



In a decision that embraces the use of modern-day technology to assist the trier of fact, the Ninth Circuit recently [ruled](#) that neither a Google Earth satellite image nor a program-generated digital "tack" of GPS coordinates placed on the satellite image is hearsay for purposes of proving a defendant's location at the time of arrest.

Defendant Paciano Lizarraga-Tirado was convicted of illegally re-entering the United States as a previously removed alien. He appealed the conviction, arguing that he was on the Mexico side of the U.S.-Mexico border at the time of his arrest. At trial, one of the arresting Border Patrol agents testified that she recorded the GPS coordinates of the location of arrest using a handheld GPS device. An exhibit of a Google Earth satellite image depicting the area of arrest and marked with a digital "tack" of the GPS coordinates provided by the

arresting agent was admitted into evidence over the defendant's objection that the image was hearsay. Hearsay—an out of court statement offered to prove the truth of the matter asserted—is inadmissible as evidence unless an exception applies because a witness should ideally testify under oath, in the presence of the trier of fact, and subject to cross-examination. The Ninth Circuit concluded that the Google Earth satellite image, absent any labels or markers, is not hearsay because a statement must make an "assertion" (be testimonial in character) to be hearsay and a photograph that merely depicts the location of arrest does not make an assertion. As for the "tack" labeled with GPS coordinates, the Ninth Circuit acknowledged the risk of both human error and program error but explained away both. A "tack" can be placed by a Google Earth user in two ways: (1) by manually clicking a spot on the image, which results in a tack that can be labeled by the user, and (2) by typing in GPS coordinates into Google Earth, allowing the program to generate a tack at the appropriate spot on the image. The Ninth Circuit concluded that the first method (a user's manual labeling of a tack) is classic hearsay because the user is making an assertion as to the location of something in particular, and the user could label the tack with incorrect GPS coordinates and thereby misstate the true location of the event at issue. Regarding the second method of placing a tack (where Google Earth generates a tack based on GPS coordinates typed into the program), the Ninth Circuit concluded that the program-generated tack is not hearsay because a "statement" for hearsay purposes is defined as a person's oral or written assertion, not a machine's. The court acknowledged that program-generated assertions may not necessarily be accurate, but explained that such concerns can be addressed by the rules of authentication and [Federal Rule of Evidence 901](#), which require the proponent of evidence to show that the evidence "is what the proponent claims it is." Here, the rule would potentially allow for authentication of the Google Earth program-generated evidence by, for example, calling a witness to testify regarding the reliability of the program or the court taking "judicial notice" of the program's reliability. The federal rules of evidence permit courts to take "[judicial notice](#)" of a "fact that is not subject to reasonable dispute" because it is generally known within the court's territorial jurisdiction or it can be readily determined by a reliable source. But Lizarraga-Tirado did not raise an authentication objection at trial or on appeal, and thus the Ninth Circuit did not directly address whether the evidence was properly authenticated. Although the record in this case was silent as to whether the tack was placed manually or by Google Earth using GPS coordinates typed into the program, the Ninth Circuit took "judicial notice" that the tack must have been program-generated because entering those GPS coordinates on Google Earth generated a tack identical to the one shown on the image admitted at trial. In many cases, courts have commented on the importance of taking "judicial notice" in only limited circumstances because of its potential to bypass safeguards involved in the usual process of proving facts. And while a party has the right to be heard on the propriety of taking judicial notice, and in criminal cases the court is to instruct the jury that it need not accept the noticed fact as conclusive, a court's taking "judicial notice" of the reliability of evidence has the potential to erode parties' rights to have a case determined by competent evidence and by testimony given under oath, in the presence of the trier of fact, and subject to cross-examination. The Ninth Circuit decision here embraced the technological tools available to assist the trier of fact in finding facts in a case, but it remains to be seen whether in practice this decision will erode procedural protections provided by the rules of evidence. At a minimum, the opinion highlights the importance of evaluating both hearsay and authenticity issues when offering evidence involving technological tools.

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