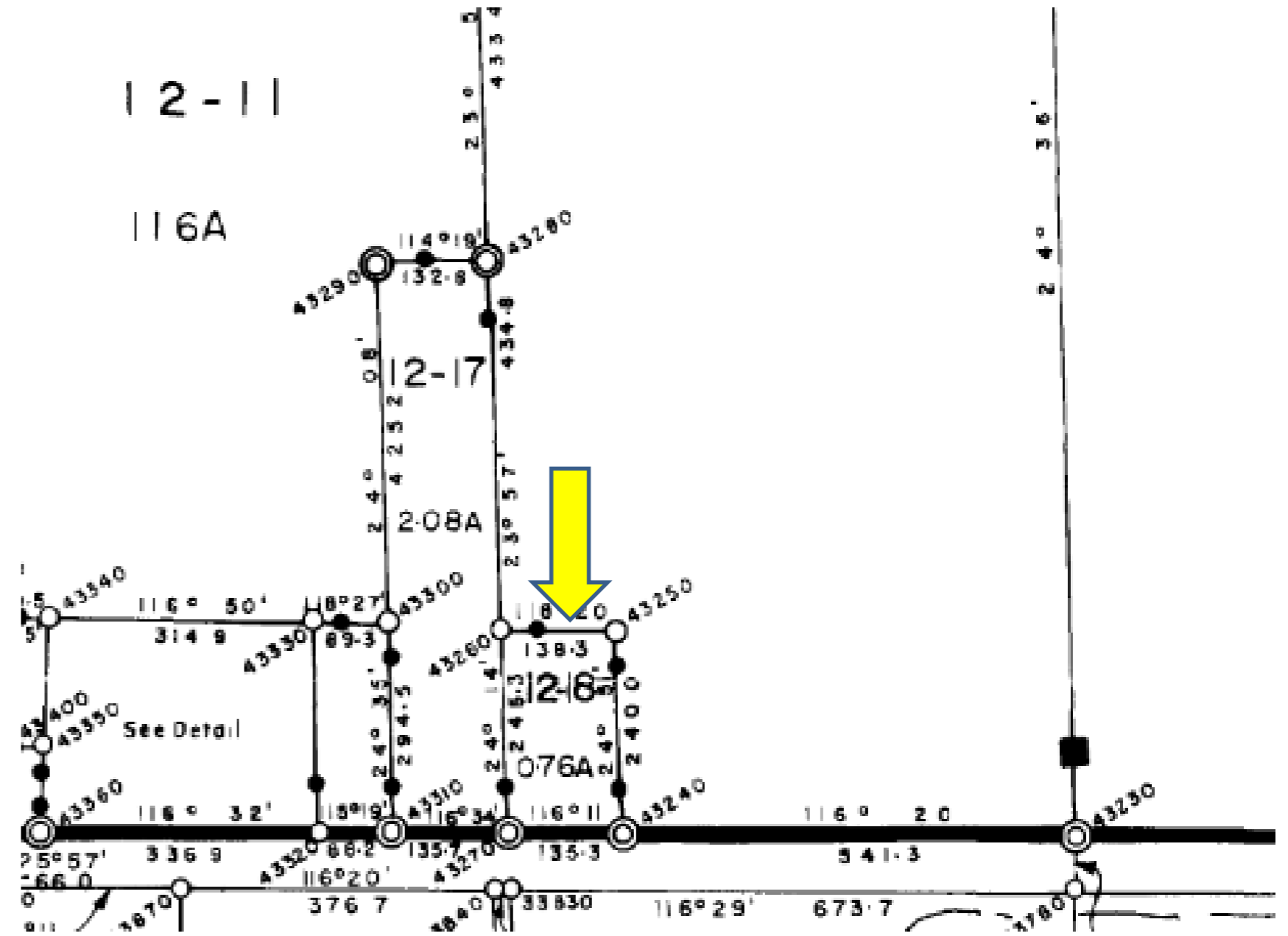
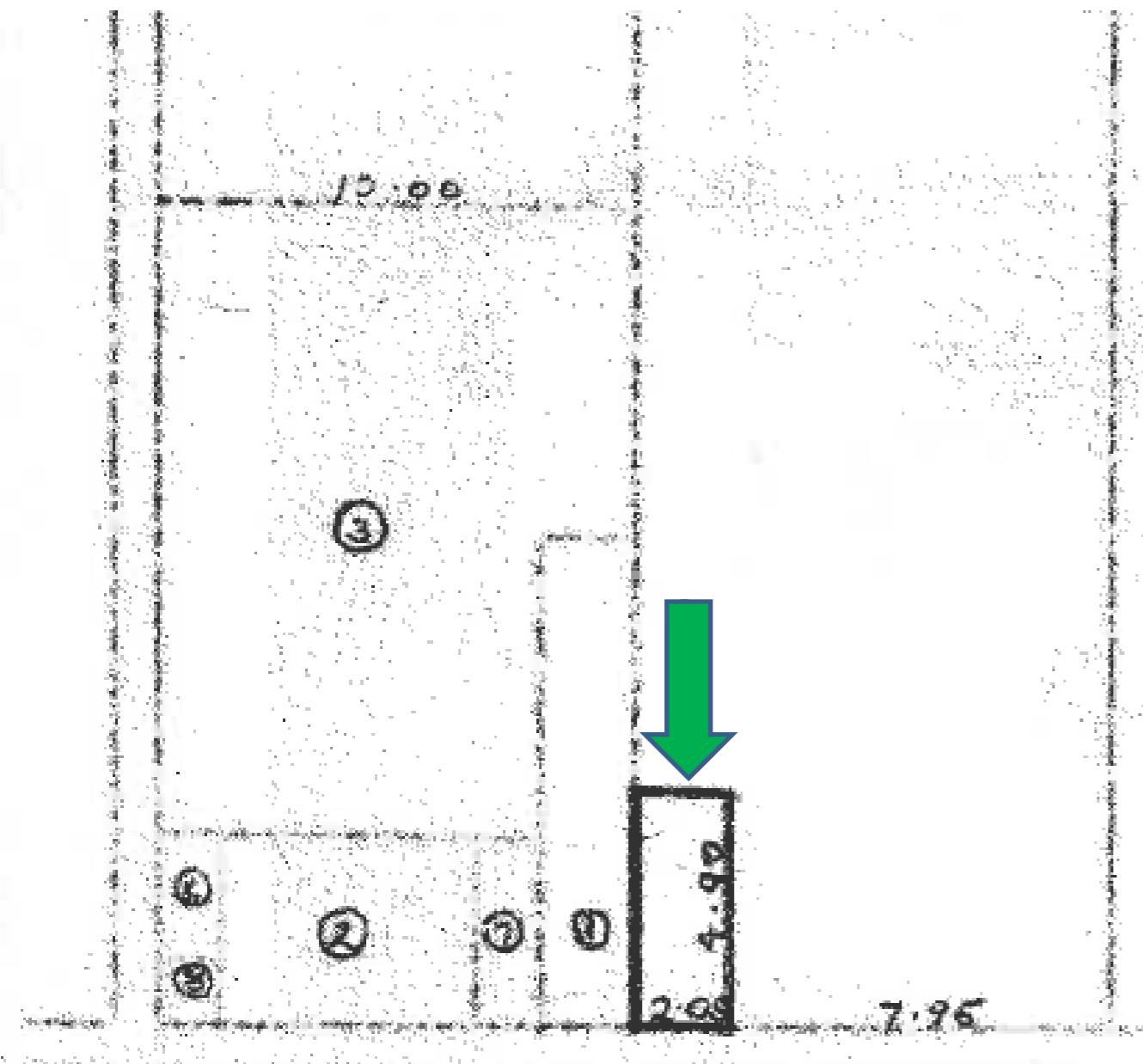
Many houses built on large lots;
confusing when lots are subdivided



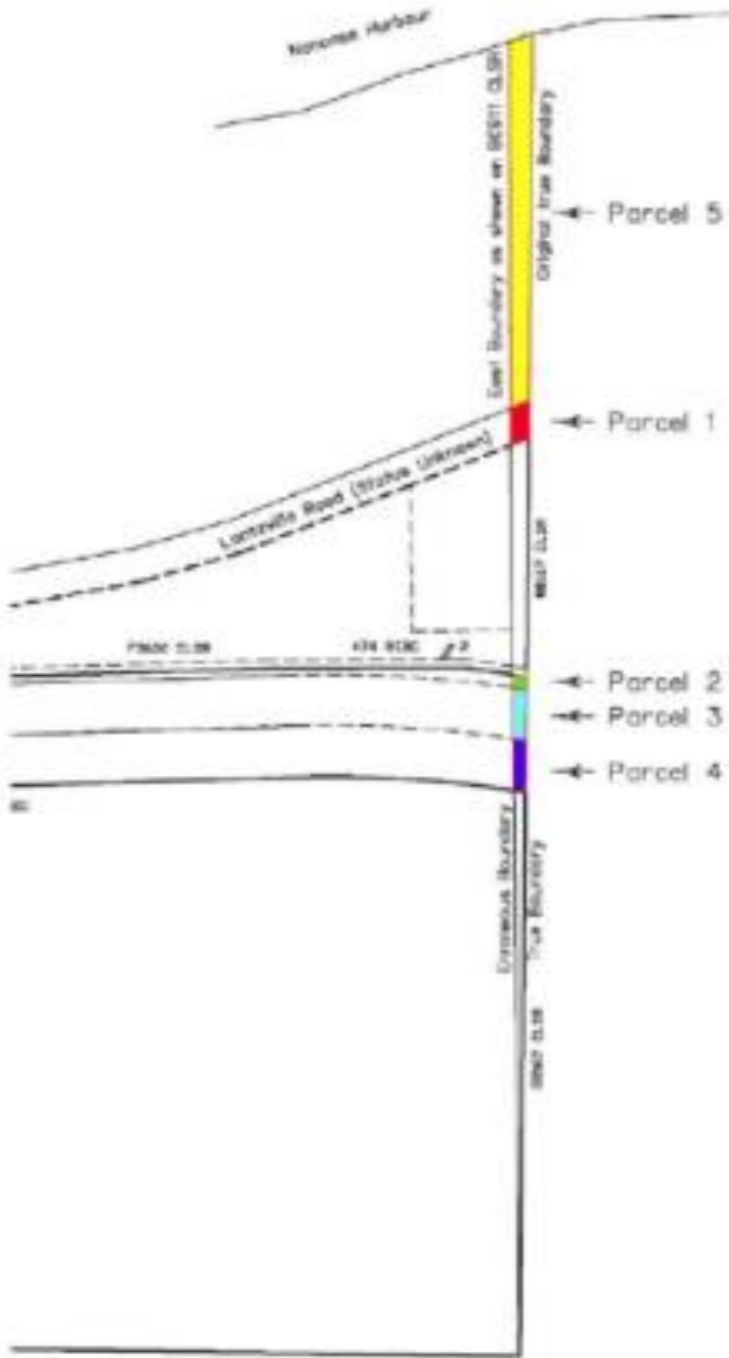
BDRU: Internal boundary issues (p2)



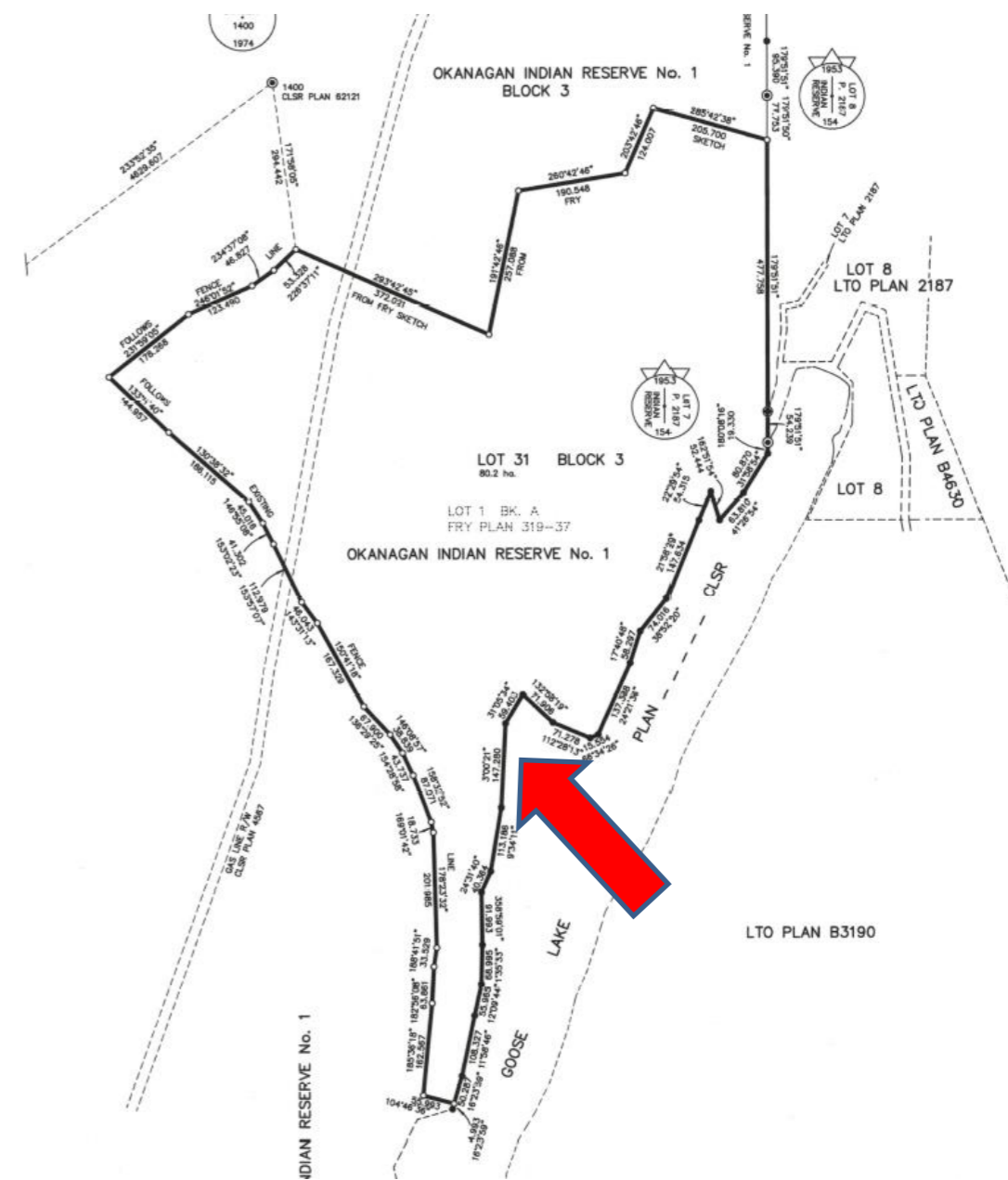
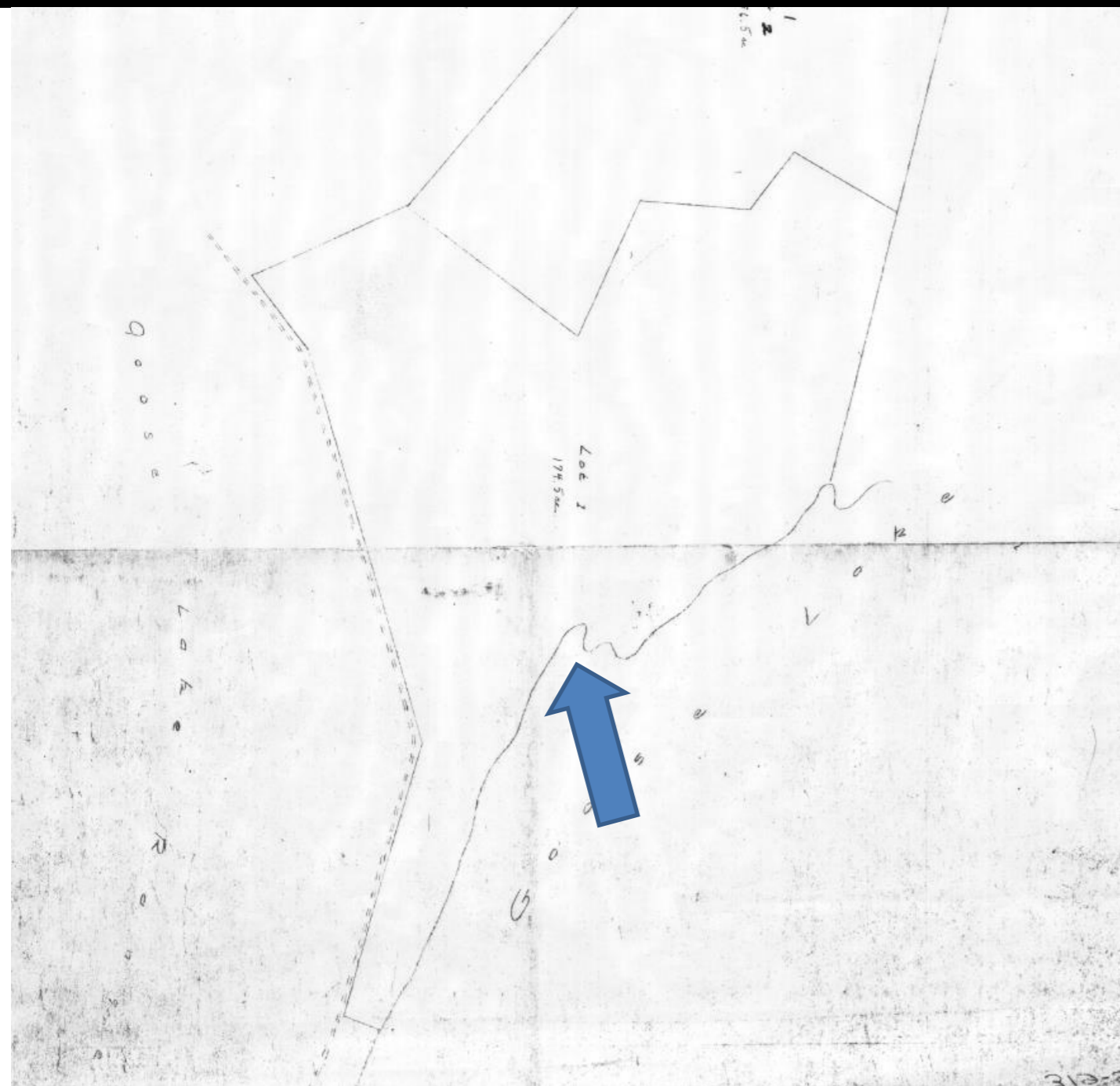
BDRU: Internal boundary issues (p3)



BDRU: External boundary issues (p1)



BDRU: External boundary issues (p2)



5 lessons from research

1. Acknowledge the past:

- Broader colonial context for BDRU; state institutions/initiatives are often suspect owing to power differential between parties.

2. Creation of any process must be community driven:

- “To be legitimate, dispute resolution may have to be negotiated ... combining indigenous and non-indigenous elements” – Webber (2004)

3. Resolution must involve the entire community:

- Concentrate on restoring relationships and incorporating traditional knowledge, values, oral history, storytelling, etc...

4. Opt-in (how the process will work in and for each community)

5. Indigenous justice programs are varied:

- Dispute resolution is included in (most) Land Codes, however this typically is generic (non-specific).
- Some communities will align boundary dispute resolution with existing justice programs; others have no such programs.

How does BDRU fit in?

1. Likely a range of options (depending on context/community wishes; **subject to** findings from engagement and six test cases)
2. Some permutations:
 - Work directly with the disputants through various FN led, community-based justice programs (e.g Qwí:qwelstóm).
 - Work with a group/panel in the community (Lands Manager, Elder, Surveyor, etc...)
 - Work solely as an impartial fact-finder
 - Hire an outside third-party mediator (mediation, negotiation, arbitration)
 - Use community-based justice program as facilitator for boundary issues

What's next (plan for 2019-20)?

1. Continue engaging/partnering: 25 planned in BC, ON, Prairies (e.g. Mistawasis FN, Muskoday FN & Wahpeton FN – late June), Quebec and Atlantic Canada.
2. Network with ADR professionals to see how they might assist in the process.
3. Run two boundary dispute resolution test cases: If FN interest.