A PUBLICATION OF LUCAS & COMPANY, LLC

P.O. BOX 361606
BIRMINGHAM
AL 35236-1606

**Important Stuff:**

- **THIS MONTH:** We are considering the infamous case that was the genesis of the First Surveyor Concept.
- **NEXT MONTH:** We will consider another interesting surveying case.
- Subscription rate **$25.00** (U.S.) per year.
- Subscribe at our website: www.LucasAndCompany.com

**Visit Our Links**

Our Blog

Our Website

**Inside this issue:**





# THE LUCAS LETTER™

Legal Issues Affecting the Surveying and Engineering Community



**Volume 13, Issue 1** **January 2020**

## Judge & Jury: First Surveyor Concept

### The Case: *Rivers v. Lozeau* - Florida Court of Appeals 1989

This is a boundary dispute case ultimately involving the location of the SE1/4 of the SW1/4 of Section 15, Township 14 South, Range 24 East of the Tallahassee Principal Meridian, in Marion County, Florida. In legal contemplation Section 15, as with all other regular sections in the Public Land Survey System (PLSS), consist of 16 nominal 40-acre lots (a.k.a., 1/4-1/4 sections). The General Land Office (GLO) surveyors originally laid out each section in the field by running the exterior boundary and setting 8 corner monuments around the perimeter. Subsequently, the GLO plat would be prepared in the office protracting the 16 lots onto the plat generating a total pf 25 subdivision lot corners. SEE SKETCH This left 17 corners to be set in the future.

The future came in 1964 when Rizzo purchased the SE1/4 of the SW1/4 and hired Moorhead Engineering to survey the property and monument the external boundaries and "certain internal division lines." No details are given about the Moorhead survey but we are led to believe that Moorhead was the 'first surveyor' to attempt to subdivide the 1/4-1/4 out of the greater Section 15. In 1969, based on the Moorhead survey, Rizzo conveyed the "North 400.00 feet of the SE1/4 of SW1/4" to Brown. Rizzo told Brown that his south boundary was located 33 feet north of two Moorhead monuments ostensibly set as a part of "certain internal division lines." Brown set this line himself by measuring 33 feet north off the Moorhead monuments. Eventually the Brown property vested in Lozeau. In 1975, Rizzo conveyed the his property south of the Brown/Lozeau line to Adams and eventually down to Rivers. The north boundary of this property was described by metes and bounds: "along a line 400.00 feet south of an parallel to the north line of the SE1/4 of SW1/4." SEE FIG.3

In [1983] the Bureau of Land Management (BLM) conducted a "dependent resurvey" of the lands of the forest service. SEE FIG.4 Experience in this neck of the woods has taught us that the BLM typically ignores locally recognized corners, like the S1/4 corner held by Moorhead, and re-establishes the section by proportionate measurements, placing new section corners in new locations where they have never existed before. In 1986 Britt performed a survey. We are told almost nothing about the Britt survey, but my 40 years of experience allows me to fill-in the blanks, to wit: Lozeau noticed that the government came in and moved the S1/4 corner 30 feet south of its original position when they straightened the south line of the section. Thinking that this could affect his south boundary, Lozeau hired Britt in 1986 to 'resurvey' his property. Britt obliged and utilizing the freshly minted BLM dependent resurvey monuments, proceeded to 'breakdown' the section into its perfect aliquot parts, resulting in a 29-foot movement of the boundaries. See FIG.1 & FIG.2 Apparently Moorhead was merely a 'first surveyor,' even though he may have followed proper breakdown procedure based on the existing section corners before the BLM moved them. Who wins? JNL

## The Legal Angle: By Jeff Lucas, Editor

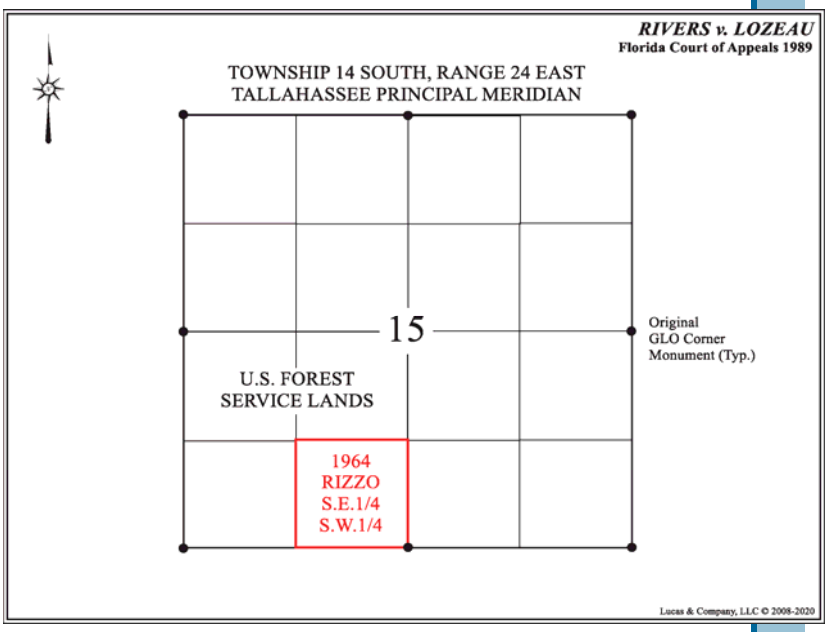
This month we are considering the infamous case of *Rivers v. Lozeau*, the genesis of the First Surveyor Concept. The concept basically states that the first surveyor to attempt to subdivide a section within the Public Land Survey System (PLSS), or any subdivision for that matter, where the subdivision lines have been protracted on a plan of subdivision and not actually run on the ground, will be honored as an 'original surveyor' only if proper procedure was followed, or, in some instances, if the first surveyor's results are deemed 'close enough.' Walt Robillard was probably the first to articulate this role of the surveyor in *Evidence and Procedures for Boundary Location*, a book originally published by Curtis Brown in 1962, two decades before the case that conceived the concept. Presumably, Robillard was involved in the case, possibly as an expert witness. For Robillard's rendition of the concept see Endnote vii on PAGE 9 OF 9 of the opinion.

Prior to the First Surveyor Concept, the surveyor had only two roles (as discussed in the case): First, the surveyor is an 'original surveyor' who lays out original subdivision lines for a common grantor; Second, the surveyor is a 'retracement surveyor' who follows in the footsteps of the original surveyor and whose only duty is to find the original lines not to correct them. These two concepts are firmly established in American property law. In contrast, the First Surveyor concept (not articulated by the court but inferred by Robillard based on the outcome), has one court opinion to hang its hat on, *Rivers v. Lozeau*. Unfortunately, many surveyors (too many) have adopted the concept as a basis for rejecting earlier subdivision layout not performed by the original subdivision surveyor; in most cases being the GLO surveyor who ran the section lines but not the subdivision of section lines as they were merely protracted on the plat. So, is this a real concept based on the correct law (federal land law in this case) or is it just another instance of surveyor mythology, where surveyors just believe what they are doing is right without any supporting legal bedrock? Join us on our BLOG to continue the discussion. JNL

## Points to Ponder:

- Sixteen lots contemplated under federal law and protracted on the GLO plat; altogether 25 corners, but the GLO only set 8 of them. What did the government expect people to do in order to find the location of their valuable property on the ground?
- Judge Cowart who wrote the appellate court opinion stated that section subdivision lines drawn on the GLO plat "are not merely theoretical concepts but are real lines, actually run and marked on the ground." With all due respect, was he 'merely' delusional of 'actually' on drugs?
- Does this case, the judges opinion, and the ultimate outcome have Walt Robillard written all over it or what? Who else could have come up with such a crazy, delusional, half-baked theory to defend the idea of breaking sections down into their theoretical aliquot parts? The most amazing and crazy thing is that some judge actually bought it.
- The GLO/BLM Manuals have never supported the theory in this case. The 2009 BLM Manual makes it abundantly clear that this theory is ludicrous. See Endnote vii, below. Do you think this fact will make any difference in the practices of those surveyors who already drank the cool-aid?

GO TO OPINION




**All Sketches Intended as an Approximation of the Case Scenario and Not an Actual Representation of the Case.**

## The Verdict Is In: *Rivers v. Lozeau* - Florida Court of Appeals 1989

If the theoretical subdivision lines were "actually run and marked on the ground" as the court said, wouldn't Moorhead have actually found them as run and marked when he performed his survey? The fact of the matter is they were never run nor were they marked until Moorhead conducted his survey. Moorhead used something to control his determination of the boundary and it was most likely the existent and locally accepted S1/4 corner of the section. The BLM's 1983 dependent resurvey of the section indicates that the south line of Section 15 is absolutely straight. Experience in this neck of the woods (I practiced in Florida for 20 years) tells us that none of the section lines in the state were ever run on straight lines as would be achieved by a new survey in 1983. A survey of the 1983 era would, however, be able to achieve a relatively straight line.

The evidence that we have in front of us, indicates that the BLM probably threw out the locally accepted S1/4 corner in favor of a straight line determination of the 'true' south boundary of the section. The local corner used by Moorhead was probably located 29-30 north of the BLM surveyed corner. It may still be there today. Who's to say that the locally accepted corner was not a perpetuation of the original 1/4 section corner? Also, there is no indication that Moorhead did not follow proper procedure when he made his determination of the location of the Rizzo property. So why was the Moorhead survey cast aside?

The final result in this case is that the First Surveyor Concept 'theory' gave Britt license to violate the *bona fide* property rights of Rizzo and his successors in title. Is this really what the federal government had in mind when it refused to run the section subdivision lines; instead, leaving it to the local surveyor to determine those lines in a *bona fide*, good faith effort to establish the subdivision lines on the ground? All of the previous editions of the GLO/BLM Manual say the same thing—it's just that the 2009 Manual now makes it abundantly clear—the First Surveyor Concept is abhorrent to original federal intent relative to the subdivision of the sections. As contemplated under federal law, and as illustrated in Endnote vii, the original intent of the federal government was that the local surveyor would be hired as an expert to determine the location of the section subdivision lines and when completed as contemplated, the local surveyor (Moorhead in this case) would be the original surveyor of the "previously fixed local survey legal subdivision corners." Section 3-137 of the 2009 Manual of Surveying Instructions. See Endnote vii, below.

**"The following surveyor, rather than being the creator of the boundary line, is only its discoverer and is only that when he correctly locates it."**

We are now aware that the court ruled against the Moorhead determination in favor of the Britt determination and sent the case back to the trial court for further deliberations, no doubt awarding Lozeau the northern 28.71 feet of Rivers' property. How many of the other properties in this section (and adjoining sections) were also affected by the movement of the section corners by the BLM? How many other property owners had their *bona fide* private property rights violated by the BLM and the local surveyor? What happens 20 years from now (some 60 years after the 1983 BLM dependent resurvey), and either the BLM of the U.S. Forest Service decides to do another dependent resurvey of the federal lands out in that area of the country due to a proliferation of 'lost and obliterated' corners? Will all of the property lines need to be moved again? Federal law contemplated that the section corners would remain forever unchanged. This isn't the only case out there that demonstrates that to be a false premise. Sections corners, all over the country, move all of the time because surveyors move them! And the First Surveyor Concept provides cover for just such activity. Instead of being defenders of private property rights, surveyors have become the offenders. But it doesn't have to be that way, we just need to understand the laws that govern our practice even if a certain judge doesn't. Join us on our BLOG. JNL

BACK TO PAGE ONE

## PROBABLE 1986 BRITT SURVEY SCENARIO

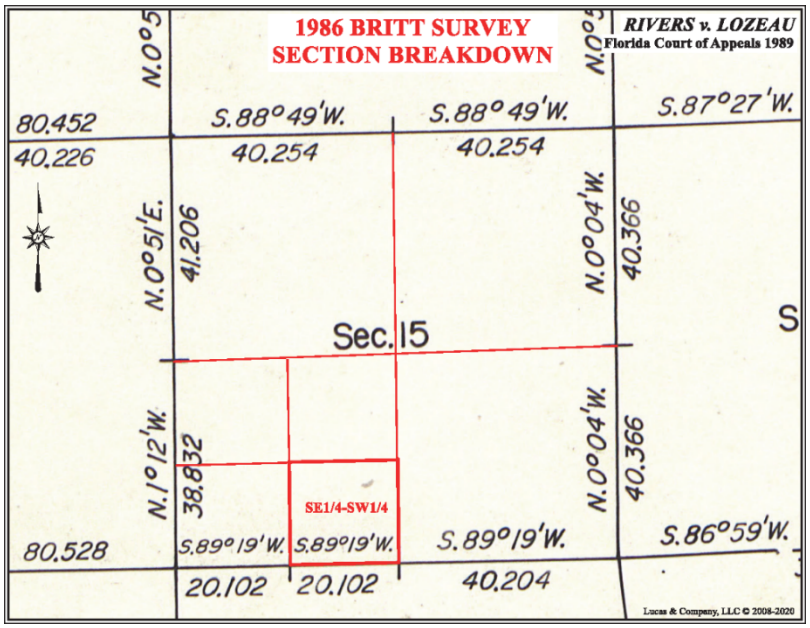



**Figure 1**
After the BLM Dependent Resurvey, Britt Probably
Would Have Broken the Section Down as Illustrated.

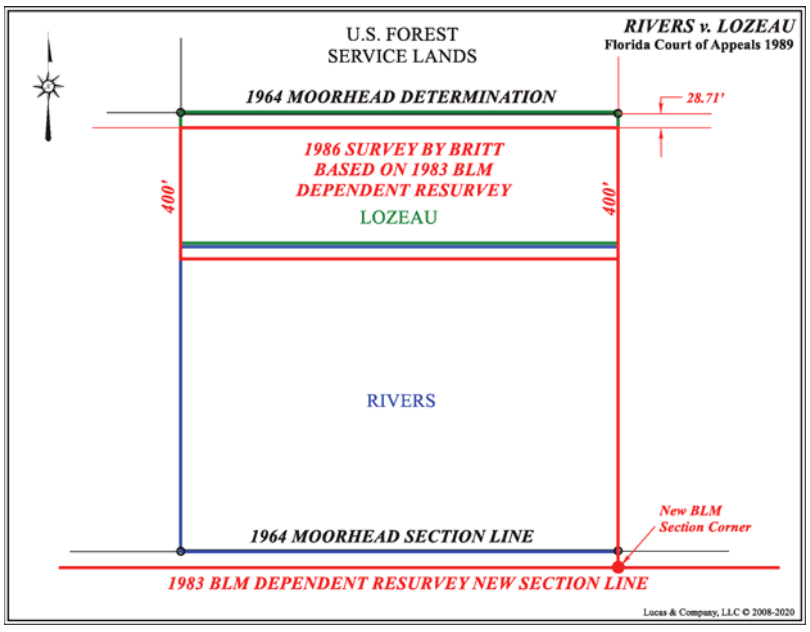



**Figure 2**
Given that the BLM Straightened the South Section Line and
Moved the S1/4 Corner 29-30 Feet South, Britt's Section Breakdown
Moved Lozeau's Property 28.71 Feet South and into Rivers' Property.

BACK TO PAGE ONE

**HAROLD J. RIVERS and MARY E. RIVERS, Appellants/Cross-Appellees**
**v.**
**RAYMOND S. LOZEAU and JOY ELAINE LOZEAU, his wife, Appellees/Cross-Appellants**

**Court of Appeal of Florida, Fifth District**

**539 So. 2d 1147; 14 Fla. L. Weekly 523**

**February 23, 1989, Filed**

**LUCAS LETTER HEAD NOTES [LLHN]:**[i]

***Real Property Law; Boundaries; Generally:***
***Real Property Law; Deeds; Deed Interpretation; Rules of Construction:***
***Real Property Law; Deeds; Legal Descriptions; Descriptive Elements:***
***Real Property Law; Boundaries; Surveys; Original Surveys:***
**[LLHN1]** Real property descriptions are controlled by the descriptions of their boundary lines which are themselves controlled by the terminal points or corners as established on the ground by the original surveyor creating those lines. A property description that refers to, and adopts by reference, the description of a boundary line is dependent upon the proper location of the adopted line, which is dependent upon the location of the terminal points of the adopted line, which are dependent on their location on the ground as established by the original surveyor creating that adopted line.

***Real Property Law; Boundaries; Surveys; Original Surveys:***
***Real Property Law; Deeds; Deed Interpretation; Rules of Construction:***
***Real Property Law; Deeds; Legal Descriptions; Priority of Calls:***
**[LLHN2]** When there is an inconsistency between the description of a corner (a line terminal point) in field notes and plats subsequently made and recorded and the original monument evidencing that corner on the ground, the original monument on the ground controls.

***Government; State & Territorial Government; Boundaries; Surveying Authority:***
***Professions; Practice of Land Surveying; Defined:***
***Real Property Law; Deeds; Legal Descriptions; Sufficiency of Description:***
**[LLHN3]** Although title attorneys and others who regularly work with them develop expertise as to land descriptions, the only professional authorized to locate land lines on the ground is a registered land surveyor. In fact, the definition of a legally sufficient real property description is one that can be located on the ground by a surveyor. However, in the absence of statute, a surveyor is not an official and has no authority to establish boundaries; like an attorney speaking on a legal question, he can only state or express his professional opinion as to surveying questions.

***Real Property Law; Boundaries; Surveys; Original Surveys:***
**[LLHN4]** The surveyor can, in the first instance, lay out or establish boundary lines within an original division of a tract of land which has theretofore existed as one unit or parcel. In performing this function, he is known as the "original surveyor" and when his survey results in a property description used by the owner to transfer title to property that survey has a certain special authority in that the monuments set by the original surveyor on the ground control over discrepancies within the total parcel description and, more importantly, control over all subsequent surveys attempting to locate the same line.

***Real Property Law; Boundaries; Surveys; Retracement Survey:***
***Real Property Law; Boundaries; Surveys; Following in the Footsteps:***
**[LLHN5]** A surveyor can be retained to locate on the ground a boundary line which has theretofore been established. When he does this, he "traces the footsteps" of the "original surveyor" in locating existing boundaries. Correctly stated, this is a "retracement" survey, not a resurvey, and in performing this function, the second and each succeeding surveyor is a "following" or "tracing" surveyor and his sole duty, function and power is to locate on the ground the boundaries corners and boundary line or lines established by the original survey; he cannot establish a new corner or new line terminal point, nor may he correct errors of the original surveyor. He must only track the footsteps of the original surveyor. The following surveyor, rather than being the creator of the boundary line, is only its discoverer and is only that when he correctly locates it.

COUNSEL: Bryce W. Ackerman of Savage, Krim, Simons, Fuller & Ackerman, P.A., Ocala, for Appellants/Cross-Appellees.

H. Randolph Klein of Klein & Klein, Ocala, for Appellees/Cross-Appellants.

JUDGES: Cowart, J. Cobb, J., and Glickstein, H. S., Associate Judge, concur.

**OPINION BY:** COWART **[539 So.2 1149]**

This is a land boundary line dispute case.

**THE FACTS:** The controversy in this case involves the correct location of the line between two parcels of land lying within the 40 acre quarter-quarter section described as the Southeast 1/4 of the Southwest 1/4 of Section 15, Township 14 South, Range 24 East, in Marion County, Florida. In 1964 Joseph Rizzo and his wife owned that portion of this quarter-quarter section that is in question. The U. S. Forestry Service owns the land to the north. At that time, the Rizzos retained a surveyor, Moorhead Engineering, to survey their land and to establish certain internal land lines dividing it into parts. Moorhead undertook to locate and monument Rizzos' external boundary lines and corners and to establish and monument the terminal points of certain internal division lines.

In 1969, the Rizzos conveyed to Marcus E. Brown and wife by deed containing the following land description: BACK TO PAGE ONE

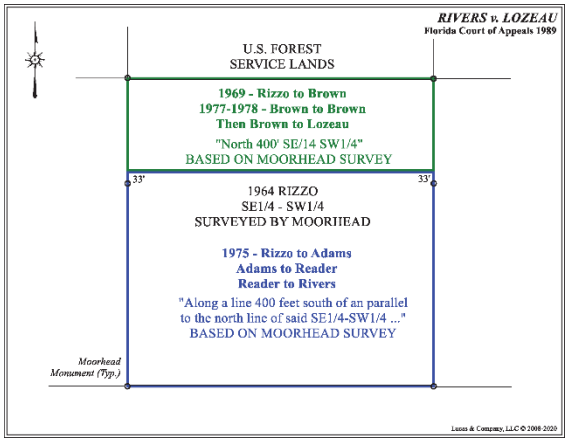



**Figure 3**

"The North 400.00 feet of SE 1/4 of SW 1/4 of Section 15, Township 14 South, Range 24 East, Marion County, Florida."

The west, north, and east lines of the Brown parcel followed the outer or external boundary lines of the property owned by the Rizzos. The south line of the Brown parcel did not follow any internal line established by the Moorhead survey. Mr. Rizzo showed Marcus Brown the monuments Moorhead had set as being the north corners of this quarter-quarter section and certain other Moorhead monuments which the Rizzos told Marcus Brown were 33 feet south of the south line of the parcel the Rizzos conveyed to Brown. Later in 1977 or 1978, Marcus Brown measured 33 feet north of the Moorhead monuments shown him by Mr. Rizzo and placed a metal rod at the point Mr. Rizzo had told him was his south

boundary line. Marcus Brown conveyed this property by the same description to George Brown who conveyed by the same description to appellees Raymond S. Lozeau and his wife.

In 1975, the Rizzos conveyed a parcel of their remaining land to Paul W. Adams and wife, which parcel was described by reference to the boundary lines of this quarter-quarter section with the north line of the property conveyed being described as:

> "thence N 89 53'01" E. along a line 400.00 feet south of and parallel to the North line of said SE 1/4 of SW 1/4 a distance of 1327.04 feet to a point on the East line of said SE 1/4 of SW 1/4 …."

Using substantially the same land description, the Adamses [sic] conveyed to Daniel E. Reader and wife, who conveyed to appellants Harold J. Rivers and wife.

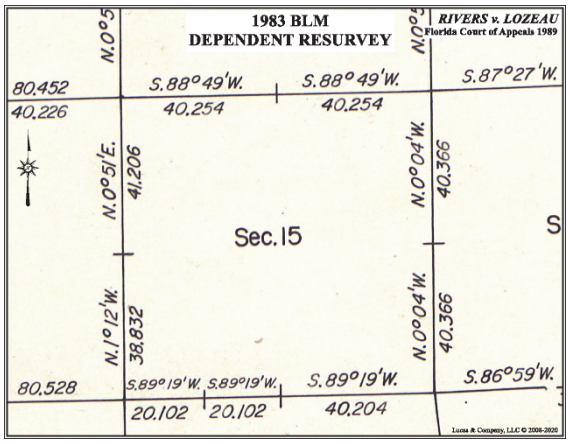



**Figure 4**

In 1982[ii] the U. S. Bureau of Land Management did a "dependent resurvey" of the lands of the U. S. Forestry Service which retraced the lines of the original government survey and identified, restored, and remonumented the original position of the corners of the original U. S. government survey.[1] This remonumenting of the original government survey, along with a 1986 survey by Whit Holley Britt, made obvious to all the true location of the north line of this quarter-quarter section on the ground and that the Moorhead monuments intended to denote that line were actually located 28.71 feet north of the true location of that line as it was originally established by the official U.S. government survey and reestablished by the 1982 government "dependent [re]survey." BACK TO PAGE ONE

Appellees Lozeaus brought this action in ejectment and for declaratory judgment against the appellants Riverses [sic] who had possession of the south 28.71 feet of the north 400 feet measured from the north line of the quarter-quarter section according to the U.S. government (and Britt) surveys. The Lozeaus argued that they acquired legal title to the disputed land by virtue of the 1969 deed from Rizzo to Marcus Brown and the successive conveyances to them. The Riverses [sic] argued that Moorhead was the original surveyor and that his monuments on the ground controlled the **[539 So.2 1150]** location of the land subsequently conveyed by Rizzo, notwithstanding that "later" surveys, i.e., the government survey of 1982 and the 1986 Britt survey, may show the Moorhead monuments to have been in error.[2] After a non-jury trial, the trial court found that the property descriptions of the parties overlapped and ordered that the exact dimensions of the overlap be established and the overlapping property split evenly between the plaintiffs and defendants. The Riverses [sic] appeal and the Lozeaus cross-appeal.

---

[1] This is only a re-establishment of the true position of the original survey by retracement. *Clark on Surveying and Boundaries*, § 650 Dependent surveys, page 956, (Grimes 4th Ed. 1976).

[2] *See Akin v. Godwin,* 49 So.2d 604 (Fla. 1950); *Willis v. Campbell,* 500 So.2d 300 (Fla. 1st DCA 1986); *Zwakhals v. Senft,* 206 So.2d 62 (Fla. 4th DCA 1968); *City of Pompano Beach v. Beatty,* 177 So.2d 261 (Fla. 2d DCA 1965) and *Froscher v. Fuchs,* 130 So.2d 300 (Fla. 3d DCA 1961).

**LAND DESCRIPTIONS:** Since time immemorial, parcels of land have been identified and described by reference to a series of lines or "calls" or "courses" that connect to completely encircle the perimeter or boundaries of a particular parcel. A particular property description may consist entirely of descriptions of original lines that compose it or it may, in whole or in part, refer to other sources which themselves show or describe previously surveyed and existing lines or calls. An individual line or call in a property description usually, but not always,[3] refers to an imaginary straight line customarily described in several ways: (1) by reference to its length, (2) by reference to its terminal points (commonly called "corners" or "angles"), (3) by reference to its angle with regard to true north, magnetic north, or to one or more other lines. A property description composed of descriptions of its constituent boundary lines or calls is known as a "metes and bounds" description. Of the ways that boundary lines are described, the reference to terminal points is the strongest and controls when inconsistent with other references.[4] In effect, **[LLHN1]** real property descriptions are controlled by the descriptions of their boundary lines which are themselves controlled by the terminal points or corners as established on the ground by the original surveyor creating those lines. A property description that refers to, and adopts by reference, the description of a boundary line is *DEPENDENT* upon the proper location of the adopted line, which is dependent upon the location of the terminal points of the adopted line, which are dependent on their location on the ground as established by the original surveyor creating that adopted line.

**LAND SURVEYORS: [LLHN3]** Although title attorneys and others who regularly work with them develop expertise as to land descriptions, the only professional authorized to locate land lines on the ground is a registered land surveyor.[5] In fact, the definition of a legally sufficient real property description is one that can be located on the ground by a surveyor. However, in the absence of statute, a surveyor is not an official and has no authority to establish boundaries; like an attorney speaking on a legal question, he can only state or express his professional opinion as to surveying questions.

In working for a client, a surveyor basically performs two distinctly different roles or functions:

First, **[LLHN4]** the surveyor can, in the first instance, lay out or establish boundary lines within an original division of a tract of land which has theretofore existed as one unit or parcel. In performing this function, he is known as the "original surveyor" and *when his survey results in a property description used by the owner to transfer* **[539 So.2 1151]** *title to property*[6] that survey has a certain special authority in that the monuments set by the original surveyor on the ground control over discrepancies within the total parcel description and, more importantly, control over all subsequent surveys attempting to locate the same line.[iii]

---

[3] Property descriptions sometimes refer to irregular natural lines capable of identification, such as the banks, shores, and high and low marks of bodies of water such as oceans, lakes, rivers and streams, and to the midtread of streams, the face of cliffs, the ridge of mountains, etc.

[4] In a similar manner, **[LLHN2]** when there is an inconsistency between the description of a corner (a line terminal point) in field notes and plats subsequently made and recorded and the original monument evidencing that corner on the ground, the original monument on the ground controls. *See Tyson v. Edwards,* 433 So.2d 549 (Fla. 5th DCA 1983), rev. denied, 441 So.2d 633 (Fla. 1983).

[5] *See* § 472.005(3), Fla. Stat.

[6] This is a most important qualification.

Second, **[LLHN5]** a surveyor can be retained to locate on the ground a boundary line which has theretofore been established. When he does this, he "traces the footsteps" of the "original surveyor" in locating existing boundaries. Correctly stated, this is a "retracement" survey, not a resurvey,[iv] and in performing this function, the second and each succeeding surveyor is a "following" or "tracing" surveyor and his sole duty, function and power is to locate on the ground the boundaries corners and boundary line or lines established by the original survey; he cannot establish a new corner or new line terminal point, nor may he correct errors of the original surveyor. He must only track the footsteps of the original surveyor. The following surveyor, rather than being the creator of the boundary line, is only its discoverer and is only that when he correctly locates it.[7] [v]

**ORIGINAL LAND LINES:** When there is a boundary dispute caused by an ambiguity in the property description in a deed, it is often stated that the courts seek to effectuate the intent of the parties. This is not an accurate notion. The intent of the parties to a contract for the sale and purchase of land, both the buyer and the seller, may be relevant to a dispute concerning that contract, but in a real sense, the grantee in a deed is not a party to the deed, he does not sign it and his intent as to the quality of the legal title he receives and as to the location and extent of the land legally conveyed by the deed is quite immaterial as to those matters. The owner of a parcel of land, being the grantee under a patent or deed, or devisee under a will or the heir of a prior owner, has no authority or power to establish the boundaries of the land he owns;[vi] he has only the power to establish the division or boundary line between parcels when he owns the land on both sides of the boundary line he is establishing. In short, an original surveyor can establish an original boundary line only for an owner who owns the land on both sides of the line that is being established and that line becomes an authentic original line *only when the owner makes a conveyance based on a description of the surveyed line*[8] and has good legal title to the land described in his conveyance.

**UNITED STATES AS ORIGINAL OWNER AND ITS CADASTRAL ENGINEER:** Subject only to certain rights of individuals under Spanish grants, the United States became the owner of all land now in the State of Florida by virtue of a treaty with Spain dated Feb. 22, 1819 and ratified Feb. 22, 1821 and, as original governmental owner, caused Florida to be surveyed in accordance with a rectangular system of surveys of public lands adopted by Acts of Congress. The permanent seat of government having been established at Tallahassee, an initial point of reference was located nearby through which a north-south guide line was run according to the true meridian and a base (township) line was run east-west on a true parallel of latitude.[9] North-south range lines, six miles apart and parallel to the Tallahassee Principal Meridian, were run throughout the state except where impracticable because of navigable waters, etc. Likewise, East-West township lines, six miles apart and parallel to the base line, were also run throughout the state to form normal townships six **[539 So.2 1152]** miles square each of which were divided into thirty-six square sections, one mile long

---

[7] *See Clark on Surveying and Boundaries*, Chap. 14 Tracking a Survey, pg. 339 and generally (Grimes 4th Ed. 1976).

[8] Neither the 1969 deed from the Rizzos to Marcus Brown nor the 1975 deed from the Rizzos to Paul W. Adams contains property descriptions of lines bounded by monuments set by surveyor Moorhead in 1964. This would be an entirely different case if the land descriptions in question described lines "commencing at (or running to) a concrete monument set in 1964 by surveyor Moorehead, etc."

[9] *See* § 258.08, Fla. Stat., and Fla. Stat. Annot., Vol. 1, page 119, (West 1961). Unfortunately, this helpful material has been omitted from the 1988 edition of this volume of F.S.A.

on each side containing as nearly as may be, 640 acres each. These sections were numbered respectively, beginning with the number one, in the northeast corner and proceeding west (left) and east (right) alternately through the townships with progressive numbers. Sections were divided into squares of quarter sections containing 160 acres. The quarter-quarter section corners are placed on the line connecting the section and quarter-section corners, and midway between them. Although theoretically conceived and invisible, these lines are not merely theoretical concepts but are real lines, actually run and marked on the ground with terminal points monumented by surveyors acting under the authority of the cadastral engineer of the Bureau of Land Management.[vii] The approved and accepted boundary lines established by the federal government surveyors are unchangeable and control all references in deeds and other documents describing parcels of land by reference to the federal government of sections, townships and ranges.

**THE LAW APPLIED TO THE FACTS OF THIS CASE:** In establishing the internal lines within Rizzo's subdivision, Moorhead acted as an "original surveyor" but in attempting to locate and monument Rizzo's external boundary lines which are described by reference to the federal rectangle system of surveying, Moorhead was a "following surveyor"[viii] and not only failed to properly find the northern boundary of this quarter-quarter section where it was located by the original government surveyor (and also re-established by an authorized federal government resurvey) but to evidence his erroneous opinion as to the true line, the Moorhead surveyor placed monuments 28.71 feet north of the true north line of this quarter-quarter section. From the time the federal government granted this quarter-quarter section to the original grantee down to the Rizzos, the title conveyed was to a tract of land located according to the original government survey and by the deed from the Rizzos to Brown, and subsequent deeds, the Lozeaus acquired title to the north 400 feet of this quarter-quarter section according to the true boundary line established by the original government surveyors. This is true regardless of the fact that Mr. Rizzo showed Marcus Brown the erroneous monuments set by the Moorhead surveyors[10] and regardless of where anyone erroneously thought or believed the correct location of this land boundary line to be. Neither the title to land nor the

---

[10] Notwithstanding that Rizzo and Brown both may have subjectively believed or intended Rizzo's deed to Brown to convey the land between the erroneous Moorhead monuments, because the deed described land by reference to the U.S. government survey it conveyed the legal title to the north 400 feet of this quarter-quarter section as measured from the true location of the original government survey. To the extent that Rizzo's deed conveyed legal title to land Rizzo did not intend to convey, Rizzo's remedy would have been to have brought a reformation suit in equity to have his deed reformed to describe the correct parcel by a correct description. Of course, the resulting litigation can be easily visualized: Rizzo would claim that he and his grantee Marcus Brown intended Rizzo's deed to convey land only south to a point 33 feet north of one of Moorhead's monuments and his deed should be reformed accordingly. Brown would admit that was true but would then claim that the parties also obviously intended that Brown was to obtain property 400 feet wide from north to south and that Brown should either keep the 400 feet described in the deed or be entitled to obtain money damages from Rizzo or to rescind the transaction because of Rizzo's misrepresentation that he owned to the erroneous Moorhead monument located 28.71 feet north of Rizzo's true line and Rizzo did not own that northern 28.71 feet. These contentions, which never matured, existed only between the original parties and do not inure to any subsequent good faith purchasers who took legal title to their parcels according to the land descriptions contained therein, and the equitable and legal rights between Rizzo and Brown being personal to them are immaterial in litigation between subsequent owners.

boundaries to a deeded parcel move about from time to time based on where someone, including a particular surveyor, might erroneously believe the correct location of the true boundary line to be.

In 1975, the Rizzos conveyed to appellant Rivers' predecessor in title property the northern boundary **[539 So.2 1153]** of which is defined as being 400 feet south of, and parallel to, the north line of this quarter-quarter section. Regardless of any assertion that this conveyance was made relying on the Moorhead survey, the description *itself* does not describe the line in question by reference to the survey or monuments set by the Moorhead surveyor. On the contrary, that description adopts by reference the true north line of this quarter-quarter section which is necessarily controlled by the location of that line as established by the original government survey. Even if the description in the subsequent deed is considered to overlap the south 28 feet of the property previously conveyed by the Rizzos to Lozeaus' predecessor in title (which it does not), it is quite immaterial because, at the time of the conveyance to Paul W. Adams, Mr. and Mrs. Rizzo did not own that south 28 feet, they having previously conveyed legal title to it to Marcus Brown, Lozeaus' predecessor in title. All else argued in this case is immaterial. The Lozeaus are entitled to prevail in this controversy.

All legal theories that could change the result in this case, such as those relating to adverse possession, title by acquiescence, estoppel, lack of legal title, etc., were neither asserted, nor argued, nor material in this case. This case is reversed and remanded with instructions that the trial court enter a judgment in favor of the appellees Raymond S. Lozeau and wife, in accordance with the land description as controlled by the official U. S. government survey.

REVERSED and REMANDED.

---

Endnotes:

[i] All headnotes (a.k.a., the law of the case) in this opinion are provided by the Editor of TLL for the convenience of our readers. All footnotes, such as this one, are also provided by the Editor of TLL and may include the Editor's commentary to the opinion, which should be considered only as the Editor's opinion and not as the law of the case. JNL.

[ii] The actual approved date of the resurvey was 1983.

[iii] I agree with this definition of original surveyor, wholeheartedly, and have often quoted it in various settings. An original surveyor sets out new boundary lines for a common grantor in positions where they have never existed before.

[iv] This is an excellent observation by the court. A "retracement" and a "resurvey" are not the same thing. A retracement attempts to find where a previously established property line is located on the ground. A "resurvey" is a new survey to supersede a previous survey. The Bureau of Land Management (BLM), Manual of Surveying Instructions (various editions, esp., 1947, 1973 and 2009), explains that a "dependent" and "independent resurvey" are new original surveys to replace an earlier, faulty, original survey that needed to be overhauled. A "resurvey" cannot happen in private practice because diverse private property interests are involved. It can only happen when the federal government wished to reconstitute its own property (the public lands, a.k.a., federal interest lands) or when a private developer wants to "resurvey" a subdivision of land and reconstitute the lot lines, necessarily excluding any lots that have already been conveyed.

[v] This is also an excellent description of the role of the retracing surveyor. I have used it often in my writings and in my seminar presentations. The problem is that the remainder of the opinion quickly falls into a total

fantasy devoid on any grasp on reality, or the law, or of common sense. Therefore, I quit using this opinion as a reference for anything, because if someone actually reads the case and then questions my apparent approval, it is impossible to explain in a few words (without a full and complete dissertation on the opinion, as we are doing now) why the definitions of original and retracement surveyor are so good, yet the ultimate outcome of the case is a dumpster fire.

[vi] This is not an absolute truth. It may be generally true, but there are numerous exceptions to this statement. Many, if not most, of the boundary establishment doctrines are based on the actions and inactions of the respective owners of adjoining properties, who were at some instant in time a grantee.

[vii] This is where the court moves into fantasyland and loses all grasp on reality.

> "Although theoretically conceived and invisible, these lines are not merely theoretical concepts but are real lines, actually run and marked on the ground with terminal points monumented by surveyors acting under the authority of the cadastral engineer of the Bureau of Land Management." [Emphasis added.]

The court is saying that when the theoretical 1/4 section and 1/4-1/4 section lines for Section 15 were drawn on the General Land Office (GLO) plat they were actually run on the ground. This represents a total misunderstanding of federal law on the issue of the subdivision of the sections and the intent of the original grantor (the federal government) relative to the role of the original surveyor and retracing surveyor, with regard to the subdivision of section lines.

The only corner actually set for the Rizzo property by the original GLO survey was the south 1/4 corner of the section. The only line actually run was the south line of the SW 1/4. Generally speaking, the GLO did not run the subdivision of section lines, but federal law contemplated how those subdivision lines would be run and established. From the 2009 Manual of Surveying Instructions, which is the applicable federal agency's articulation of federal land law, first enacted under the Land Ordinance of 1785, *et seq*., we find the following:

> **1-1.** The corner monuments *on the ground established actual on-the-ground locations* for the boundaries of the lands entered, patented, and/or otherwise conveyed. This process assures the orderly disposition of the public lands and avoids confusion and contention.
>
> **3-4**. By law, (1) the corners marked in public land surveys shall be established as the *Proper corners of sections, or of the subdivisions of the sections*, which they were intended to designate ….
>
> **3-4**. (2) *the boundary lines actually run and marked shall be and remain the proper boundary lines of the sections or subdivisions for which they were intended*, and the lengths of these lines as returned shall be held as the true length thereof ….
>
> **3-131.** The *function of the local surveyor* begins when employed as an expert to identify lands that have passed into private ownership. This may be a simple or a most complex problem. …
>
> **3-132.** The work of the local surveyor usually includes *the subdivision of the section* into the legal subdivisions shown upon the approved plat. In this capacity, the local surveyor is performing *a function contemplated by law*. He or she cannot properly serve the client or the public unless familiar with the legal requirements concerning the subdivision of sections.
>
> **3-135**. *The Bureau of Land Management assumes no control or direction over the acts of local and county surveyors in the matters of subdivision of sections*, evaluation of evidence of corner locations, and reestablishment of lost corners of original surveys where the lands have passed into private ownership, nor will the Bureau of Land Management issue instructions in such cases.

> **3-99**. In the public land survey system a corner is fixed in position by operation of law. Corners marked in official surveys followed by use are fixed in position by monuments. Only a small portion of corners are marked on the ground in original surveys. Subdivision-of-section corners are generally not marked. *Their positions are fixed on the plat by protraction. Their positions are fixed on the ground by the survey process of running (and marking) line between marked corners, and setting monuments*.
>
> **3-137**. The protracted position of the *legal subdivision corner* on the survey plat is merely the first step in fixing the position of a corner. *The corner position is fixed by the running and marking of the lines*.
>
> **3-137**. A decision to set aside *previously fixed local survey legal subdivision corners* must be supported by evidence that goes beyond mere demonstration of technical error, reasonable discrepancies between former and new measurement, and less than strict adherence to restoration and subdivision rules. [Emphasis added.]

Thus, the "fixed local survey" *is* the "legal subdivision." In this case that would have been the Moorhead survey. The court's opinion in this case is badly flawed, and repugnant to federal law and common sense. Unfortunately, it is worse than that. This case has become the posterchild for the First Surveyor Concept, apparently first articulate by Walt Robillard in *Evidence and Procedures for Boundary Location*. From the Sixth Edition (2011) at page 335, we find the following:

> "At times, the surveyor must determine whether he or she is retracing an 'original survey' or a 'first survey.'… Initially the surveyor must determine whether the creating surveyor actually ran the creating line and then reduced the survey to notes or the description was created on paper and then a surveyor subsequently placed that description on the ground. When a parcel or parcels are created on paper, without a survey being conducted, and the surveyor is later requested to place one of these paper-described parcels on the ground, this survey should be considered the 'first' survey, in that it is the first survey to be placed on the ground after the description. The difference is that whereas the original survey controls, the first survey is nothing more than an opinion by the surveyor of where the written description should be placed. As such, it is always open to collateral attack." (Referencing *Rivers v. Lozeau*). BACK TO PAGE ONE

"Always open to collateral attack," regardless of reliance, regardless of acquired *bona fide* private property rights, regardless of the intent of the original developer/grantor, regardless of the peace and tranquility in the neighborhood, regardless of any consideration except for precise measurements. The results of this aberrant surveying philosophy are well documented in the court cases and in the physical evidence found on the ground—can you say "pincushion corner"?

Robillard singlehandedly created a new role for the land surveyor out of a seriously flawed court opinion that runs contrary to common sense and federal law. The First Surveyor Concept has become widely adopted in our western states and is the basis for rejecting as-contemplated-under-federal-law original section subdivision corners, such was established by the Moorhead survey in the present case, because either proper procedure wasn't followed or the results weren't 'close enough.'

The assault unleashed by this case on the *bona fide* private property rights of American citizens across the country is incalculable—but palpable. As with the court's opinion in this case, too many surveyors have no clue what they are doing and the damage they are causing. This is a serious problem for the future of land surveying, as we know it. Only God knows how long society will put up with surveyors moving their property corners around on the whim of the next surveyor to come along.

[viii] Given the above discussion, it is now obvious that the court is making an erroneous statement here and has not correctly interpreted federal law on the issue of the subdivision of sections, as contemplated by the federal government (i.e., the original common grantor).