VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

HARRISON NEAL, Plaintiff, v, FAIRFAX COUNTY POLICE DEPARTMENT, et al., Defendants.	)	Case No. CL-2015-5902 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION AND STATEMENT OF MATERIAL FACTS

Plaintiff, HARRISON NEAL ("Neal"), should be granted summary judgment because, based on the undisputed material facts, defendants'[1] long-term storage and use of automated license plate reader ("ALPR") data pertaining to Neal's vehicular travel violates the requirements of the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 *et seq.* ("Data Act") and therefore entitles Neal to appropriate relief under Va. Code § 2.2-3809.[2]

An ALPR is a device that captures every license plate number that comes within its field of vision and, after converting the image to a searchable, alphanumeric format, stores that tag number in a searchable database, along with the precise date, time, and location at which it was recorded. ALPRs are typically mounted on police vehicles or on stationary objections, where they may record thousands of license plate numbers a day. (Compl. ¶ 6).

The Data Act was enacted, among other reasons, because the General Assembly found

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[1] The defendants, the Fairfax County Police Department and Colonel Edwin C. Roessler, Jr., the Chief of Police, are frequently referred to, for convenience, simply as "FCPD."

[2] The parties have agreed that should Mr. Neal prevail on the merits, an award of reasonable attorneys' fees under Va. Code § 2.2-3809 will be addressed subsequently.

that personal privacy was "directly affected by the extensive collection, maintenance, use and dissemination of personal information,"[3]; that "[t]he increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from these practices,"[4]; and that "[a]n individual's opportunities to secure employment, insurance, credit, and his right to due process, and other legal protections are endangered by the misuse of certain of these personal information systems,"[5]. Accordingly, "In order to preserve the rights guaranteed a citizen in a free society" the legislature promulgated the Act to "establish procedures to govern information systems containing records on individuals." Va. Code § 2.2-3800(B)(4).

In 2013, in response to an inquiry from the State Police, then-Attorney General of Virginia Kenneth Cuccinelli, II, determined that the Data Act governs law enforcement agencies' collection and storage of information using ALPRs. (2013 Op. Va. Att'y Gen. 7, Compl. Ex. C, the "AG Opinion").

The AG Opinion determined that ALPR information constitutes "personal information" as defined in Va. Code § 2.2-3801:

> Data collected utilizing LPR technology falls within this statutory definition, as, for example, it may assist in locating an individual data subject, documenting his movements, or determining his personal property holdings. The collection of such information may adversely affect an individual who, at some point in time, may be suspected of and or charged with a criminal violation. Accordingly, data collected by an LPR generally meets the definition of "personal information" and thus falls within the scope of the Data Act.

AG Opinion at 3.

The inquiry from the State Police described two different ways of using ALPR data, "an

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[3] Va. Code § 2.2-3800(B)(1)
[4] Va. Code § 2.2-3800(B)(2)
[5] Va. Code § 2.2-3800(B)(3)

'active' manner, whereby law enforcement collects, evaluates, and analyzes the LPR data in real time to determine the relevance to an ongoing case or emergency,[6] and, alternatively, a 'passive' manner, whereby law enforcement collects unanalyzed data for potential future use if a need for the collected data arises respecting criminal or terroristic activities." *Id.* at 1-2.

The Attorney General ultimately concluded that law enforcement agencies violate the Data Act's requirements when they engage in the "passive" use of ALPRs: that is, the persistent maintenance and use of the captured, tagged, and converted license plate image data "for potential future use if a need for the collected data arises respecting criminal or terroristic activities." (Compl. Ex. C at 4.) The Virginia State Police changed their policy to conform to the AG Opinion; FCPD has refused to do so. Its standard operating procedure provides that each record captured by ALPRs is stored in a database for up to one year (Compl. Ex. A at 5), providing FCPD with historical travel and location data on hundreds of thousands of people who live, work, and travel in Fairfax County. Furthermore, FCPD is party to a Memorandum of Understanding that allows law enforcement agencies in other jurisdictions, including Maryland, Washington, D.C., and Northern Virginia, access to FCPD's ALPR data. (Compl. ¶ 12.)[7]

ALPR images of Neal's personal automobile and Virginia license plate were captured, converted, and stored[8] in searchable form by the ALPR system, and, as provided in FCPD's

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[6] Typically, agencies maintain a "hot list" of vehicles relevant to current investigations, and the ALPR checks each license plate it records against the list. Records that do not match any on the hot list are discarded within 24 hours. The AG Opinion found that this "active" use of ALPRs does not violate the Data Act, and Plaintiff does not challenge such use of the technology in this suit.

[7] FCPD shares ALPR data collected with other law enforcement agencies in the greater Washington, D.C. area. See documents produced by Defendants, Exhibits 1, 2 and 3. Additionally, a few FCPD employees "maintain working relationships with neighboring jurisdictions" and "[f]rom time to time these agencies may call or email [FCPD] requesting a query of our LPR database for a license plate associated with a crime or investigation." Def. FCPD Answers to First Set of Interrogatories #4. See Exhibit 4.

[8] FCPD's response to Neal's FOIA request, described at Compl. ¶¶ 13-14, is attached to the Complaint as Exhibit B. It includes two sheets of paper, each of which contains two pictures of Neal's vehicle and a chart indicating the precise time, date, and location at which the photographs were taken.

standard operating procedures, were subject to being queried, read, or retrieved at the discretion of FCPD for at least 364 days.

The parties have distilled their dispute to a single question of law[9]: whether or not the information collected, stored, and archived with respect to Neal's personal automobile constitutes "personal information" as defined in the Data Act – an issue that this Court has already resolved in Neal's favor. If it does, and thereby is thus subject to the strictures of that Act, the parties agree that FCPD's long-term storage and "passive use" of Neal's license tag archive data ("LTA Information") does not comport with one or more of the requirements for personal information systems under the Data Act, Va. Code § 2.2-3803, and violates one or more of Neal's rights as a "data subject" as provided in Va. Code § 2.2-3806, thereby making him an "aggrieved party" entitled to equitable relief. *Id.*

STANDARD OF REVIEW

Summary judgment under Rule 3:20 of the Rules for the Supreme Court of Virginia is appropriate when there are no material facts in dispute. *Thurmond v. Prince William Prof'l Baseball Club, Inc.*, 265 Va. 59, 64, 574 S.E.2d 246, 250 (2003). A grant of summary judgment may be based upon undisputed facts established by the pleadings, the orders made at a pretrial conference, and the admissions in the proceedings. *Turner v. Lotts*, 244 Va. 554, 556, 422 S.E.2d 765, 766-67 (1992). Summary judgment is rare, but it is appropriate "when it clearly appears that one of the parties is entitled to judgment within the framework of the case." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5, 82 S.E.2d 588, 590 (1954).

ARGUMENT

[9] A list of the material undisputed facts upon which Plaintiff relies, with references to the record, is attached as Appendix A. The parties have stipulated to the authenticity of documents produced during discovery for purposes of these cross motions for summary judgment.

The Data Act governs the collection, storage, and dissemination of "personal information" in an "information system" by government agencies. The Act is necessary because the General Assembly found:

1. An individual's privacy is directly affected by the extensive collection, maintenance, use and dissemination of personal information;

2. The increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from these practices;

3. An individual's opportunities to secure employment, insurance, credit, and his right to due process, and other legal protections are endangered by the misuse of certain of these personal information systems; and

4. In order to preserve the rights guaranteed a citizen in a free society, legislation is necessary to establish procedures to govern information systems containing records on individuals.

Va. Code § 2.2-3800(B)(4). Neal must prevail on summary judgment because FCPD – a government agency covered by the Act – stored Neal's LTA information for at least 365 days[10] without any particularized need, in violation of the Data Act.

I. NEAL'S LTA INFORMATION, LIKE ALL FCPD'S ALPR DATA, IS PERSONAL INFORMATION AS DEFINED BY THE DATA ACT.

"'[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent.'" *Conger v. Barrett*, 280 Va. 627, 630, 702 S.E.2d 117, 118 (2010) (alteration in original) (quoting *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983)). "'When the language of a statute is unambiguous, we are bound by the plain meaning of that language.'" *Commonwealth v. Morris*, 281 Va. 70, 76, 705 S.E.2d 503, 505 (2011) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)).

[10] FCPD's SOP allows for storage of ALPR data for 364 days. However, FCPD has at times stored ALPR data for up to 730 days as a result of incorrect computer storage settings. See documents produced by Defendant, Exhibit 5.

And "'[i]f a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.'" *Id.* (quoting *Conyers*, 273 Va. at 104). *Commonwealth v. Amerson*, 281 Va. 414, 418-19, 706 S.E.2d 879, 882-83 (2011).

Both the plain language and the express purposes of the Data Act establish that ALPR data are personal information. The Data Act broadly defines "personal information" to ensure that individuals are protected from government abuse regardless of the type of information or technology or method employed to gather such information. Personal information is:

> *all* information that (i) describes, *locates* or *indexes anything about an individual* including, *but not limited* to his social security number, driver's license number, *agency-issued identification number*, student identification number, real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record; or (ii) affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; *and the record of his presence,* registration, or membership in an organization or activity, or admission to an institution.

Va. Code § 2.2-3801 (emphasis added).

The statute is deliberately comprehensive, encompassing "all information" that describes, locates, or indexes "*anything* about an individual" or allows *any* inference about an individual's "personal characteristics," activities, or associations. Va. Code § 2.2-3801 (emphasis added). The list of examples of personal information in the definition is expressly non-exclusive. ("Use of those words [but not limited to] manifests a legislative intent that the statute not be given an *'expressio unius'* construction."). *Surles v. Mayer*, 48 Va. App. 146, 164, 628 S.E. 2d 563, 572 (2006) (quoting *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 528 (1979)).

Among the specific examples of what constitutes "personal information," the legislature included the category "agency-issued identification number." It is difficult to understand how the tag number assigned by the DMV, a state agency, in connection with Neal's auto registration,

is anything other than an "agency-issued identification number." Like a driver's license number or a social security number, Neal's LTA information, which FCPD admits it stores in its ALPR database (along with the vehicle's location information), is a unique "identification number" which has been "assigned" by a state agency (the DMV) to Neal and his automobile.

Even if license plate numbers were not an "agency-issued identification number," ALPR data would still be personal information because it creates a "record of his presence" as contemplated by Section 2.2-3801. A license plate record contains a photograph of the license plate in searchable, alphanumeric form, the precise date, time, and location that the photo was taken, and is maintained in the database for a year. (Compl. ¶ 6.) If a particular vehicle repeatedly appears at a certain location over the course of a year, inferences may be drawn about the driver's physicians, place of worship, school, memberships, and travel routes.

In the related context of GPS monitoring, the U.S. Supreme Court has noted that location data is sensitive because it can reveal "a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *See United States v. Jones,* 132 S. Ct. 945, 955 (2012). "The Government can store such records and efficiently mine them for information years into the future." *Id.* at 955-56. The Court explained that GPS monitoring "is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Id.* at 956 (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)). The same observations apply to the passive use of ALPRs, with this significant difference: GPS devices collect location information about specific persons, usually on the basis of suspected of criminal activity. The passive use of ALPRs, on the other hand, collects location information from every one of thousands of vehicles that travel within their range, not on the

basis of any individualized suspicion, but voraciously, capturing within its net cars -- and their owners and probable drivers -- who, except in an infinitesimal number of instances, have no connection whatsoever with wrongdoing.

License plate numbers are also "personal information" for the independent reason that they "index" personal information that is readily accessible to FCPD, in any number of databases easily available to FCPD. ALPR technology is expressly designed to work in combination with other vast and powerful collections of "Big Data,"[11] including but not limited to data maintained by the Virginia Division of Motor Vehicles (DMV) (Compl. ¶ 19), to uncover a host of personal characteristics, transactions, connections, and behaviors.[12] Armed with nothing more than a person's license plate number, FCPD may readily obtain from DMV or another law enforcement agency[13] (or even an internet resource) a huge trove of sensitive and highly personal information,

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[11] Another example of the unexpected ways in which "big data" information can be (and frequently is) cross-referenced with license plate data involves the DEA Office of Special Intelligence. That office operates DICE (Deconfliction and Information Coordination Endeavor), which is a national deconfliction tool "designed to exploit information from communication related sources." Deconfliction items available on DICE include phone numbers, email addresses, financial accounts, license plates, and URL/IP addresses. DICE checks the National License Plate Reader Program (NLPRP) data repository for crossing information. See documents produced by Defendant, Exhibit 6.

[12] According to a study conducted by Cynthia Lum, a former law enforcement officer and professor at George Mason University, that specifically examined the FCPD ALPR program, there is a continuum of ALPR uses. The primary use is "an immediate check of a motorists' license plate in order to detect whether that vehicle or license plate has been stolen or whether the particular vehicle is the subject of a search related to an investigation." A second point involves connecting scanned ALPR data to a "secondary data source associated with those plates.... This involves linking the ALPR data with records from a state's Department of Motor Vehicles." At this step, the ALPR information is linked to the "registered owner of the vehicle and then to a portion of that owner's motor vehicle record." The third point on the continuum involves connecting the ALPR data with "tertiary databases by using motor vehicle information to identify persons of interest." The police run the license plate number for the registered owner and then run the owner for the existence of an open warrant, which may include registered sex offenders, those delinquent on child support payments, recently released violent offenders, etc. The fourth point on the continuum uses the long-term storage of data from ALPRs as a storehouse "preserv[ed] for investigative purposes." The final point on the continuum is using ALPR data for predictive analysis. Here the collected data is used to "determine patterns of behavior and movements in order to anticipate and prevent crime." See documents produced by Defendant, Exhibit 7.

[13] For example, FCPD can combine ALPR data with NCIC data (a nationwide, computerized index of criminal justice information) to learn an ALPR data subject's record with respect to criminal history, fugitive status, association with stolen properties, connection to missing persons, terror watch lists, local and interstate warrant status, motor vehicle registrations, property ownership, and even traffic and parking violations. See documents produced by Defendant, Exhibit 8. Indeed, LexisNexis offered to run

including information expressly identified as deserving of protection in the Data Act, such as social security number, date of birth, and address. Va. Code § 2.2-3801.

Like LTA Information, many of the types of personal information listed in the statute are essentially random strings of characters that are not inherently descriptive of a person's appearance or activities. *See* Va. Code § 2.2-3801 (including "social security number, driver's license number, [and] agency-issued identification number" among types of "personal information.") The power of these numbers, and their danger when misused, is not that they convey information about an individual in and of themselves, but that they easily lead to other information that is profoundly private. ALPR records do not consist only of license plate numbers; they include the precise date, time, and location at which the license plate was observed. As explained above, such information may be deeply revealing of a person's activities and associations, and are decidedly within the category of "all information that . . . *affords a basis for inferring* . . . things done by or to such individual . . . and *the record of his presence* . . . in an . . . activity." Va. Code § 2.2-3801 (emphasis added).

Interpreting "personal information" to include LTA Information is entirely consistent with what is often referred to as "personally identifiable information" ("PII") within the fields of law enforcement, intelligence-gathering, personal privacy, big data, and civil liberties. The Department of Homeland Security ("DHS") defines PII as "any information that permits the identity of an individual to be directly or indirectly inferred, including any information that is linked or linkable to that individual..."[14] Final registration information that is obtained through

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FCPD ALPR data through their vast legal databases to "see if any corresponding associations pop up ...." See documents produced by Defendant, Exhibit 9. The almost limitless plethora of databases that can be combined and cross-referenced with one another through a network or the internet is what makes the suspicionless long-term storage and potential search of passive ALPR data so dangerous to the public's privacy rights.

[14]U.S. DEPT. OF HOMELAND SECURITY, HANDBOOK FOR SAFEGUARDING SENSITIVE PERSONALLY IDENTIFIABLE INFORMATION (MARCH 2012),

the use of LPRs is PII according to the DHS definition and standards. *Id.*

A. The AG Opinion Which Concluded That Information Collected With ALPRs Is Personal Information Is Entitled To Due Consideration

The 2013 AG Opinion found that the information collected with ALPRs constitutes "personal information" as defined in the Data Act. The Data Act therefore prohibits law enforcement from using the technology to collect and store such data when no need for such data has been "clearly established in advance" and it is "not properly classified as criminal intelligence information or otherwise related directly to law enforcement investigations and intelligence gathering respecting criminal activity." Va. Code §2.2-3800(C)(2); §52-48. The Attorney General found that law enforcement agencies violate these requirements when they engage in the "passive" use of ALPR data, that is, the persistent maintenance, storage, and use of vehicular travel data "for potential future use if a need for the collected data arises respecting criminal or terroristic activities." (Compl. Ex. C at 4). The thousands of records that are passively stored, for no particular reason, and subject to query every day are not relevant to any current investigation, but are kept in searchable databases in case they may possibly be useful later.

The Attorney General's reasonable interpretation of the statute is "entitled to due consideration." *Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998). Moreover, the correctness of that interpretation is significantly bolstered by the legislative activity that took place in the 2015 General Assembly Session, when the legislature refused to adopt a Governor's amendment that would have allowed for the passive use and storage of

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HTTPS://WWW.DHS.GOV/SITES/DEFAULT/FILES/PUBLICATIONS/HANDBOOK%20FOR%20SAFEGUARDING%20SENSITIVE%20PII_0.PDF

ALPR data for up to sixty days.[15] "The legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view. *Beck v. Shelton,* 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) (quoting *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E.2d 603, 605-06 (1983)).

B. This Court Has Already Determined That Neal's LTA Information Is Personal Information.

On August 28, 2015, Judge Grace Burke Carroll overruled FCPD's demurrer by determining, as a matter of law, that Neal's LTA Information is personal information, governed by the Data Act. See Ex. 11, Order with transcript incorporated by reference. Judge Carroll ruled, *inter alia:* "this Court finds that that information is personal information...Otherwise what would be the point of holding that information?" See Transcript incorporated in Order. No new facts or considerations have emerged since Judge Carroll made that ruling, and her determination should remain the law of the case.

None of the material facts have changed since that ruling. Nothing with respect to the applicable law has changed since then, either. This Court should not lightly ignore or depart from Judge Carroll's decision. Although a ruling from a previous stage of the proceedings is not clothed with the full protection of the "law of the case," until the losing party has had an

[15] HB 1673 (House 94-Y, 2-N; Senate 37-Y, 0-N) and SB 965 (Senate 38-Y, 0-N; House 97-Y, 0-N) passed by overwhelming majorities to allow law enforcement agencies to maintain passive ALPR data for up to seven days, and no more; it also expressly included ALPR data as "personal information" and prohibited the unauthorized use of such data. The Governor proposed an amendment to expand the ability of law enforcement agencies to passively collect and maintain ALPR data for up to 60 days. The General Assembly rejected the amendments, but could not override the Governor's veto. It is clear that the General Assembly agreed with the AG Opinion that the current definition of personal information already encompasses ALPR data, but that it was also aware that some local police agencies, like FCPD, believed otherwise, and continued to collect and store vast numbers of ALPR records for long periods. This legislative action plainly reveals that the General Assembly knew of and relied upon the AG Opinion in deciding to keep the current version of the statute -- authoritatively interpreted by the Attorney General to prohibit all passive storage and use of ALPR data, but misunderstood by some localities – rather than to adopt an amendment that would have permitted localities to keep the data for as much as 60 days.

opportunity to appeal, *Robbins v. Robbins*, 48 Va. App. 466, 474, 632 S.E.2d 615, 619 (2006), such prior rulings are nevertheless, if not clearly erroneous, entitled to respect and consideration. For prudential reasons of judicial economy and fairness, once a court decides a rule of law, that decision should ordinarily govern the same issues in subsequent stages of the same matter. *Arizona v. California*, 460 U.S. 605, 618-19; *see also, Fisher v. Right Aid Corp.*, 2012 U.S. Dist. LEXIS 22720 at 7, (D. Md. Feb. 23, 2012) ("Such a rule promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.").

Although trial courts have the power of self-contradiction, they generally will not exercise it. *Rawls v. Smith*, 2001 Va. Cir. LEXIS 26 (Southampton County 2001). To do so would compromise the goal of finality and opens the door for judge shopping. *Id.* at 5 ("[I]f one trial judge felt free to revisit another's prior rulings—at least on any routine basis—the specter of judge shopping would become all too real. A better recipe for strife and inefficiency could hardly be imagined."); *see also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991) ("When an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched what has already been done...Accordingly, traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court..."). For these reasons, trial courts will generally decline to reverse earlier rulings by another judge unless such determinations were clearly erroneous. *Thomas v. Commonwealth*, 62 Va. App. 104, 111, 742 S.E.2d 403, 407 (2013). Here, Judge Carroll's decision should not be reversed because it is not clearly erroneous. Like the Attorney General, she found Neal's LTA Information to be personal information.

Pretrial rulings made by this Court, while not binding, should still guide these proceedings in the interests of judicial economy and fairness to the litigants, who otherwise

would be required to relitigate issues settled earlier in the case. Judge Carroll's reasonable determination (like Attorney General Cuccinelli's) that ALPR data constitutes "personal information" is correct and should be followed as the law of the case entitling Neal to summary judgment.

II. The Data Act Applies To Neal Because He Is A "Data Subject" About Whom Identifiable Particulars Are Located In An "Information System" That Includes, But Is Not Limited To, FCPD's ALPR Database.

In support of its demurrer, FCPD unsuccessfully argued that Neal's LTA Information in its database does not alone reveal the identity of the owner or driver of the automobile. Further, FCPD argued that one would have to query a different database in order to determine the name, address, social security number, and other highly sensitive information pertaining to the subject vehicle's owner. FCPD's argument falls apart because the number of databases is irrelevant. FCPD cannot circumvent the Data Act by breaking up the steps and ignoring that the silos communicate with each other and can be used in combination. Instead, the General Assembly designed the Data Act to protect the rights of any "data subject," that is, "an individual about whom personal information is indexed or *may be located* under his name, *personal number*, or *other identifiable particulars*, in an *information system*. Va. Code § 2.2-3801 (emphasis added).

An "information system" is:

> *the total components* and operations of a record-keeping process, including information collected or managed by means of *computer networks* and the *Internet*, whether automated or manual, containing personal information and the name, *personal number, or other identifying particulars* of a data subject.

Va. Code §2.2-3801. The ALPR database is part of an information system that contains personal information (*e.g.*, exact time, location, and means of travel) along with *identifying particulars* (*e.g.*, "*personal numbers*" such as a unique alphanumeric license plate issued to a readily identifiable owner and probable driver), about an individual (*e.g.*, the vehicle's owner or driver)

by means of *computer networks* and *the Internet*.

The definition of "information system" contains no requirement that the system be confined to one specific database or agency. FCPD enjoys instant access to the records of the Virginia Division of Motor Vehicles. Even without DMV access, an incredible range of sensitive personal information can be accessed in a matter of seconds using nothing more than a license plate number.[16] The Data Act was clearly written to reach the "total components and operations" of a "system of information" that is "collected or managed by means of computer networks or the Internet." This definition, which could hardly have been articulated more expansively, encompasses "the *total* components and operations of a record-keeping process," regardless of where or by whom the records are stored. Interpreting such broad language to exclude systems that may cross agency lines or that require some readily available cross-reference to yield the data subject's name would be unreasonable and contrary to the purpose of the Act.

The ALPR database would be of little use as an "an investigative tool to aid in the detection or investigation of terrorism or a series of related crimes" (FCPD SOP 11-039, Compl. Ex. A at 5), if FCPD could not use it, in a matter of seconds, to access the information available in the DMV database. The ALPR database and the DMV database represent two integral "components" and "operations" of an integrated "record-keeping process," which FCPD can manage by "automated or manual" means through "computer networks" and the "Internet." They are two inextricably complementary parts of "the total components and operations of a record-keeping process" that FCPD's ALPR surveillance system is designed to encompass.

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[16] The Court may take judicial notice of the ease with which a license plate number alone can be used to unlock intimate personal information about the owner (*e.g.*, name, address, mobile phone number, criminal background report, arrest records, DUI and DWI records, criminal driving violations, email address, vehicle VIN number, vehicle registration information) with just a few clicks of the mouse via readily accessible internet resources such as http://www.everify.com, http://lookup.dmvfiles.org, or https://www.searchquarry.com.

CONCLUSION

The Data Act applies to FCPD's ALPR program because Neal is a data subject about whose vehicular travel FCPD collected, stored, and used personal information within its overall information system without any showing of particularized need. Accordingly, FCPD's collection and use of Neal's personal information contravenes the Data Act, and this Court should follow the lead of Attorney General Cuccinelli and Judge Carroll and grant summary judgment to Neal.

Respectfully Submitted,

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APPENDIX A

STATEMENT OF UNDISPUTED FACTS

1. An ALPR is a device used to capture a photo of a license plate, as well as the date time, and location that the photo was taken. (Compl. ¶6).

2. The ALPR captures a photo of the license plate and optical character technology converts the image into data. ("Compl. Ex. C).

3. FCPD has ready access to databases operated by the Virginia Department of Motor Vehicles (DMV). (Compl. ¶ 19.) Armed with nothing more than a person's license plate number, FCPD may quickly obtain from the DMV specific types of data that are expressly included within the Data Act's definition of "personal information," such as social security number, date of birth, other vehicles owned or registered, lien information, and address.

4. Law enforcement agencies use ALPR data in two ways. First, agencies may maintain a "hot list" of license plate numbers, which may include the plates of vehicles that have been reported missing or that are suspected of involvement in a crime. Every time the ALPR scans a license plate, the scan is automatically checked against the hot list, so that target vehicles may be quickly identified.

5. Second, law enforcement may save the data associated with every license plate scan and store it in a large database (FCPD's LTA) for future reference, sometimes referred to as "passive" use. (Compl. ¶ 8).

6. Since at least 2010, FCPD has possessed one or more ALPRs. The equipment was provided to the FCPD as part of a grant from the United States Department of Homeland Security. (Compl. ¶ 9).

7. FCPD is party to a Memorandum of Understanding that allows law enforcement agencies in other jurisdictions, including Maryland, Washington, D.C., and Northern Virginia, to access FCPD ALPR data. (Compl. ¶ 12.)

8. FCPD adopted SOP 11-039 in January 2010 and pursuant to such SOP uses its ALPRs in both an "active" and "passive" manner. (Compl. ¶ 10 and Ex. C).

9. With respect to the "passive" use of ALPRs, FCPD retains ALPR data for 364 days pursuant to their SOP. (Answer ¶ 31 and Compl. Ex. C.)

10. The Data Act prohibits government agencies from collecting and storing personal information except when the need for such data has been "clearly established in advance." Va. Code § 2.2-3800(C)(2); (Compl. ¶ 20).

11. On February 13, 2013, then-Attorney General of Virginia Kenneth T. Cuccinelli, II, issued a legal opinion in response to an inquiry by the Virginia State Police on the use of ALPRs by Virginia law enforcement agencies in which he concluded that data collected with ALPRs is "personal information as defined by the Data Act." (Compl. ¶28; Ex 3).

12. The AG Opinion also concluded that "passive" use of ALPR technology is prohibited by the Data Act. (Compl. ¶¶ 26-27).

13. The State Police have modified their ALPR policies and practices to conform to the conclusions in the AG Opinion. Images that are not identified as relevant to an ongoing criminal investigation or prosecution are expunged within 24 hours. Mr. Neal does not challenge this type of use of ALPR data, which he refers to as "active" use. (Compl. ¶7).

14. On or about May 9, 2014, Mr. Neal submitted a request to the FCPD seeking all ALPR records related to a particular license plate number. On May 15, 2014, FCPD sent Mr. Neal a response saying that "[w]ithin the last 364 days, your tag was read twice by our ALPR

system." The response from FCPD also included two sheets of paper, each of which has two pictures of Mr. Neal's vehicle and a chart indicating the time and date at which the photographs were taken. (Compl. ¶¶ 13-14; Ex. B.)

APPENDIX B

Arizona v. California

Supreme Court of the United States

December 8, 1982, Argued ; March 30, 1983, Decided

No. 8, Orig.

Reporter
460 U.S. 605; 103 S. Ct. 1382; 75 L. Ed. 2d 318; 1983 U.S. LEXIS 137; 51 U.S.L.W. 4325; 36 Fed. R. Serv. 2d (Callaghan) 11

ARIZONA v. CALIFORNIA ET AL.

Subsequent History: Petition for Rehearing Denied June 20, 1983. Decree entered March 9, 1964. Amended decree entered February 28, 1966. Decided and supplemental decree entered January 9, 1979. Decided March 30, 1983. Second supplemental decree entered April 16, 1984.
Opinion reported: *373 U.S. 546*; decree reported: *376 U.S. 340*; amended decree reported: *383 U.S. 268*; opinion and supplemental decree reported: *439 U.S. 419*; opinion reported: *460 U.S. 605*.
Rehearing denied by *Arizona v. California, 462 U.S. 1146, 103 S. Ct. 3131, 77 L. Ed. 2d 1381, 1983 U.S. LEXIS 693 (1983)*
Supplemental opinion at *Arizona v. California, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194, 1984 U.S. LEXIS 225 (1984)*

Prior History: ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE AND MOTIONS TO INTERVENE.
Arizona v. California, 439 U.S. 419, 99 S. Ct. 995, 58 L. Ed. 2d 627, 1979 U.S. LEXIS 210 (1979)

Core Terms

reservations, decree, Tribes, irrigable, water rights, rights, special master, acreage, boundaries, River, parties, issues, disputed, practicably, determinations, perfected, secretarial, Basin, intervene, proceedings, acres, additional water, boundary dispute, adjudications, mainstream, agencies, reopen, cases, res judicata, allocations

Case Summary

Procedural Posture
The Court issued a decree in 1964 whereby intervenor United States acquired water rights for five Indian reservations. Petitioner tribes' asked to intervene and sought, with the United States, to have their water rights under the 1964 decree increased. The original parties and intervenor states filed exceptions to the special master's findings, which allowed the tribes to intervene and determined that the tribes were entitled to more water.

Overview

The Court granted the motions to intervene because (1) the tribes did not seek to bring new claims against the states, (2) the states' sovereign immunity under the *Eleventh Amendment* was not compromised, (3) the tribes met the standards for permissive intervention, *Fed. R. Civ. P. 24, (4)* the tribes' participation in litigation critical to their welfare should not be discouraged, and (5) the motion was timely. The court held that the prior determination of water rights precluded relitigation of the irrigable acreage issue with respect to lands identified in the 1964 decree because the Court's retention of discretion to correct certain errors, determine reserved questions, and modify the decree was subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated. The Court declined to increase tribal water rights based upon reservation boundaries extended by order of the Secretary of the Interior because those boundaries had not been finally determined within the meaning of the 1964 decree. The Court adopted the master's conclusions with respect to reservation boundaries that had been determined by judicial decree.

Outcome
The court granted the motions to intervene and held that the 1964 decree should be amended by providing to the respective reservations appropriate water rights to service the irrigable acreage that the special master found to be contained within the tracts adjudicated by judicial decree to be reservation lands. The court directed the parties to submit a proposed decree to carry the Court's opinion into effect.

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Native Americans > Water Rights

HN1 Nothing in the *Eleventh Amendment* has ever been seriously supposed to prevent a state's being sued by the United States.

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Permissive Intervention

Civil Procedure > Parties > Intervention > Intervention of Right

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Governments > Courts > Rule Application & Interpretation

HN2 The Federal Rules of Civil Procedure are only a guide to procedures in an original action, *Sup. Ct. R. 9.2*.

Governments > Native Americans > Civil Rights

Public Health & Welfare Law > Social Services > Native Americans

HN3 The Indians are entitled to take their place as independent qualified members of the modern body politic. Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Motions to Intervene

Civil Procedure > Parties > Intervention > Time Limitations

HN4 Permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN5 A provision of a Supreme court decree in an original proceeding that provides that any of the parties may apply at the foot of this decree for its amendment or for further relief and that the Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy, grants the Supreme Court power to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the decree.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN6 A judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest..

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN7 Law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Law of the case directs a court's discretion, it does not limit the tribunal's power.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN8 A provision of a Supreme Court decree in an original proceeding that provides that any of the parties may apply at the foot of this decree for its amendment or for further relief and that the Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy, is subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN9 A fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters

reliance on judicial action by minimizing the possibility of inconsistent decisions.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Real Property Law > Water Rights > General Overview

HN10 Certainty of rights is particularly important with respect to water rights in the western United States.

Real Property Law > Water Rights > General Overview

HN11 The doctrine of prior appropriation, the prevailing law in the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN12 Res judicata does not require all aspects of a case to be final before finality attaches.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Relief From Judgments > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN13 A provision of a Supreme Court decree in an original proceeding that provides that any of the parties may apply at the foot of this decree for its amendment or for further relief and that the Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy, does not contemplate a departure from the fundamental principles of finality and conclusiveness so as to permit retrial of factual or legal issues that were fully and fairly litigated 20 years ago.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Real Property Law > Water Rights > Water Dispute Procedures

HN14 The Supreme Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Contracts Law > ... > Discharge & Payment > Defenses > Failure of Consideration

HN15 If in cases with reservations of jurisdiction that involved equitable apportionment the United States Supreme Court's retention of jurisdiction is limited to the consideration of new issues and changed circumstances, rather than to permit the relitigation of factual determinations on which a decree has been based, a fortiori the reservation of jurisdiction in a case not governed by equitable apportionment is no broader.

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN16 Technological advances alone ought not to call for re-opening a complete decree.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Relief From Judgments > General Overview

Contracts Law > Formation of Contracts > Consideration > General Overview

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

HN17 Detrimental reliance is certainly relevant in a balancing of the equities when determining whether changed circumstances justify modification of a decree.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Contracts Law > Formation of Contracts > Consideration > General Overview

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

HN18 Even the absence of detrimental reliance cannot open an otherwise final determination of a fully litigated issue. Finality principles would become meaningless if an

adversarially determined issue were final only if the equities were against revising it.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Governments > Native Americans > Authority & Jurisdiction

HN19 The magnitude of the adjustment requested is relevant only after it is established that the underlying legal issue is one which should be redetermined.

Governments > Fiduciaries

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > Water Rights

HN20 As a fiduciary, the United States has full authority to bring the Winters rights claims for the Indians and bind them in the litigation.

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Real Property Law > Water Rights > General Overview

HN21 The United State's representation of varied interests in litigation involving water rights does not deprive decisions of the United States Supreme Court of finality.

Governments > Federal Government > Executive Offices

Governments > Native Americans > Water Rights

Torts > ... > Standards of Care > Special Care > Highly Skilled Professionals

HN22 A breach of the United States' duty to represent the tribes' interests is not demonstrated merely by showing that the government erred in its calculation of irrigable acreage, whether by oversight or, as viewed in retrospect, by an unnecessarily cautious litigation strategy. Certainly, a claim of inadequate representation is not found--at least not in a court of law--by sifting through testimony in Congress, Presidential speeches, and other commentary which discuss whether the government has at other times in other circumstances been slow to press Indian claims.

Administrative Law > Agency Adjudication > Informal Agency Action

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions

HN23 Secretarial orders do not constitute "final determinations" within the meaning of a Supreme Court decree in an original proceeding that provided for an adjustment of water rights in the event that the boundaries of the respective reservations are "finally determined."

Lawyers' Edition Display

Decision

Extent of irrigable acreage on Indian reservation lands used to calculate rights of Indian Tribes to waters of Colorado River, held not relitigable in interest of finality in regard to acreage on reservation lands omitted by United States in making calculations of Indian Tribes' water rights established in prior Supreme Court decree.

Summary

The United States Supreme Court, in a case within its original jurisdiction, had previously established the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the *Colorado River (Arizona v California (1963) 373 US 546, 10 L Ed 2d 542, 83 S Ct 1468*; decree, *(1964) 376 US 340, 11 L Ed 2d 757, 84 S Ct 755*). In doing so, the Court held in its opinion that the proper standard for calculating the water rights of the Indian Tribes was the practicably irrigable acreage that existed within the boundaries of the reservations. A provision of the 1964 decree declared that the Court retained jurisdiction of the case to modify the decree or grant further relief when proper. Another provision of the 1964 decree provided that the water rights of two of the reservations could be adjusted to take into account any change in irrigable acreage brought about when various reservation boundary disputes were finally determined. Later, a 1979 supplemental decree was entered by the Court, identifying the present perfected rights to the use of the mainstream water in each state and their priority dates as agreed upon by the parties (*Arizona v California (1979) 439 US 419, 58 L Ed 2d 627, 99 S Ct 995*). The 1979 decree also provided that the water rights of the remaining three reservations could also be adjusted when various boundary disputes regarding those reservations were finally determined. The five Indian Tribes were not parties to the proceedings leading to the two decrees, the Tribes' interest being represented by the United States government. The 1979 decree did not resolve the claims of the United States and the Indian Tribes that the Tribes' water rights should be increased to take into account reservation lands with irrigable acreage that had been omitted from the original calculations due to the United States' failure to claim them, and also new irrigable acreage that existed within land that had been newly

recognized to be within the reservation boundaries, both by orders of the United States Secretary of the Interior and by adjudications in separate lawsuits to quiet title to the lands. The Court referred these claims to a Special Master for determination. Granting the Indian Tribes' motions to intervene in the hearings on these claims, the Special Master issued a recommended decree, finding for the United States and the Indian Tribes on their claims.

On exceptions to the Special Master's report and recommended decree and motions to intervene, the United States Supreme Court sustained in part and overruled in part the exceptions to the Special Master's report, and granted the motions to intervene. In an opinion by White, J., joined by Burger, and Ch. J., Powell, Rehnquist, and O'Connor, JJ., it was held that (1) the motions of the Indian Tribes to intervene should be granted, since any *Eleventh Amendment* immunity of the states from an action by the Indian Tribes did not apply, and the Indians had met the requirements for permissive intervention, (2) the Indian Tribes' water rights should not be increased to take into account the omitted lands, since the interest in finality dictated against relitigation of the issue, and the provision in the 1964 decree allowing the Court to amend the decree or grant further relief when proper did not require otherwise, there also being no conflict of interest or legally inadequate representation on the part of the United States when representing the Indian Tribes' interests, (3) the Indian Tribes' water rights should not be increased to take into account the irrigable acreage existing within the new lands determined by the Secretary of the Interior to be within their reservation boundaries, the disputed boundaries not having been "finally determined" by the Secretary's order within the meaning of the provision in the 1964 decree, and (4) the Indian Tribes' water rights should be increased to take into account the irrigable acreage within the lands adjudicated to be within the reservation boundaries in the actions to quiet title, the actions having "finally determined" the disputed reservation boundaries within the meaning of the provision of the 1964 decree.

Brennan, J., joined by Blackmun, and Stevens, JJ., concurred in part and dissented in part, expressing the view that (1) the Indian Tribes' motions to intervene should be granted, (2) the Indian Tribes' water rights should be increased to take into account the lands omitted under the prior decree, since the interest in finality was limited, the Tribes would otherwise suffer a manifest injustice if the omitted lands were not included, and the states would not be substantially prejudiced by taking into account the omitted lands, and (3) the Special Master's resolution of the boundary disputes when taking into account the irrigable acreage within the boundaries newly recognized by the Secretary of the Interior, so as to increase the Indian Tribes' water rights, should be upheld.

Marshall, J., did not participate.

Headnotes

WATERS §18 > Colorado River -- water rights -- United States Supreme Court decree -- definition of right -- > Headnote:

LEdHN[1A] [1A]***LEdHN[1B]*** [1B]

For purposes of a United States Supreme Court decree, which had established the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, a "perfected right" is a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use; also for purposes of the decree, "present perfected rights" means perfected rights in existence as of June 25, 1929, the effective date of the Boulder Canyon Project Act (*43 USCS 617*).

INDIANS §32 > POSSESSIONS §88 > STATES §71 > establishment of water rights -- Colorado River -- intervention of Indian Tribes -- immunity of states -- Eleventh Amendment -- > Headnote:

LEdHN[2A] [2A]***LEdHN[2B]*** [2B]

In a case of original jurisdiction before the United States Supreme Court to establish the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, the motions of the five Indian Tribes to intervene in the proceedings before a Special Master appointed by the Court should be granted to allow them to seek to have their water rights increased above that granted in a previous decree of the Court, in which their interests were represented by the United States government, where the states may no longer assert any assumed sovereign immunity or immunity afforded by the *Eleventh Amendment* (there being no difference in the two sources of immunity in the present case), from a suit brought by the Indian Tribes regarding the water rights in question, the water right claims of the Tribes having originally been brought by the United States, for which no immunity under the *Eleventh Amendment* existed, and the Tribes do not seek to bring new claims against the states, but only seek to participate in the adjudication of their vital water rights that was commenced by the United States.

INDIANS §32 > STATES §71 > establishment of water rights -- intervention by Indian Tribes -- > Headnote:

LEdHN[3] [3]

In a case of original jurisdiction before the United States Supreme Court to establish the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, the motions of the five Indian Tribes to intervene in proceedings before a Special Master appointed by the Court should be granted to allow them to seek to have their water rights increased above that granted in a previous decree of the Court, in which their interests were represented by the United States government, where aside from the fact that the Court's own rules make clear that the Federal Rules of Civil Procedure are only a guide to procedures in an original action, the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules of Civil Procedure; their interests in the water rights have been and will continue to be determined in the litigation since the United States' action as their representative will bind the Tribes to any judgment, and the Indian Tribes are entitled to take their place as independent qualified members of the body politic, the states having shown no persuasive reasons why their interest would be prejudiced or the litigation unduly delayed by the Tribes' presence.

INDIANS §32 > JUDGMENT §66 > STATES §71 > WATERS §18.5 > determination of water rights -- Indian Tribes -- relitigation -- effect of prior decree -- finality -- > Headnote:

LEdHN[4A] [4A]*LEdHN[4B]* [4B]*LEdHN[4C]* [4C]*LEdHN[4D]* [4D]

The prior determination of the rights of five Indian Tribes to the Lower Basin waters of the Colorado River in a previous decree in a case of original jurisdiction before the United States Supreme Court precludes relitigation before the Court of the issue of the amount of irrigable acreage within recognized Indian reservation boundaries in order to consider the claims of the Tribes and the United States government that certain irrigable acreage was omitted when calculating the Tribes' water rights in the previous proceedings, in which the United States government represented the Indian Tribes, where (1) the principles of res judicata, even though the technical rules of preclusion are not applicable, advise against reopening the calculation of irrigable acreage, such recalculation running directly counter to the strong interests in finality in the litigation, which was brought to assure the states and private interests of the amount of water they could anticipate receiving from the Colorado River, (2) the provision in the previous decree allowing the Court to amend the decree or allow further relief when proper did not contemplate retrial of factual or legal issues fully and fairly litigated 20 years ago, the provision being mainly a safety net to avoid the preclusion under res judicata of adjusting the decree in light of unforeseeable changes in circumstances, (3) the Court does not reopen an adjudication in an original action concerning disputes over boundaries and water rights to reconsider factual determinations, even in cases where equitable apportionment governs the disputes, the reservation of jurisdiction in the present case, governed by federal laws establishing the Indian reservations and not by equitable apportionment, being no broader than where equitable apportionment does apply, (4) allowing relitigation of the Indian Tribes' claims may reopen relitigation of other issues as well, (5) any absence of detrimental reliance by the states on the previous decree cannot open an otherwise final decree, (6) the fact that the changes requested involved reallocation of less water than involved in the initial litigation does not allow litigation of the issue to be reopened, and (7) the absence of the Indian Tribes in the prior proceedings does not dictate or authorize relitigation of their rights, since the United States had full authority as their fiduciary to bring their claims and bind them to the litigation, and there was no showing that the United States was involved in an actual conflict of interest or that its representation was legally inadequate, a breach of the United States' duty to represent the Indian Tribes' interests not being demonstrated merely by a showing that the government erred in its calculation of irrigable acreage, whether by oversight or because of an unnecessarily cautious litigation strategy (Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

JUDGMENT §66 > STATES §71 > determination of water rights -- Indian Tribes -- Colorado River -- effect of prior decree -- finality -- > Headnote:

LEdHN[5] [5]

In a case of original jurisdiction before the United States Supreme Court regarding the establishment of the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, the claims of the United States and the Indian Tribes that certain irrigable acreage on the reservations was omitted when calculating the water rights of the Indian Tribes established under a prior decree of the Court would be res judicata if presented in a different proceeding, but such claims are not res judicata before the Court in the present case, where a provision in the prior decree allows the Court to amend the decree or provide further relief when proper.

JUDGMENT §66 > STATES §71 > determination of water rights -- effect of prior decree -- finality -- > Headnote:

LEdHN[6A] [6A]*LEdHN[6B]* [6B]

In a case of original jurisdiction before the United States Supreme Court regarding the establishment of the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, a provision in a prior decree of the Court establishing such rights grants the Court the power to correct certain errors, to determine reserved questions, and to make necessary modifications to the decree, but the decision whether to exercise such power is not governed by "law of the case" principles that allow a court to depart from its prior holding if it is clearly erroneous and would work a manifest injustice, where the doctrine was intended for the ordinary course of litigation, and its use would weaken to an intolerable extent the finality of the Court's decrees in original actions, particularly in a case governed by statutory rather than equitable criteria; rather, the provision in the prior decree must be given a narrower reading and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated, where, although the technical rules of preclusion are not strictly applicable, the principles underlying these rules should inform the decision whether to reopen litigation on an issue decided under the previous decree, and these principles are particularly applicable with respect to real property, certainty of rights being particularly important with respect to water rights in the Western United States.

JUDGMENT §66 > adjudication of issue -- conclusiveness -- policies -- > Headnote:

LEdHN[7] [7]

Res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment; nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive; to preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

BOUNDARIES §18 > INDIANS §32 > STATES §71 > WATERS §18.5 > water rights -- Indian Tribes -- Colorado River -- boundary determination by United States -- effect on prior decree -- > Headnote:

LEdHN[8A] [8A]*LEdHN[8B]* [8B]

In a case of original jurisdiction before the United States Supreme Court regarding the establishment of the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, the extension of reservation boundaries by order of the United States Secretary of the Interior has not "finally determined" disputed portions of the reservation borders within the meaning of provisions in the Court's previous decrees regarding the water rights in question that would otherwise allow the water rights of the Indian Tribes to be increased by taking into account the new irrigable acreage within the newly determined boundaries, where none of the parties to the prior decree, all of whom agreed to the stipulated provision, intended that ex parte secretarial determinations of the boundary issues would constitute "final determinations," none of the parties contending that the boundary dispute should not be judicially resolved at all. (Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

BOUNDARIES §18 > INDIANS §32 > STATES §71 > WATERS §18.5 > water rights -- Indian Tribes -- Colorado River -- adjudications of reservation boundary disputes -- effect on prior decree -- > Headnote:

LEdHN[9A] [9A]*LEdHN[9B]* [9B]

In a case of original jurisdiction before the United States Supreme Court regarding the establishment of the respective rights of three states and various federal establishments, including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, judicial adjudications of boundary disputes regarding the reservations, made in separate actions brought to quiet title to the land, have "finally determined" the reservation boundaries within the meaning of provisions in the Court's previous decrees establishing the Indian Tribes' water rights, such provisions allowing the water rights of the Indian Tribes to be increased by taking into account additional irrigable acreage within the new finally determined boundaries, where the states, although not parties to the adjudications nor bound by them in a res judicata sense, have not asserted that the adjudications were incorrect in determining that the parcels of land at issue were reservation lands.

BOUNDARIES §18 > INDIANS §32 > STATES §71 > WATERS §18.5 > determination of Indian reservation boundaries -- water rights -- Colorado River -- proper forum -- > Headnote:

LEdHN[10] [10]

In the case of original jurisdiction before the United States Supreme Court regarding the establishment of the respective rights of three states and various federal establishments,

including the reservations of five Indian Tribes, to the Lower Basin waters of the Colorado River, the Special Master appointed by the Court is not required to adjudicate the disputes over the new reservation boundaries established by orders of the Secretary of the Interior, the new boundaries increasing the Indian Tribes' water rights beyond that which were established by a previous decree of the Court, where one of the states has already brought suit to adjudicate the dispute in a Federal District Court, which is an available and suitable forum to settle the disputes, the previous decree anticipating that, if at all possible, boundary disputes should be settled in forums other than the Special Master.

Syllabus

This extended litigation over rights to the waters of the Colorado River began in 1952 when Arizona brought an original action in this Court against California and several of its public agencies. Later, Nevada, New Mexico, Utah, and the United States became parties. Following the report of a Special Master, the major issue in the case -- the apportionment of water among the lower basin States -- was resolved in the Court's opinion, *373 U.S. 546*, and 1964 decree, *376 U.S. 340*. A supplemental decree identifying present perfected rights was entered in 1979. *439 U.S. 419*. Pursuant to the Court's initial opinion and decree, the United States acquired water rights for the reservations of five Indian Tribes that are dependent upon the river for their water. The proper standard for measuring the water rights intended for the reservations was held to be "practicably irrigable acreage," and the Special Master's calculation of the amount of such acreage was approved. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased to account for (1) "omitted lands" -- irrigable lands within recognized reservation boundaries for which water rights were not claimed in the earlier litigation; and (2) "boundary lands" -- irrigable lands claimed to now have been finally determined to lie within the reservations. A Special Master appointed by the Court issued a preliminary finding allowing the Tribes to intervene and a final report concluding that the Tribes are entitled to the additional rights.

Held:

1. The Indian Tribes' motions to intervene are granted. Since the Tribes do not seek to bring new claims or issues against the States but only ask leave to participate in an adjudication of their water rights that was commenced by the United States, this Court's judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the *Eleventh Amendment* is not compromised. Moreover, the Tribes satisfy the standards for permissive intervention set forth in the Federal Rules of Civil Procedure, which serve as a guide in an original action in this Court. Pp. 613-615.

2. The States' exceptions to the Special Master's conclusion that the Tribes are entitled to increased water rights for omitted lands are sustained. The prior determination of Indian water rights in the 1964 decree precludes relitigation of the irrigable acreage issue. Article IX of the 1964 decree -- which provided that this Court would retain jurisdiction of the action "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy" -- must be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated. The principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage to which the Tribes are entitled. To apply the law-of-the-case doctrine in this Court's original actions, as the Special Master would here, would weaken the finality of the decrees in such actions, particularly in a case such as this one which turns on statutory rather than Court-fashioned equitable criteria. Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interests in finality in this litigation, a major purpose of which has been to provide the necessary assurance to the States and various private interests involved of the amount of water they can anticipate receiving from the Colorado River. Article IX did not contemplate a departure from these fundamental principles so as to permit retrial of factual or legal issues that were fully and fairly litigated 20 years ago. The absence of the Indian Tribes in the prior proceedings does not require relitigation of their reserved rights. Pp. 615-628.

3. The States' and state agencies' exceptions to the Special Master's finding that certain reservation boundaries extended by order of the Secretary of the Interior have been "finally determined" within the meaning of Article II(D)(5) of the 1964 decree -- which provided that the quantities of water fixed in the provisions of the decree setting forth the reservations' water rights in the Colorado River shall be subject to appropriate adjustment by agreement or decree of this Court in the event "the boundaries of the respective reservations are finally determined" -- are sustained. But with respect to the boundaries determined by judicial decree in certain quiet title actions, the exceptions are overruled, and the Special Master's conclusion that these boundaries were "finally determined" within the meaning of Article II(D)(5) is adopted. Accordingly, the 1979 supplemental decree in this case should be amended to provide to the respective reservations appropriate water rights to service the irrigable acreage the Special Master found to be contained within the

tracts adjudicated by the specified quiet title judgments to be reservation land. Pp. 628-641.

Exceptions to the Special Master's Report sustained in part and overruled in part, and motions to intervene granted.

Counsel: Carl Boronkay and Ralph E. Hunsaker argued the cause for the State of Arizona et al. With Mr. Boronkay on the brief for the California Agencies were Warren J. Abbott, Maurice C. Sherrill, Justin McCarthy, Ira Reiner, Gilbert W. Lee, John W. Witt, C. M. Fitzpatrick, and Joseph Kase, Jr. With Messrs. Hunsaker and Boronkay on the briefs for the State of Arizona et al. were George Deukmejian, Attorney General of California, R. H. Connett and N. Gregory Taylor, Assistant Attorneys General, Douglas B. Noble and Emil Stipanovich, Jr., Deputy Attorneys General, Roy H. Mann, Messrs. Reiner, Lee, Witt, Fitzpatrick, Sherrill, McCarthy, and Kase, Richard Bryan, Attorney General of Nevada, and James LaVelle, Chief Deputy Attorney General. Mr. Hunsaker filed a brief for the State of Arizona.

Lawrence A. Aschenbrenner argued the cause for the Chemehuevi Indian Tribe et al. With him on the briefs were Arlinda F. Locklear, John J. Mullins, Jr., Thomas W. Fredericks, Robert S. Pelcyger, and Raymond C. Simpson. Mr. Simpson filed a brief for the Quechan Tribe.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were Solicitor General Lee, Assistant Attorney General Dinkins, Myles E. Flint, Tom W. Echohawk, and Scott B. McElroy. *

Judges: WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN and STEVENS, JJ., joined, post, p. 642. MARSHALL, J., took no part in the consideration or decision of the case.

Opinion by: WHITE

Opinion

[*607] [***326] [**1385] JUSTICE WHITE delivered the opinion of the Court.

The problem of irrigating the arid lands of the Colorado River Basin has been confronted by the peoples of that region [*608] for 2,000 years and by Congress and this Court for many decades. Today we conclude another chapter in this original action brought to determine rights to the waters of the Colorado River. In earlier proceedings in this case, the United States, an intervenor in the principal action, acquired water rights for five Indian reservations that are dependent upon the river for their water. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased.

I

The Colorado River Compact of 1922 divided the waters of the Colorado River between the Upper- and Lower-Basin States, but fell short of apportioning the respective shares among the individual States. Nor did the Boulder Canyon Project Act of 1928, 45 Stat. 1057, as amended, *43 U. S. C. § 617 et seq. (1976 ed. and Supp. V)* (Project Act), a vast federal effort to harness and put to use the waters of the lower Colorado River, expressly effect such an apportionment. The principal dispute that became increasingly pressing over the years concerned the respective shares of the Lower-Basin States, particularly the shares of California and Arizona.

This litigation began in 1952 when Arizona, to settle this dispute, invoked our original jurisdiction, *U.S. Const., Art. III, § 2, cl. 2*, by filing a motion for leave to file a bill of complaint against California and seven [**1386] public agencies of the State. [1] Arizona sought to confirm its title to water in the Colorado River system and to limit California's annual consumptive use of the river's waters. Nevada intervened, praying for determination of its water rights; Utah and New Mexico were joined as defendants; and the United States intervened, seeking water rights on behalf of various federal establishments, including the reservations of five Indian [*609] Tribes -- the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe.

After lengthy proceedings, Special Master Simon Rifkind filed a report recommending a certain division of the Colorado River waters among California, Arizona, and Nevada. The parties' respective exceptions to the Master's report were extensively briefed and the case was twice argued. The Court for the most part agreed with the *Special*

* Briefs of amici curiae were filed by Michael R. Thorp for the Pyramid Lake Tribe; and by M. Byron Lewis and John B. Weldon, Jr., for the Salt River Project Agricultural Improvement and Power District et al.

[1] Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

Master, 373 U.S. 546 (1963), and our views were carried forward in the decree found at 376 U.S. 340 (1964).

The long and rich story of the efforts on behalf of the States involved to arrive at a mutually satisfactory plan of apportionment is set forth in the Special Master's report and the Court's opinion and need not be repeated here. We agreed with the Special Master that the [***327] allocation of Colorado River water was to be governed by the standards set forth in the Project Act rather than by the principles of equitable apportionment which in the absence of statutory directive this Court has applied to disputes between States over entitlement to water from interstate streams. Nor was the local law of prior appropriation necessarily controlling. The Project Act itself was held to have created a comprehensive scheme for the apportionment among California, Nevada, and Arizona of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries. Congress had decided that a fair division of the first 7.5 million acre-feet of such mainstream waters would give 4.4 million acre-feet to California, 2.8 million acre-feet to Arizona, and 300,000 acre-feet to Nevada. Arizona and California would share equally in any surplus. 373 U.S., at 565.

LEdHN[1A] [1A]Over strong objection, we also agreed with the Special Master that the United States had reserved water rights for the Indian reservations, effective as of the time of their creation. Id., at 598-600. See Winters v. United States, 207 U.S. 564 (1908). These water rights, having vested before [*610] the Project Act became effective on June 25, 1929, were ranked with other "present perfected rights," [2] and as such were entitled to priority under the Act. 373 U.S., at 600. Rejecting more restrictive standards for measuring the water rights intended to be reserved for the reservations, we agreed with the Master and the United States, speaking on behalf of the Tribes, that the "only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." Id., at 601. We further sustained the Master's findings, arrived at after full, adversary proceedings, as to the various acreages of practicably irrigable land on the different reservations. *Ibid.* These findings [**1387] were subsequently incorporated in our decree of March 9, 1964. Article II(D) of our decree specified each reservation's entitlement to diversions from the mainstream.

LEdHN[1B] [1B]

Not all aspects of the case were finally resolved in the 1964 decree. First, in the course of determining irrigable acreage on the reservations, the Master resolved a dispute between the United States and the States with respect to the boundaries of the Colorado River and Fort Mojave Indian Reservations, generally finding that the reservations were smaller than the United States claimed them to be. Although we based the water rights decreed to these two reservations on the irrigable acreage within the boundaries determined by the Special Master, we found that it had been "unnecessary" [***328] for the Special Master finally to have determined these [*611] boundaries [3] and provided in Article II(D) that the quantities of water provided for the Fort Mojave Indian Reservation and the Colorado River Indian Reservation "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S., at 345. See Part V, *infra*. Second, Article VI of the decree provided that the parties, within two years, should provide the Court with a list of the outstanding present perfected rights in the mainstream waters. Finally, in Article IX of the decree we retained jurisdiction over the case for the purpose of further modifications and orders that we deemed proper.

On January 9, 1979, we entered a supplemental decree identifying the present perfected rights to the use of the mainstream water in each State and their priority dates as agreed to by the parties. 439 U.S. 419. We also decreed that, in the event of shortage, the Secretary of the Interior shall, before providing for the satisfaction of these present perfected rights, first provide for the satisfaction in full of the Indian water rights set forth in the 1964 decree for the five reservations. We expressly noted that these quantities, fixed in paragraphs 1 through 5 of Article II(D) of the 1964 decree "shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 439 U.S., at 421. The 1979 decree thus resolved outstanding issues in the litigation. But before that decree

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[2] A "perfected right" is a "water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use." 376 U.S., at 341. "Present perfected rights" means perfected rights in existence as of June 25, 1929, the effective date of the Project Act. *Ibid.*

[3] "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." 373 U.S., at 601.

was entered new questions arose: The five Indian Tribes, ultimately joined by the United States, made claims for additional water rights to reservation lands.

[*612] Because the United States had represented their interests, the Indian Tribes previously had no part in the litigation. In 1977, however, the Fort Mojave, Chemehuevi, and Quechan (Fort Yuma) Indian Tribes moved for leave to intervene as indispensable parties. By April 10, 1978, the Colorado River Indian Tribes and the Cocopah Indian Tribe had also filed petitions for intervention. Three of the Tribes sought intervention to oppose entry of the 1979 decree that was to set the priority order for water rights in the Colorado River. The Tribes also raised claims for additional water rights appurtenant to two types of land: (1) the so-called "omitted" lands -- irrigable lands, within the recognized 1964 boundaries of the reservations, for which it was said that the United States failed to claim water rights in the earlier litigation; and (2) "boundary" lands -- lands that were or should have been officially recognized as part of the reservations and that had assertedly been finally determined to lie within the reservations within the meaning of the 1964 decree.

[***329] Initially, both the state parties and the United States opposed intervention. Subsequently, [**1388] the United States dropped its opposition to the Tribes' intervention. Still later, on December 22, 1978, the United States joined the Indians in moving for a supplemental decree to grant additional water rights to the reservations. In our 1979 decree, we denied the motion of the Fort Mojave, Chemehuevi, and Quechan Tribes to intervene insofar as they sought to oppose entry of the supplemental decree. Other matters raised by their motion, as well as that of the United States' and the other two Tribes, were not resolved. We appointed Senior Judge Elbert P. Tuttle Special Master and referred these motions to him. *439 U.S., at 436-437*.

II

After conducting hearings, the Special Master issued a preliminary report on August 28, 1979, granting the Indian Tribes leave to intervene in subsequent hearings on the [*613] merits. In addition, the Special Master concluded that certain boundaries of the reservations had now been finally determined within the meaning of Article II(D) of the 1964 decree, primarily because of administrative decisions taken by the Secretary of the Interior. These decisions purported considerably to enlarge the reservations affected and, with respect to the Colorado River and Mojave Reservations, were for the most part reassertions of the positions submitted by the United States to Special Master Rifkind, rejected by him, and left open by us to later final resolution. We refused to allow the States to file exceptions at that time, *444 U.S. 1009 (1980)*, and the Special Master held further hearings on the merits.

On February 22, 1982, the Special Master issued his final report. The Special Master's findings were almost entirely consistent with the position of the United States and the Indian Tribes. Rejecting the States' strong objections to reopening the question of whether more practicable irrigable acreage actually existed than the United States claimed, Special Master Rifkind found, and our 1963 opinion and 1964 decree specified, the Special Master concluded that each of the Tribes was entitled to additional water rights based on land that he determined to be irrigable over and beyond that previously found. Furthermore, based on his earlier boundary determination, the Master determined that there was additional practicably irrigable acreage for which the Indians were entitled to further water rights. The States have filed exceptions to both of these determinations, as well as to various factual findings concerning the amount of practicably irrigable acreage.

III

The States have also refiled their exceptions to the Special Master's preliminary findings allowing the Indian Tribes to intervene in the action. We consider this matter first.

LEdHN[2A] [2A]We agree with the Special Master that the Indian Tribes' motions to intervene should be granted. The States oppose [*614] the motions and insist that, without their consent, the Tribes' participation violates the [***330] *Eleventh Amendment*. [4] Assuming, *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe, *United States v. Minnesota, 270 U.S. 181, 193-195 (1926)*, the States involved no longer may assert that immunity with respect to the subject matter of this action. Water right claims for the Tribes were brought by the United States. ***HN1*** Nothing in the *Eleventh Amendment* "has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi, 380 U.S. 128, 140 (1965)*. See, *e. g., United States v. Texas, 143 U.S. 621, 646 [**1389] (1892)*; *United States v. California, 297 U.S. 175 (1936)*; *United States v. California, 332 U.S. 19, 26-28 (1947)*. The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the

[4] There are suggestions in the papers that the States' sovereign immunity is in some respect distinct from the immunity afforded by the *Eleventh Amendment*. Insofar as the question of intervention posed here is concemed, we appreciate no such difference.

controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the *Eleventh Amendment* is not compromised. See, *e. g.*, *Maryland v. Louisiana, 451 U.S. 725, 745, n. 21 (1981)*.

LEdHN[2B] [2B]

LEdHN[3] [3]The States also oppose intervention on grounds that the presence of the United States insures adequate representation of the Tribes' interests. The States maintain that the prerequisites for intervention as of right set forth in *Rule 24 of the Federal Rules of Civil Procedure* are not satisfied. Aside from the fact that our own Rules make clear that ***HN2*** the Federal Rules are only a guide to procedures in an original action, see this Court's Rule 9.2; *Utah v. United States, 394 U.S. 89, 95 (1969)*, it is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention **[*615]** set forth in the Federal Rules. The Tribes' interests in the water of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. *Heckman v. United States, 224 U.S. 413, 444-445 (1912)*. Moreover, ***HN3*** the Indians are entitled "'to take their place as independent qualified members of the modern body politic.'" *Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968)*, quoting *Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)*. Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged. [5] The States have failed to present any persuasive reason why their interests would be prejudiced or this litigation unduly delayed by the Tribes' presence. The Tribes' motions **[***331]** to intervene are sufficiently timely with respect to this phase of the litigation. Of course, ***HN4*** permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration. The motions to intervene are granted.

IV

LEdHN[4A] [4A]We turn now to the first major question in the case: whether the determination of practicably irrigable acreage within recognized reservation boundaries should be reopened to consider claims for "omitted" lands for which water rights could have been sought in the litigation preceding the 1964 decree. The Special Master agreed with the United States and the Tribes that it is not too late in the day to modify the 1964 adjudication and decree, notwithstanding his own finding that "[the] claim in the original case . . . embraced the totality of water rights for the Reservation lands." Tuttle Report, at 31. We disagree with the Special Master and sustain **[*616]** the exceptions filed by the States and state agencies to his conclusion. In our opinion, the prior determination of Indian water rights in the 1964 decree precludes relitigation of the irrigable acreage issue.

Arizona v. *California*, unlike many other disputes over water rights that we have adjudicated, has been and continues to be governed mainly by statutory considerations. The primary issue in the case -- the allocation of the waters of the Lower Colorado River Basin among the States -- was resolved by the distribution of waters intended **[**1390]** by Congress and written into the Project Act. The question of Indian water rights -- an important but ancillary concern -- was also decided by recourse to congressional policy rather than judicial equity. We held that the creation of the reservations by the Federal Government implied an allotment of water necessary to "make the reservation livable." *373 U.S., at 599-600*. See *Winters v. United States, 207 U.S. 564 (1908)*; *Cappaert v. United States, 426 U.S. 128, 141 (1976)*. We rejected the argument, urged by the States, that equitable apportionment should govern the question. We were "not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined by the doctrine of equitable apportionment." *373 U.S., at 597*. "Moreover, even were we to treat an Indian reservation like a State, equitable apportionment would still not control, since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations." *Ibid.*

We went on to reject Arizona's further arguments that (1) the doctrine of *Pollard's Lessee v. Hagan, 3 How. 212 (1845)*, and *Shively v. Bowlby, 152 U.S. 1 (1894)*, prevented the Federal Government from reserving waters for federally reserved lands, *373 U.S., at 597*; (2) water rights could not be reserved by Executive Order, *id., at 598*; and (3) there was insufficient evidence that the United States intended to reserve water for **[***332]** the Tribes, *id., at 598-600*.

[*617] The standard for quantifying the reserved water rights was also hotly contested by the States, who argued that the Master adopted a much too liberal measure. Our decision to rely upon the amount of practicably irrigable acreage contained within the reservation constituted a rejection of Arizona's proposal that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," *i. e.*, by the number of Indians. The practicably-irrigable-acreage standard was preferable because how many Indians

[5] For this reason, the States' reliance on *New Jersey v. New York, 345 U.S. 369 (1953) (per curiam)*, where the Court denied the city of Philadelphia's request to intervene in that interstate water dispute on the grounds that its interests were adequately represented by the State of Pennsylvania, is misplaced.

there will be and what their future needs will be could "only be guessed," *id., at 601*. By contrast, the irrigable-acreage standard allowed a present water allocation that would be appropriate for future water needs. *Id., at 600-601*. Therefore, with respect to the question of reserved rights for the reservations, and the measurement of those rights, the Indians, as represented by the United States, won what can be described only as a complete victory. A victory, it should be stressed, that was in part attributable to the Court's interest in a *fixed* calculation of future water needs. Applying the irrigable-acreage standard, we found that the Master's determination as to the amount of practicably irrigable acreage, an issue also subject to adversary proceedings, was reasonable. Our subsequent decree reflected this judgment. *376 U.S. 340 (1964)*.

LEdHN[5] [5]***LEdHN[6A]*** [6A]The Tribes and the United States now claim that certain practicably irrigable acreage was "omitted" from those calculations. [6] There is no question that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata. That would be true here were it not for Article IX of the 1964 decree which provides: [7]

[*618] **[**1391]** "Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

We agree with the United States and the Tribes that ***HN5*** this provision grants us power to correct certain errors, to determine reserved questions, and, if necessary, to make modifications in the decree. We differ in our understanding of the circumstances which make exercise of this power appropriate.

[*333]** The Special Master believed that the decision whether to exercise that discretion should be governed by "law of the case" principles. Unlike the more precise requirements of res judicata, ***HN7*** law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. See 1B J. Moore & T. Currier, Moore's Federal Practice para. 0.404 (1982) (hereinafter Moore). [8] Law of the case directs a court's discretion, it does not limit the tribunal's power. *Southern R. Co.* v. *Clift, 260 U.S. 316, 319 (1922)*; *Messenger v. Anderson, 225 U.S. 436, 444 (1912)*. In that sense, the doctrine might appear applicable here. But law of the case doctrine was understandably crafted with **[*619]** the course of ordinary litigation in mind. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of res judicata and collateral estoppel will attach. To extrapolate wholesale law of the case into the situation of our original jurisdiction, where jurisdiction to accommodate changed circumstances is often retained, [9] would weaken to an intolerable extent the finality of our decrees in original actions, particularly in a case such as this turning on statutory rather than Court-fashioned equitable criteria.

For the following reasons, we hold that ***HN8*** Article IX must be given a narrower reading and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.

LEdHN[6B] [6B] ***LEdHN[7]*** [7]First, while the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision. It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment. 1B Moore para. 0.407, pp. 931-935; R. Field, B. Kaplan, & K. Clermont, Materials on Civil Procedure 860 (4th ed. 1978). Nevertheless, ***HN9*** a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. *Montana v. United States, 440 U.S. 147, 153 (1979)*; *Federated Department Stores, Inc.* v. *Moitie, 452*

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[6] The United States attributes the omission of irrigable acreage to the complexity of the case. The state parties maintain that the omission was in part a tactical decision made to portray the irrigable-acreage standard as a reasonable basis for calculating the reservations' water needs.

[7] The parties do not contend that absent Article IX the decree would not be final. Although this Court had not entered a decree on other present perfected rights, *439 U.S. 419 (1979)*, at the time the United States moved to reopen the irrigable-acreage question, the pendency of the former does not undermine the finality of our earlier determination of the latter. See *Restatement (Second) of Judgments § 13, Comment e* (1982) ***HN6*** ("A judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest").

[8] Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. See, *e. g.*, *White v. Murtha, 377 F.2d 428, 431-432 (CA5 1967)*.

[9] Of course, this case does not present the issue of the proper standard to be applied when a district court issues an equitable decree and retains jurisdiction.

U.S. 394, 398 (1981); Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1877). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of [**1392] inconsistent decisions." Montana v. United States, supra, at 153-154.

[*620] [***334] In no context is this more true than with respect to rights in real property. Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. [10] Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open. *Minnesota Co.* v. National Co., 3 Wall. 332, 334 (1866); United States v. Title Ins. Co., 265 U.S. 472, 486 (1924). ***HN10*** Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. Colorado River Water Conservation District v. United States, 424 U.S. 800, 804 (1976). ***HN11*** The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights. [11]

LEdHN[4B] [4B]Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system. "In the arid parts of the West . . . claims to water for use on federal reservations inescapably [*621] vie with other public and private claims for the limited quantities to be found in the rivers and streams." United States v. New Mexico, 438 U.S. 696, 699 (1978). If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." Id., at 705.As Special Master Tuttle recognized, "[not] a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications." Tuttle Report, at 46. Not only did the Metropolitan Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocation cannot help but exacerbate potential water shortage problems for these projects and their States. [12]

HN13

[***335] Article IX did not contemplate a departure from these fundamental principles so as to permit retrial of factual or legal issues [**1393] that were fully and fairly litigated 20 years ago. The Article does not explicate the conditions under which changes in the decree are appropriate. Very little discussion surrounded the Article, which was included in Master Rifkind's [*622] recommended decree as an agreed-upon provision. [13] This in itself suggests that the Article was

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[10] See E. Kempf, Abraham Lincoln's Philosophy of Common Sense, Part 1, p. 346 (1965).

[11] Prior appropriation law serves western interests by encouraging the diversion of water for irrigating otherwise barren lands and for other productive uses, and by ensuring developers that they will continue to enjoy use of the water. "Appropriation law, developed in the arid West, is usually thought of as a system for water-short areas. Where there is not enough for everyone, the rule of priority insures that those who obtain rights will not have their water taken by others who start later." F. Trelease, Cases and Materials on Water Law 11 (3d ed. 1979).

[12] The United States and the dissenting Justices contend that the States did not enjoy certainty of the extent of their water rights until quantification of non-Indian present perfected rights was accomplished in 1979. Of course, not everything was settled in 1964, but most important things were and one of them was the extent of irrigable acreage within the uncontested boundaries of the reservations. The presence of other uncertainties did not render the 1964 decree an interlocutory judgment subject to relitigation in all respects. Moreover, under the United States' line of argument, echoed by the dissent, no aspect of our 1964 decision could safely be relied upon due to the incomplete determination of present perfected rights. As already noted, ***HN12*** res judicata does not require all aspects of a case to be final before finality attaches. See n. 7, *supra*. We agree with the States that the uncertainties not resolved until 1979 were not of a nature and magnitude to deter the States from relying upon our 1964 decree with respect to the litigated issue of irrigable acreage on the reservations.

[13] Rifkind Report, at 360. The Imperial Irrigation District was the only party expressly to address Article IX, noting that the Article would preserve the Court's power to correct determinations that are "erroneous or unworkable." Supplement and Amendment to Imperial Irrigation District's Form of Decree of Court 11 (Dec. 1963). The District's favoring the inclusion of Article IX may have been predicated on the States' more general argument for equitable apportionment, under which an open-ended decree could permit adjustments as increases in non-Indian water needs outstripped Indian water utilization. We do not read the District's submission as recommending the relitigation of settled issues nor do we attach particular weight to the source as an indicium of the Court's intent in including Article IX.

mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of res judicata, precluded ourselves from adjusting the decree in light of unforeseeable changes in circumstances.

This reading is supported by the proceedings before Master Rifkind. The record demonstrates that it was the understanding of the parties and Master Rifkind's intention that the calculation of practicably irrigable acreage be final. [14] [*623] That was our understanding as well, and was reflected in his and our choice of the practicably-irrigable-acreage standard as a measure which would allow [***336] a *fixed* present determination of future needs for water. [15] It is untenable that the parties, the Special Master, and this Court would have intended Article IX to undercut the prevailing understanding that the calculation of practicably irrigable acreage was to be final without so much as discussing the subject.

[**1394] This interpretation of Article IX is consistent with our action in prior original cases. Our long history of resolving disputes over boundaries and water rights reveals a simple fact: ***HN14*** This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were [*624] correctly made. In two original cases in which provisions virtually identical to Article IX were included, subsequent modifications were made in reaction to changed circumstances. *Wisconsin v. Illinois, 278 U.S. 367 (1929), 281 U.S. 179*, decree entered, *281 U.S. 696 (1930)*, temporarily modified, *352 U.S. 945 (1956), 352 U.S. 983 (1957)*, superseded, *388 U.S. 426 (1967)*; *New Jersey v. New York, 283 U.S. 336*, decree entered, *283 U.S. 805 (1931)*, modified, *347 U.S. 995 (1954)*. [16] The Court's purpose in retaining jurisdiction in those cases can be gleaned from the respective reports of the Special Masters, which note the need for flexibility in light of changed conditions and questions which could not be disposed of at the time of an initial decree. [17] This interpretation [***337] is also consistent with the role

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[14] Master Rifkind's intention that the calculation of irrigable acreage be final is most clearly evident in one exchange with United States counsel on the precise subject. Upon being informed that some mesa lands not included within the Government's submission might be irrigable if an additional pumping plant were constructed, Master Rifkind inquired whether the Government's maps "illustrate and define" the irrigable acreage. Mr. Warner, representing the United States, stated that he was probably not "authorized to give anything away that we ought to claim," but could offer assurance that "we do not propose to ask a decree allowing water . . . for use on the Indian reservations in excess of the proof we are now offering in this matter." Master Rifkind then inquired: "And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?" Mr. Warner replied: "That is correct," and Master Rifkind noted: "that is the way we are going to be bound. This is a statement that I will take seriously." Counsel then responded that if there was a mistake in the Indian water rights claims, the United States would "ask [for] leave to correct it." This suggestion was clearly rebuffed by the Master, who labeled the categories of irrigable lands indicated on the maps as constituting a "Bill of Particulars," subject to correction only for clerical error. Tr. of Arg. before Special Master Rifkind 14,154-14,157. The dissent, *post*, at 649, in seizing upon Mr. Warner's statement that he was not "authorized to give anything away," forgets that our interest in the exchange is that it reflects Master Rifkind's intent that the parties be bound by the submission on irrigable acreage.

Additional passages of similar import are collected in Appendix A to Brief for State Parties in Support of Exceptions (May 20, 1982). See also n. 15, *infra*.

[15] Master Rifkind's discussion of the disadvantages of an open-end decree make this clear:

"One possibility would be to adopt an open-end decree, simply stating that each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment. However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply." Rifkind Report, at 263-264.

For this reason, the Master concluded that "the most feasible decree" would be to establish a water right for each of the reservations in the amount necessary to irrigate all of the practicably irrigable acreage on the reservations and to satisfy related stock and domestic uses. This would "establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." *Id., at 265*.

[16] *Wisconsin* v. *Illinois* was an action brought to prevent Illinois and the Sanitary District of Chicago from diverting water from Lake Michigan for the purpose of diluting and carrying away the sewage of Chicago. The Court's decree was temporarily modified in 1956 because of an "emergency in navigation caused by low water in the Mississippi River." *352 U.S. 945*. In *New Jersey* v. *New York*, litigation concerning the diversion of water from the Delaware River system, the decree was amended with the consent of the parties to take account of changed conditions concerning the discharge of sewage.

In *Wyoming v. Colorado, 259 U.S. 419 (1922)*, the Court corrected an inadvertent omission four months after the entry of a decree. *260 U.S. 1 (1922)*. See 2 R. Clark, Waters and Water Rights 338 (1967).

[17] See Report of Special Master on Re-Reference in *Wisconsin* v. *Illinois*, O. T. 1929, Nos. 7, 11, and 12, Orig., p. 145 ("It is recommended that the Court should retain jurisdiction as there are

of a "court of equity to modify an injunction in adaptation to changed [*625] conditions." *Railway Employes v. Wright, 364 U.S. 642, 647 (1961)*; *United States v. Swift & Co., 286 U.S. 106, 114 (1932)*.

We note that our cases with similar reservations of jurisdiction involved equitable apportionment where our latitude to correct inequitable allocations injustices is at its broadest. ***HN15*** If even there our retention of jurisdiction was limited to the consideration of new issues and changed circumstances, rather than to permit the relitigation of factual determinations on which a decree has been based, *a fortiori* the reservation of jurisdiction in this case, not governed by equitable apportionment, is no broader. [18]

We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable-acreage standard itself should be reconsidered in [**1395] light of our decisions in *United States v. New Mexico, 438 U.S. 696 (1978)*, and *Washington v. Washington Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979)*, and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other. It would be counter to the interests of all parties to this case to open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree. These considerations, combined with the practice in our original cases and the [*626] strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated.

Because we have determined that the principles of res judicata advise against reopening the calculation of the amount of practicably irrigable acreage, and that Article IX does not demand that we do so, it is unnecessary to resolve the bitterly contested question of the extent to which the States have detrimentally relied on the 1964 decree. ***HN17*** Detrimental reliance is certainly relevant in a balancing of the equities when determining whether changed circumstances justify modification of a decree. We believe that a certain manner [***338] of reliance has occurred, *supra, at 621*, but ***HN18*** even the absence of detrimental reliance cannot open an otherwise final determination of a fully litigated issue. Finality principles would become meaningless if an adversarially determined issue were final only if the equities were against revising it. [19]

Similarly, it is hardly determinative that the changes requested by the United States and the Indian Tribes do not involve reallocations of as much water as was involved in the initial litigation. Aside from the fact that the requested increases of between 15 and 22 percent in the amount of irrigable acreage determined in the initial decree hardly constitute "relatively minor adjustments," ***HN19*** the magnitude of the adjustment requested is relevant only *after* it is established that the underlying legal issue is one which should be redetermined.

LEdHN[4C] [4C]Finally, the absence of the Indian Tribes in the prior proceedings in this case does not dictate or authorize relitigation of their reserved rights. ***HN20*** As a fiduciary, the United States had full authority to bring the *Winters* rights claims for the [*627] Indians and bind them in the litigation. *Heckman v. United States, 224 U.S. 413 (1912)*. [20] We find

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questions which it is impossible to dispose of at this time in full justice to the parties . . . and unforeseen contingencies may arise"); Report of Special Master in *New Jersey* v. *New York*, O. T. 1930, No. 16, Orig., p. 199 (recommending retention of jurisdiction because "the future is necessarily fraught with uncertainties"). See also Report of Special Master in *Nebraska* v. *Wyoming*, O. T. 1944, No. 6, Orig., p. 10 ("Recommendation is further made of retention by the Court of jurisdiction to amend the decree upon a showing of such change of conditions as might render the operation of the decree inequitable").

[18] It is not seriously contended that the claim for omitted lands is predicated upon an unforeseeable change in circumstances. The only suggested pertinent development since the prior adjudication is the advent of more sophisticated irrigation technologies that would increase the amount of practicably irrigable acreage. Clearly, however, such technological improvements will continue indefinitely, and if a basis for recalculating the extent of irrigable acreage, the decree would have no finality at all. The United States concedes that ***HN16*** "technological advances alone ought not to call for re-opening a complete decree," Reply Brief for United States 18. We agree.

[19] We are not convinced of the dissent's assessment that "the balance of hardships in this case is decidedly in the Tribes' favor." *Post*, at 655. As the dissent recognizes, "the Tribes are not currently able to use all the rights allocated to them under the 1964 decree," *post*, at 653. When viewed against the serious water shortages faced by all people, including other Tribes, in the Lower-Basin States, this is hardly the mark of manifest injustice.

[20] Contrary to the dissent, *post*, at 650, *Heckman*'s square holding that the United States' representation of Indian claims is binding, *224 U.S., at 443-446*, has not been undermined, let alone "repudiated," by subsequent cases. *Cramer v. United States, 261 U.S. 219 (1923)*, was a suit brought by the United States to confirm the right of several individual Indians to possess certain lands patented to a third party. A bare citation, *id., at 232*, is the extent of *Heckman*'s role in the case. *Shoshone Tribe v. United States, 299 U.S. 476 (1937)*, and *United States v. Creek Nation, 295 U.S. 103 (1935)*, the other cases relied upon by the dissent, involve suits brought in the Court of Claims by Indian Tribes seeking compensation from the United

no merit in the Tribes' contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests arising from the Government's interest in securing water [**1396] rights for other federal property, or otherwise. The United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holdings in the West. See, *e. g.*, *Colorado River Water Conservation District v. United States, 424 U.S., at 805*. ***HN21*** The Government's representation of these varied interests does not deprive our decisions of finality. In this case, there is no demonstration that the United States, as a fiduciary, was involved in an actual conflict of interest. From the initiation of this [***339] case, the Government has taken seriously its responsibility to represent the Tribes' interests, and we have no indication that the Government's representation of the Tribes' interests with respect to the amount of practicably irrigable acreage was legally inadequate. Recognition of Indian water rights would not diminish [*628] other federally reserved water rights. [21] Under the Project Act, there was no basis for the Government to believe that Indian water rights and water needs for other *federal* property were in direct competition. Our 1963 opinion bore this out: perfected rights for the use of federal establishments were charged against the States' apportionment, *373 U.S., at 601*, and, in times of shortage, under the decree, the Secretary of the Interior retained broad power to ensure that perfected rights for the use of federal establishments are satisfied. *Id., at 593-594*; *376 U.S., at 343-344*. Indeed, the substantial water allocations awarded the Tribes reflect the competency of the United States' representation. We believe the issue of practicably irrigable acreage was fully and fairly litigated in 1963.

LEdHN[4D] [4D]

Accordingly, we sustain the States' exceptions to this aspect of the Special Master's report.

V

We now address the dispute over reservation boundaries, which first arose during the hearing before Special Master Rifkind.

A

In the course of the proof by the United States as to the extent of the irrigable acreage of the Colorado River and Fort Mojave Reservations, California disputed the location of [*629] the boundaries of these reservations. On the theory that failure to adjudicate these controversies would leave non-Indian users in doubt as to the water available for their use, and would leave the Secretary in doubt as to how to operate Hoover Dam and the mainstream works below, the former Master deemed it necessary to resolve the boundary disputes, see Rifkind Report, at 256-257, and he held several days of hearings on these matters. Tr. 19,992 *et seq.* California objected to these proceedings. The State felt it lacked authority to represent the private individuals who claimed title to land the United States contended was part of the reservations. *Id.*, at 19,998-20,000. The Master nevertheless ruled on the boundary issues, for the most part in California's favor -- that is, the Master concluded that the reservations covered a smaller area than the United States claimed and that the irrigable acreage and reserved [***340] water rights should be determined on this basis.

California maintained its position before this Court that the Master should not have determined the disputed boundary of the Colorado River Reservation. California [**1397] contended that it would be unfair to prejudice any of the parties in future litigation over land titles or political jurisdiction by approving findings on a tangential issue never pleaded by the United States. The State also observed that postponing determination of the boundary dispute would not materially affect the priority of the water right to which the disputed land was entitled, since both the Indians and the Palo Verde Irrigation District, in which California would place the disputed land, had high priorities. [22] California did not specifically object to the Master's resolution of the Fort Mojave boundary dispute, no doubt because, on the merits of

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States for alleged takings of Indian lands. Neither of these cases even mentions, let alone qualifies, *Heckman*. Nor does either case involve the Government's binding of Indian interests in court. If these cases are at all relevant, it is to suggest that in an appropriate case the Tribes' remedy for inadequate representation by the Government may lie in the Court of Claims. We, of course, do not intimate any view now as to whether such remedy is available.

[21] ***HN22*** A breach of the United States' duty to represent the Tribes' interests is not demonstrated merely by showing that the Government erred in its calculation of irrigable acreage, whether by oversight or, as viewed in retrospect, by an unnecessarily cautious litigation strategy. Certainly, a claim of inadequate representation is not found -- at least not in a court of law -- by sifting through testimony in Congress, Presidential speeches, and other commentary which discuss whether the Government has at other times in other circumstances been "slow to press Indian claims." The dissent's reliance on such sources, *post*, at 650-652, only highlights that a claim of inadequate representation cannot be supported on this record. Indeed, the dissent concedes that the United States has not violated ordinary standards of attorney care as to be liable for inadequate representation.

[22] Opening Brief of California Defendants in Support of Their Exceptions 279-283 (May 22, 1961).

this issue, the Master entirely agreed with the State's position.

The United States responded that the Master acted properly by resolving the boundary disputes:

[*630] "The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters." [23]

The United States did not file any exceptions to the boundary determinations of the Special Master.

We did not accept the Master's resolution of the boundary disputes:

"We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *373 U.S., at 601*.

The decree that we entered limited the water rights of the two reservations to those awarded by the Master, based on the irrigable acreage within the boundaries as he had found them, but with respect to the boundary disputes, as stipulated by the parties, [24] Article II(D)(5) of the decree provided:

"[The] quantities [of water] fixed in [the paragraphs setting the water rights of the Colorado River and Fort Mojave Reservations] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *376 U.S., at 345*.

B

The disputes about the boundaries of the Colorado River and the Fort [***341] Mojave Reservations are still with us. And [*631] since the time our original decree was entered in 1964, disputes about the boundaries of the other three reservations have emerged. It is thus necessary to decide whether any or all of these boundary disputes have been "finally determined" within the meaning of Article II(D)(5), and, if so, whether the Tribes are entitled to an upward adjustment of their water rights. We begin with a summary of each of the boundary issues.

We describe first the Colorado River Reservation boundary dispute. Master Rifkind agreed with California that the disputed portion of the western boundary of the reservation ran along the west bank of the Colorado River as it moved from time to time, subject to the ordinary rules of accretion, erosion, and avulsion. The Master rejected the United States' claim that the boundary was fixed at the point where the west bank of the river existed on May [**1398] 15, 1876, the date of the relevant Executive Order revising the boundaries of the reservation. Because we found it unnecessary to resolve the question, this dispute remained open for later settlement.

On January 17, 1969, the Secretary of the Interior, relying on an opinion of the Department's Solicitor, issued an order directing that approximately the northerly two-thirds of the disputed boundary was to follow the meander lines of 1879 and 1874 and was not to follow the changing west bank of the Colorado River. This order, issued unilaterally and without a hearing, added some 4,400 acres to the reservation. Later, the United States, on behalf of the Tribes, obtained final judgment in title disputes with private parties quieting title in the Tribes to various parcels in the area added to the reservation. Also, in the course of establishing the western boundary, the Secretary corrected what he deemed to be an error in an old survey. He approved the corrected plat adding 450 acres to the reservation on December 18, 1978.

Second is the dispute as to the boundary of the Fort Mojave Reservation, specifically, the location of the westerly boundary of the so-called Hay and Wood Reserve portion of [*632] the reservation. Special Master Rifkind found that the area had been officially surveyed in 1928 and that the survey, adopted by the General Land Office of the Interior Department in 1931, was binding on the United States. Water rights were accordingly awarded on this basis. On June 3, 1974, however, the Secretary of the Interior, by order, declared null and void the 1928 survey relied upon by the Special Master and directed that a new survey be made so as to reflect the total acreage recited in the description of the Hay and Wood Reserve when it was added to the reservation in 1890. A new survey was accordingly prepared, the final plat being approved on November 6, 1978. This plat added to the reservation some 3,500 acres not treated as part of the Fort Mojave Reservation when water allocations were decreed in 1964. In this litigation, the United States claims that this additional tract contains approximately 2,000 irrigable acres for which water should be provided on a priority basis.

Third, a post-1964 secretarial order substantially enlarging the Fort Yuma Reservation has engendered controversy. The question that arose [***342] was whether some 25,000 acres

[23] Answering Brief of United States 95 (Aug. 16, 1961).

[24] Agreed Provisions for Final Decree 10 (Dec. 18, 1963).

of land, which in earlier proceedings in this case were not claimed by the United States to be part of the Fort Yuma Reservation, should now be deemed part of the reservation, thereby entitling the Tribe to appropriate additional water rights. A 1936 Interior Department Solicitor's opinion, based on an 1893 agreement with the Fort Yuma Tribes, had ruled that these lands were not part of the reservation. 1 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917-1974, p. 596. In 1968 and 1977, Interior Department Solicitors reaffirmed the 1936 opinion. But on December 20, 1978, with no prior notice to parties who had participated in proceedings leading to the 1977 opinion, the Solicitor of the Interior Department overruled the three earlier Solicitor opinions and concluded that the 1893 agreement was invalid. *86 I. D. 3 (1978)*. The Secretary acted on that opinion, [*633] thereby adding 25,000 acres to the reservation. The next day, the United States filed a claim in this proceeding asserting that some 5,800 acres of this area were irrigable. The Tribes claimed the even more of this tract was irrigable.

The Chemeheuvi Indian Reservation boundaries have also been changed since 1964. Some 2,430 acres were "restored" to this reservation by secretarial order of August 15, 1974. This resulted from a secretarial determination that part of the land taken from the reservation for the construction of Parker Dam was not needed. However, neither the United States nor the Tribe claimed before the Special Master that there is any irrigable acreage within this addition.

There have been still other boundary developments in the years since our first decree in this case. In 1977, the Fort Mojave [**1399] Tribe obtained a stipulated judgment in its favor against the assignees of a railroad patent grant. Nearly a section of land was thereby added to the reservation, 500 acres of which, it is claimed, are irrigable. Also, since 1964, there has been an accretion of some 883 acres along the west boundary of the Cocopah Indian Reservation, an accretion that the United States asserts has been confirmed as part of the reservation by a final court decree entered on May 12, 1975. Finally, in § 102(e) of the Colorado River Basin Salinity Control Act, Pub. L. 93-320 (June 24, 1974), 88 Stat. 269, Congress directed the Secretary to cede a tract of federal land to the Cocopah Indians as an addition to their reservation. This cession was intended to be considered full payment for a certain right-of-way across the Cocopah Reservation. See S. Rep. No. 93-906 (1974). Between the accretion and the congressional Act, the United States claims that 1,161 irrigable acres have been added to the Cocopah Reservation.

As we have recited, *supra, at 630-632* and this page, all of the foregoing developments with respect to reservation boundaries took place long prior to the entry of our supplemental decree in 1979. We were apprised of them by the [*634] motions of the Tribes to intervene and by the motion of the United States filed in 1978 to amend the decree by awarding additional water, based on what were alleged to be final determinations enlarging the reservation boundaries and the irrigable acreage therein. Our supplemental decree of 1979 did not rule on these motions or resolve these disputes. Rather, it not only [***343] expressly left unaffected Article II(D)(5) providing for possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other reservations:

"[The] quantities [of water] fixed in [the 1964 decree sections setting forth the water rights of each of the five Tribes] shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *439 U.S., at 421*.

The motions of the United States and the Tribes were referred to the Special Master. *Id., at 436-437*.

C

In its motion to amend the decree, the United States, with the support of the five Tribes, contended that the above-described events constituted "final determinations" of the boundaries within the meaning of our 1964 decree. The state parties and the California agencies objected that the secretarial orders and the quiet title judgments were not "final determinations" within the meaning of Article II(D)(5) of our decree, since they had not been given an opportunity to participate in any of these proceedings, and since the administrative orders were still susceptible to judicial review. They argued, however, that the boundary controversies were ripe for judicial review, and they urged the Special Master to receive evidence, hear legal arguments, and resolve each of the boundary disputes, but only for the limited purpose of establishing additional Indian water rights, if any.

[*635] Observing that we had rebuffed the former Master's attempt to resolve these disputes, Special Master Tuttle rejected the contention that he should make a *de novo* determination of the boundaries. While recognizing that the secretarial orders might be set aside in an appropriate judicial forum, and that the court judgments, although "accepted" by the Secretary, were not res judicata as to the state parties or the California agencies, the Master nevertheless found that these acts "[provided] the sort of finality contemplated by the Court when it left the boundary disputes concerning the Reservations for later determination." Tuttle Report, at 64. He regarded the two boundary disputes before the Court in 1963 as involving "conflicting positions within the Interior

Department or ambiguities in the description of boundaries." [**1400] Had the recent "definitive" secretarial orders, which have "[swept] aside inconsistencies and ambiguities," existed at the time of the hearing before the prior Master, they "would have removed any choice that the prior Master may have had regarding the proper boundaries," because boundaries fixed by Interior Department surveys are "conclusive in collateral proceedings." Id., at 67-69 (citing *Borax Consolidated, Ltd.* v. Los Angeles, 296 U.S. 10, 16-17 (1935); Stoneroad v. Stoneroad, 158 U.S. 240, 250-252 (1895); Knight v. United States Land Assn., 142 U.S. 161, 176-187 (1891); *Cragin* v. *Powell*, 128 U.S. 691, 698-699 (1888)).

[***344] The Master was unmoved by the state parties' argument that they did not receive their "day in court" before any administrative or judicial decisionmaker, since he was "aware of no claim to land in any of the disputed areas by any of the State Parties." Tuttle Report, at 74. Any remaining concerns could "be met by the inclusion in the final decree of the Court of a provision that would reduce the allotment now sought on behalf of the Tribes *pro tanto* for lands found to be practicably irrigable which subsequent litigation determines not to be Indian land." Id., at 75. Accordingly, the Master [*636] accepted almost all of the boundary changes set forth in the motion of the United States, and the States and the agencies filed their exceptions.

D

LEdHN[8A] [8A] *LEdHN[9A]* [9A]We cannot agree with the Special Master that the reservation boundaries extended by secretarial order have been "finally determined" within the meaning of Article II(D)(5) of our 1964 decree. With respect to these boundary lines, we sustain the exceptions and decline to increase the Tribes' water rights at this time. [25] However, with respect to the boundaries determined by judicial decree, [26] we overrule the exceptions and adopt the Master's conclusions.

LEdHN[8B] [8B]

In our 1963 opinion, when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights. In the first place, Article II(D)(5) was a stipulated provision; it is implausible to suggest that the [*637] States would have so meekly stipulated to *ex parte* secretarial determinations beyond the reach of judicial review. Furthermore, it was the United States that insisted that Master Rifkind should adjudicate the boundary disputes. The Special Master complied, and the United States filed no objections to his conclusions. Indeed, all of the parties treated the boundary matters as fully adjudicable issues of material fact or law. The United States wanted those matters to be adjudicated here; California apparently wanted [**1401] them resolved elsewhere. But no one contended that [***345] they should not be judicially resolved at all. Present and former officials of the Department of the Interior testified and cooperated fully with the United States at the hearing before Master Rifkind. The Department's views appeared to be as definitive and final as they ever would be. No one suggested that future administrative determinations were being contemplated, or that any such future proceedings would purport conclusively to determine the issue then before the Court.

Of course, we now intimate nothing as to the Secretary's power or authority to take the actions that he did or as to the soundness of his determinations on the merits. It must be remembered that while we did not accept Master Rifkind's boundary decisions, water allocations to the Tribes under our decree were limited to the irrigable lands within the reservation boundaries as the Master had determined them to be. Thus, up to the present the States have had the benefit of their victory before Master Rifkind on the boundary issues; and even if there were something they might have done to set in motion some judicial proceeding to resolve the disputes left open by our decree, they obviously had no great incentive to do so. The United States, on the other hand, the intervenor with the burden of proving reserved rights, might have

[25] It follows *a fortiori* from this conclusion that we must overrule the United States' claim that administrative action subsequent to the date the Master filed his report has "finally determined" the boundaries of another disputed tract -- the so-called "Checkerboard area" -- alleged to be part of the Fort Mojave Reservation. See Tuttle Report, at 81-83.

[26] These include: (1) the boundary fixed by the 1977 judgment in favor of the Fort Mojave Tribe against the assignees of the railroad patent grant; and (2) the boundary determined by the court decree of May 12, 1975, which confirmed certain accreted land to be part of the Cocopah Reservation. See supra, at 633. The only other court judgments relevant to this case are those obtained by the United States on behalf of the Colorado River Tribes. These judgments quieted the Tribes' title to certain parcels of land *totally within* the area added to the reservation by the secretarial order of January 17, 1969. See supra, at 631. Accordingly, in view of our holding that the *HN23* secretarial orders do not constitute "final determinations," the Colorado River Tribes will have to await the results of further litigation before they can receive an increase in their water allotment based on the land determined to be part of the reservation by these latter judgments.

instituted appropriate judicial proceedings in the District Courts, in which event the issues tried by the Special Master would presumably have been relitigated. Instead, the Secretary [*638] chose to bring matters to a head by a series of secretarial orders, culminating with the 1978 motion in this Court moving for a determination of the irrigable acreage within the boundary lands recognized by the Secretary, and for appropriate additional water allocations.

LEdHN[10] [10]While the California agencies have filed suit to set aside the secretarial orders extending reservation boundaries, the States have not yet sought to intervene in that litigation. They, along with the state agencies themselves, insist that Special Master Tuttle erred in refusing to adjudicate the boundary issues, that their exceptions in this respect should be sustained, and that appropriate action should be taken to resolve the disputes in this original action. In this respect, we disagree with the States. It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. [27] There will be time enough, if any of these grounds for dismissal are sustained and not overturned [***346] on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. If the litigation goes forward and is concluded, there will then also be time enough to determine the impact of the judgment on our outstanding decree with respect to Indian reservation water rights. [28]

[*639] [**1402] Hence, in our judgment, the litigation filed in the United States District Court for the Southern District of California should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated. If there are issues in that action without substantial connection to the issues in this original action, they should be severed and adjudicated separately if their consideration would substantially delay the final resolution of the questions which have made it necessary to keep our decree in this action open to accommodate the results of unresolved issues. [29]

[*640] *LEdHN[9B]* [9B]As for the several judicial adjudications of boundary disputes that determined certain lands to be Indian lands, very little need be said. The Special Master observed, and the States proclaim, that the States were not parties to these adjudications and are not bound by them in a res judicata sense. This is correct, but neither the States nor the California agencies, in their exceptions or briefs, have asserted that any of the decrees mistakenly determined that the parcels of land at issue in the adjudications were reservation lands. To the contrary, the States' brief in support of their exceptions declares that "[we] do not seek to challenge title determined in any of the cases relied upon by the United States." Exceptions of State of Arizona et al. 64.

This being so, these adjudications are final as a practical matter, and the only issue remaining concerning [***347] these parcels, which the States concede are Indian land, is the same issue that would remain if the Special Master had made

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[27] The District Court in the agencies' suit has stayed further proceedings pending this Court's decision in the present case. *Metropolitan Water District* v. *United States*, Civ. No. 81-0678-GT(M) (Apr. 28, 1982).

[28] The dissent, *post*, at 655, ascertains "no discernible purpose" in our refusal to award the Tribes an immediate increase in their water rights in the areas determined to be part of the reservations by the *ex parte* secretarial orders. The dissent agrees with the Special Master that the Tribes should now be given an increase, qualified by the proviso that these rights will be reduced *pro tanto* for practicably irrigable acreage in an area which subsequent litigation determines not to be Indian land. Unless it is assumed that any challenges to the Secretary's determinations are bound to fail, the dissent's approach has little to commend it in terms of judicial economy or finality. Its, as well as our, resolution anticipates further litigation that may affect the terms of our decree. Moreover, it would require us to decide now, perhaps unnecessarily, the propriety of the Master's findings on irrigable acreage. The dissent's reasoning would also deprive the States, albeit on a "conditional basis," *post*, at 656, of valuable water rights now vested in them, without affording them the slightest semblance of a fair hearing on their claims. Cf. *Fuentes v. Shevin, 407 U.S. 67 (1972)* (invalidating a procedure allowing prejudgment taking of property without notice or hearing). The dissent identifies no plausible basis for its conclusion that an *ex parte* determination by an executive officer of a party to this litigation should constitute a "final determination" within the meaning of our decree.

The dissent also observes, *post*, at 657-658, n. 10, that, under our holding, the States have no real incentive to bring the pending litigation to a prompt conclusion. If his approach were adopted, however, the United States and the Tribes would similarly lack incentive. At present, we have no reason to believe that the District Court will fail to ensure that the pending litigation will be promptly concluded.

[29] If the States and/or the agencies wish to challenge the recently finalized administrative action regarding the "Checkerboard area," see n. 25, *supra*, they should amend their complaint and raise the issue in the District Court suit.

the same boundary determinations and the States were content to accept them -- namely, how much practicably irrigable acreage exists in each such parcel? That issue Special Master Tuttle determined as to each parcel involved in this litigation. Insofar as we can discern from the States' brief, *id., at 117*, Table 1, the States do not differ with the Master's determination of irrigable acreage in the areas added to the reservations by way of judicial decree, except perhaps to the extent of a few acres in the tract labeled FM-11 by the parties. [30] The States argued to the Master that a small portion of FM-11 is too sandy to be irrigable. The Master, however, [*641] recited evidence that there is no sandy land in the FM-11 tract, and the States suggest no basis for rejecting [**1403] the Master's determination that this land is practicably irrigable. [31]

Therefore, we conclude that the decree should be amended by providing to the respective reservations appropriate water rights to service the irrigable acreage the Master found to be contained within the tracts adjudicated by court decree to be reservation lands.

There is no issue about the expansion of the Cocopah Reservation by congressional statute. The water right for that addition to the reservation could not be given and was not given a retroactive priority date. The right accorded dates from June 24, 1974, and hence will not disturb the prior rights of the States or the other parties to this case.

VI

Because of our disposition of the above issues, it is not necessary to resolve the other exceptions brought by the States and state agencies pertaining to the amount of irrigable acreage within the so-called omitted lands or within the boundaries that we have not recognized as finally determined at this time. It is similarly unnecessary for us to pass on the exceptions brought by the United States concerning the recommended decree. The parties are directed to submit, before September 19, 1983, a proposed decree to carry this opinion into effect.

[***348] *It is so ordered.*

[*642] JUSTICE MARSHALL took no part in the consideration or decision of this case.

Concur by: BRENNAN (In Part)

Dissent by: BRENNAN (In Part)

Dissent

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in part and dissenting in part.

I join Part III of the Court's opinion, granting the petitions to intervene in this action filed by the Fort Mojave, Colorado River, Chemehuevi, Cocopah, and Quechan Tribes (collectively, the Tribes). I also agree with the basic premise of Part IV of the Court's opinion that in Article IX of our 1964 decree, *376 U.S. 340, 353*, we retained the power to reconsider our quantification of the Tribes' reserved water rights, as set out in Article II(D) of the 1964 decree, *id., at 343-345*. See *ante*, at 618. I part company with the Court, however, in its refusal to exercise that power, given the unique circumstances of this litigation and the timing of the Tribes' and United States' motions. In addition, I find inexplicable the Court's decision to sustain the exceptions of Arizona, California, and the California agencies (hereinafter States) to the Special Master's proposed solution to the boundary lands controversy.

I

The so-called "omitted" lands are irrigable areas, within the Tribes' reservations, which the United States failed to identify during the extensive proceedings before Special Master Rifkind that preceded our 1964 decree. The fact that irrigable lands were not called to the attention of the Master or the Court is significant because the Master and the Court held that the amount of water which the Tribes were entitled to divert from the mainstream of the Colorado depended on the number

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[30] Seventeen acres of FM-11 were determined to be part of the Fort Mojave Reservation by the judgment in *Fort Mojave Tribe* v. *La Follette*, Civ. No. 69-324MR (Ariz., Feb. 7, 1977). See Supplemental Memorandum for United States with Respect to Its First Exception 5 (Sept. 27, 1982). The remainder of FM-11 has not been added to the reservation by judicial decree; it is part of the "Checkerboard area." See *id., at 3*; n. 25, *supra*. The States claim that 24 acres of FM-11 are too sandy to be practicably irrigable, but it appears that few, if any, of these 24 acres are within the part of FM-11 awarded to the Tribe in the *La Follette* decree. See State Parties' Exhibits 142, 158(G).

[31] At the hearing before Master Tuttle, the States presented the expert testimony of economists who stated that sandy acreage could not practicably be farmed because crop yields would be too low and production costs too high. The States have excepted to the Master's rejection of this *economic* testimony. However, the Master accepted the testimony of the United States' *soils* expert, who concluded that no sandy lands existed on FM-11. Tuttle Report, at 188-189. The States have not contested the Master's finding that the soil on FM-11 is not sandy, and this ends the matter. It is thus unnecessary for us to consider the States' arguments regarding the economic feasibility of farming on sandy soil.

of "irrigable acres" within each reservation. 373 U.S. 546, 601 (1963); Report of Special Master Rifkind 263-265 (hereinafter Rifkind Report). Although the States vociferously dispute exactly how much of the omitted lands [*643] are in fact irrigable, they do not dispute two facts critical to the question now before the Court. First, even under the States' legal theories a substantial portion [**1404] of the omitted lands are irrigable -- at least 18,500 acres, see Report of Special Master Tuttle 109, 125 (hereinafter Tuttle Report) -- and would have supported an award of additional diversion rights in our 1964 decree had they been identified at that time. Second, the United States completely failed to present evidence regarding the irrigability of these lands until after the Tribes sought leave to intervene in these proceedings in 1977.

There are strong arguments for correcting the quantifications of the Tribes' diversion rights in the 1964 decree, to include the amounts of water that could be used economically to irrigate the omitted lands. As this litigation now stands, the considerations of finality are not so strong, nor the interests of justice so weak, as the Court would have them. The system contemplated by our 1964 decree for allocating the waters of the Colorado River's Lower Basin has yet to become final, either as a formal or as a practical matter, and correction of the decree at this [***349] time would in no way compromise our continuing intention to effect a final allocation of the Lower Basin mainstream. Furthermore, awarding additional diversion rights to reflect the irrigable acreage not considered prior to the 1964 decree would correct a manifest injustice to the Tribes, who were not themselves before this Court in 1964, and it would do so with little, if any, prejudice to interests of other parties to this litigation.

A

The Court's opinion excessively extols the principle of "finality," but overlooks the caveat that "finality" means different things in different contexts, and that the law accords finality different weight depending on the context. First, the Court borrows support from formal, largely nondiscretionary doctrines such as res judicata. It admits, however, that res [*644] judicata has no applicability to this case, *ante*, at 619, for the simple reason that the omitted lands claims have been raised in the course of the same proceeding in which they were supposedly decided before, and that proceeding has not yet reached the stage of final judgment. In a case such as this, when a party seeks reconsideration of questions decided at an earlier stage of a single, continuing litigation, the law allows courts more discretion than in a case in which the party wants to upset a final judgment in another proceeding, before another judge. See generally 1B J. Moore & T. Currier, Moore's Federal Practice paras. 0.401, 0.404[1] (1982) (hereinafter Moore); cf. United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 199 (1950).

A final judgment makes a difference. It marks a formal point at which considerations of economy, certainty, reliance, and comity take on more strength than they have before the judgment. A court's decision to reconsider a prior ruling before the case becomes final, however, is ultimately a matter of "good sense." Moore § 0.404[10], at 573. Concern for finality remains an important policy, even before final judgment. In the absence of some overriding reason, a court should be reluctant to reopen that which has been decided merely to correct an error, even though it has the power to do so. See Messenger v. Anderson, 225 U.S. 436, 444-445 (1912). Nevertheless, federal courts have traditionally thought that correcting a manifest injustice was reason enough to reconsider a prior ruling, see Moore para. 0.404[1], p. 408, and, although they may hold a party to its failure to litigate a claim when it had the opportunity, they have regarded finality concerns as less compelling when the question at issue has never actually been contested, see *Hartford Life Ins. Co.* v. Blincoe, 255 U.S. 129, 136 (1921). [1]

[*645] [**1405] The Court also uses "finality" in a more practical sense, appealing to [***350] the obvious benefits to society of having property rights be certain. This meaning of finality underlies the Court's invocation of Abraham Lincoln and the development needs of the West. *Ante*, at 620-621. More importantly, it was central to the Court's choice of an "irrigable acreage" standard in 1963, for that measure accorded the highest degree of certainty to all Lower Basin interests. Special Master Rifkind rejected Arizona's proposal that the Indians be allocated only enough water to satisfy their presently foreseeable needs, precisely because that solution would be subject to re-evaluation in the future, "[placing] all junior rights in jeopardy of the uncertain and the unknowable." Rifkind Report 263-264. Therefore, he urged -- and the Court held, 373 U.S., at 600-601:

"[The] most feasible decree that could be adopted in this case, even accepting Arizona's contention, would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation. . . . This will preserve the full extent of the water rights created by the United States and will

[1] The equity doctrine of "changed circumstances," see *ante*, at 624-625, reflects many of the same principles. Yet even if changed circumstances are necessary to modify an injunction -- and I doubt that an equity court would turn its back on manifest injustice -- they have never been the *sine qua non* of adjusting a decree in the process of making it final. The question before us is whether we should do that.

establish rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." Rifkind Report 265.

Thus, although the Court stresses Special Master Rifkind's interest in a fixed and final decree, see *ante*, at 622-624, and n. 15, that interest is largely irrelevant to the question at hand. One can share Special Master Rifkind's interest in having a fixed decree, and even Abraham Lincoln's scorn for scoundrels in courthouse basements, and still think it desirable to correct the decree before it becomes fixed. Our interest in a fixed, reliable decree is well enough served if we make clear [*646] that it should not be subject to reopening, even to correct the kind of clear error that the Tribes and the United States have shown here, once this litigation becomes final.

The Court acknowledges that this litigation was far from final when the United States and the Tribes raised the claims now at issue, because the Court had not confirmed a list of the "present perfected rights," or rights to use Colorado River mainstream flows that vested before the effective date of the Boulder Canyon Project Act of 1928, 43 U. S. C. § 617. *Ante*, at 611. The allocation system for the Lower Basin could not become final until an authoritative list of "present perfected rights" and their priority dates had been established. [2] Article II of the 1964 [***351] decree identified a number of federal "present perfected rights," including those of the Tribes, representing rights to divert about 900,000 acre-feet of mainstream flows per year. The 1964 decree, however, did not address any "present perfected rights" acquired under state law. The full list of "present perfected rights" was not submitted to or confirmed by this Court until 1979. See 439 U.S. 419. As quantified by our 1979 decree, state "present perfected rights" accounted [**1406] for rights to divert well over 3 million acre-feet of mainstream flows. Thus, in 1977, [*647] when the Tribes first sought to intervene in this litigation for the purpose of raising their omitted lands claims, and in 1978, when the United States moved for entry of a supplemental decree concerning the omitted lands, issues critical to the 1964 decree's allocation system had yet to be finally determined. [3]

Furthermore, it has long been recognized that the primary object of this litigation was to establish a regimen for allocating the Lower Basin waters sufficiently reliable to permit Congress and Arizona to go forward with the Central Arizona Project, a massive public works effort to make Colorado River water available to agricultural interests in central Arizona. Tuttle Report 38-39; Meyers, The Colorado River, 19 Stan. L. Rev. 1, 73 (1966) (hereinafter Meyers). That purpose has been accomplished. The Central Arizona Project was authorized in 1968, and construction has now reached an advanced stage. But even at this late date the Project is still several years from completion. And until it is ready to begin diverting Colorado River water, the allocation system in our 1964 decree has little practical importance, because Arizona lacks the capacity to use most of the water rights allocated to it in the 1964 decree.

In sum, the interest in "finality" does not dispose of this case. Principles of judicial economy provide the sole basis for the Court's refusal to correct the 1964 decree. But no significant adjudicative resources were expended on the omitted lands claims in the proceedings prior to the 1964 decree, because they were not raised at all. And, although the United States' failure to identify the omitted irrigable lands 25 years ago should not be excused, I cannot join in depriving the Tribes permanently of significant rights to water on that basis alone, especially when I see little prejudice to the [*648] States from reopening the 1964 decree to the extent necessary to correct the error. [4]

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[2] It is unnecessary to describe fully the complex structure of our 1964 decree. Suffice it to say that the Indian Tribes' rights at issue in this case are among the "present perfected rights," but they are not the only such rights. These rights are important because the Secretary of the Interior has an obligation to satisfy them to their full extent, and that water is charged against the States' overall entitlements under the 1964 decree. Furthermore, in drought years "present perfected rights" cannot be made to bear pro rata reductions along with other water users; rather, the Secretary is obligated to satisfy them in full, starting with the right established first in time and proceeding chronologically (except for the Indian rights, which must be satisfied first regardless of priority, 439 U.S. 419, 421 (1979)). As a practical matter, then, the more "present perfected rights" there are, the less certain it is that other users will receive a specific amount of water in any given year, especially in years when mainstream flows are less than the 7.5 million acre-feet benchmark used in the 1964 decree.

[3] The 1979 decree was handed down before we acted on the Tribes' motions to intervene or any of the claims now before the Court. The decree expressly left these matters open for resolution and referred them to Judge Tuttle as Special Master. *Id., at 421-422, 436-437.*

[4] The Court suggests that if we reopened the question of irrigable acreage we would also have to reconsider the "irrigable acreage" standard itself. See *ante*, at 625-626. In raising that specter, the Court ignores the obvious distinction between the standard and its application to the omitted lands. No issue was the subject of more controversy in the proceedings leading up to our 1964 decree than the "irrigable acreage" standard. Unlike the actual quantification of the acreage, the standard was discussed extensively, both in Special Master Rifkind's report, at 257-266, and in the Court's opinion, 373 U.S. 546, 600-601 (1963). The "irrigable acreage" standard *has* been fully and fairly litigated. Nor does the Court's opinion or Special

B

[***352] The Tribes will suffer a manifest injustice if we fail to consider the omitted lands claims. Under the uncorrected 1964 decree, the Tribes stand to lose forever valuable rights to which they are entitled under the Court's construction of the Executive Orders creating their reservations, 373 U.S., at 595-601. This loss occurs entirely because the United States failed to perform its obligations as trustee and advocate to present evidence to the Court of *all* irrigable lands within the reservations, or at least to make a record of its justification for not presenting such evidence.

[**1407] It is certainly not the case that the United States made a considered decision to waive the Tribes' claims to water for the omitted lands. Cf. *ante*, at 617-618, n. 7, and 622-623, n. 14 (suggesting otherwise). The existence of some omitted [*649] irrigable lands came to light at one point in the hearings, when an agricultural specialist mentioned that some mesa lands adjacent to irrigable acreage claimed by the United States could also be irrigated. App. to Brief for State Parties in Support of Exceptions 11. Special Master Rifkind immediately pressed the United States' representative for an express waiver on the spot of all claims to water for irrigable acreage not identified in the pre-1964 hearings, but the attorney responded, "I am probably not authorized to give anything away that we ought to claim." *Id.*, at 12. [5]

Heckman v. United States, 224 U.S. 413 (1912), see *ante*, at 627, does not require us to make the Tribes bear the cost of the United States' error. The relevant question in *Heckman*, raised by non-Indian defendants, was whether individual Indians were necessary parties in a suit by the United States to set aside conveyances by those Indians of lands they were forbidden by statute to alienate, and over which the United States had significant trust responsibilities. 224 U.S., at 444. The Court held that the United States had power to enforce the statutory restrictions [***353] without the acquiescence of the Indians, and that by virtue of the restrictions the individual Indians had no interest in the subject matter of the suit. Id., at 445. In passing, the Court noted that representation of Indian interests by the United States "traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty." *Ibid.*

[*650] Were it not for the trust relationship recognized in *Heckman* and other cases, the United States' litigation decisions could not estop the Tribes, who were not separately represented. Insofar as *Heckman* intimates that the United States' power to compromise Indian interests is not subject to judicial scrutiny, it has long since been repudiated by this Court. See, e. g., Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103, 110 (1935); Cramer v. United States, 261 U.S. 219, 227-229 (1923). Instead, we have recognized that the United States' relationship to Indian interests is much like that of a fiduciary to a beneficiary. Under the modern view, the "discharge of the national duty" requires sharp attention to the quality of the United States' fulfillment of its trust obligations, including the obligation to represent Indian interests in litigation.

There has often been reason to question the quality of that representation, especially when rights to scarce water in the West were at stake. In 1973, the National Water Commission reported: "In the history of the United States Government's treatment of Indian Tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters." National Water Comm'n, Water Policies for the Future -- Final Report to the President and to the Congress of the United States 475. President Nixon admitted as much in a 1970 message to Congress:

"The United States Government acts as a legal trustee for the land and water rights of American Indians. These [**1408] rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal dispute. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and [*651] water rights *and* the *private* interests of

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Master Rifkind's report indicate that some other standard of measurement would have been chosen had the Court been apprised of the irrigable acreage in the omitted lands. This Court adopted the "irrigable acreage" standard for the reasons stated in its opinion -- it is the only "feasible and fair way by which reserved water for the reservations can be measured," id., at 601. It reflects the purposes for which the reservations were created, and once final it need not be readjusted in light of changed circumstances, unlike an equitable measure linked to current or expected population. If a few acres worth of water more or less would have changed our decision, we would not have rejected the argument that Indian water rights be determined by familiar equitable principles rather than by the more objective standard.

[5] See *ante*, at 622-623, n. 14. A close reading of the exchange between Special Master Rifkind and the Government attorney reveals that the Special Master did not continue to press his demand for a binding waiver. In light of the United States' delicate trust responsibilities in Indian water cases, it would have been improper to require the attorney to make a split-second decision to concede an important class of claims in response to surprise testimony from a witness. Cf. Manual for Complex Litigation § 1.80, p. 89 (1982); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1291, 1297-1298 (1976).

Indians in land which the government holds as trustee.

". . . There is considerable evidence that the Indians are the losers when such situations arise." H. R. Doc. No. 91-363, pp. 9-10, 116 Cong. Rec. 23261 (emphasis in original).

The Court carefully explains that the United States had no "actual conflict of interest" with regard to Lower Basin water rights, by which it apparently means that the recognition of Indian water rights did not diminish other federally reserved water rights. See *ante*, at 627. I agree. Nevertheless, history discloses that the United States has not always taken such a narrow view of its interests in water [***354] rights controversies. On the Colorado River and elsewhere, it has constructed extensive water projects to serve nonfederal interests; congressional authorization of the Boulder Canyon Dam was the crucial event in the development of the Lower Basin, shaping this litigation from its inception. See *373 U.S., at 564-590*. The United States has sometimes been slow to press Indian claims when they conflicted with those of politically influential non-Indian interests. See, *e. g.*, *Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252, 256-257 (DC 1973)*. See generally Federal Protection of Indian Resources: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., 235-249, 907-914 (1971) (hereinafter Senate Hearings); F. Cohen, Handbook of Federal Indian Law 596-599 (1982) (hereinafter Cohen). [6] We [*652] should not, therefore, leap to the conclusion that the irrigability of *all* reservation lands, including the omitted lands, "was fully and fairly litigated in 1963," *ante*, at 628.

This case provides proof (if any is needed) that those with direct interests -- economic, historical, spiritual -- in the outcome of a case are their own best representatives. Upon entering this litigation, the Tribes swiftly exposed the extent of the United States' pre-1964 neglect. I would not hold that the United States had so violated the ordinary standards of attorney care as to be liable for "inadequate" representation of the Indian interests in this litigation, if that were the standard of liability, on the basis of the mere fact that it failed to claim water rights for some irrigable acreage. But I do not find in this record any justification for the United States' failure to present evidence on the omitted lands. Even if the United States did intend to waive the omitted lands claims, I see no good reason, before final judgment, to deny the Tribes a hearing on claims that have never been litigated. As a matter of justice, the Tribes deserve this chance to defend rights which should have been theirs.

C

In deciding whether to correct the 1964 decree, we should also consider any possible prejudice which the States might suffer as a result. Of course, the States would prefer that we not allocate additional water rights to the Tribes; at least at some point [**1409] in the future, additional Indian rights may make the rights of junior state appropriators less certain. With regard to timeliness and finality, however, prejudice means prejudice from procedure rather than from the result. Hence, the important question is whether the States would [*653] be any worse off because [***355] the additional Indian rights were confirmed in 1983 rather than 1964.

The Special Master considered this issue at length and determined that the States would not be significantly prejudiced by adjustments in the 1964 decree. Tuttle Report 38-46. [7] The whole question of reliance by the States, however, involves the highest degree of speculation. First, the amount of water entering the Lower Basin at Lee Ferry, Ariz., and available for use by Lower Basin interests has historically averaged far more than the 7.5 million acre-feet contemplated by the 1964 decree. See Rifkind Report 117. Until far more development occurs in the Upper Basin States, that situation can be expected to continue. Furthermore, improvements in irrigation, farming, and conservation technology may well permit more efficient exploitation of the

[6] There are many ways of compromising a claim besides making a decision not to press it. Devoting fewer resources to investigating and preparing the claim than its economic importance would warrant has the same effect. In cases such as this, the Justice Department is responsible for pressing the Indians' claims in court, but the Interior Department and the experts it employs are responsible for developing the facts of the claim and bringing it to the attention of the Justice Department. The practical result of this bifurcated responsibility may often be to confer effective power to waive Indian claims on Interior Department hydrologists and agricultural experts. See Senate Hearings 445-449 (testimony of W. Kiechel, Jr., Deputy Assistant Attorney General, Land and Natural Resources Division).

[7] The Special Master observered that in 1968 Congress authorized construction of the Central Arizona Project based on projections of mainstream flows available for diversion by Arizona far lower than current projections, so that it is not possible to argue that the Central Arizona Project would not be commercially viable if the Indians receive additional water rights. Tuttle Report 38-41; see S. Rep. No. 408, 90th Cong., 1st Sess., 18-21, 32-35 (1967). The Special Master also found that water would be available to meet the full diversion capacity of water projects begun by Nevada after 1964. Tuttle Report 44-46. The Metropolitan Water District of Southern California -- the junior major appropriator in California -- presented some evidence of reliance, but did not "fully explain why [it] will receive less water if the Tribes receive additional water rights." *Id.*, at 42. In any event, under current projections of demand the Metropolitan Water District will not be ready to use its existing entitlements before the year 2010. *Ibid.*

present and future quantities of available water, so that more users will be accommodated by the same or less amounts of water.

In addition, the Tribes are not currently able to use all the rights allocated to them under the 1964 decree. [8] Until substantial [*654] new irrigation systems or industrial plants are built, any additional water rights that the Tribes receive will have little or no practical effect on the availability of water to other Lower Basin interests. The Tribes can probably lease their rights to others with the consent of the United States, but they have not explored this option extensively. See Cohen 592-593; Meyers 71; cf. 2 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917-1974, p. 1930 (1964). Even if the Tribes leased all of their rights to other Lower Basin users, it would merely mean that [***356] existing interests with the means to divert water from the Colorado River would pay a market rate for additional water. If the Tribes do not lease their rights, the water will simply be available for use by other Lower Basin interests, in accord with the allocation system established by the 1964 decree. In any event, non-Indian users will not be deprived of water in the near future on account of the rights at issue in this case.

[**1410] In sum, correcting the 1964 decree to reflect additional irrigable acreage in the omitted lands would not harm the States more than they would have been harmed had the omitted lands been considered in framing the 1964 decree. In truth, Indian water rights are unlikely to affect state interests to any significant degree until well into the next generation, [*655] when all concerned will have had plenty of time to prepare. Yet if we foreclose the Tribes now from asserting their rights to water for the omitted lands, those rights will be lost forever, through no fault of their own. The balance of hardships in this case is decidedly in the Tribes' favor. In order to avert a manifest injustice to the Tribes before this litigation becomes final and the allocation system in the 1964 decree begins to have a practical effect, I would reopen the 1964 decree to recognize additional water rights for the Tribes.

II

Reasonable judges might differ over some aspects of this case, but I would not have thought the Special Master's solution to the boundary lands controversy was among them. The Court's failure to approve a decree that includes a quantification of the water rights appurtenant to the disputed boundary areas serves no discernible purpose, and it is profoundly inconsistent with its emphasis in Part IV of its opinion on the ideals of finality, judicial economy, and predictability of water rights. At no point does the Court explain its rejection of the Special Master's entirely reasonable proposal regarding the boundary lands.

In our 1963 opinion, we rejected Special Master Rifkind's *de novo* determination of boundary disputes concerning two of the reservations, *373 U.S., at 601*, and our 1964 decree was left open to the extent of permitting an award of additional water rights should the boundaries be "finally determined," Art. II(D)(5), *376 U.S., at 345*. The 1979 decree recognized that the actual boundaries of all five reservations are subject to dispute. *439 U.S., at 421-422*. At the outset of the current phase of this litigation, all parties agreed that it was time to bring the maximum degree of certainty possible to the Lower Basin allocation system, a task requiring "final determination" of the disputed boundaries, at least for the purpose of quantifying the Tribes' entitlement to water. The United States and the Tribes urged before the Special Master that certain administrative determinations by [*656] the Secretary of the Interior had finally determined the boundaries of the reservations, where the disputed boundaries lay between reservation land and other federal lands. [9] The States argued, as they had in 1963, that this Court [***357] should determine the relevant boundaries *de novo*.

The Special Master chose a middle course, calculated to put an end to further litigation in this Court. He took evidence on and determined the amount of irrigable acreage within the boundaries recognized by the Secretary of the Interior, and he

[8] From 1975, when the Fort Mojave Tribe began to use its water for the first time, through 1981, the Tribes collectively diverted only 77% of the water to which they were entitled under the 1964 decree. In individual years, diversions ranged from 83% of the 1964 decree awards (1981) to 72% (1978). U.S. Dept. of Interior, Bureau of Reclamation, Compilation of Records in Accordance with Article V of the Decree of the Supreme Court of the United States in *Arizona* v. *California* Dated March 9, 1964 -- Calendar Years 1925-1981. The Chemehuevi diverted no water at all, although they are entitled to 11,340 acre-feet a year, *ibid.*, because there appears to be no diversion system in place on their reservation, either for purposes of irrigation or for other development. See Senate Hearings 1075 (testimony of R. Esquerra). The Special Master's Report makes clear that substantial capital investment would be required before the Tribes could begin to use additional water. See, *e. g.*, Tuttle Report 165-184, 242-248. On the Fort Mojave Reservation alone the United States' expert estimated that over $ 2.1 million would be required to develop six units of land for which the United States claimed additional water rights. See United States Exhibits 132-140.

[9] The Court determines that other disputed boundaries have been "finally determined" by judicial adjudications that the States have not challenged. It approves amending the 1964 decree to include water rights appurtenant to these parcels. *Ante*, at 640-641. To this extent, I concur in Part V of the Court's opinion.

calculated the corresponding water rights for inclusion in the final decree. However, he also recommended that the final decree include the following proviso:

"Provided, further, . . . that lands presently determined for this purpose to be within the boundaries of the above-named Reservations and later determined to be outside the boundaries of the above-named Reservations, as well as any accretions thereto to which the owners of such land may be entitled, should not be included as irrigable acreage within the Reservations and that the above specified diversion requirements of such land that is irrigable shall be reduced by [**1411] the unit diversion quantities listed in the [1979 decree]." Tuttle Report 282-283.

The effect of this proviso would be to grant the Indian Tribes the water rights appurtenant to the disputed boundary areas on a conditional basis. If the States succeeded in overturning any of the Secretary's boundary determinations in an appropriate forum, the corresponding water rights -- precisely quantified for each area in the Special Master's Report, *id.*, at 192-196, 239-277 -- would automatically be subtracted from the Tribes' entitlements.

[*657] The advantages of the Special Master's proposal are obvious. First and foremost, it remains faithful to the approach taken in our 1963 opinion. On the one hand, it does not require this Court to decide in the first instance either what are the exact boundaries of the reservations or whether the Secretary's administrative boundary determinations are binding on all parties for all purposes. On the other hand, it settles the maximum possible extent of Indian water rights. It allows the States to rely absolutely on that figure, and it informs them precisely how much water is at stake if they choose to litigate particular boundary questions in other forums. In 1963, the same considerations led us to adopt the "irrigable acreage" standard itself. Special Master Rifkind recommended rejecting an open-ended decree because it "would place all junior water rights in jeopardy of the uncertain and the unknowable," Rifkind Report 264, whereas a fixed decree would "provide certainty for both the United States and non-Indian users," *id., at 265*. Finally, the Special Master's proposal would preclude further litigation in this Court over quantification of the water rights reserved for any boundary areas in fact within the reservations.

The Court disregards these virtues. Simply turning the clock back to 1964, it guarantees that the original jurisdiction litigation over Lower Basin water rights will proceed to another "round," and possibly still more "rounds" thereafter, as one-by-one the border questions are settled by litigation. If any of the Secretary's determinations are upheld, the Court will have to duplicate the efforts of the present Special Master. [***358] See *ante*, at 638. [10] The full extent of the Tribes' rights [*658] to divert mainstream water will remain uncertain for the near future, just as finality in this case begins to have practical importance. See *supra, at 647*.

For the reasons described in Part I-C, *supra*, awarding additional water rights to the Tribes works no immediate harm to state interests. The Court's preference for prolonging this litigation and its attendant uncertainty is at odds with the principles upon which it resolves the omitted lands issue. I would accept the Special Master's resolution of the boundary lands issue for purposes of framing a final decree in this action.

III

The Court's disposition of the omitted lands and boundary lands issues makes it unnecessary for it to reach the remaining issues in this case. Although my own views would require us to reach those issues, I do not think it worthwhile to discuss [**1412] them at any length. The States have filed a number of highly specific exceptions to the Special Master's determinations regarding the irrigability of particular parcels. Although formal concepts of "plain error" and "abuse of discretion" do not apply to the recommendations of special masters in original jurisdiction litigation, the care with which the present Special Master has explained his conclusions on these technical issues demands respect, and I would overrule the States' exceptions. The United States has also filed four exceptions. The first asks that we recognize for purposes of our decree the Secretary of the Interior's resolution of an [*659] additional border question concerning the Fort Mojave Reservation; the others involve essentially clerical matters of conforming the Special Master's recommended decree to our

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[10] The Court seems to believe that pending litigation in the Southern District of California involving only some of the boundary issues presented by this case, as well as only some of the parties, provides an appropriate forum for resolving the boundary disputes once and for all. *Ante*, at 639. It suggests that other parties enter the lawsuit voluntarily, and that they use it to decide additional issues. *Ante*, at 639, n. 29. However, under the Court's ruling today the States have absolutely no reason to prosecute additional claims -- as long as the boundary issues are not decided, the water rights that turn on them belong to the States. (As defendant, of course, the United States has no choice but to litigate.) The Court also makes the unprecedented suggestion that we might be willing to decide the boundary questions *de novo* if the States' District Court suit is barred by lack of standing, sovereign immunity, or the statute of limitations. *Ante*, at 638. I would not leave that impression. Because "[certainty] of rights is particularly important with respect to water rights in the Western United States," *ante*, at 620, such results in the District Court would "finally determine" the boundaries of the reservations within the meaning of Article II(D)(5) of the 1964 decree.

two prior decrees. I would sustain the exceptions of the United States.

References

32A Am Jur 2d, Federal Practice and Procedure 537, 547, 551, 556, 570, 572; 41 Am Jur 2d, Indians 23- 25; *46 Am Jur 2d, Judgments 379- 381*, *394- 403*; 72 Am Jur 2d, States, Territories, and Dependencies 99- 103; *78 Am Jur 2d, Waters 309- 315*

8 Federal Procedure, L Ed, Courts and Judicial System 20:200, 20:210, 20:214, 20:219, 20:233, 20:235; Federal Procedure, L Ed Judgments and Orders 51:189

2 Federal Procedural Forms, L Ed, Appeal, Certiorari, and Review 3:721-3:742

43 USCS 617

US L Ed Digest, Boundaries 18, 34; Indians 32; Judgment 66; States, Territories, and Possessions 88; Supreme Court of the United States 71; Waters 18, 185

L Ed Index to Annos, Boundaries; Indians; Judgment; States; Supreme Court of the United States; Waters

ALR Quick Index, Boundaries; Indians; Judgments; Res Judicata; States; Waters and Watercourses

Federal Quick Index, Boundaries; Indians; Judgments and Decrees; Res Judicata; States; Supreme Court of the United States; Waters and Watercourses

Annotation References:

Original jurisdiction of United States Supreme Court in suits between states. *68 L Ed 2d 969*.

Intervention and joinder of parties in action in Supreme Court under its original jurisdiction. *62 L Ed 2d 897*.

Supreme Court's construction of *Eleventh Amendment* restricting federal judicial power to entertain suits against a state. *50 L Ed 2d 928*.

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Questioned
As of: August 4, 2016 12:53 PM EDT

United States v. Jones

Supreme Court of the United States

November 8, 2011, Argued; January 23, 2012, Decided

No. 10-1259

Reporter
132 S. Ct. 945; 181 L. Ed. 2d 911; 2012 U.S. LEXIS 1063; 80 U.S.L.W. 4125; 23 Fla. L. Weekly Fed. S 102; 2012 WL 171117

UNITED STATES, Petitioner v. ANTOINE JONES

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Writ of mandamus denied *In re Jones, 670 F.3d 265, 399 U.S. App. D.C. 300, 2012 U.S. App. LEXIS 4575 (2012)*
Post-conviction relief denied at *United States v. Jones, 2014 U.S. Dist. LEXIS 95395 (D.D.C., July 14, 2014)*

Prior History: *United States v. Maynard, 615 F.3d 544, 392 U.S. App. D.C. 291, 2010 U.S. App. LEXIS 16417 (2010)*

Disposition: [***1] Affirmed.

Core Terms

monitoring, privacy, trespass, surveillance, electronic, installation, cases, expectation of privacy, concurrence, beeper, container, tracking, conversations, attachment, vehicle's, seizure, phone, physical intrusion, intrusion, devices, signals, trespassory, technology, occurs, fourth amendment violation, tracking device, property right, invaded, constitutionally protected, individual's

Case Summary

Procedural Posture
Defendant was charged with drug conspiracy under *21 U.S.C.S. §§ 841* and *846*. A district court denied in part defendant's motion to suppress evidence obtained through a global-positioning-system (GPS) device under the *Fourth Amendment*. A jury returned a guilty verdict. The United States Court of Appeals for the District of Columbia Circuit reversed the conviction and denied the Government's petition for rehearing en banc. Certiorari was granted.

Overview
Defendant came under suspicion of trafficking in narcotics. Agents installed a GPS tracking device on the undercarriage of a vehicle registered to defendant's wife while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements. The Government conceded noncompliance with a warrant that had been obtained. The appellate court found that admission of the evidence obtained by warrantless use of the GPS device violated the *Fourth Amendment*. The U.S. Supreme Court determined that the Government's installation of the GPS device on defendant's vehicle, and its use of that device to monitor the vehicle's movements, constituted a "search." Under the common-law trespassory test, the Government physically occupied private property for the purpose of obtaining information. Such a physical intrusion would have been considered a "search" within the meaning of the *Fourth Amendment* when it was adopted. Defendant possessed the vehicle at the time the Government trespassorily inserted the information-gathering device. The Government forfeited its alternative argument that officers had reasonable suspicion and probable cause.

Outcome
The Court affirmed the appellate court's judgment. 9-0 Decision; 2 Concurrences.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

HN1 See *U.S. Const. amend. IV*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN2 It is beyond dispute that a vehicle is an "effect" as that term is used in the *Fourth Amendment*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN3 The Government's installation of a global-positioning-system device on a target's vehicle, and its use of that device

to monitor the vehicle's movements, constitutes a "search."

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN4 Regarding the significance of property rights in search-and-seizure analysis, English law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN5 The text of the *Fourth Amendment* reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > General Overview

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN6 The United States Supreme Court's *Fourth Amendment* jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. Thus, the Court has held that wiretaps attached to telephone wires on the public streets did not constitute a *Fourth Amendment* search because there was no entry of the houses or offices of the defendants. The Court's later cases, of course, have deviated from that exclusively property-based approach. The Court has said that the *Fourth Amendment* protects people, not places, and has found a violation in attachment of an eavesdropping device to a public telephone booth. The Court's later cases have applied the analysis of Justice Harlan's concurrence in the Katz case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy."

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > General Overview

HN7 At bottom, the United States Supreme Court must assure preservation of that degree of privacy against government that existed when the *Fourth Amendment* was adopted. For most of the Court's history the *Fourth Amendment* was understood to embody a particular concern for government trespass upon the areas (persons, houses, papers, and effects) it enumerates. Katz did not repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between other people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no *Fourth Amendment* violation unless the conversational privacy of the homeowner himself is invaded. The Court does not believe that Katz, by holding that the *Fourth Amendment* protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN8 Whatever new methods of investigation may be devised, the United States Supreme Court's task, at a minimum, is to decide whether the action in question would have constituted a "search" within the original meaning of the *Fourth Amendment*. Where the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN9 Katz, the United States Supreme Court has explained, established that property rights are not the sole measure of *Fourth Amendment* violations, but did not snuff out the previously recognized protection for property. Katz did not erode the principle that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the *Fourth Amendment*. The Court has embodied that preservation of past rights in the Court's very definition of "reasonable expectation of privacy" which the Court has said to be an expectation that has a source outside of the *Fourth Amendment*, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. Katz did not narrow the *Fourth Amendment's* scope.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN10 A trespass on "houses" or "effects," or a Katz invasion

of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN11 The Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN12 Quite simply, an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the *Fourth Amendment*. The Government's physical intrusion on such an area--unlike its intrusion on an "effect"--is of no *Fourth Amendment* significance. Thus, the United States Supreme Court's theory is not that the *Fourth Amendment* is concerned with any technical trespass that led to the gathering of evidence. The *Fourth Amendment* protects against trespassory searches only with regard to those items (persons, houses, papers, and effects) that it enumerates.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > General Overview

HN13 In the *Fourth Amendment* context, the United States Supreme Court does not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN14 The United States Supreme Court has to date not deviated from the understanding that mere visual observation does not constitute a search. Accordingly, a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

Lawyers' Edition Display

Decision

[**911] Government's attachment of global-positioning-system (GPS) device to undercarriage of motor vehicle registered to accused's wife, and government's use of that device to monitor vehicle's movements, held to constitute search under *Federal Constitution's Fourth Amendment*.

Summary

Procedural posture: Defendant was charged with drug conspiracy under *21 U.S.C.S. §§841* and *846*. A district court denied in part defendant's motion to suppress evidence obtained through a global-positioning-system (GPS) device under the *Fourth Amendment*. A jury returned a guilty verdict. The United States Court of Appeals for the District of Columbia Circuit reversed the conviction and denied the Government's petition for rehearing en banc. Certiorari was granted.

Overview: Defendant came under suspicion of trafficking in narcotics. Agents installed a GPS tracking device on the undercarriage of a vehicle registered to defendant's wife while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements. The Government conceded noncompliance with a warrant that had been obtained. The appellate court found that admission of the evidence obtained by warrantless use of the GPS device violated the *Fourth Amendment*. The U.S. Supreme Court determined that the Government's installation of the GPS device on defendant's vehicle, and its use of that device to monitor the vehicle's movements, constituted a "search." Under the common-law trespassory test, the Government physically occupied private property for the purpose of obtaining information. Such a physical intrusion would have been considered a "search" within the meaning of the *Fourth Amendment* when it was adopted. Defendant possessed the vehicle at the time the Government trespassorily inserted the information-gathering device. The Government forfeited its alternative argument that officers had reasonable suspicion and probable cause.

Outcome: The Court affirmed the appellate court's judgment. 9-0 Decision; 2 Concurrences.

Headnotes

SEARCH AND SEIZURE §4 > FOURTH AMENDMENT > Headnote:

LEdHN[1] [1]

See *U.S. Const. amend. IV*, which protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. (Scalia, J.,

joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §10.2 > MOTOR VEHICLE AS "EFFECT" > Headnote:

LEdHN[2] [2]

It is beyond dispute that a vehicle is an "effect" as that term is used in the *Fourth Amendment*. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §23 > INSTALLATION OF GPS ON VEHICLE > Headnote:

LEdHN[3] [3]

The Government's installation of a global-positioning-system device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search." (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §2 > TRESPASS > Headnote:

LEdHN[4] [4]

Regarding the significance of property rights in search-and-seizure analysis, English law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §8 > PROPERTY RIGHTS > Headnote:

LEdHN[5] [5]

The text of the *Fourth Amendment* reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5 SEARCH AND SEIZURE §5.1 SEARCH AND SEIZURE §8 SEARCH AND SEIZURE §23 > FOURTH AMENDMENT -- TRESPASS -- LOCATION OF WIRETAPS -- PRIVACY > Headnote:

LEdHN[6] [6]

The United States Supreme Court's *Fourth Amendment* jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. Thus, the Court has held that wiretaps attached to telephone wires on the public streets did not constitute a *Fourth Amendment* search because there was no entry of the houses or offices of the defendants. The Court's later cases, of course, have deviated from that exclusively property-based approach. The Court has said that the *Fourth Amendment* protects people, not places, and has found a violation in attachment of an eavesdropping device to a public telephone booth. The Court's later cases have applied the analysis of Justice Harlan's concurrence in the Katz case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy." (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5.1 SEARCH AND SEIZURE §8 SEARCH AND SEIZURE §9 SEARCH AND SEIZURE §19 > FOURTH AMENDMENT -- PRIVACY -- PLACES AND OBJECTS > Headnote:

LEdHN[7] [7]

At bottom, the United States Supreme Court must assure preservation of that degree of privacy against government that existed when the *Fourth Amendment* was adopted. For most of the Court's history the *Fourth Amendment* was understood to embody a particular concern for government trespass upon the areas (persons, houses, papers, and effects) it enumerates. Katz did not repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between other people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no *Fourth Amendment* violation unless the conversational privacy of the homeowner himself is invaded. The Court does not believe that Katz, by holding that the *Fourth Amendment* protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5 > FOURTH AMENDMENT -- PHYSICAL INTRUSION > Headnote:

LEdHN[8] [8]

Whatever new methods of investigation may be devised, the United States Supreme Court's task, at a minimum, is to decide whether the action in question would have constituted a "search" within the original meaning of the *Fourth Amendment*. Where the Government obtains information by

physically intruding on a constitutionally protected area, such a search has undoubtedly occurred. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5 SEARCH AND SEIZURE §5.1 > FOURTH AMENDMENT -- PROPERTY RIGHTS -- PRIVACY > Headnote:

LEdHN[9] [9]

Katz, the United States Supreme Court has explained, established that property rights are not the sole measure of *Fourth Amendment* violations, but did not snuff out the previously recognized protection for property. Katz did not erode the principle that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the *Fourth Amendment*. The Court has embodied that preservation of past rights in the Court's very definition of "reasonable expectation of privacy" which the Court has said to be an expectation that has a source outside of the *Fourth Amendment*, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. Katz did not narrow the *Fourth Amendment's* scope. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5.1 SEARCH AND SEIZURE §8 SEARCH AND SEIZURE §9 > HOUSES -- EFFECTS -- PRIVACY > Headnote:

LEdHN[10] [10]

A trespass on "houses" or "effects," or a Katz invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5 > TRESPASS > Headnote:

LEdHN[11] [11]

The Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §7 SEARCH AND SEIZURE §8 SEARCH AND SEIZURE §8.5 SEARCH AND SEIZURE §9 SEARCH AND SEIZURE §19 > FOURTH AMENDMENT -- PROTECTED AREAS AND ITEMS > Headnote:

LEdHN[12] [12]

Quite simply, an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the *Fourth Amendment*. The Government's physical intrusion on such an area--unlike its intrusion on an "effect"--is of no *Fourth Amendment* significance. Thus, the United States Supreme Court's theory is not that the *Fourth Amendment* is concerned with any technical trespass that led to the gathering of evidence. The *Fourth Amendment* protects against trespassory searches only with regard to those items (persons, houses, papers, and effects) that it enumerates. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §5 SEARCH AND SEIZURE §23 > TRESPASS -- ELECTRONIC SIGNALS > Headnote:

LEdHN[13] [13]

In the *Fourth Amendment* context, the United States Supreme Court does not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to Katz analysis. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

SEARCH AND SEIZURE §2 SEARCH AND SEIZURE §10.3 > VISUAL OBSERVATION -- AUTOMOBILE -- EXPECTATION OF PRIVACY > Headnote:

LEdHN[14] [14]

The United States Supreme Court has to date not deviated from the understanding that mere visual observation does not constitute a search. Accordingly, a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Sotomayor, JJ.)

Syllabus

[915]** **[*946]** The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C.

Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the *Fourth Amendment*.

Held: The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the *Fourth Amendment*. *Pp. ___ - ___, 181 L. Ed. 2d, at 917-923.*

(a) The *Fourth Amendment* protects the "right of the people to be secure in their persons, houses, papers, and effects, [***2] against unreasonable searches and seizures:" Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on [*947] an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted. *Pp. ___ - ___, 181 L. Ed. 2d, at 917-918.*

(b) This conclusion is consistent with this Court's *Fourth Amendment* jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the analysis of Justice Harlan's concurrence in *Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576*, which said that the *Fourth Amendment* protects a person's [**916] "reasonable expectation of privacy," *id., at 360, 88 S. Ct. 507, 19 L. Ed. 2d 576*. Here, the Court need not address the Government's contention that Jones had no "reasonable expectation of privacy," because Jones's *Fourth Amendment* rights do not rise or fall with the *Katz* formulation. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the *Fourth Amendment* was adopted." *Kyllo v. United States, 533 U.S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94*. *Katz* did not repudiate [***3] the understanding that the *Fourth Amendment* embodies a particular concern for government trespass upon the areas it enumerates. The *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test. See *Alderman v. United States, 394 U.S. 165, 176, 89 S. Ct. 961, 22 L. Ed. 2d 176*; *Soldal v. Cook County, 506 U.S. 56, 64, 113 S. Ct. 538, 121 L. Ed. 2d 450*. *United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55*, and *United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530*--post-Katz cases rejecting *Fourth Amendment* challenges to "beepers," electronic tracking devices representing another form of electronic monitoring--do not foreclose the conclusion that a search occurred here. *New York v. Class, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81*, and *Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214*, also do not support the Government's position. *Pp. ___ - ___, 181 L. Ed. 2d, at 918-923.*

(c) The Government's alternative argument--that if the attachment and use of the device was a search, it was a reasonable one--is forfeited because it was not raised below. *P. ___, 181 L. Ed. 2d, at 923.*

615 F.3d 544, 392 U.S. App. D.C. 291, affirmed.

Counsel: Michael R. Dreeben argued the cause for petitioner.

Stephen C. Leckar argued the cause for respondent.

Judges: Scalia, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Thomas, and Sotomayor, JJ., joined. Sotomayor, J., filed a concurring opinion. Alito, J., filed an opinion concurring in the judgment, in which GINSBURG, Breyer and [***4] Kagan, JJ., joined.

Opinion by: SCALIA

Opinion

[*948] Justice **Scalia** delivered the opinion of the Court.

We decide whether the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the *Fourth Amendment*.

I

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint FBI and Metropolitan Police Department task force. Officers employed various investigative techniques, including visual surveillance of the nightclub, installation of a camera focused on the front door of the club, and a pen register and wiretap covering Jones's cellular phone.

Based in part on information gathered from these sources, in 2005 the Government applied to the United States District Court for the District of Columbia for a warrant authorizing the use of an electronic tracking device on the Jeep Grand Cherokee registered [**917] to Jones's wife. A warrant issued, authorizing installation of the device in the District of Columbia and within [***5] 10 days.

On the 11th day, and not in the District of Columbia but in

Maryland,[1] agents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.

The Government ultimately obtained a multiple-count indictment charging Jones and several alleged co-conspirators with, as relevant here, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of *21 U.S. C. §§ 841* and *846*. Before trial, Jones filed a motion to [***6] suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence. *451 F. Supp. 2d 71, 88 (2006)*. It held the remaining data admissible, because " '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.' " *Ibid.* (quoting *United States v. Knotts, 460 U.S. 276, 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983)*). Jones's trial in October 2006 produced a hung jury on the conspiracy count.

In March 2007, a grand jury returned another indictment, charging Jones and others with the same conspiracy. The Government introduced at trial the same GPS-derived locational data admitted in the first trial, which connected Jones to the alleged conspirators' stash house that contained $850,000 in cash, 97 kilograms of [*949] cocaine, and 1 kilogram of cocaine base. The jury returned a guilty verdict, and the District Court sentenced Jones to life imprisonment.

The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use [***7] of the GPS device which, it said, violated the *Fourth Amendment*. *United States v. Maynard, 615 F.3d 544, 392 U.S. App. D.C. 291 (2010)*. The D. C. Circuit denied the Government's petition for rehearing en banc, with four judges dissenting. *625 F.3d 766, 393 U.S. App. D.C. 194 (2010)*. We granted certiorari, *564 U.S. ___, 131 S. Ct. 3064; 180 L. Ed. 2d 885 (2011)*.

II

A

The *Fourth Amendment* provides in relevant part that ***HN1 LEdHN[1]*** [1] "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." ***HN2 LEdHN[2]*** [2] It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment [**918]. *United States v. Chadwick, 433 U.S. 1, 12, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977)*. We hold that ***HN3 LEdHN[3]*** [3] the Government's installation of a GPS device on a target's vehicle,[2] and its use of that device to monitor the vehicle's movements, constitutes a "search."

It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the *Fourth Amendment* when it was adopted. *Entick v. Carrington*, 95 Eng. Rep. 807 (C. P. 1765), is a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' " with regard to search and seizure. *Brower v. County of Inyo, 489 U.S. 593, 596, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989)* (quoting *Boyd v. United States, 116 U.S. 616, 626, 6 S. Ct. 524, 29 L. Ed. 746 (1886)*). In that case, Lord Camden expressed in plain terms ***HN4 LEdHN[4]*** [4] the significance of property rights in search-and-seizure analysis:

> "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; [***9] if he will tread upon his neighbour's ground, he must justify it by law." *Entick, supra*, at 817.

HN5 LEdHN[5] [5] The text of the *Fourth Amendment*

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[1] In this litigation, the Government has conceded noncompliance with the warrant and has argued only that a warrant was not required. *United States v. Maynard, 615 F.3d 544, 566, n. (CADC, 392 U.S. App. D.C. 291 2010)*.

[2] As we have noted, the Jeep was registered to Jones's wife. The Government acknowledged, however, that Jones was "the exclusive driver." *Id., at 555*, n. (internal quotation marks omitted). If Jones was not the owner he had at least the property rights of a bailee. The Court of Appeals concluded that the vehicle's registration did not affect his ability to make a ***Fourth Amendment*** objection, *ibid.*, [***8] and the Government has not challenged that determination here. We therefore do not consider the ***Fourth Amendment*** significance of Jones's status.

reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, ***HN6 LEdHN[6]*** [6] our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. Kyllo v. United States, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); Kerr, The **[*950]** Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 816 (2004). Thus, in Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), we held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants," id., at 464, 48 S. Ct. 564, 72 L. Ed. 944.

Our later cases, of course, have deviated from that exclusively property-based approach. In Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), we said that "the Fourth Amendment protects people, not places," and **[***10]** found a violation in attachment of an eavesdropping device to a public telephone **[**919]** booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy," id., at 360, 88 S. Ct. 507, 19 L. Ed. 2d 576. See, e.g., Bond v. United States, 529 U.S. 334, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000); California v. Ciraolo, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986); Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

The Government contends that the Harlan standard shows that no search occurred here, since Jones had no "reasonable expectation of privacy" in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads, which were visible to all. But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. ***HN7 LEdHN[7]*** [7] At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Kyllo, supra, at 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, **[***11]** papers, and effects") it enumerates.[3] *Katz* did not repudiate that understanding. Less than two years later the Court upheld defendants' contention that the Government could not introduce against them conversations between *other* people obtained by warrantless placement of electronic surveillance devices in their homes. The opinion rejected the dissent's contention that there was no Fourth Amendment violation "unless the conversational privacy of the homeowner himself is invaded."[4] Alderman v. United States, **[*951]** 394 U.S. 165, 176, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969). "[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home . . . . " Id., at 180, 89 S. Ct. 961, 22 L. Ed. 2d 176.

More recently, in Soldal v. Cook County, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a 'technical' sense" when a **[**920]** trailer home was forcibly removed, **[***13]** id., at 62, 113 S. Ct. 538, 121 L. Ed. 2d 450, no Fourth Amendment violation occurred because law enforcement had not "invade[d] the [individuals'] privacy," id., at 60, 113 S. Ct. 538, 121 L. Ed. 2d 450. ***HN9 LEdHN[9]*** [9] *Katz*, the Court explained, established that "property rights are not the sole measure of Fourth Amendment violations," but did not "snuf[f] out the previously recognized protection for property." 506 U.S., at 64, 113 S. Ct. 538, 121 L. Ed. 2d 450. As Justice Brennan explained in his concurrence in *Knotts*, *Katz* did not erode the principle "that, when the Government *does* engage in physical

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[3] Justice Alito's concurrence (hereinafter concurrence) doubts the wisdom of our approach because "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case." Post, at ___, 181 L. Ed. 2d, at 928 (opinion concurring in judgment). But in fact it posits a situation that is not far afield--a constable's concealing himself in the target's coach in order to track its movements. *Ibid.* There is no doubt that **[***12]** the information gained by that trespassory activity would be the product of an unlawful search--whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled. ***LEdHN[8]*** [8] In any case, it is quite irrelevant whether there was an 18th-century analog. ***HN8*** Whatever new methods of investigation may be devised, our task, at a minimum, is to decide whether the action in question would have constituted a "search" within the original meaning of the ***Fourth Amendment***. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

[4] Thus, the concurrence's attempt to recast Alderman as meaning that individuals have a "legitimate expectation of privacy in all conversations that [take] place under their roof," post, at ___ - ___, 181 L. Ed. 2d, at 930, is foreclosed by the Court's opinion. The Court took as a given that the homeowner's "conversational privacy" had not been violated.

intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the *Fourth Amendment*." *460 U.S., at 286, 103 S. Ct. 1081, 75 L. Ed. 2d 55* (opinion concurring in judgment). We have embodied that 'preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the *Fourth Amendment*, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998)* (internal quotation marks omitted). *Katz* did not narrow the *Fourth Amendment's* scope.[5]

The Government [***15] contends that several of our post-Katz cases foreclose the conclusion that what occurred here constituted a search. It relies principally on two cases in which we rejected *Fourth Amendment* challenges to "beepers," electronic tracking devices that represent another form of electronic monitoring. The first case, *Knotts*, upheld against *Fourth Amendment* challenge the use of a "beeper" that had been placed in a container of chloroform, allowing law enforcement to monitor the location of the container. *460 U.S., at 278, 103 S. Ct. 1081, 75 L. Ed. 2d 55*. We said that there had been no infringement of Knotts' reasonable expectation of privacy since the information obtained--the location of the automobile carrying the container on public roads, and the location of the off-loaded container in open fields near Knotts' cabin--had been voluntarily conveyed to the [*952] public.[6] *Id., at 281-282, 103 S. Ct. 1081, 75 L. Ed. 2d 55*. But as we [**921] have discussed, ***HN11 LEdHN[11]*** [11] the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test. The holding in *Knotts* addressed only the former, since the latter was not at issue. The beeper had been placed in the container before it came into Knotts' possession, with the consent of the then-owner. [***16] *460 U.S., at 278, 103 S. Ct. 1081, 75 L. Ed. 2d 55*. Knotts did not challenge that installation, and we specifically declined to consider its effect on the *Fourth Amendment* analysis. *Id., at 279, 103 S. Ct. 1081, 75 L. Ed. 2d 55*. *Knotts* would be relevant, perhaps, if the Government were making the argument that what would otherwise be an unconstitutional search is not such where it produces only public information. The Government does not make that argument, and we know of no case that would support it.

The second "beeper" case, *United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984)*, does not suggest a different conclusion. There we addressed the question left open by *Knotts*, whether the installation of a beeper in a container amounted to a search or seizure. *468 U.S., at 713, 104 S. Ct. 3296, 82 L. Ed. 2d 530*. As in *Knotts*, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. *468 U.S., at 708, 104 S. Ct. 3296, 82 L. Ed. 2d 530*. [***17] Thus, the specific question we considered was whether the installation "*with the consent of the original owner* constitute[d] a search or seizure . . . when the container is delivered to a buyer having no knowledge of the presence of the beeper." *Id., at 707, 104 S. Ct. 3296, 82 L. Ed. 2d 530* (emphasis added). We held not. The Government, we said, came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. See *id., at 712, 104 S. Ct. 3296, 82 L. Ed. 2d 530*. That conclusion is perfectly consistent with the one we reach here. Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location. *Cf.* On *Lee v. United States, 343 U.S. 747, 751-752, 72 S. Ct. 967, 96 L. Ed. 1270 (1952)* (no search or seizure where an informant, who was wearing a concealed microphone, was invited into the defendant's business). Jones, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing.

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[5] The concurrence notes that post-Katz we [***14] have explained that " 'an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation.' " *Post, at ___, 181 L. Ed. 2d, at 930* (quoting *United States v. Karo, 468 U.S. 705, 713, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984)*). That is undoubtedly true, and undoubtedly irrelevant. *Karo* was considering whether a seizure occurred, and as the concurrence explains, a seizure of property occurs, not when there is a trespass, but "when there is some meaningful interference with an individual's possessory interests in that property." *Post, at ___, 181 L. Ed. 2d, at 927* (internal quotation marks omitted). Likewise with a search. Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information. ***LEdHN[10]*** [10] Related to this, and similarly irrelevant, is the concurrence's point that, if analyzed separately, neither the installation of the device nor its use would constitute a ***Fourth Amendment*** search. See ibid. Of course not. ***HN10*** A trespass on "houses" or "effects," or a Katz invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.

[6] *Knotts* noted the "limited use which the government made of the signals from this particular beeper," *460 U.S., at 284, 103 S. Ct. 1081, 75 L. Ed. 2d 55*; and reserved the question whether "different constitutional principles may be applicable" to "dragnet-type law enforcement practices" of the type that GPS tracking made possible here, ibid.

The Government also points to our exposition in *New York v. Class, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986)*, [***18] that "[t]he exterior of a car . . . is thrust into the public eye, and thus to examine it does not constitute a 'search.' *Id., at 114, 106 S. Ct. 960, 89 L. Ed. 2d 81*. That statement is of marginal relevance here since, as the Government acknowledges, "the officers in this case did *more* than conduct a visual inspection of respondent's vehicle," Brief for United States 41 (emphasis added). By attaching the device to the Jeep, officers encroached on a protected area. In Class itself we suggested that this would make a difference, for we concluded that an officer's momentary [**922] reaching into the interior of a vehicle did constitute a search.[7] *475 U.S., at 114-115, 106 S. Ct. 960, 89 L. Ed. 2d 81*.

[*953] Finally, the Government's position gains little support from our conclusion in *Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)*, that officers' information-gathering intrusion on an "open field" did not constitute a *Fourth Amendment* search even though it was a trespass at common law, *id., at 183, 104 S. Ct. 1735, 80 L. Ed. 2d 214*. ***HN12 LEdHN[12]*** [12] Quite simply, an open field, unlike the curtilage of a home, see *United States v. Dunn, 480 U.S. 294, 300, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987)*, is not one of those protected areas enumerated in the *Fourth Amendment*. *Oliver, supra, at 176-177, 104 S. Ct. 1735, 80 L. Ed. 2d 214*. See also *Hester v. United States, 265 U.S. 57, 59, 44 S. Ct. 445, 68 L. Ed. 898 (1924)*. The Government's physical intrusion on such an area--unlike its intrusion on the "effect" at issue here--is of no *Fourth Amendment* significance.[8]

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[7] The Government also points to *Cardwell v. Lewis, 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974)*, in which the Court rejected the claim that the inspection of an impounded vehicle's tire tread and the collection of paint scrapings from its exterior violated the ***Fourth Amendment***. Whether the plurality said so because no search occurred or because the search was reasonable is unclear. Compare *id., at 591, 94 S. Ct. 2464, 41 L. Ed. 2d 325* (opinion of Blackmun, J.) ("[W]e fail to comprehend what expectation of privacy was infringed"), with *id., at 592, 94 S. Ct. 2464, 41 L. Ed. 2d 325* ("Under circumstances such as these, where probable cause exists, a warrantless [***19] examination of the exterior of a car is not unreasonable . . .").

[8] Thus, our theory is not that the ***Fourth Amendment*** is concerned with "any technical trespass that led to the gathering of evidence." *Post, at ___, 181 L. Ed. 2d, at 928* (Alito, J., concurring in judgment) (emphasis added). The ***Fourth Amendment*** protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates. The trespass that occurred in *Oliver* may properly be understood as a "search," [***20] but not one "in the constitutional sense." *466 U.S., at 170, 183, 104 S. Ct. 1735, 80 L. Ed. 2d 214*.

B

The concurrence begins by accusing us of applying "18th-century tort law." *Post, at ___, 181 L. Ed. 2d, at 927*. That is a distortion. What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide at *a minimum* the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply *exclusively Katz*'s reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.

The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. *Post, at ___, 181 L. Ed. 2d, at 931*. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, ***HN13 LEdHN[13]*** [13] we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

In fact, it is the concurrence's insistence on the exclusivity of the *Katz* test that needlessly leads us into "particularly vexing problems" in the present case. ***HN14 LEdHN[14]*** [14] This Court has to date [***21] not deviated from the understanding that mere visual observation does not constitute a search. See *Kyllo, 533 U.S., at 31-32, 121 S. Ct. 2038, 150 L. Ed. 2d 94*. We accordingly held in *Knotts* that "[a] person [**923] traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *460 U.S., at 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55*. Thus, even assuming that the concurrence is correct to say that "[t]raditional surveillance" of Jones for a 4-week period "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance," *post, at ___, 181 L. Ed. 2d, at 933*, our cases suggest that such visual observation is constitutionally [*954] permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.

And answering it affirmatively leads us needlessly into additional thorny problems. The concurrence posits that "relatively short-term monitoring of a person's movements on public streets" is okay, but that "the use of longer term GPS monitoring in investigations *of most offenses* is no good. *Post, at ___, 181 L. Ed. 2d, at 934* (emphasis added). That introduces yet another [***22] novelty into our jurisprudence. There is no precedent for the proposition that whether a

search has occurred depends on the nature of the crime being investigated. And even accepting that novelty, it remains unexplained why a 4-week investigation is "surely" too long and why a drug-trafficking conspiracy involving substantial amounts of cash and narcotics is not an "extraordinary offens[e]" which may permit longer observation. See *post, at ___ - ___, 181 L. Ed. 2d, at 934*. What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or of a 6-month monitoring of a suspected terrorist? We may have to grapple with these "vexing problems" in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.

III

The Government argues in the alternative that even if the attachment and use of the device was a search, it was reasonable--and thus lawful--under the *Fourth Amendment* because "officers had reasonable suspicion, and indeed probable cause, to believe that [Jones] was a leader in a large-scale cocaine distribution conspiracy." Brief for United States 50-51. We have no occasion to consider **[***23]** this argument. The Government did not raise it below, and the D. C. Circuit therefore did not address it. See *625 F. 3d, at 767* (Ginsburg, Tatel, and Griffith, JJ., concurring in denial of rehearing en banc). We consider the argument forfeited. See *Sprietsma v. Mercury Marine, 537 U.S. 51, 56, n. 4, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002)*.

The judgment of the Court of Appeals for the D. C. Circuit is affirmed.

It is so ordered.

Concur by: SOTOMAYOR; ALITO

Concur

Justice **Sotomayor**, concurring.

I join the Court's opinion because I agree that a search within the meaning of the *Fourth Amendment* occurs, at a minimum, "[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area." *Ante, at ___, n. 3, 181 L. Ed. 2d, at 919*. In this case, the Government installed a **[**924]** Global Positioning System (GPS) tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, *Fourth Amendment* protection. See, *e.g., Silverman v. United States, 365 U.S. 505, 511-512, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)*. **[***24]**

Of course, the *Fourth Amendment* is not concerned only with trespassory intrusions on property. See, *e.g., Kyllo v. United States, 533 U.S. 27, 31-33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)*. Rather, even in the absence of a trespass, "a *Fourth Amendment* search occurs when the government violates a subjective expectation of privacy that society recognizes **[*955]** as reasonable." *Id., at 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94*; see also *Smith v. Maryland, 442 U.S. 735, 740-741, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)*; *Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* (Harlan, J., concurring). In *Katz*, this Court enlarged its then-prevailing focus on property rights by announcing that the reach of the *Fourth Amendment* does not "turn upon the presence or absence of a physical intrusion." *Id., at 353, 88 S. Ct. 507, 19 L. Ed. 2d 576*. As the majority's opinion makes clear, however, *Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. *Ante, at ___, 181 L. Ed. 2d, at 920*. Thus, "when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the *Fourth Amendment*." *United States v. Knotts, 460 U.S. 276, 286, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983)* (Brennan, J., concurring in judgment); see also, *e.g.*, **[***25]** *Rakas v. Illinois, 439 U.S. 128, 144, n. 12, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)*. Justice Alito's approach, which discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' Jeep, erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control. See *post, at ___ - ___, 181 L. Ed. 2d, at 929-930* (opinion concurring in judgment). By contrast, the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case.

Nonetheless, as Justice Alito notes, physical intrusion is now unnecessary to many forms of surveillance. *Post, at ___ - ___, 181 L. Ed. 2d, at 931-933*. With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones. See *United States v. Pineda-Moreno, 617 F.3d 1120, 1125 (CA9 2010)* (Kozinski, C. J., dissenting from denial of rehearing en bans). In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion **[***26]** on property, the majority opinion's trespassory test may provide little guidance. But "[s]ituations involving merely the transmission of electronic signals

without trespass would *remain* subject to *Katz* analysis." [**925] *Ante, at ___, 181 L. Ed. 2d, at 922*. As Justice Alito incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. *Post, at ___ - ___, 181 L. Ed. 2d, at 917-922*. Under that rubric, I agree with Justice Alito that, at the very least, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *Post, at ___, 181 L. Ed. 2d, at 934*.

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, *e.g.*, *People v. Weaver, 12 N. Y. 3d 433, 441-442, 909 N.E.2d 1195, 1199, 882 N.Y.S.2d 357 (2009)* ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination [***27] to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The [*956] Government can store such records and efficiently mine them for information years into the future. *Pineda-Moreno, 617 F. 3d, at 1124* (opinion of Kozinski, C. J.). And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." *Illinois v. Lidster, 540 U.S. 419, 426, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004)*.

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring--by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track--may "alter the relationship [***28] between citizen and government in a way that is inimical to democratic society." *United States v. Cuevas-Perez, 640 F.3d 272, 285 (CA7 2011)* (Flaum, J., concurring).

I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. See *Kyllo, 533 U.S., at 35, n. 2, 121 S. Ct. 2038, 150 L. Ed. 2d 94*; *ante, at ___, 181 L. Ed. 2d, at 923* (leaving open the possibility that duplicating traditional surveillance "through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy"). I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate [**926] branch, a tool so amenable to misuse, especially in light of the *Fourth Amendment's* goal to curb arbitrary exercises [***29] of police power to and prevent "a too permeating police surveillance," *United States v. Di Re, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948)*.*

[*957] More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g.*, *Smith, 442 U.S., at 742, 99 S. Ct. 2577, 61 L. Ed. 2d 220*; *United States v. Miller, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976)*. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit

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* *United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983)*, does not foreclose the conclusion that GPS monitoring, in the absence of a physical intrusion, is a ***Fourth Amendment*** search. As the majority's opinion notes, *Knotts* reserved the question whether " 'different constitutional principles may be applicable' " to invasive law enforcement practices such as GPS tracking. See *ante, at ___, n. 6, 181 L. Ed. 2d, at 920* (quoting *460 U.S., at 284, 103 S. Ct. 1081, 75 L. Ed. 2d 55*). *United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984)*, addressed the ***Fourth Amendment*** implications of the installation of a beeper in a container with the consent of the container's original owner, who was aware that the beeper would be used for surveillance purposes. *Id., at 707, 104 S. Ct. 3296, 82 L. Ed. 2d 530*. Owners of GPS-equipped cars and smartphones do not contemplate that these devices will be used to enable covert surveillance of their movements. To the contrary, subscribers of one such service greeted a similar suggestion with anger. Quain, Changes to OnStar's Privacy Terms Rile Some Users, N.Y. Times (Sept. 22, 2011), online at http://wheels.blogs.nytimes.com/2011/09/22/changes-to-onstars-privacy-terms-rile-some-users [***30] (as visited Jan. 19, 2012, and available in Clerk of Court's case file). In addition, the bugged container in Karo lacked the close relationship with the target that a car shares with its owner. The bugged container in Karo was stationary for much of the Government's surveillance. See *468 U.S., at 708-710, 104 S. Ct. 3296, 82 L. Ed. 2d 530*. A car's movements, by contrast, are its owner's movements.

and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice Alito notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or [***31] come to accept this "diminution of privacy" as "inevitable," *post, at ___, 181 L. Ed. 2d, at 932*, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our *Fourth Amendment* jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to *Fourth Amendment* protection. See *Smith, 442 U.S., at 749, 99 S. Ct. 2577, 61 L. Ed. 2d 220* (Marshall, J., dissenting) ("Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes"); see also *Katz, 389 U.S., at 351-352, 88 S. Ct. 507, 19 L. Ed. 2d 576* ("[W]hat [a person] seeks to preserve as private, even in an area accessible [**927] to the public, may be constitutionally protected").

Resolution of these difficult questions in this case is unnecessary, [***32] however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision. I therefore join the majority's opinion.

Justice **Alito**, with whom Justice **Ginsburg**, Justice **Breyer**, and Justice **Kagan** join, concurring in the judgment.

This case requires us to apply the *Fourth Amendment's* prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device[1] to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels.[2] And for this reason, the Court concludes, [*958] the installation and use of the GPS device constituted a search. *Ante, at ___ - ___, 181 L. Ed. 2d, at 917-918*.

This holding, in my judgment, is unwise. It strains the language of the *Fourth Amendment*; it has little if any support in current *Fourth Amendment* case law; and it is highly artificial.

I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.

I

A

The *Fourth Amendment* prohibits "unreasonable searches and seizures," and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms. The Court does not contend that there was a seizure. A seizure of property occurs when there is "some meaningful interference with an individual's possessory interests in that property," *United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)*, [***34] and here there was none. Indeed, the success of the surveillance technique that the officers employed was dependent on the fact that the GPS did not interfere in any way with the operation of the vehicle, for if any such interference had been detected, the device might have been discovered.

The Court does claim that the installation and use of the GPS constituted a search, see *ante, at ___ - ___, 181 L. Ed. 2d, at 917-922*, but this conclusion is dependent on the questionable proposition that these two procedures cannot be separated for purposes of *Fourth Amendment* analysis. If these two procedures are analyzed separately, it is not at all clear from the Court's opinion [**928] why either should be regarded as a search. It is clear that the attachment of the GPS device was not itself a search; if the device had not functioned or if the officers had not used it, no information would have been obtained. And the Court does not contend that the use of the device constituted a search either. On the contrary, the Court accepts the holding in *United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983)*, that the use of a surreptitiously planted electronic device to monitor a vehicle's movements on public roads did not amount to a search. See

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[1] Although the record does not reveal the size or weight of the device used in this case, there is now a device in use that weighs two ounces and is the size of a credit card. Tr. of Oral Arg. 27.

[2] At common law, a suit for trespass to chattels [***33] could be maintained if there was a violation of "the dignitary interest in the inviolability of chattels," but today there must be "some actual damage to the chattel before the action can be maintained." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 87 (5th ed. 1984) (hereinafter Prosser & Keeton). Here, there was no actual damage to the vehicle to which the GPS device was attached.

*ante, [***35] at ___, 181 L. Ed. 2d, at 920.*

The Court argues--and I agree--that "we must 'assur[e] preservation of that degree of privacy against government that existed when the *Fourth Amendment* was adopted.' " *Ante, at ___, 181 L. Ed. 2d, at 919* (quoting *Kyllo v. United States, 533 U.S. 27, 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)*). But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?[3]) The Court's theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable, see Prosser & Keeton 75, but a trespass on open fields, as opposed to the "curtilage" of a home, does not fall within the scope of the *Fourth Amendment* because private property outside the curtilage [*959] is not part of a "hous[e]" within the meaning of the *Fourth Amendment*. See *Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)*; *Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924)*.

B

The Court's reasoning in this case is very similar to that in the Court's early decisions involving wiretapping and electronic eavesdropping, namely, that a technical trespass followed by the gathering of evidence constitutes a search. In the early electronic surveillance cases, the Court concluded that a *Fourth Amendment* search occurred when private conversations were monitored as a result of an "unauthorized physical penetration into the premises occupied" by the defendant. *Silverman v. United States, 365 U.S. 505, 509, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961)*. In *Silverman*, police officers listened to conversations in an attached home by inserting a "spike mike" through the wall that this house shared with the vacant house next door. *Id., at 506, 81 S. Ct. 679, 5 L. Ed. 2d 734*. This procedure was held to be a search because the mike made contact with a heating duct on the other side of the wall and thus "usurp[ed] . . . an integral part of the premises." *Id., at 511, 81 S. Ct. 679, 5 L. Ed. 2d 734*.

By contrast, in cases in which there was no trespass, it was [***37] held that there was no search. Thus, in *Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928)*, the [**929] Court found that the *Fourth Amendment* did not apply because "[t]he taps from house lines were made in the streets near the houses." *Id., at 457, 48 S. Ct. 564, 72 L. Ed. 944*. Similarly, the Court concluded that no search occurred in *Goldman v. United States, 316 U.S. 129, 135, 62 S. Ct. 993, 86 L. Ed. 1322 (1942)*, where a "detectaphone" was placed on the outer wall of defendant's office for the purpose of overhearing conversations held within the room.

This trespass-based rule was repeatedly criticized. In *Olmstead*, Justice Brandeis wrote that it was "immaterial where the physical connection with the telephone wires was made." *277 U.S., at 479, 48 S. Ct. 564, 72 L. Ed. 944* (dissenting opinion). Although a private conversation transmitted by wire did not fall within the literal words of the *Fourth Amendment*, he argued, the Amendment should be understood as prohibiting "every unjustifiable intrusion by the government upon the privacy of the individual." *Id., at 478, 48 S. Ct. 564, 72 L. Ed. 944*. See also, *e.g.*, *Silverman, supra, at 513, 81 S. Ct. 679, 5 L. Ed. 2d 734* (Douglas, J., concurring) ("The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests seems to me beside the point. Was not [***38] the wrong . . . done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device--even the degree of its remoteness from the inside of the house--is not the measure of the injury"); *Goldman, supra, at 139, 62 S. Ct. 993, 86 L. Ed. 1322* (Murphy, J., dissenting) ("[T]he search of one's home or office no longer requires physical entry, for science has brought forth far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the *Fourth Amendment*).

Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), finally did away with the old approach, holding that a trespass was not required for a *Fourth Amendment* violation. *Katz* involved the use of a listening device that was attached to the outside of a public telephone booth and that allowed police officers to eavesdrop on one end of the target's phone conversation. This procedure [*960] did not physically intrude on the area occupied by the target, but the *Katz* Court, "repudiate[d]" the old doctrine, *Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)*, and held that "[t]he fact that the electronic device employed . . . did not [***39] happen to penetrate the wall of the booth can have no constitutional significance," *389 U.S., at 353, 88 S. Ct. 507, 19 L. Ed. 2d 576* ("[T]he reach of th[e] [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure"); see

[3] The [***36] Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both--not to mention a constable with incredible fortitude and patience.

Rakas, supra, at 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (describing *Katz* as holding that the "capacity to claim the protection for the *Fourth Amendment* depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place"); *Kyllo, supra, at 32, 121 S. Ct. 2038, 150 L. Ed. 2d 94* ("We have since decoupled violation of a person's *Fourth Amendment* rights from trespassory violation of his property"). What mattered, the Court now held, was whether the conduct at issue "violated the privacy upon which [the defendant] justifiably relied [**930] while using the telephone booth." *Katz, supra, at 353, 88 S. Ct. 507, 19 L. Ed. 2d 576*.

Under this approach, as the Court later put it when addressing the relevance of a technical trespass, "an actual trespass is neither necessary *nor sufficient* to establish a constitutional violation." *United States v. Karo , 468 U.S. 705, 713, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984)* (emphasis added). *Ibid.* ("Compar[ing] *Katz v. United States, 389 U.S. 347, [88 S. Ct. 507, 19 L. Ed. 2d 576] (1967)* [***40] (no trespass, but *Fourth Amendment* violation), with *Oliver v. United States, 466 U.S. 170, [104 S. Ct. 1735, 80 L. Ed. 2d 214] (1984)* (trespass, but no *Fourth Amendment* violation)"). In *Oliver*, the Court wrote:

> "The existence of a property right is but one element in determining whether expectations of privacy are legitimate. 'The premise that property interests control the right of the Government to search and seize has been discredited.' *Katz, 389 U.S., at 353, [88 S. Ct. 507, 19 L. Ed. 2d 576]* (quoting *Warden v. Hayden, 387 U.S. 294, 304, [87 S. Ct. 1642, 18 L. Ed. 2d 782] (1967)*; some internal quotation marks omitted)." *466 U.S., at 183, 104 S. Ct. 1735, 80 L. Ed. 2d 214*.

II

The majority suggests that two post-*Katz* decisions--*Soldal v. Cook County, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992)*, and *Alderman v. United States, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969)*--show that a technical trespass is sufficient to establish the existence of a search, but they provide little support.

In *Soldal*, the Court held that towing away a trailer home without the owner's consent constituted a seizure even if this did not invade the occupants' personal privacy. But in the present case, the Court does not find that there was a seizure, and it is clear that none occurred.

In *Alderman*, the Court held that the *Fourth Amendment* rights of homeowners were implicated by the use of [***41] a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. See *394 U.S., at 176-180, 89 S. Ct. 961, 22 L. Ed. 2d 176*. *Alderman* is best understood to mean that the homeowners had a legitimate expectation of privacy in all conversations that took place under their roof. See *Rakas, 439 U.S., at 144, n. 12, 99 S. Ct. 421, 58 L. Ed. 2d 387* (citing *Alderman* for the proposition that "the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment"); *439 U.S., at 153, 99 S. Ct. 421, 58 L. Ed. 2d 387* (Powell, J., concurring) (citing *Alderman* [*961] for the proposition that "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable); *Karo, supra, at 732, 104 S. Ct. 3296, 82 L. Ed. 2d 530* (Stevens, J., concurring in part and dissenting in part) (citing *Alderman* in support of the proposition that "a homeowner has a reasonable expectation of privacy in the contents of his home, including items owned by others").

In sum, the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory.

III

Disharmony [***42] with a substantial [**931] body of existing case law is only one of the problems with the Court's approach in this case.

I will briefly note four others. First, the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation). Attaching such an object is generally regarded as so trivial that it does not provide a basis for recovery under modern tort law. See Prosser & Keeton § 14, at 87 (harmless or trivial contact with personal property not actionable); D. Dobbs, Law of Torts 124 (2000) (same). But under the Court's reasoning, this conduct may violate the *Fourth Amendment*. By contrast, if long-term monitoring can be accomplished without committing a technical trespass--suppose, for example, that the Federal Government required or persuaded auto manufacturers to include a GPS tracking device in every car--the Court's theory would provide no protection.

Second, the Court's approach leads to incongruous results. If the police attach [***43] a GPS device to a car and use the device to follow the car for even a brief time, under the Court's theory, the *Fourth Amendment* applies. But if the

police follow the same car for a much longer period using unmarked cars and aerial assistance, this tracking is not subject to any *Fourth Amendment* constraints.

In the present case, the *Fourth Amendment* applies, the Court concludes, because the officers installed the GPS device after respondent's wife, to whom the car was registered, turned it over to respondent for his exclusive use. See *ante, at ___, 181 L. Ed. 2d, at 920*. But if the GPS had been attached prior to that time, the Court's theory would lead to a different result. The Court proceeds on the assumption that respondent "had at least the property rights of a bailee," *ante, at ___, n. 2, 181 L. Ed. 2d, at 918*, but a bailee may sue for a trespass to chattel only if the injury occurs during the term of the bailment. See 8A Am. Jur. 2d, Bailment §166, pp. 685-686 (2009). So if the GPS device had been installed before respondent's wife gave him the keys, respondent would have no claim for trespass--and, presumably, no *Fourth Amendment* claim either.

Third, under the Court's theory, the coverage of the *Fourth Amendment* may vary from [***44] State to State. If the events at issue here had occurred in a community property State[4] or a State that has adopted the Uniform Marital Property Act,[5] respondent would likely be an owner of the vehicle, and it would not matter whether the [*962] GPS was installed before or after his wife turned over the keys. In non-community-property States, on the other hand, the registration of the vehicle in the name of respondent's wife would generally be regarded as presumptive evidence that she was the sole owner. See 60 C. J. S., Motor Vehicles § 231, pp. 398-399 (2002); *8 Am. Jur. 2d, Automobiles, § 1208*, pp. 859-860 (2007).

Fourth, the Court's reliance on the law of trespass will present particularly vexing problems in cases involving [**932] surveillance that is carried out by making electronic, as opposed to physical, contact with the item to be tracked. For example, suppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this [***45] system constitute a trespass to chattels? Trespass to chattels has traditionally required a physical touching of the property. See *Restatement (Second) of Torts §217* and *Comment e* (1963 and 1964); Dobbs, *supra*, at 123. In recent years, courts have wrestled with the application of this old tort in cases involving unwanted electronic contact with computer systems, and some have held that even the transmission of electrons that occurs when a communication is sent from one computer to another is enough. See, *e.g.*, *CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1021 (SD Ohio 1997)*; *Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1566, n. 6, 54 Cal. Rptr. 2d 468 (1996)*. But may such decisions be followed in applying the Court's trespass theory? Assuming that what matters under the Court's theory is the law of trespass as it existed at the time of the adoption of the *Fourth Amendment*, do these recent decisions represent a change in the law or simply the application of the old tort to new situations?

IV

A

The Katz expectation-of-privacy test avoids the problems and complications noted above, but it is not without its own difficulties. It involves a degree of circularity, see *Kyllo, 533 U.S., at 34, 121 S. Ct. 2038, 150 L. Ed. 2d 94*, [***46] and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks. See *Minnesota v. Carter, 525 U.S. 83, 97, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998)* (Scalia, J., concurring). In addition, the *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.[6]

On the other [***47] hand, concern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened [*963] with respect to wiretapping. After *Katz*, Congress did not leave it to the courts to develop a body of *Fourth Amendment* case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute, see *18 U.S. C. §§ 2510-2522 (2006 ed. and Supp. IV)*, and since that time, the regulation of wiretapping has been

[4] See, *e.g.*, *Cal. Family Code Ann. §760* (West 2004).

[5] See Uniform Marital Property Act 4, 9A U. L. A. § 116 (1998).

[6] See, *e.g.*, NPR, The End of Privacy http://www.npr.org/series/114250076/the-end-of-privacy (all Internet materials as visited Jan. 20, 2012, and available in Clerk of Court's case file); Time Magazine, Everything About You Is Being Tracked--Get Over It, Joel Stein, Mar. 21, 2011, Vol. 177, No. 11.

governed primarily by statute and not by case [**933] law.[7] In an ironic sense, although *Katz* overruled *Olmstead*, Chief Justice Taft's suggestion in the latter case that the regulation of wiretapping was a matter better left for Congress, see *277 U.S., at 465-466, 48 S. Ct. 564, 72 L. Ed. 944*, has been borne out.

B

Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements. In some locales, closed-circuit television video monitoring is becoming ubiquitous. On toll roads, automatic toll collection systems create a precise record of the [***48] movements of motorists who choose to make use of that convenience. Many motorists purchase cars that are equipped with devices that permit a central station to ascertain the car's location at any time so that roadside assistance may be provided if needed and the car may be found if it is stolen.

Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users--and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States.[8] For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road.[9] Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability [***49] and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

V

In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical. Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. The surveillance at issue in this case--constant monitoring of the location of a vehicle for four weeks--would have required a large team of agents, multiple vehicles, and perhaps aerial assistance.[10] Only an investigation of unusual importance could have justified such an expenditure of law enforcement [*964] resources. [**934] Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap. In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. [***50] See, *e.g.*, Kerr, *102 Mich. L. Rev., at 805-806*. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.

To date, however, Congress and most States have not enacted statutes regulating the use of GPS tracking technology for law enforcement purposes. The best that we can do in this case is to apply existing *Fourth Amendment* doctrine and to ask whether the use of GPS tracking in a particular case involved [***51] a degree of intrusion that a reasonable person would not have anticipated.

Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See *Knotts, 460 U.S., at 281-282, 103 S. Ct. 1081, 75 L. Ed. 2d 55*. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not--and indeed, in the main, simply could not secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the

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[7] See Kerr, The *Fourth Amendment* and New Technologies: Constitutional Myths and the Case for Caution, *102 Mich. L. Rev. 801, 850-851 (2004)* (hereinafter Kerr).

[8] See CTIA Consumer Info, 50 Wireless Quick Facts, http://www.ctia.org/consumer-info/index.cfni/AID/10323.

[9] See, *e.g.*, The bright side of sitting in traffic: Crowdsourcing road congestion data, Google Blog, http://googleblog.blogspot.com/2009/08/bright-side-of-sitting-in-traffic.html.

[10] Even with a radio transmitter like those used in *United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983)*, or *United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984)*, such long-term surveillance would have been exceptionally demanding. The beepers used in those cases merely "emit[ted] periodic signals that [could] be picked up by a radio receiver." *Knotts, 460 U.S., at 277, 103 S. Ct. 1081, 75 L. Ed. 2d 55*. The signal had a limited range and could be lost if the police did not stay close enough. Indeed, in *Knotts* itself, officers lost the signal from the beeper, and only "with the assistance of a monitoring device located in a helicopter [was] the approximate location of the signal . . . picked up again about one hour later." *Id., at 278, 103 S. Ct. 1081, 75 L. Ed. 2d 55*.

line was surely crossed before the 4-week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a *Fourth Amendment* search, the police may always seek a warrant.[11] We also need not consider whether [***52] prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.

For these reasons, I conclude that the lengthy monitoring that occurred [***53] in this case constituted a search under the *Fourth Amendment*. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.

References

U.S.C.S., *Constitution, Amendment 4*

1 Criminal Constitutional Law § 2.03 (Matthew Bender)

27 Moore's Federal Practice §§641.102, 641.121 (Matthew Bender 3d ed.)

2 Search and Seizure §§33.10-33.15 (Matthew Bender)

L Ed Digest, Search and Seizure § 23

L Ed Index, Automobiles and Highway Traffic

Validity, under Federal Constitution, of warrantless search of motor vehicle--Supreme Court cases. *142 L. Ed. 2d 993*.

Supreme Court's development of "open fields doctrine" with respect to *Fourth Amendment* search and seizure protections. *80 L. Ed. 2d 860*.

Obtaining evidence by use of sound recording or mechanical or electronic eavesdropping device ("bugging") as violation of *Fourth Amendment*--federal cases. *59 L. Ed. 2d 959*.

Supreme Court's views as to the federal legal aspects of the right of privacy. *43 L. Ed. 2d 871*.

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[11] In this case, the agents obtained a warrant, but they did not comply with two of the warrant's restrictions: They did not install the GPS device within the 10-day period required by the terms of the warrant and by *Fed. Rule Crim. Proc. 41(e)(2)(A)(i)*, and they did not install the GPS device within the District of Columbia, as required by the terms of the warrant and by *18 U.S. C. §3117(a)* and *Rule 41(b)(4)*. In the courts below the Government did not argue, and has not argued here, that the ***Fourth Amendment*** does not impose these precise restrictions and that the violation of these restrictions does not demand the suppression of evidence obtained using the tracking device. See, e.g., *United States v. Gerber, 994 F.2d 1556, 1559-1560 (CA11 1993)*; *United States v. Burke, 517 F.2d 377, 386-387 (CA2 1975)*. Because it was not raised, that question is not before us.

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Chrysler Credit Corp. v. Country Chrysler, Inc.

United States Court of Appeals for the Tenth Circuit

March 29, 1991, Filed

Nos. 89-6240, 89-6280 (consolidated)

Reporter
928 F.2d 1509; 1991 U.S. App. LEXIS 4952; 19 Fed. R. Serv. 3d (Callaghan) 272

CHRYSLER CREDIT CORPORATION, a Delaware corporation, Plaintiff-Appellee, v. COUNTRY CHRYSLER, INC., an Oklahoma corporation; MAX PEPPER; MURIEL S. PEPPER; CINDY JOAN PEPPER GUTERMAN, Defendants and Third-Party Plaintiffs-Appellants, v. CHRYSLER CORPORATION, Third-Party Defendant

Prior History: [**1] Appeal from the United States District Court for the Western District of Oklahoma; D.C. No. CIV-86-503-B.

Disposition: Reversed and Remanded and Vacated.

Core Terms

district court, transferred, transferee, transferor, counterclaim, money judgment, certification, transfer order, severed, third-party, law of the case, sanctions, lack of jurisdiction, proceedings, retain jurisdiction, final judgment, retransfer, mandamus, appellate court, bifurcated, parties, docketed, Sheet, venue, punitive damages, summary judgment, vehicles, appeals, issues, unpub

Case Summary

Procedural Posture
Appellants, car dealership and its officers, sought review of the judgment from United States District Court for the Western District of Oklahoma, awarding actual and punitive damages and attorney's fees and costs to appellee credit corporation, and imposing sanctions against appellants pursuant to *Fed. R. Civ. P. 11*. The district court had transferred the case to another district before certifying its judgment against appellants.

Overview
Appellee credit corporation brought suit in district court asserting that appellants, dealership and its officers, sold vehicles in which appellee held a security interest without remitting the proceeds. The district court entered judgment against appellants and transferred the case to a second district pursuant to *28 U.S.C.S. § 1404(a)* where an identical suit was pending. After the transfer, appellees sought certification of the judgment against appellants and the district court entered judgment awarding actual and punitive damages and attorney's fees and costs to appellee, and imposing sanctions against appellants pursuant to *Fed. R. Civ. P. 11*. The court reversed the judgment and remanded with instructions to vacate for want of jurisdiction. The court held that the district court lost jurisdiction over the case the day its was docketed in the transferee court, and after that point could not revoke, modify, or clarify its transfer judgment or reopen the case because jurisdiction was exclusively in the transferee court. The court held that appellee had to collect its money judgment from the transferee court or seek to have the case retransferred.

Outcome
The court reversed the district court's judgment entered after the date it had transferred the case and reversed the sanction award. The court also remanded with instructions to vacate for want of jurisdiction. The court held that the district court lost jurisdiction the day the case was docketed in the transferee court and that it had no jurisdiction after that point to revoke, modify, or clarify its transfer order, or to reopen the case.

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN1 Congress enacted *28 U.S.C.S. § 1404(a)* in 1948 as a federal housekeeping measure, allowing easy change of venue within a unified federal system.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN2 See 28 U.S.C.S. § 1404(a).

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN3 Although drafted in accordance with the forum non conveniens doctrine, 28 U.S.C.S. § 1404 was intended to revise rather than merely codify the common law. Courts therefore enjoy greater discretion to transfer a cause pursuant to 28 U.S.C.S. § 1404(a) than to dismiss the action based upon forum non conveniens.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN4 Although 28 U.S.C.S. § 1404(a) only speaks of district courts, the United States Supreme Court has held that the statute does not preclude transfer by appellate courts where unusual circumstances indicate the necessity thereof.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > Improper Venue Transfers

Criminal Law & Procedure > Jurisdiction & Venue > General Overview

HN5 28 U.S.C.S. § 1404(a) transfers must be distinguished from transfers carried out under 28 U.S.C.S. § 1406(a). In the case of § 1404(a), both the transferor and the transferee court have venue over the action; it is more efficient to prosecute the action in the latter court. Conversely, in the case of § 1406(a), the transferor court lacks venue and must transfer the action in order for it to proceed.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Consent

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

HN6 The party moving to transfer a case pursuant to 28 U.S.C.S. § 1404(a) bears the burden of establishing that the existing forum is inconvenient. But § 1404(a) does not allow a court to transfer a suit to a district which lacks personal jurisdiction over the defendants, even if they consent to suit. Moreover, when a case is transferred under § 1404(a), the transferee court must apply the same law as applicable in the transferor court, irrespective of whether the transfer was sought by the plaintiff or defendant.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN7 28 U.S.C.S. § 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness. Among the factors a district court should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

HN8 An action may be transferred under 28 U.S.C.S. § 1404(a) at any time during the pendency of the case, even after judgment has been entered. Once transferred, the action retains its procedural identity. The transferee court's powers are coextensive with those of the transferor court; it may issue any order or render any judgment that could have been made in the transferor court had the transfer never taken place.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN9 When an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done. Accordingly, traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, including its transfer order. Nevertheless, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Law of the case directs a court's discretion, it does not limit the tribunal's power. A prior ruling of a transferor court therefore may be reconsidered when the governing law has been changed by the subsequent decision of a higher court, when new evidence becomes available, when a clear error has been committed or to prevent manifest injustice.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Vacation of Judgments

HN10 Once the files in a case are transferred physically to the court in the transferee district, the transferor court loses all jurisdiction over the case, including the power to review the transfer. The date the papers in the transferred case are docketed in the transferee court, not the date of the transfer order, consequently forms the effective date that jurisdiction in the transferor court is terminated. The district court retains jurisdiction to vacate its transfer order where motion for reconsideration is granted before the files are received by transferee court.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN11 The date the papers in the transferred case are docketed in the transferee court also forms the effective date that appellate jurisdiction in the transferor circuit is terminated; the transfer order becomes unreviewable as of that date. Because an appeal from a transfer order filed after the physical transfer of the record would be futile, the preferred approach is to delay physical transfer of the papers in the transferred case for a long enough time to allow the aggrieved party to file a mandamus petition.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN12 The mere transfer of the record cannot ratify an otherwise invalid transfer. Hence, where a district court transfers a case without proper authority or the transferee court lacks jurisdiction over the case, a valid transfer has not been effectuated and appellate jurisdiction still lies in the transferor circuit.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Remedies > Writs > All Writs Act

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN13 A district court's order granting or denying a transfer pursuant to *28 U.S.C.S. § 1404(a)* is an interlocutory order not immediately appealable under *28 U.S.C.S. § 1291*. The party opposing transfer either may seek certification under *28 U.S.C.S. 1292(b)* to appeal the transfer or else petition for mandamus under the All Writs Act, *28 U.S.C.S. § 1651*. But where the transferor court has entered partial judgment under *Fed. R. Civ. P. 54(b)* prior to transfer, the court of appeals in the transferor circuit has jurisdiction to review the question, irrespective of whether other issues in the case have been transferred out-of-circuit.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN14 The possibility of an appeal from the final judgment in the transferee circuit, even with the difficult burden of demonstrating prejudice there, will preclude relief by writ. The remedy of a future appeal from a final judgment in the transferee court is inadequate and therefore justifies mandamus only when the appeal is totally unavailable or when it cannot correct extraordinary hardship because of the particular circumstances. A court of appeals in the transferee circuit lacks jurisdiction to review the judgments of district court in the transferor circuit. But nothing precludes the

parties from arguing or the transferee circuit from reviewing whether the transferee district court correctly applied the law of the case in the transferred action.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN15 Review of the transferee court's application of law of the case provides a limited avenue through which the transferee appellate court may address the merits of the underlying issue. The court of appeals in a transferee circuit may review a district court's decision not to retransfer a case. A transferee appellate court has jurisdiction to review a transfer order. Once a party moves for retransfer in the transferee district court, the transferee circuit lacks power to adjudicate an allegedly erroneous transfer absent a motion to retransfer made in the transferee district court. Although appellate review of a district court's application of the law of the case doctrine is governed by the limited standard of clear error and manifest injustice, such review is not totally unavailable.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN16 The prohibition against appellate review of transferor court rulings does not preclude review of the application of law of the case by the transferee district court in the United States Court of Appeals for the Tenth Circuit.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > Parties > Joinder of Parties > Misjoinder

HN17 *28 U.S.C.S. § 1404(a)* only authorizes the transfer of an entire action, not individual claims. A court acting under *§ 1404(a)* may not transfer part of a case for one purpose while maintaining jurisdiction for another purpose; the section contemplates a plenary transfer of the entire case. A district court lacks authority under *§ 1404(a)* to transfer case only for purposes of trial and retain jurisdiction over the rest of the action. But where certain claims in an action are properly severed under *Fed. R. Civ. P. 21*, two separate actions result; a district court may transfer one action while retaining jurisdiction over the other. Severance and transfer under *Fed. R. Civ. P. 21* and *§ 1404(a)* appropriate on rare occasions. When transferring a portion of a pending action to another jurisdiction, district courts first must sever the action under *Rule 21* before effectuating the transfer. The severed case is transferred in its entirety while the retained case remains in its entirety in the transferor court.

Civil Procedure > Parties > Joinder of Parties > Misjoinder

HN18 A court may sever and transfer claims against some defendants while retaining jurisdiction over other defendants.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Parties > Joinder of Parties > Misjoinder

Civil Procedure > Trials > Separate Trials

HN19 Separate trials ordered pursuant to *Fed. R. Civ. P. 42(b)* must be distinguished from a severance under *Fed. R. Civ. P. 21*. Under *Rule 42*, the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues. *Fed. R. Civ. P. 42(b)*. Conversely, *Rule 21* allows any claim against a party to be severed and proceeded with separately. *Fed. R. Civ. P. 21*. Separate trials under *rule 42(b)* result in a single judgment while claims severed under *Rule 21* become independent actions with separate judgments entered in each. While judgment on a claim severed under *Rule 21* is final for purposes of appeal, judgment on a claim bifurcated under *Rule 42(b)* is not an appealable final judgment, absent a *Fed. R. Civ. P. 54(b)* certification.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN20 In the United States Court of Appeals for the Sixth Circuit, the law of the case doctrine is sufficiently flexible to

permit departure from rulings in the transferor circuit where clearly warranted.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN21 Appellate courts do not reach out to decide an issue when the party adversely affected has not appealed the adverse order.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Judgments > Relief From Judgments

HN22 Fed. R. Civ. P. 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced.

Civil Procedure > Dismissal > General Overview

Civil Procedure > Dismissal > Voluntary Dismissals > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN23 A court must have the authority to consider whether there has been a violation of Fed. R. Civ. P. 11 regardless of the dismissal of the underlying action. The harm to the legal process that Rule 11 is intended to protect can occur even when a plaintiff dismisses a frivolous claim under Fed. R. Civ. P. 41(a)(1). Thus, imposition of sanctions may take place after a Fed. R. Civ. P. 41(a)(1) dismissal.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Dismissal > Voluntary Dismissals > General Overview

HN24 Where an ethical violation is committed, the district court's jurisdiction to punish that violation cannot be extinguished by voluntary dismissal.

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN25 A district court retains the inherent authority under Fed. R. Civ. P. 11 to sanction unethical conduct practiced before it, even if the court lacks jurisdiction to rule on the merits of the case.

Counsel: Louis W. Bullock (Patricia W. Bullock with him on the brief), of Bullock & Bullock, Tulsa, Oklahoma, for Defendants-Appellants.

Eric S. Eissenstat (Terry W. Tippens with him on the brief), of Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Judges: Holloway, Chief Judge, Baldock, Circuit Judge and J. Thomas Greene, District Judge. *

Opinion by: BALDOCK

Opinion

[*1512] BALDOCK, Circuit Judge.

Defendants-appellants Country Chrysler, Inc., Max Pepper, Muriel S. Pepper and Cindy Joan Pepper Guterman (the Peppers) appeal from the district court's 1) award of $ 255,000 actual and punitive damages, attorney's fees and costs to plaintiff-appellee Chrysler Credit Corporation and 2) imposition of $ 33,000 sanctions against them pursuant to Fed. R. Civ. P. 11. This action began in the federal district court for the Western District of Oklahoma. Judgment was granted to Chrysler Credit on its claim against the Peppers and the case subsequently transferred [**2] to the federal district court for the Eastern District of Michigan for resolution of the Peppers' counterclaims and third-party complaint. The Michigan court granted summary judgment against the Peppers on their counterclaims and third-party complaint, but declined to certify the Oklahoma judgment. Chrysler Credit then returned to the Oklahoma court seeking certification of its Oklahoma money judgment and Rule 11 sanctions. The Oklahoma court entered judgment against the Peppers on Chrysler Credit's claim and imposed Rule 11 sanctions against them.

Our jurisdiction over these consolidated appeals arises under 28 U.S.C. § 1291. We hold that the Oklahoma court lost jurisdiction over this case when it transferred it to the Michigan court. The Oklahoma court thus lacked jurisdiction to enter judgment against the Peppers in June 1991 and to impose sanctions under Rule 11. We therefore reverse both the money judgment entered by the Oklahoma court in June 1989 and the sanction award. We remand with instructions to vacate both decisions for want of jurisdiction.

I.

The labyrinthine history of this case involves parallel and simultaneous judicial proceedings in the Western District of Oklahoma [**3] and the Eastern District of Michigan. Despite

* The Honorable J. Thomas Greene, United States District Judge for the District of Utah, sitting by designation.

the considerable overlap between the Oklahoma and Michigan proceedings, we discuss each *seriatim*.

A. Western District of Oklahoma

Chrysler Credit Corp. is a Delaware corporation with its principal place of business located in Troy, Michigan. Country Chrysler, Inc. was an automobile dealership located in Guthrie, Oklahoma which sold [*1513] Chrysler automobiles. Defendant Max Pepper was president of Country Chrysler, Cindy Pepper Guterman, vice-president and Muriel Pepper, secretary. All three also were shareholders. From July 1983 until February 1986, Chrysler Credit provided wholesale vehicle inventory financing to Country Chrysler for the purchase of automobiles from Chrysler Corporation. Chrysler Credit advanced funds to Country Chrysler and retained a security interest in all purchased vehicles. Country Chrysler agreed to remit the outstanding balance to Chrysler Credit as each vehicle was sold at retail.

In May 1986, Chrysler Credit brought suit in the Western District of Oklahoma alleging that the Peppers sold vehicles "out of trust," *i.e.*, sold vehicles in which Chrysler Credit held a security interest without remitting the proceeds. [**4] Chrysler Credit sought actual and punitive damages, an accounting of all proceeds, possession of all remaining vehicles or proceeds and satisfaction of personal guarantees executed by the individual defendants. The Peppers counterclaimed alleging eight causes of action against Chrysler Credit: (1) violation of the Automobile Dealers Day in Court Act, *15 U.S.C. § 1222*; (2) violation of the Oklahoma Motor Vehicle Commission Act, *Okla. Stat. Ann. tit. 47 § 565(9)(a)* (West 1988); (3) intentional interference with prospective contractual relations; (4) violations of the Sherman and Clayton Acts, *15 U.S.C. §§ 1* & *14*; (5) violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*; (6) violation of the Oklahoma Antitrust Statutes, *Okla. Stat. Ann. tit. 15 § 217* & tit. 79 *§ 1* (West 1966 & 1990 Supp.); (7) common law fraud; and (8) breach of contract. The Peppers also joined Chrysler Corporation as a third-party defendant. Chrysler Corporation moved to sever the Peppers' counterclaim from the underlying cause of action pursuant to *Fed. R. Civ. P. 21* and *42(b)*, and to dismiss or transfer the third-party claims to Michigan. Rec. vol. II, doc. 71 at 13. Chrysler Credit also sought to sever the Peppers' [**5] counterclaims from their action pursuant to *Fed. R. Civ. P. 42(b)*. Rec. vol. II, doc. 72. The district court found that "the complexity of the issues, the substantive difference in the claims, the availability of a jury, the status of discovery, the separate nature of the proof and the real possibility of confusion render this a proper case for *bifurcation under Rule 42*." Rec. vol. II, doc. 74 at 1 (emphasis supplied). It therefore ordered that Chrysler Credit's claim be tried separately from the Peppers' counterclaim and third-party complaint. *Id.*

On July 29, 1987, the district court rendered findings of fact and conclusions of law on Chrysler Credit's claim. The court found that the Peppers had sold vehicles out of trust and entered judgment against them in the amount of $ 211,419. Rec. vol. II, doc. 136, ex. 3 & 4. On October 14, 1987, the court assessed $ 18,872 attorney's fees against the Peppers, but took no action on Chrysler Credit's claim for punitive damages. Rec. vol. II, doc. 125 at 2. That same day, acting pursuant to *28 U.S.C. § 1404(a)*, the district court ordered the case transferred to the Eastern District of Michigan where an identical action between the parties [**6] was pending. [1] Rec. vol. II, doc. 124. The district court docket sheet indicates that the original pleadings or documents were shipped to the Michigan clerk the same day. On October 23, 1987, the transferred case was docketed in the Michigan court.

On November 24, 1987, Chrysler Credit filed a motion in the Oklahoma court seeking certification of its money judgment pursuant to *Fed. R. Civ. P. 54(b)*. The district judge replied with the following letter:

> November 25, 1987 [**7]
>
> The Court Clerk's Office inadvertently accepted for filing on November 24, 1987, your motion and brief for certification. As you are aware, this court transferred [*1514] Case No. CIV-86-503-B to the Eastern District of Michigan on October 14, 1987. This court no longer has jurisdiction. As there no longer is a file for Case No. CIV-86-503-B in this court, your documents cannot be filed and should not have been accepted.
>
> I have directed the Court Clerk to return your documents to you, along with this letter. If you wish to file any documents in CIV-86-503-B, such papers must be filed in Michigan.

Rec. vol. II, doc. 140, ex. C. A year later, the district court ordered that all of the exhibits from Chrysler Credit's claim be withdrawn from the clerk's office within fifteen days or be destroyed. *Id.*, ex. D.

B. Eastern District of Michigan

In February 1986, Chrysler Corporation filed case No. 86-

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[1] While observing that the Peppers had filed a notice of appeal on Chrysler Credit's money judgment, the Oklahoma district court concluded that such notice was premature because, absent a final judgment or ***Rule 54(b)*** certification, no final judgment was in place. This court subsequently dismissed the Peppers' appeal as premature because both the counterclaim and the third-party complaint remained pending and no ***Rule 54(b)*** certification had issued. *Chrysler Credit Corp. v. Country Chrysler*, No. 87-2424, unpub. order at 2 (10th Cir. Feb. 24, 1988).

CV-70735 against the Peppers in the Eastern District of Michigan alleging that they failed to honor dealer capital loan agreements or pay monies owed. The Peppers filed an identical counterclaim and third-party complaint against Chrysler Credit as in the Oklahoma action. When the Michigan court [**8] received the transferred Oklahoma action, it was designated No. 87-CV-73875-DT and consolidated with No. 86-CV-70735. In April 1988, Chrysler Credit filed a motion in the Michigan court seeking certification of the Oklahoma money judgment. The Michigan court found that the Oklahoma money judgment was not final because it would be subject to an offset if defendants prevailed on their counterclaims; consequently, it denied Chrysler Credit's motion. On September 14, 1988, the Michigan court granted summary judgment to Chrysler Credit on all of the Peppers' counterclaims. *Chrysler Motors Corp. v. Country Chrysler*, Nos. 86-CV-70735-DT & 87-CV-73875-DT, unpub. order (E.D. Mich. Sept. 14, 1988). On February 9, 1989, the Michigan court granted judgment under Rule 54(b) to Chrysler Credit on the Pepper's third-party claims, but declined to certify the Oklahoma money judgment. *Chrysler Motors Corp. v. Country Chrysler*, Nos. 86-CV-70735-DT & 87-CV-73875-DT, unpub. order at 7-8 (S.D. Mich. Feb. 9, 1989). Chrysler Credit moved for reconsideration of this order on February 23, 1989, but *withdrew the motion* on March 22 and *elected not to appeal.* The Michigan court granted summary [**9] judgment to Chrysler Corporation on April 7, 1989 on its complaint and one of the Peppers' counterclaims; the Peppers' remaining claims were dismissed.

The Peppers appealed both the Michigan court's grant of summary judgment and the Oklahoma money judgment to the Sixth Circuit. The Sixth Circuit held that the Pepper's appeal from the summary judgment in favor of Chrysler Corporation was premature because damages had not yet been calculated. *Chrysler Motors Corp. v. Country Chrysler, Inc.*, No. 89-1472, unpub. order (6th Cir. July 31, 1989) [884 F.2d 578 (table)]. As appellee, Chrysler Credit reversed its arguments with respect to the Oklahoma judgment contending that jurisdiction over the Oklahoma judgment remained in Oklahoma. The Sixth Circuit concluded:

> [Chrysler] Credit . . . contends that the Pepper's appeal from orders entered by the Oklahoma district court is not within this Court's jurisdiction. The Oklahoma court bifurcated the case, ruled on Credit's complaint and transferred the Peppers' counterclaim and third party complaint to Michigan. We note that the Oklahoma court recently entered final judgment for Credit on its complaint, and the Peppers appealed that judgment to the Tenth Circuit [**10] Court of Appeals. The portion of the case decided by the Oklahoma court is not within the Sixth Circuit's jurisdiction.

Id. at 3. The Sixth Circuit consequently dismissed the appeal from the Oklahoma judgment. *Id.* at 4.

C. Western District of Oklahoma

On March 23, 1989, before the Peppers filed their notice of appeal to the Sixth Circuit, Chrysler Credit returned to the Western District of Oklahoma and filed a motion for certification of its 1987 money judgment. Rec. vol. II, doc. 135. Chrysler Credit argued that because the Pepper's claims had been disposed of by the Michigan [*1515] court, the Oklahoma judgment was now final. *Id.*, doc. 136. On April 10, 1989, the district court ordered the case "reopened." Rec. vol. II, doc 137. The Peppers then moved to stay the proceedings, arguing that jurisdiction over the Oklahoma money judgment remained in Michigan. Rec. vol. II, doc. 140. But the district court held, in contradiction to its November 25 letter, that "only the counterclaim and third-party complaint were transferred" in 1987 and that the rest of the action had been retained by the Oklahoma court. Rec. vol. II, doc 151 at 2-3. The Oklahoma court denied the Peppers' motion [**11] to stay the proceedings and, noting that they had advanced a contrary position before the Michigan court, ordered them to show cause why sanctions should not be imposed. *Id.* at 4. The Peppers then unsuccessfully sought a writ of mandamus and an application for a stay of proceedings in this court. *Country Chrysler v. Honorable Luther L. Bohanon*, No. 89-6183, unpub. order (10th Cir. June 13, 1989). On June 23, 1989, the Oklahoma court entered final judgment in favor of Chrysler Credit consisting of $ 211,419 actual damages, $ 25,000 punitive damages, $ 18,872 attorney's fees and costs. Rec. vol. II., doc. 168.

We note that the case never has been transferred back to the Western District of Oklahoma. Yet, after conducting an evidentiary hearing, the court then issued findings of fact and conclusions of law holding that the Peppers' conduct warranted sanctions based upon: 1) their adoption and prosecution of the counterclaim; 2) their objection to filing of foreign judgment; 3) their objection to Chrysler Credit's application for a hearing on punitive damages; and 4) their motion to vacate or stay the proceedings. Rec. vol. II., doc. 174. Acting pursuant to Fed. R. Civ. P. 11, [**12] the court assessed attorney's fees of $ 33,686 against the Peppers and their counsel. Rec. vol. II., doc. 175.

II.

HN1 Congress enacted 28 U.S.C. § 1404(a) in 1948 "as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981) (quoting Van Dusen v. Barrack, 376 U.S. 612, 613, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964)). Section 1404(a) provides: ***HN2*** "For the convenience of parties and witnesses,

in the interest of justice, a district court [2] [**13] may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). *HN3* Although drafted in accordance with the *forum non conveniens* doctrine, the statute was intended to revise rather than merely codify the common law. Courts therefore enjoy greater discretion to transfer a cause pursuant to § 1404(a) than to dismiss the action based upon forum non conveniens. [3] Piper Aircraft, 454 U.S. at 253.

HN6 The party moving to transfer a case pursuant to § 1404(a) bears the burden of establishing that the existing forum is inconvenient. Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 567 (10th Cir. 1978); Wm. A. Smith Contracting v. Travelers Indem. Co., 467 F.2d 662, 664 (10th Cir. 1972). But § 1404(a) does not allow a court to transfer a suit to a district which lacks personal jurisdiction over the defendants, even if they consent to suit. *See* Hoffman v. Blaski, 363 U.S. 335, 343-44, 4 L. Ed. 2d 1254, 80 S. Ct. 1084 (1960); Morris v. Peterson, 759 F.2d 809, 812 (10th Cir. 1985). Moreover, when a case is transferred under § [**14] 1404(a), the [*1516] transferee court must apply the same law as applicable in the transferor court, irrespective of whether the transfer was sought by the plaintiff or defendant. Ferens v. John Deere Co., 494 U.S. 516, 108 L. Ed. 2d 443, 110 S. Ct. 1274, 1282-84 (1990).

HN7 "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29, 101 L. Ed. 2d 22, 108 S. Ct. 2239 (1988) (quoting Van Dusen, 376 U.S. at 622).

> Among the factors [a district court] should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations [**15] of a practical nature that make a trial easy, expeditious and economical.

Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967).

HN8 An action may be transferred under § 1404(a) at any time during the pendency of the case, even after judgment has been entered. 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3844 at 334-35 (1986). Once transferred, the action retains its procedural identity. Danner v. Himmelfarb, 858 F.2d 515, 521 (9th Cir. 1988), cert. denied, 490 U.S. 1067, 104 L. Ed. 2d 632, 109 S. Ct. 2067 (1989). The transferee court's powers are coextensive with those of the transferor court; it may issue any order or render any judgment that could have been made in the transferor court had the transfer never taken place. *Id.*

HN9 "When an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done." Magnetic Eng'g & Mfg. v. Dings Mfg., 178 F.2d 866, 868 (2d Cir. 1950) (L. Hand, J.). Accordingly, traditional principles of law of the case counsel against the transferee court reevaluating [**16] the rulings of the transferor court, including its transfer order. *See* In re Cragar Indus., 706 F.2d 503, 505 (5th Cir. 1983); Roofing & Sheet Metal Serv. v. La Quinta Motor Inns, 689 F.2d 982, 986-87 (11th Cir. 1982); Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 168-69 (3d Cir. 1982) (evaluating § 1406(a) transfer); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* para. 110.13[6]; 15 *Federal Practice and Procedure* § 3846 at 359. Nevertheless,

> law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. . . . Law of the case directs a court's discretion, it does not limit the tribunal's power.

Arizona v. California, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983) (citations omitted). A prior ruling of a

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[2] *HN4* Although § 1404(a) only speaks of district courts, the Supreme Court has held that the statute does not preclude transfer by appellate courts "where unusual circumstances indicate the necessity thereof . . . ." Koehring Co. v. Hyde Constr., 382 U.S. 362, 365, 15 L. Ed. 2d 416, 86 S. Ct. 522 (1966).

[3] *HN5* Section 1404(a) transfers must be distinguished from transfers carried out under 28 U.S.C. § 1406(a). In the case of § 1404(a), both the transferor and the transferee court have venue over the action; it is more efficient to prosecute the action in the latter court. Conversely, in the case of § 1406(a), the transferor court lacks venue and *must* transfer the action in order for it to proceed.

transferor court therefore may be reconsidered when the governing law has been changed by the subsequent decision of a higher court, *see* Crane Co. v. American Standard, 603 F.2d 244, 248-49 (2d Cir. 1979), when new evidence becomes [**17] available, *see* Peterson v. Lindner, 765 F.2d 698, 704 (7th Cir. 1985), when a clear error has been committed or to prevent manifest injustice, *see* Arizona v. California, 460 U.S. at 618 n.8. [4]

HN10 Once the files in a case are transferred physically to the court in the transferee district, the transferor court loses [*1517] all jurisdiction over the case, including the power to review the transfer. [5] Roofing & Sheet Metal Serv., 689 F.2d at 988-89 n.10; In Re Nine Mile Limited, 673 F.2d 242, 243 (8th Cir. 1982); In re Southwestern Mobile Homes, 317 F.2d 65, 66 (5th Cir. 1963). [**18] *See* Hyde Constr. v. Koehring Co., 348 F.2d 643, 648 (10th Cir. 1965), *rev'd on other grounds*, 382 U.S. 362, 15 L. Ed. 2d 416, 86 S. Ct. 522 (1966). The date the papers in the transferred case are docketed in the transferee court, not the date of the transfer order, consequently forms the effective date that jurisdiction in the transferor court is terminated. Lou v. Belzberg, 834 F.2d 730, 733 (9th Cir. 1987), *cert. denied*, 485 U.S. 993, 99 L. Ed. 2d 512, 108 S. Ct. 1302 (1988); 15 *Federal Practice and Procedure* § 3846 at 357. *See, e.g.*, Robbins v. Pocket Beverage Co., 779 F.2d 351, 355 (7th Cir. 1985) (district court retained jurisdiction to vacate its transfer order where motion for reconsideration was granted before files were received by transferee court).

[**19] *HN11* The date the papers in the transferred case are docketed jn the transferee court also forms the effective date that appellate jurisdiction in the transferor circuit is terminated; the transfer order becomes unreviewable as of that date. [6] [**20] Belzberg, 834 F.2d at 733; In re Sosa, 229 U.S. App. D.C. 447, 712 F.2d 1479, 1480 (D.C. Cir. 1983); Starnes v. McGuire, 168 U.S. App. D.C. 4, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); 15 *Federal Practice and Procedure* § 3846 at 357. Because an appeal from a transfer order filed after the physical transfer of the record would be futile, the preferred approach is to delay physical transfer of the papers in the transferred case for a long enough time to allow the aggrieved party to file a mandamus petition. [7] Roofing & Sheet Metal Serv., 689 F.2d at 988-89 n.10; Nine Mile Limited, 673 F.2d at 243; 15 *Federal Practice and Procedure* § 3846 at 357.

The question whether a transferee circuit has jurisdiction to review the decisions of a transferor [**21] district court is one over which the circuits are split. Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. Penn. L. Rev. 595, 642-44 (1987). This court held in McGeorge v. Continental Airlines, 871 F.2d 952, 954 (10th Cir. 1989), that the transferee circuit cannot exercise direct review over the rulings of the transferor district court when a case is transferred out-of-circuit. *McGeorge* can be read to conflict with this court's earlier holding in In re Dalton, 733 F.2d 710 (10th Cir. 1984). There, petitioners sought a writ of mandamus prohibiting the Colorado district court from transferring an action to the District of Arizona pursuant to § 1404(a). Among the criteria this court applied in determining whether mandamus would lie was whether petitioner would be damaged or [*1518] prejudiced by the transfer in a way not correctable on appeal. Id. at 717. We concluded:

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[4] *See, e.g.*, Blaski v. Hoffman, 260 F.2d 317, 322 (7th Cir. 1958) ("We think the decision of the Fifth Circuit in this [transferred] matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that Circuit would be to follow what it considers an erroneous decision by this Court."), *aff'd on other grounds*, **363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)**.

[5] In Koehring Co. v. Hyde Constr., 382 U.S. 362, 15 L. Ed. 2d 416, 86 S. Ct. 522 (1966), the Supreme Court suggested in a footnote that the transferor court "may lose jurisdiction" before the physical transfer of the record. *See* id. at 365 n.4. However, subsequent interpretation of *Koehring* has limited application of this language to cases involving "extraordinary intervention by an appellate court, with an explicit assertion that its transfer order is *instanter*." Robbins v. Pocket Beverage Co., 779 F.2d 351, 355 (7th Cir. 1985).

[6] Of course, *HN12* the mere transfer of the record cannot ratify an otherwise invalid transfer. Farrell v. Wyatt, 408 F.2d 662, 664 (2d Cir. 1969). Hence, where a district court transfers a case without proper authority or the transferee court lacks jurisdiction over the case, a valid transfer has not been effectuated and appellate jurisdiction still lies in the transferor circuit. *Id.*

[7] *HN13* A district court's order granting or denying a transfer pursuant to **§ 1404(a)** is an interlocutory order not immediately appealable under **28 U.S.C. § 1291**. Equifax Serv. v. Hitz, 905 F.2d 1355, 1362 (10th Cir. 1990); In re Dalton, 733 F.2d 710, 714-15 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1185, 83 L. Ed. 2d 959, 105 S. Ct. 947 (1985). The party opposing transfer either may seek certification under 28 U.S.C. 1292(b) to appeal the transfer or else petition for mandamus under the All Writs Act, 28 U.S.C. § 1651. *See* Hustler Magazine v. United States District Court, 790 F.2d 69, 70 (10th Cir. 1986). But where the transferor court has entered partial judgment under **Rule 54(b)** prior to transfer, the court of appeals in the transferor circuit has jurisdiction to review the question, irrespective of whether other issues in the case have been transferred out-of-circuit. McGeorge v. Continental Airlines, 871 F.2d 952, 954 (10th Cir. 1989).

> ***HN14*** The *possibility of an appeal from the final judgment in the transferee circuit*, even with the difficult burden of demonstrating prejudice there, will preclude relief **[**22]** by writ. The remedy of a future appeal from a final judgment in the transferee court is inadequate and therefore justifies mandamus only when the *appeal is totally unavailable* or when it cannot correct extraordinary hardship because of the particular circumstances.

Id. (emphasis supplied, citations omitted). At least one commentator has interpreted our language as holding that the appellate court in the transferee district has jurisdiction to review rulings by the transferor district court, an interpretation directly contrary to our holding in *McGeorge*. *See* Steinman, 125 U. Penn. L. Rev. at 641 n.152. In *McGeorge*, appellants sought direct review of rulings made by the district court in the transferor circuit. We held that a court of appeals in the transferee circuit lacks jurisdiction to review the judgments of district court in the transferor circuit. But nothing in *McGeorge* precludes the parties from arguing or the transferee circuit from reviewing whether the transferee district court correctly applied the law of the case in the transferred action.

HN15 Review of the transferee court's application of law of the case provides a limited avenue **[**23]** through which the transferee appellate court may address the merits of the underlying issue. *See, e.g.*, Nascone v. Spudnuts, Inc., 735 F.2d 763, 765-66 (3d Cir. 1984) (court of appeals in transferee circuit may review district court's decision not to retransfer case); Linnell v. Sloan, 636 F.2d 65, 67 (4th Cir. 1980) (transferee appellate court has jurisdiction to review transfer order once party moves for retransfer in transferee district court). *Cf.* Purex Corp. v. St. Louis Nat'l Stockyards, 374 F.2d 998, 1000 (7th Cir.) (transferee circuit lacks power to adjudicate allegedly erroneous transfer absent motion to retransfer made in transferee district court), *cert. denied*, 389 U.S. 824, 88 S. Ct. 59, 19 L. Ed. 2d 77 (1967). Such review of the transferee court's application of law of the case generally is limited to the question of whether the transferor court's rulings were "clearly erroneous and would work a manifest injustice." Arizona v. California, 460 U.S. 605, 618 n.8, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983). *See* Gage v. General Motors, 796 F.2d 345, 349-50 (10th Cir. 1988). Certainly, this standard is far more **[**24]** deferential than direct appellate review. But *Dalton* only held that there was a "possibility" of review in the transferee circuit," that such review was not "totally unavailable." 733 F.2d at 717. Although appellate review of a district court's application of the law of the case doctrine is governed by the limited standard of clear error and manifest injustice, such review is not totally unavailable.

HN16 The prohibition in *McGeorge* against appellate review of transferor court rulings should not be read as precluding review of the application of law of the case by the transferee district court in this circuit. Accordingly, our language in *Dalton* suggesting that appellate courts may review the transferee court's application of law of the case to the rulings of the transferor court may be harmonized with our holding in *McGeorge* that direct review of such actions is prohibited. We now endorse such a harmonious reading of *Dalton* and *McGeorge*.

HN17 Section 1404(a) only authorizes the transfer of an entire action, not individual claims. Wyndham Assoc. v. Bintliff, 398 F.2d 614, 618 (2d Cir.), *cert. denied*, 393 U.S. 977, 89 S. Ct. 444, 21 L. Ed. 2d 438 (1968); **[**25]** Cain v. New York State Bd. of Elections, 630 F. Supp. 221, 226 (E.D.N.Y. 1986); 15 *Federal Practice and Procedure* § 3846 at 363. A court acting under § 1404(a) may not transfer part of a case for one purpose while maintaining jurisdiction for another purpose; the section "contemplates a plenary transfer" of the entire case. In re Flight Transp. Corp. Securities Litigation, 764 F.2d 515, 516 (8th Cir. 1985) (Pennsylvania district court lacked authority under § 1404(a) to transfer case only for purposes of trial and retain jurisdiction **[*1519]** over the rest of the action). But where certain claims in an action are properly severed under Fed. R. Civ. P. 21, two separate actions result; [8] a district court may transfer one action while retaining jurisdiction over the other. Wyndham Assoc., 398

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[8] ***HN19*** Separate trials ordered pursuant to Fed. R. Civ. P. 42(b) must be distinguished from a severance under Rule 21. Under Rule 42:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues . . . .

Fed. R. Civ. P. 42(b). Conversely, Rule 21 allows "any claim against a party [to] be severed and proceeded with separately." Fed. R. Civ. P. 21. Separate trials under Rule 42(b) result in a single judgment while claims severed under Rule 21 become independent actions with separate judgments entered in each. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2387 at 277 (1971 & 1990 Supp.); 3A J. Moore, *Moore's Federal Practice* para. 21.05[2] at 21-34-35 (1990). While judgment on a claim severed under Rule 21 is final for purposes of appeal, judgment on a claim bifurcated under Rule 42(b) is not an appealable final judgment, absent a ***Rule 54(b)*** certification. *See* Vann v. Citicorp Sav. of Ill., 891 F.2d 1507, 1511 (11th Cir. 1990); United States v. O'Neil, 709 F.2d 361, 368 & n.6 (5th Cir. 1983); Belmont Place Assoc. v. Blyth, Eastman, Dillon & Co., 565 F.2d 1322, 1323 (5th Cir. 1978); 3A *Moore's Federal Practice* para. 21.05[2] at 35.

F.2d at 618; 15 *Federal Practice and Procedure* § 3846 at 363 n.19; 3A *Moore's Federal Practice* para. 21.05[2] at 43-44 (severance and transfer under Rule 21 and § 1404(a) appropriate on rare occasions). *See, e.g.*, Carver v. Knox County, Tenn., 887 F.2d 1287, 1293 (6th Cir. 1989), *cert. denied*, 495 U.S. 919, 109 L. Ed. 2d 311, 110 S. Ct. 1949 (1990); **[**26]** Toro Co. v. Alsop, 565 F.2d 998, 1000-1001 (8th Cir. 1977), *cert. denied*, 435 U.S. 952, 55 L. Ed. 2d 802, 98 S. Ct. 1579 (1988). When transferring a portion of a pending action to another jurisdiction, district courts first must sever the action under Rule 21 before effectuating the transfer. *See, e.g.*, Cain, 630 F. Supp. at 226; Hess v. Gray, 85 F.R.D. 15, 22-27 (N.D. Ill. 1979); Mobil Oil v. W. R. Grace & Co., 334 F. Supp. 117, 121-24 (S.D. Tex. 1971); General Tire & Rubber Co. v. Jefferson Chem. Co., 50 F.R.D. 112, 114-16 (S.D.N.Y. 1970); Leesona Corp. v. Cotwool Mfg., 204 F. Supp. 139, 140-41 (W.D.S.C. 1962), *appeal dismissed*, 308 F.2d 895 (4th Cir. 1962). *But see* State of Alabama v. Blue Bird Body Co., 71 F.R.D. 606 (M.D. Ala. 1976) (§ 1404(a) transfer after Rule 42(b) bifurcation), *aff'd in part and rev'd in part*, 573 F.2d 309 (5th Cir. 1978). The severed case is transferred in its entirety while the retained case remains in its entirety in the transferor court. 15 *Federal Practice and Procedure* **[**27]** § 3845 at 478; *see also id.* § 3825 at 351-52 ***HN18*** (court may sever and transfer claims against some defendants while retaining jurisdiction over other defendants).

[28]** III.

A.

Although the Oklahoma court bifurcated the Peppers' counterclaims and third-party complaint from Chrysler Credit's claim, the court explicitly stated that it was bifurcating the case pursuant to Fed. R. Civ. P. 42(b). Thus, while Chrysler Credit's claim was tried separately from the Peppers' counterclaims and third-party complaint, all claims remained part of one single action which would result in a single judgment. *See 9 Federal Practice & Procedure* § 2387 at 277; 3A *Moore's Federal Practice* para. 21.05[2] at 35. The district court's order of transfer simply cannot be construed as a Rule 21 severance; nowhere in the order does the court refer to Rule 21 or imply that two separate actions are being created. Moreover, the Oklahoma court's letter of November 25 declining to accept Chrysler Credit's motion for Rule 54(b) certification of its judgment after transfer is further evidence that the Oklahoma court intended to transfer the entire action to the Michigan court. Irrespective of whether the Oklahoma court intended to retain jurisdiction over Chrysler's claim, however, it lacked authority under § 1404(a) to transfer a portion of the single action to Michigan for **[**29]** one purpose while retaining jurisdiction over the remainder. *See* In re Flight Transp., 764 F.2d at 516; Wyndham Assoc., 398 F.2d at 618. Had the **[*1520]** Oklahoma court certified Chrysler Credit's judgment under Rule 54(b) prior to transfer, it effectively would have severed the action and allowed the counterclaim to remain in the circuit. *See* McGeorge, 871 F.2d at 954. But in the absence of a Rule 54(b) certification or a Rule 21 severance, we must conclude that the Oklahoma court transferred the entire action to the Michigan court on October 14.

The district court issued its transfer order and sent the original pleadings to the Eastern District of Michigan on October 14, 1987; [9] consequently, it lost jurisdiction over this case on October 23, 1987, the day the case was docketed in the Michigan court. *See* Roofing & Sheet Metal Serv., 689 F.2d at 988-89 n.10; Nine Mile Limited, 673 F.2d at 243. After October 14, the court had no jurisdiction to revoke, modify or clarify its transfer order; jurisdiction was vested exclusively in the Michigan court. *See* Robbins, 779 F.2d at 355. **[**30]** The Oklahoma court therefore lacked jurisdiction to "reopen" the case in April 1989 as the Michigan court never retransferred the action.

Once this case was transferred to the Michigan court, all rulings made prior to transfer were law of the case. *See* Cragar Indus., 706 F.2d at 503; Roofing & Sheet Metal Serv., 689 F.2d at 986-87; Hayman Cash Register, 669 F.2d at 168-69. Consequently, the Oklahoma money judgment remains part of the Michigan action and must be prosecuted there. Of course, the Michigan court **[**31]** was not obligated to certify the Oklahoma judgment in robotic fashion; ***HN20*** in the Sixth Circuit, the law of the case doctrine is sufficiently flexible to permit departure from rulings in the transferor circuit where clearly warranted. *See* Skil Corp. v. Millers Falls Co., 541 F.2d 554, 558 (6th Cir.), *cert. denied*, 429 U.S. 1029, 50 L. Ed. 2d 631, 97 S. Ct. 653, 192 U.S.P.Q. (BNA) 543 (1976). Subsequent decisional authority, new evidence or clear error by the Oklahoma court would preclude rigid application of law of the case to the Oklahoma money judgment. *See* Arizona v. California, 460 U.S. at 618 n.8.

We recognize that our holding that jurisdiction over Chrysler Credit's claim remains vested in Michigan contradicts the express holding of the Sixth Circuit. We believe, however,

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[9] Technically, the district court should have allowed the parties time to seek certification or file a mandamus petition before physically transferring the record and divesting this court of jurisdiction over the appeal. *See* Wm. A. Smith Contracting Co. v. Travelers Indem. Co., 467 F.2d 662, 664 (10th Cir. 1974). However, because the record does not indicate that such a petition would have been filed, this oversight proved harmless.

that the Sixth Circuit was misled by the contradictory [10] positions taken both by counsel and by the Oklahoma court. After repeatedly seeking certification of its Oklahoma money judgment in the Michigan court, Chrysler Credit never appealed the Michigan court's denial of its motion. Instead, before the Peppers even filed their notice of appeal from the Michigan judgment, Chrysler Credit returned to Oklahoma [**32] and convinced the district court that it had retained jurisdiction over its money judgment all along. By the time the Sixth Circuit concluded that it lacked jurisdiction over the Oklahoma money judgment, the Oklahoma court *already* had entered judgment in the same claim, contrary to its prior actions and statements. [11] Even if the Oklahoma court had not erroneously [*1521] concluded that it retained jurisdiction over Chrysler Credit's money judgment, the Sixth Circuit was not in a position to hear an appeal from that judgment. First, as the Sixth Circuit noted in its order, no final judgment had been entered on the case and certification had not been granted on the Oklahoma money judgment. Hence, in the absence of a *Rule 54(b)* certification by the Michigan court, the Sixth Circuit had no jurisdiction to review the Oklahoma money judgment, even though jurisdiction over that claim properly was vested in the Michigan court. Second, Chrysler Credit did not appeal the Michigan court's denial of its certification motion; ***HN21*** appellate courts do not "reach out to decide an issue when the party adversely affected ha[s] not appealed the adverse order." *Snell v. Tunnell, 920 F.2d 673, 676 (10th Cir. 1990).* [**33] [12]

[10] We recognize that, at various stages in the proceedings, both parties took inconsistent positions with respect to the jurisdiction of the Michigan court over the Oklahoma judgment. Nevertheless, this court does not recognize the doctrine of judicial estoppel. *United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986).* Whatever positions the parties have taken, we possess an independent duty to inquire into our jurisdiction and the failure of the parties to advance the argument properly below does not preclude our inquiry here.

[11] Faced with this *fait accompli*, the Sixth Circuit probably concluded that, given its inability to review the actions of the Oklahoma district court, comity between the circuits required it to defer to the Oklahoma district court and construe the transfer order as a *Rule 21* severance. Because of our inherent authority to review the actions of the district courts within this circuit, *see 28 U.S.C. 1294(1)*, we decline to display similar solicitude toward the Oklahoma district court's action.

[12] We recognize, of course, that "it is very nearly impossible" to appeal the *denial* of a ***Rule 54(b)*** certification and that the only possible remedy may be mandamus. *See Tri-State Generation & Trans. v. Shoshone R. Power, 874 F.2d 1346, 1368-69 (10th Cir. 1989)* (Baldock, J., dissenting).

[**34] Splitting the circuits always is something we approach with trepidation. We are especially loath to contradict our sister circuit where our contrary ruling involves the same case. Nevertheless, after carefully reviewing the record and the governing legal authority, we have arrived at the conclusion that the Oklahoma court lacked jurisdiction over Chrysler Credit's money judgment. Chrysler Credit either must collect its Oklahoma money judgment in the Michigan court or seek to have the case retransferred to the Oklahoma court. [13] Absent a retransfer of this case, jurisdiction remains in the Michigan court and the Oklahoma court is precluded from entering *any* ruling regarding this case.

[**35] B.

Chrysler Credit contends that even if the Oklahoma court's intention was ambiguous in its October 1987 transfer order, its May 1989 order stating that only the counterclaims and third-party complaint were transferred constituted a proper clarification under *Fed. R. Civ. P. 60(a)*. We disagree. ***HN22*** *Rule 60(a)* "can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." 11 *Federal Practice and Procedure* § 2854 at 149; *Allied Materials Corp. v. Superior Prod. Co., 620 F.2d 224, 226 (10th Cir. 1980)*. In *In re Galiardi, 745 F.2d 335 (5th Cir. 1984)*, defendants moved to transfer a case from Texas to New York both on the grounds of *§ 1404(a)* (inconvenient venue) and *§ 1406(a)* (improper venue). The district court in Texas granted the motion without specifying whether the transfer was pursuant to *§ 1404(a)* or *§ 1406(a)*. The New York district court construed the Texas court's transfer order as a *§ 1404(a)* transfer and consequently ruled that Texas law applied to the action. *See Ferens, 110 S. Ct. at 1283*. Defendants returned to the transferor [**36] court seeking clarification of the court's transfer order pursuant to *Fed. R. Civ. P. 60(a)*, whereupon the court entered an order amending its transfer order holding that the case was transferred for improper venue pursuant to *§ 1406*. Holding that *Rule 60(a)* "does not grant a district court *carte blanche* to supplement by amendment an earlier order by what is subsequently claimed to be an oversight or omission," the Fifth Circuit concluded that "the Texas district court lacked jurisdiction in 1984 to amend its 1982 transfer

[13] We have no authority to order the Michigan court to retransfer the action back to the Oklahoma court. *See McGeorge v. Continental Airlines, 871 F.2d 952, 954 (10th Cir. 1989)*. Our only power would be to direct the Oklahoma court to *request* that the Michigan court retransfer the action. *See In Re Nine Mile Limited, 673 F.2d 242, 244 (8th Cir. 1982)*. But because we do not wish to decide for Chrysler Credit whether to proceed in Michigan or Oklahoma, we decline to express an opinion on where this action should be concluded.

order." *Galiardi, 745 F.2d at 337*.

The Fifth Circuit's reasoning in *Galiardi* is persuasive. The district court divested itself of jurisdiction when the record was docketed in the Michigan court; *Rule 60(a)* cannot be invoked to correct an invalid transfer or restore jurisdiction where none exists. Moreover, in the case before us, [*1522] the Oklahoma court's explicit reference to *Rule 42(b)* in its bifurcation order, the text of its transfer order and its November 25 letter clearly establish that the court intended to transfer the entire case. The fact that the court subsequently recognized the consequences of its action is insufficient to invoke [**37] *Rule 60(a)*. *See Allied Materials, 620 F.2d at 226*.

C.

We finally must address the effect of the Supreme Court's recent decision in *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990)*, on the Oklahoma court's jurisdiction to impose *Rule 11* sanctions on the basis of the Peppers' counterclaim which was transferred to the Michigan court. In *Cooter & Gell*, the Supreme Court was faced with the question of whether a plaintiff's voluntary dismissal of his action pursuant to *Fed. R. Civ. P. 41(a)(1)* deprived the district court of jurisdiction to impose *Rule 11* sanctions. Stating that ***HN23*** "a court must have the authority to consider whether there has been a violation of [*Rule 11*] regardless of the dismissal of the underlying action[,]" the Supreme Court declined to hold that a *Rule 41(a)(1)* dismissal terminated the court's authority to impose sanctions. *Id. 110 S. Ct. at 2455*. The Court reasoned that the harm to the legal process that *Rule 11* is intended to protect can occur even when a plaintiff dismisses a frivolous claim under *Rule 41(a)(1)*. *Id. at 2457*. Thus, imposition of sanctions may take place after a *Rule 41(a)(1)* [**38] dismissal.

We do not see the holding in *Cooter & Gell* as controlling upon the instant case. The essence of the Supreme Court's holding in *Cooter & Gell* is that ***HN24*** where an ethical violation is committed, the district court's jurisdiction to punish that violation cannot be extinguished by voluntary dismissal. Here, the Peppers did not seek to dismiss their counterclaim or otherwise divest the Oklahoma court of jurisdiction over it. Rather, the entire action was transferred to another jurisdiction where the Peppers' counterclaims were litigated to completion. The Michigan court was fully competent to adjudicate any sanctions issues arising out of the Peppers' counterclaim. We do not read *Cooter & Gell* as authorizing a district court to impose *Rule 11* sanctions for conduct arising out of a case which it lacks jurisdiction over, when such jurisdiction clearly is vested in another court. [14]

[**39] The district court's June 1989 judgment and its sanction award are REVERSED and REMANDED with instructions to VACATE for want of jurisdiction.

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[14] Of course, ***HN25*** a district court retains the inherent authority under ***Rule 11*** to sanction unethical conduct practiced before it, even if the court lacks jurisdiction to rule on the merits of the case. *See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 L. Ed. 2d 359, 110 S. Ct. 2447, 2457 (1990)*.

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Fisher v. Rite Aid Corp.

United States District Court for the District of Maryland

February 23, 2012, Decided; February 23, 2012, Filed

CIVIL NO. RDB-11-0984

Reporter
2012 U.S. Dist. LEXIS 22720; 2012 WL 603200

JAMES FISHER, ET AL., PLAINTIFFS, v. RITE AID CORPORATION AND ECKERD CORPORATION D/B/A RITE AID, DEFENDANTS.

Prior History: *Craig v. Rite Aid Corp., 2012 U.S. Dist. LEXIS 16418 (M.D. Pa., Feb. 9, 2012)*

Core Terms

district court, law of the case doctrine, motion to dismiss, class action, issues

Counsel: [*1] For James Fisher, individually and on behalf of all other persons similarly situated, Plaintiff: Gary E Mason, LEAD ATTORNEY, Nicholas A Migliaccio, Whitfield Bryson & Mason LLP, Washington, DC; Robert E DeRose, PRO HAC VICE, Barkan Meizlish Handelman Goodin DeRose, Columbus, OH.

For Rite Aid Corporation, Eckerd Corporation, doing business as Rite Aid, Defendants: James A Rothschild, LEAD ATTORNEY, Anderson Coe and King LLP, Baltimore, MD; Beth Anne Moeller, PRO HAC VICE, Bonnie Puckett, PRO HAC VICE, Daniel E Turner, PRO HAC VICE, Ogletree Deakins Nash Smoak and Stewart PC, Atlanta, GA; Patrick G Brady, PRO HAC VICE, Epstein Becker and Green PC, Newark, NJ.

Judges: RICHARD D. BENNETT, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD D. BENNETT

Opinion

MEMORANDUM OPINION

Plaintiff James Fisher ("Plaintiff" or "Fisher"), on behalf of himself and others similarly situated, filed this class action lawsuit in the Circuit Court for Baltimore City against Defendants Rite Aid Corporation ("Rite Aid") and Eckerd Corporation ("Eckerd") (collectively, "Defendants") alleging violations of the Maryland Wage Payment and Collection Law ("MWPCL") and the Maryland Wage and Hour Law ("MWHL"). Defendants removed this action to this [*2] Court pursuant to the Class Action Fairness Act, *28 U.S.C. § 1332(d)(2)(A)*. While the Defendants have moved to dismiss this case on several grounds, their primary argument is that it is duplicative of earlier filed actions brought under the Fair Labor Standards Act ("FLSA") in this Court as well as in the United States District Court for the Middle District of Pennsylvania. In other words, Defendants argue that the law of the case doctrine mandates dismissal of the Plaintiff's case. The parties' submissions have been fully briefed and no hearing is necessary. *See Local Rule 105.6* (D. Md. 2011). For the reasons that follow, Defendants' Motion to Dismiss (ECF No. 19) is GRANTED.

BACKGROUND & PROCEDURAL HISTORY

On December 29, 2008, Rite Aid and Eckerd were named as defendants in a class action lawsuit brought under the Fair Labor Standards Act of 1938 ("FLSA"), as amended, *29 U.S.C. § 207*, in the United States District Court for the Middle District of Pennsylvania. *See generally Craig v. Rite Aid Corp., No. 08-cv-2317, 2009 U.S. Dist. LEXIS 114785, 2009 WL 4723286 (M.D. Pa. Dec. 9, 2009)*. On June 26, 2009, Plaintiff James Fisher ("Plaintiff" or "Fisher") joined the *Craig* class action and on December 9, 2009, the federal [*3] court in Pennsylvania granted conditional certification, permitting notice of opt-in opportunity to a nationwide collective class, defined to include "all individuals classified as exempt from the FLSA's overtime pay provisions and employed as salaried Assistant Managers . . ." *2009 U.S. Dist. LEXIS 114785, [WL] at *4*.

Soon after joining the *Craig* class action, on July 21, 2009, Fisher filed suit in this Court (*Fisher I*) pursuant to the Maryland Wage Payment and Collection Law ("MWPCL") and the Maryland Wage and Hour Law ("MWHL"). On June 8, 2010, this Court dismissed Fisher's MWHL claim without prejudice, pursuant to the first-to-file-rule on the ground that

Fisher's action was related to another action filed in the United States District Court for the Middle District of Pennsylvania, namely, the *Craig* class action. *See Fisher v. Rite Aid Corp., No. RDB-09-1909, 2010 U.S. Dist. LEXIS 56383, 2010 WL 2332101, at *3 (D. Md. June 8, 2010).* [1]

Plaintiff subsequently filed a similar Complaint (*Fisher II*) in the United States District Court for the Middle District of Pennsylvania. *See Fisher v. Rite Aid Corp., 764 F. Supp. 2d 700, 705-06 (M.D. Pa. 2011).* [*4] On February 16, 2011, the Pennsylvania District Court dismissed Plaintiff's complaint without prejudice on the ground that Plaintiff's MWHL claim was "inherently incompatible" with the FLSA claim he had asserted in the *Craig* action as an opt-in plaintiff. *Id.* In dicta, the Pennsylvania District Court noted that Plaintiff could re-file his MWHL action in state court, "provided the statute of limitations or other procedural matters do not bar such initiation . . ." *Id. at 706.*

On March 14, 2011, Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit, which was consolidated with another appeal of a case against Rite Aid filed by Plaintiff's counsel that is currently pending. [2] Within days of filing his Notice of Appeal, Plaintiff filed this pending class action suit in the Circuit Court for Baltimore City. Defendants removed this action pursuant to the Class Action Fairness Act, *28 U.S.C. § 1332(d)(2)(A).* [3]

On April 26, 2011, Defendants filed the pending Motion to Dismiss. Essentially, Defendants argue that Plaintiff's lawsuit is precluded by law of the case principles. Alternatively, Defendants also argue that this Court should dismiss this case under the first-to-file rule as in *Fisher I*, and under the doctrine of inherent incompatibility as the *Fisher II* court did. For the following reasons, Defendants' Motion to Dismiss (ECF No. 19) is GRANTED pursuant to the law of the case doctrine.

STANDARD OF REVIEW

Under *Federal Rule of Civil Procedure 12(c)*, a party may move for judgment on the pleadings any time after the pleadings are closed, as long it is early enough not to delay trial. [4] *See Fed. R. Civ. P. 12(c).* The legal standard governing such a Motion is the same as a Motion to Dismiss under *Rule 12(b)(6). See, e.g., Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999); Booker v. Peterson Cos., 412 F. App'x 615, 616 (4th Cir. Feb. 25, 2011); Economides v. Gay, 155 F. Supp. 2d 485, 488 (D. Md. 2001).* In determining whether dismissal is appropriate, this Court assumes as true all well-pleaded facts in the plaintiff's complaint, but does not accept the plaintiff's legal [*6] conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009).* A complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); see also Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 768 (4th Cir. 2011); Andrew v. Clark, 561 F.3d 261, 266 (4th Cir. 2009).* To survive a *Rule 12(b)(6)* motion, the legal framework of the complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555.* The Supreme Court has explained that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).*

ANALYSIS

The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the [*7] same case." ***Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); see also Allfirst Bank v. Progress Rail Servs. Corp., 178 F. Supp. 2d 513, 517 (D. Md. 2001).*** Such a rule "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811, (1988)* (citation and internal quotations omitted).

While courts exercise discretion in applying the law of the case doctrine, *see Pepper v. United States, 131 S. Ct. 1229, 1250, 179 L. Ed. 2d 196 (2011),* the United States Court of Appeals for the Fourth Circuit has noted that a court should generally uphold prior rulings in the same or similar litigation unless "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest

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[1] This Court dismissed the Plaintiff's MWPCL claim with prejudice as that statute does not govern claims for overtime wages.

[2] *Fisher* II was consolidated with *Knepper v. Rite Aid Corp., 764 F. Supp. 2d 707, 708 (M.D. Pa. 2011).*

[3] Plaintiff pleaded the Class Action Fairness action as grounds for federal jurisdiction in both *Fisher I* and *Fisher II. See* Notice of Removal, [*5] ECF No. 1.

[4] Defendants filed an Answer (ECF No. 13) on April 21, 2011, prior to filing the Motion to Dismiss (ECF No. 19).

injustice." *Sejman v. Warner-Lambert Co., Inc., 845 F.2d 66, 69 (4th Cir. 1988)*. Deference to earlier rulings in the same or similar litigation serves to avoid reconsideration of the same issues over and over. *See Ulmet v. United States, 888 F.2d 1028, 1031 (4th Cir. 1989)* **[*8]** (declining jurisdiction over a claim that conflicted with another court's determination on grounds of judicial comity). Moreover, the law of the case doctrine applies as much to the "decisions of a coordinate court in the same case as to a court's own decisions." *Christianson, 486 U.S. at 816*.

In this case, both the parties and the underlying factual issues are the same as earlier filed cases in both this Court and the United States District Court for the Middle District of Pennsylvania. *See New Beckley Mining Corp. v. International Union, UMWA, 946 F.2d 1072, 1073 (4th Cir. 1991)* (noting that cases are parallel when "substantially the same parties litigate substantially the same issues in different forums"). When Plaintiff filed suit against the same Defendants and asserted the same or similar claims a year ago, this Court dismissed this case (*Fisher I*) on the ground that the first-to-file rule "requires substantially overlapping cases filed in separate fora to be resolved in the forum where the initial case is filed unless a balance of convenience favors the second action." *See Fisher v. Rite Aid Corp., No. RDB-09-1909, 2010 U.S. Dist. LEXIS 56383, 2010 WL 2332101, at *2 (D. Md. June 8, 2010)* (citations omitted). **[*9]** Moreover, the United States District Court for the Middle District of Pennsylvania also dismissed this case (*Fisher II*) under the doctrine of inherent incompatibility. *See Fisher v. Rite Aid Corp., 764 F. Supp. 2d 700, 705-06 (M.D. Pa. 2011)*. As Defendants aptly note in their memorandum, Plaintiff's dissatisfaction with a district court's decision does not allow him to appeal that decision to a different district court. *See Ellicott Mach. Corp. v. Modern Welding Co., 502 F.2d 178, 181 (4th Cir. 1974)* (noting that considerations of comity and judicial economy do not allow for a plaintiff to "appeal from one district court to another").

The exceptions to the law of the case doctrine also do not apply to this case. Subsequent trials of this case have not produced "substantially different evidence," *Sejman, 845 F.2d at 69*, nor has any "controlling authority . . . since made a contrary decision of law applicable to the issue." *Id.* Additionally, the prior decisions of this Court and the United States District Court for the Middle District of Pennsylvania were not "clearly erroneous" nor would they result in a "manifest injustice" to the Plaintiff. *Id.* While the Pennsylvania court indicated **[*10]** that Plaintiff could file his MWHL claim in state court, the only reasonable interpretation of the court's language was that Plaintiff could file his own *individual* claim in Maryland state court—not the same class action that has been dismissed by two federal district courts.

In sum, this action is now the third iteration of a case that has been dismissed by two separate federal courts. Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." ***Arizona, 460 U.S. at 618***. In this case, the Plaintiff may not relitigate the same or similar claims because revisiting such decisions "threaten[s] to send litigants into a vicious circle of litigation." *Christianson, 486 U.S. at 816*.

As a final matter, Plaintiff's Complaint will be dismissed with prejudice. Having already dismissed the Plaintiff's claims in *Fisher I*, this Court must avoid "the agitation of settled issues as well as the burdens of repeated reargument by indefatigable diehards." *Baron Fin. Corp. v. Natanzon, 509 F. Supp. 2d 501, 520 (D. Md. 2007)* (quoting *Christianson, 486 U.S. at 816*; 18B CHARLES ALAN WRIGHT, ARTHUR **[*11]** R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478 (2d ed. 2002)).

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss (ECF No. 19) is GRANTED.

A separate Order follows.

Dated: February 23, 2012

/s/ RICHARD D. BENNETT

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 23rd day of February, 2012, ORDERED that:

1. Defendants Rite Aid Corporation and Eckerd Corporation's Motion to Dismiss (ECF No. 19) is GRANTED;

2. This Case is DISMISSED WITH PREJUDICE;

3. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to Counsel; and

4. The Clerk of the Court CLOSE THIS CASE.

/s/ RICHARD D. BENNETT

UNITED STATES DISTRICT JUDGE

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Rawls v. Smith

Circuit Court of Southampton County, Virginia

January 17, 2001, Entered

Law No. CL0071

Reporter
2001 Va. Cir. LEXIS 26; 2001 WL 43095

JOANNE RAWLS, Plaintiff, v. KENNETH I. SMITH, and MARION G. SMITH, Defendants.

Core Terms

cottage, innkeeper, premises, Rental, inspect, motion for judgment, tort duty, landlord, vacation, common law, residential

Case Summary

Procedural Posture
Plaintiff filed a civil action seeking damages for personal injuries she allegedly sustained while vacationing at defendants' beach cottage in North Carolina. Defendants responded with a motion to dismiss which the trial court initially denied. Plaintiff then filed a motion for judgment.

Overview
Plaintiff injured party was a tenant in a cottage on a property allegedly owned and operated by defendant business proprietors. Plaintiff made use of a porch swing at the cottage. While she was doing so, the swing fell, and plaintiff sustained injury to her right leg and ankle. Plaintiff filed suit and alleged the swing fell because it was rusty, warn, and had a defective chain. Plaintiff contended defendants, as owners and operators of the cottage, had a duty to maintain the premises in a reasonably safe condition for rental, to make reasonable inspections to determine whether any latent defects existed, and to warn of any such latent defects known to them, their agents, and employees. Plaintiff admitted, however, that no written lease agreement existed and the rental period covered a single weekend. Defendants responded with a motion to dismiss and asserted they did not owe any legal duty to plaintiff. The trial court initially denied the motion to dismiss. However, after plaintiff filed a motion for judgment, the trial court found that plaintiff had pled no facts that implicated either a statutory obligation or a common law tort duty that defendants owed to plaintiff.

Outcome
Order entered that plaintiff's motion for judgment was found to be insufficient as a matter of law. Plaintiff granted leave to file an amended motion for judgment within 10 days from the date the order was entered. If no timely-filed amended pleading alleging facts sufficient to change the trial court's decision was filed, the trial would enter a final order dismissing the case.

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Remands

HN1 The law-of-the-case doctrine binds a trial court only after it has issued a ruling that went unchallenged in an appeal and later remand of the case. The doctrine has no binding effect on a trial court prior to appeal. A trial court may modify or rescind interlocutory orders at any time before final judgment, and can change its mind while a matter is still pending.

Banking Law > Commercial Banks > Bank Expansions > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Governments > Courts > Authority to Adjudicate

Torts > Procedural Matters > Conflict of Law > Place of Injury

HN2 Though a Virginia court applies its own law to procedural issues, the lex loci governs as to all matters going to the basis of the right of action itself.

Governments > Legislation > Effect & Operation > Retrospective Operation

Real Property Law > Landlord & Tenant > Landlord's Duties > Duty to Repair

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > Premises & Property Liability > Lessees & Lessors > General Overview

Torts > ... > Negligence > Duty to Repair > General Overview

Torts > ... > Negligence > Duty to Repair > Statutory Requirements

HN3 The North Carolina Vacation Rental Act, *N.C. Gen. Stat. § 42A-1 et seq.*, imposes upon lessors of vacation homes the duty to make all repairs and do whatever is reasonably necessary to put and keep the property in a fit and habitable condition. *N.C. Gen. Stat. § 42A-31(2)*. The North Carolina General Assembly, however, enacted the statute in 1999 and it applies only prospectively.

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Interpretation

HN4 Ordinarily, statutes are presumed to act prospectively only, unless it is clear that the legislature intended that the law be applied retroactively. An intention to give a statute a retroactive operation will not be inferred.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > Residential Leases

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > Premises & Property Liability > Lessees & Lessors > General Overview

HN5 *N.C. Gen. Stat. § 42-42(a)(2)* of the North Carolina Residential Rental Agreements Act imposes various duties on landlords of residential leaseholds. However, it extends only to premises normally held out for the use of residential tenants who are using the dwelling unit as their primary residence. *N.C. Gen. Stat. § 42-40(2)*.

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > General Premises Liability > Types of Premises > Hotels

Torts > Premises & Property Liability > Lessees & Lessors > General Overview

HN6 Under North Carolina law, an innkeeper owes the general duty of ordinary care to maintain the premises in such a condition that it may be used safely by guests in the manner for which it was intended.

Real Property Law > Landlord & Tenant > Lease Agreements > Residential Leases

Torts > Premises & Property Liability > General Premises Liability > General Overview

HN7 An inn or hotel has been properly defined as a public house of entertainment for all who choose to visit it. It is this publicly holding a place out as one where all transient persons, who may choose to come, will be received as guests for compensation that qualifies the premises as an inn or hotel. Moreover, the definition of an innkeeper must be contrasted with that of a landlord. An innkeeper, as distinguished from a landlord, is in direct and continued control of his guest rooms.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Real Property Law > Landlord & Tenant > Landlord's Duties > Duty to Repair

Torts > Premises & Property Liability > Lessees & Lessors > General Overview

Torts > ... > Liabilities of Lessors > Negligence > Duty to Inspect

Torts > ... > Negligence > Duty to Repair > General Overview

HN8 Under North Carolina law, absent an express agreement to do so, a landlord owes no common law duty to inspect or to maintain the leasehold premises.

Judges: [*1] D. Arthur Kelsey, Judge.

Opinion by: D. Arthur Kelsey

Opinion

OPINION AND ORDER

The plaintiff, Joanne Rawls, filed this civil action seeking damages for personal injuries she allegedly sustained while vacationing at the defendants' beach cottage in North Carolina. The defendants argue that neither statutory law nor common law imposes upon them, as short-term lessors of a vacation cottage, any duty to exercise due care to inspect or to

maintain the cottage for the benefit of Rawls. The Court agrees, finding that the facts pled do not implicate a tort duty as a matter of law. [1]

I.

Rawls alleges that Kenneth and Marion Smith "are the owners and operators of a cottage" located in Kill Devil Hills, North Carolina. Motion for Judgment P1, at 1. On April 11, 1997, Rawls "was a Tenant in the Smith Cottage and was using the [*2] porch swing." Motion for Judgment P5, at 2. The swing allegedly "fell because of a rusty, worn, and defective chain," causing Rawls to sustain "serious injury to her right leg and ankle." Id. Rawls contends that the Smiths, as the "owners and operators" of the cottage, had a "duty to maintain the premises in a reasonably safe condition for rental; to make reasonable inspections to determine whether any latent defects existed; and to warn of any such latent defects known to them, their agents and employees." Motion for Judgment P2, at 1-2. Rawls also asserts that the Smiths violated implied warranties of habitability and fitness for intended use by failing to inspect and to maintain the cottage in a safe condition. See Motion for Judgment P3, at 2. Rawls admits, however, that no written lease agreement existed and the rental period covered a single weekend. See Hearing Transcript at 16-18 (Dec. 12, 2000).

The Smiths filed a motion to dismiss on the grounds that they owed no legal duty (whether characterized as a tort duty of care or an implied warranty) either to inspect or to maintain the leasehold premises. Judge E. Everett Bagnell heard oral argument and issued a letter opinion agreeing with [*3] the Smiths' challenge of the implied warranty theory. With respect to the request to dismiss the tort cause of action, Judge Bagnell stated that this request would be "overruled at this time." Letter Opinion (Dec. 9, 1999); see also Order (Jan. 7, 2000). "The court will reconsider this ruling," Judge Bagnell further noted, "if defendant's counsel wishes to present authority on the issue of whether under North Carolina law the defendant is exempt from negligence." Id.

The Smiths filed additional legal briefs on the tort duty issue and requested another hearing on this issue. In the meantime, Judge Bagnell went into retirement and the case was placed back on the open docket.

II.

As a preliminary matter, Rawls argues that this Court should not reconsider Judge Bagnell's decision overruling the motion to dismiss the tort theory of liability. The Smiths rely on the same cases, Rawls points out, previously cited to Judge Bagnell. True enough--with little or no additional elaboration, the arguments presented by the Smiths on the tort duty issue (as well as the case citations offered in support) appear to be substantially the same ones presented earlier. Under these circumstances, [*4] Rawls contends, the law-of-the-case doctrine protects her from having to relitigate the issue. For two related reasons, the Court disagrees.

First, ***HN1*** the law-of-the-case doctrine binds a trial court only after it has issued a ruling that went unchallenged in an appeal and later remand of the case. See generally *Commonwealth v. Luzik, 259 Va. 198, 206, 524 S.E.2d 871, 877 (2000)*; *Lockheed Information Management Systems v. Maximus, 259 Va. 92, 108, 524 S.E.2d 420, 429 (2000)*; *American Filtrona Co. v. Hanford, 16 Va. App. 159, 164, 428 S.E.2d 511, 514 (1993)*. The doctrine has no binding effect on a trial court prior to appeal. A trial court may modify or rescind interlocutory orders "at any time before final judgment," *Freezer v. Miller, 163 Va. 180, 197 n.2, 176 S.E. 159, 165 n.2 (1934)* (citation omitted), and can, to put it plainly, "change its mind while the matter is still pending." *Pinkard v. Pinkard, 12 Va. App. 848, 853, 407 S.E.2d 339, 342 (1991)*; see also *Bennett v. Commonwealth, 33 Va. App. 335, 344, 533 S.E.2d 22, 27 (2000)* (even after the entry of a final order, "judges can [*5] change their minds" within the Rule 1:1 period).

Second, despite possessing the raw power of self-contradiction, trial courts are understandably loath to exercise it. Judicial second-guessing hardly fosters confidence in the institution. And if the practice became habitual, it would compromise the goal of finality and expose judges to the just criticism of being intellectually insecure. To make matters worse, if one trial judge felt free to revisit another's prior rulings--at least on any routine basis--the specter of judge shopping would become all too real. A better recipe for institutional strife and inefficiency could hardly be imagined.

Though Rawls makes a fair point by suggesting that this Court leave well enough alone, the argument has less persuasive force in this case than it might have in most others. Judge Bagnell overruled the motion to dismiss on the tort duty issue, but did so with the caveat that he would "reconsider this ruling" at some later stage of the case. See Letter Opinion (Dec. 9, 1999); Order (Jan. 7, 2000). This self-limiting language substantially weakens any reliance by Rawls on the finality of the interlocutory decision. The caveat also made clear [*6] that, while confident enough to overrule the motion "at this time," id., Judge Bagnell thought the issue deserving of additional consideration. Lastly, Judge Bagnell's retirement

[1] Kenneth L. Dietrick, Esq. and Robert S. Ricks, Esq. represent the plaintiff. William R. Savage, III, Esq. and James V. Chafin, Esq. of Glasscock, Gardy & Savage represent the defendants.

since issuing this ruling eliminates the possibility that the final result might be an unwitting product of judge shopping. For these reasons, while sympathetic to the general principles advocated by Rawls, the Court finds them inapplicable to the unique circumstances of this case.

Turning now to the principal legal issue: Did the Smiths owe a tort duty of care to Rawls that would require them to inspect the cottage and to maintain it in a safe condition during the term of the lease? Under traditional Virginia choice-of-law principles, *lex loci delicti* (the place of the wrong) governs the analysis. See *Jones v. R. S. Jones & Associates, 246 Va. 3, 5, 431 S.E.2d 33, 34 (1993)*. ***HN2*** Though Virginia law still controls procedural issues, "the *lex loci* will govern as to all matters going to the basis of the right of action itself . . . ." Id. (quoting *Maryland v. Coard, 175 Va. 571, 580-81, 9 S.E.2d 454, 458 (1940)*). The place of the wrong, North Carolina, treats the **[*7]** question whether a tort duty exists as one of law for the court where the facts are not in dispute. See *Carlson v. Branch Banking & Trust Co., 123 N.C. App. 306, 311, 473 S.E.2d 631, 634 (1996)* ("the issue of whether a duty exists is a question of law for the court."); see also *RESTATEMENT (SECOND) TORTS § 328B(b)* (in negligence action, court must determine whether the facts "give rise to any legal duty").

Rawls argues that the Smiths' legal duty can be found in ***HN3*** the North Carolina Vacation Rental Act, *N.C. Gen. Stat. § 42A-1 et seq.* That statute imposes upon lessors of vacation homes the duty to make "all repairs and do whatever is reasonably necessary to put and keep the property in a fit and habitable condition." *N.C. Gen. Stat. § 42A-31(2)*. The North Carolina General Assembly, however, enacted this statute in 1999 and intended it to apply prospectively only. See 1999 N.C. Session Laws 420, § 1 (Act effective Jan. 1, 2000 and only "applies to rental agreements entered into on or after that date"). The Vacation Rental Act, therefore, could not apply retroactively to the 1997 accident sustained by Rawls. [2]

[*8] Rawls next turns to ***HN5*** the North Carolina Residential Rental Agreements Act, *N.C. Gen. Stat. § 42-42(a)(2)*, which imposes various duties on landlords of residential leaseholds. The Smiths correctly point out, however, that the statute in effect at the time of the accident extended only to premises which were "normally held out for the use of residential tenants who are using the dwelling unit as their primary residence." *N.C. Gen. Stat. § 42-40(2)*. [3] Rawls concedes that she did not reside in the vacation-weekend cottage as her primary residence. See Hearing Transcript at 16-18 (Dec. 12, 2000). This statute, therefore, does not apply. See *Conley v. Emerald Else Realty, Inc., 350 N.C. 293, 296, 513 S.E.2d 556, 559 (1999)*.

[*9] Rawls next argues that the Smiths should be characterized as innkeepers. See generally North Carolina Innkeeper Act, *N.C. Gen. Stat. § 72-1 et seq.* ***HN6*** Under North Carolina law, an innkeeper owes "the general duty of ordinary care to maintain the premises in such a condition that it may be used safely by guests in the manner for which it was intended." *Connelly v. Family Inns of America, Inc., 141 N.C. App. 583, 587, 540 S.E.2d 38, 41, 2000 WL 1879131* at *2 (N.C. App. 2000); see also *Rappaport v. Days Inn of America, Inc., 296 N.C. 382, 383-84, 250 S.E.2d 245, 247 (1979)*.

For this innkeeper duty to exist in this case, the Smiths must have been running an inn. "***HN7*** An 'inn' or 'hotel' has been properly defined as a public house of entertainment for all who choose to visit it." *Holstein v. Phillips, 146 N.C. 366, 370, 59 S.E. 1037, 1039 (1907)*. "It is this publicly holding a place out as one where all transient persons, who may choose to come, will be received as guests for compensation" that qualifies the premises as an inn or hotel. Id.; see also *Tamerlane Realty Trust v. Bd. of Appeals of Provincetown, 23 Mass. App. Ct. 450, 454, 503 N.E.2d 464, 466 (1987)* **[*10]** (innkeepers hold themselves "out to the public as ready to entertain travelers, strangers and transient guests"); *Williams v. Riley, 56 N.C. App. 427, 428, 289 S.E.2d 102, 104 (1982)* (the lease of an entire dwelling takes the residence out of the innkeeper definition). Moreover, the definition of an innkeeper must be contrasted with that of a landlord. "An innkeeper (as distinguished from a landlord) is in direct and continued control of his guest rooms." *Flax v. Monticello Realty Co., 185 Va. 474, 478, 39 S.E.2d 308, 311 (1946)* (citation omitted); see also Black's Law Dictionary at 708 (7th ed. 1999) (An inn is a "public lodging establishment.").

Rawls has not alleged sufficient facts to support an inference that the Smiths could be treated as innkeepers or that the beach cottage could be considered an inn. Rawls describes herself as a weekend "Tenant" in the Smith's "rental cottage." Motion for Judgment PP3-5, at 2. Rawls does not make any

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[2] "***HN4*** Ordinarily, statutes are presumed to act prospectively only, unless it is clear that the legislature intended that the law be applied retroactively." *Arrowood v. N.C. Dept. of Health & Human Services, 140 N.C. App. 31, 41, 535 S.E.2d 585, 592 (N.C. App. 2000)* (citations omitted). An intention to give a statute a "retroactive operation will not be inferred." Id.

[3] Effective January 1, 2000, the North Carolina General Assembly deleted "who are using the dwelling unit as their primary residence" from the end of *§ 42-40(2)*. See 1999 N.C. Session Laws 420, § 2 (amendment effective only for rental agreements entered into on or after January 1, 2000).

factual allegations suggesting that the Smiths operated an inn at the cottage. To the contrary, the facts pled in the Motion for Judgment appear to contradict such an assertion. No innkeeper duties to inspect [*11] and to maintain the premises, therefore, can be predicated on the present factual allegations.

Finally, Rawls turns to general tort duties imposed by the common law. Here too, she comes up short. ***HN8*** Under North Carolina law, absent an express agreement to do so, [4] a landlord owes no common law duty to inspect or to maintain the leasehold premises. *Conley, 350 N.C. at 296, 513 S.E.2d at 559*; *Robinson v. Thomas, 244 N.C. 732, 736, 94 S.E.2d 911, 914 (1956)*. [5] This very fact explains, in part, the presence of recent statutes imposing just such an obligation on landlords. See generally John V. Orth, Who Is A Tenant? The Correct Definition Of The Status In North Carolina, *21 N.C. Cent. L.J. 79 (1995)* (the Residential Rental Agreements Act "reverses the common law rule that landlords have no duty, in the absence of express covenants, to provide residential tenants with suitable premises"). To be sure, the absence of any duties imposed by the common law on short-term lessors of vacation cottages, a proposition rendered indisputable by *Conley, 350 N.C. at 298-99, 513 S.E.2d at 560*, appears to have been the primary reason [*12] for the passage of the Vacation Rental Act.

[*13] III.

Despite giving Rawls the benefit of every reasonable inference, she nevertheless has pled no facts that would implicate either a statutory obligation or a common law tort duty to inspect or to maintain the vacation cottage owned by the Smiths. Absent a legal duty of care, no *prima facie* negligence claim can be asserted. For this reason, the Court finds the motion for judgment insufficient as a matter of law and grants Rawls leave to file an amended motion for judgment (if she is so advised) within ten days from the date of this Opinion and Order. Absent a timely filed amended pleading--alleging facts sufficient to change the result--the Court will enter a final order dismissing the case.

It is so ORDERED. [6]

Entered: January 17, 2001

D. Arthur Kelsey, Judge

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[4] The common law would recognize an *express* contractual obligation to inspect and to maintain, but Rawls makes no such allegations in this case. She relies solely on an alleged common law tort right of action. See Hearing Transcript at 16 (Dec. 12, 2000).

[5] This proposition represents the majority view among jurisdictions applying common law principles. See, e.g., *Seoane v. Drug Emporium, 249 Va. 469, 474, 457 S.E.2d 93, 96 (1995)*; *The Business Bank v. F.W. Woolworth Co., 244 Va. 333, 336 n.1, 421 S.E.2d 425, 427 n.1 (1992)* ("Under the common law, absent an express covenant to the contrary, a lessor generally is under no obligation to repair the premises and the lessee takes the premises as he finds them."); see also W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 63, at 934 (5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS § 186*, at 338 (1965); *49 AM. JUR. 2D Landlord & Tenant § 486*, at 403 (1995); 51C C.J.S. *Landlord & Tenant* § 366(1)(a) (1968).

[6] In its discretion, the Court dispenses with any requirement that this Opinion and Order be endorsed by counsel of record. See Va. Sup. Ct. R. 1:13. The Court acknowledges the objections to this ruling advanced by Rawls.

End of Document

MEMORANDUM OF UNDERSTANDING AMONG THE AGENCIES PARTICIPATING IN THE NATIONAL CAPITAL REGION'S (NCR) LICENSE PLATE READER (LPR) INFORMATION SHARING PROGRAM

PURPOSE

1. This Memorandum of Understanding (MOU) is entered into by the participating, federal, state, county, local and special jurisdiction law enforcement agencies collaborating in the NCR LPR information sharing initiative. The purpose of this MOU is to set forth the policy and procedures for the sharing of LPR data by the participating parties, including the ownership and control of the information within the system, which may be contributed by each party for the use by the participating agencies.

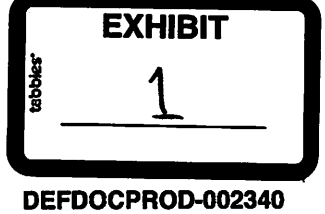
2. The driving impetus for this initiative and MOU is to reduce crime and prevent terrorism in the wake of the September 11th terrorist attacks against the United States. This includes: identifying and locating criminals, terrorists and their supporters; identifying, assessing, and responding to crime and terrorist risks and threats; and otherwise preventing, detecting, and prosecuting criminal and terrorist activities. To achieve these ends, it is essential that all law enforcement agencies cooperate in efforts to share pertinent information. The NCR LPR data sharing program will establish a mechanism that will allow member agencies to search for LPR data collected and maintained by other member agencies via the NCRnet. The NCRnet is a secure fiber optic network established by COG (Council of Governments) after the September 11th terrorist attacks against the United States that is available for use by NCR member agencies.

3. Regional LPR data will be available for use by participating law enforcement agencies in furtherance of authorized law enforcement activities as well as the prevention and detection of terrorist risks and threats. Being able to access LPR data through the NCRnet will significantly advance public safety and security, reduce crime, and will enhance the protection of this Nation's critical strategic resources in the National Capital Region which includes the aggregate areas of responsibility within the District of Columbia, State of Maryland, and Commonwealth of Virginia currently represented by the participating agencies.

PARTIES

1. The parties to this MOU are: To Be Determined.

2. The parties agree that maximum participation by all eligible law enforcement agencies will strengthen the purposes of this MOU. Accordingly, the parties anticipate and desire that other eligible agencies will join this MOU in the future. Those eligible agencies beyond the original signatories must apply for membership and be approved by the NCR LPR data sharing Governance Board (defined in the sub-section titled "Governance"). All participating agencies must be given 30 days advance notice prior to voting on a new application for membership. The NCR LPR sub-committee (an advisory



board that reports to the COG Police Chief's Committee) shall establish criteria for eligibility to join; such as but not limited to security compliance, data accountability, technical capability, and operational history.

3. A joining state, county, local, and special jurisdiction law enforcement agency once approved by the NCR LPR data sharing Governance Board shall also be considered a party and shall have the same rights, privileges, obligations, and responsibilities as the original parties.

4. A joining federal agency beyond those listed above in paragraph B.1 may also be admitted with the NCR LPR data sharing program Governance Board's approval and participate in meetings and committees; however, only one vote per federal department (i.e., Department of Justice, Department of Homeland Security, Department of Defense, Department of Interior, etc.) will be authorized. Each federal department must select the voting law enforcement executive from within that department and provide in writing the identity of that person to the Committee.

POINTS OF CONTACT

Each party shall designate an individual as the party's point of contact (POC) for representing that party in regard to the MOU. A party may change its POC at any time upon providing written notification thereof to the POCs of all other parties.

MISSION/OBJECTIVES

This initiative seeks to establish a federated search capability of the cumulative LPR data from the region's law enforcement agencies in a systematic and ongoing manner to maximize the benefits of information gathering and analysis to prevent and respond to terrorist and criminal threats; to support preventive, investigative and enforcement activities; and to reduce crime, enhance public safety and protection of the Nation's critical infrastructure in the National Capital Region. The specific objectives of the NCR LPR data sharing program are to:

1. Provide the means for the participating agencies to use LPR data to support law enforcement, criminal investigation, force protection, and counter terrorism operational and investigative activities.

2. Provide access to cumulative LPR data held by individual, participating agencies.

3. Dramatically reduce the time spent by participating agency personnel in the search and retrieval of relevant LPR data.

CONCEPT

1. NCR LPR data sharing program is a cooperative partnership of federal, state, county, local and special jurisdiction law enforcement agencies, in which each agency is participating under its own individual legal status, jurisdiction, and authorities of the individual participants. The NCR LPR data sharing program is not intended to, and shall not, be deemed to have independent legal status.

2. License Plate Reader (LPR) is a computer-based system that utilizes special cameras to capture a color image, as well as an infrared image, of the license plate of a passing vehicle. The infrared image is converted into a text file utilizing Optical Character Recognition (OCR) technology. The text file is automatically compared against an "informational data file", known as a "Hot List" and can contain information on stolen or wanted vehicles as well as vehicles associated with AMBER alerts, warrant subjects and agency-defined information.

3. LPR cameras can be mobile (mounted on vehicles) or on fixed positions such as freeway overpasses or traffic signals. LPR systems mounted have all the necessary equipment to scan plates, notify the user of a vehicle hit, and upload the "Plate Scan" information into an "LPR Repository" for retention and research.

4. Each participating agency will maintain its own in-house LPR server which will serve as the repository for that agency's LPR data. This data can then be accessed by other participating agencies via NCRnet. All participating agencies will have equal access to LPR data through NCRnet.

5. Agencies entering into this agreement hereinafter referred to as "Agency Parties", realizing the mutual benefits to be gained by sharing information, seek to share Plate Scan and Hot List information.

6. The purpose of this MOU is to outline conditions under which the Agency Parties will share and use Plate Scan and Hot List information. All Agency Parties will have equal access to Plate Scan and Hot List information in accordance with the contributing agency's data retention policy via a secure search performed via the NCRnet.

ACCESS TO AND USE OF LPR DATA.

1. Each participating agency will make LPR data available to other participating agencies via the NCRnet and agrees to permit the access, dissemination, and/or use of such information by every other party under the provisions of this MOU (and any other applicable agreements that may be established for the NCR LPR data sharing program). No party shall have any responsibility or accountability for ensuring that another party's contributing information is not constrained

from permitting this by any law, regulations, policies, and procedures applicable to the submitting party.

2. LPR Repositories shall operate 24-hours a day, 7-days a week, with downtime limited to those hours required for any necessary maintenance activities.

3. Agencies that do not provide data for including in the NCR LPR data sharing program are not eligible to be parties without express, written approval of the NCR LPR data sharing program Governance Board. Only duly constituted law enforcement agencies from federal, state, county, local, or special jurisdictions may become a party of the NCR LPR data sharing program.

4. All parties will be required to access LPR data from other participating agencies via a secure connection through the NCRnet, as provided in this MOU and any other applicable agreements that may be established for the NCR LPR data sharing program.

5. An accessing party has the sole responsibility and accountability for ensuring that any access comports with any laws, regulations, policies, and procedures applicable to the accessing party.

6. A party may only access the LPR data when it has a legitimate, official need to know the information for an authorized law enforcement, counter terrorism, public safety, and/or national security purpose, after receiving training appropriate to this MOU. An accessing party may use the information for official law enforcement matters only.

7. Information may not be disseminated without first obtaining express permission of each party that contributed the information in question, in accordance with and to the extent permitted by applicable law, required court process, or guidelines issued jointly by the Attorney General of the United States and the Director of Central Intelligence. However, immediate dissemination of information can be made if a determination is made by the recipient of the information.

   (a) that the matter involves an actual potential threat of terrorism, immediate danger of death or serious physical injury to any person, or imminent harm to the national security; and

   (b) requires dissemination without delay to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.

   The owner of the information shall be immediately notified of any and all disseminations made under this exception.

8. Any requests for LPR data from anyone other than a party to this MOU will be directed to the contributing party.

9. Agencies that are not part of this MOU will not have direct access to LPR data via NCRnet. Requests by such agencies for copies of information contained in individual agency LPR servers must be referred to the individual agency that owns the information.

USER ACCESS

1. Each Agency Party's System Administrator is responsible for management of user accounts at that Agency Party. Each Agency Party agrees that all Authorized Users shall be limited to current employees who are legally authorized to review LPR data for crime prevention and detection purposes. Each potential user shall submit a request for a login and password to the Agency System Administrator. The Agency System Administrator shall have discretion to deny or revoke individual access.

2. Each authorized User will be issued a user login and a default password by the Agency System Administrator.

3. Each Agency System Administrator is responsible for timely removal of any login accounts as Authorized Users leave the Agency, or are denied access by the Agency System Administrator for any other reason. Failure to meet the requirements of this portion of the Agreement may result in the removal of the violating agency from the NCR LPR data sharing program.

4. Each Authorized User agrees that Plate Scan and Hot List information and the networking resources are to be used solely for law enforcement purposes only and consistent with the law. Authorized Users shall not use or share the information for any unethical, illegal, or criminal purpose.

5. An Authorized User shall not access information in an LPR Repository by using a name or password that was assigned to another person, including another user, to access the system.

OWNERSHIP, ENTRY, RELEASE AND MAINTENANCE OF INFORMATION

1. Each Agency Party retains control of all information in its LPR Repository. Each Agency Party is responsible for creating, updating, and deleting records according to its own policies. Each Agency Party shall use reasonable efforts to insure the completeness and accuracy of its data.

2. Agency Parties and Authorized Users shall release or make available information accessed from an LPR Repository only to persons or entities authorized to receive LPR information pursuant to this MOU.

3. Any Agency Party receiving a public records request, subpoena, or court order ("Legal Request") for information in an LPR Repository not authored by or originated by that Agency Party shall respond to the Legal Request, and shall immediately provide a copy of the Legal Request to the Source Agency.

4. No party has any responsibility or accountability for ensuring that LPR information contributed by another party was done in compliance with all applicable laws, regulations, policies, and procedures applicable to the contributing party's entry and sharing of information via the NCRnet.

5. No party has any responsibility or accountability for making reasonable efforts to ensure the accuracy upon entry, and continuing accuracy thereafter, of information contributed by another party. Each party will notify the contributing party and the LPR Data Sharing Governance Board of any challenge to the accuracy of the contributing party's information.

6. Each agency has agreed to allow participating agencies access to its LPR data and information stored in its LPR server/repository.

7. If an Agency Party receives a request for information in an LPR Repository by anyone who is not authorized to receive information from the LPR Repository, that Agency Party shall refer the request to the law enforcement agency that originated the requested information ("Source Agency")

8. Each agency Party authorizes the release of Plate Scan and Hot List information residing in their respective data networks to other Agency Parties as permitted by law. An Agency Party that does not want certain information made available to any other Agency Party is responsible for entering that the information is not available for data exchange. There is no obligation to share Plate Scan or Hot List information with any Agency Parties based solely on their acceptance of this Agreement.

9. Plate Scan and Hot List information shall only be shared with or released to other Agency Parties. Only authorized employees who have an approved login and password ("Authorized Users") will be allowed to access any other Agency Party's Plate Scan and Hot List information.

10. When addressing any request for the disclosure of third agency information where that information was obtained as a result of a query(s) made through the NCRnet, the participating agencies shall comply with the following policy:

(a) In all cases, for providers of any third agency information held in another NCR LPR MOU signatory's files, the provider retains proprietary ownership of the information other than as provided by specific law.

(b) As agreed by all parties and established in this MOU and herein, LPR information acquired through NCRnet by all participating parties shall be considered sensitive law enforcement information, the non-disclosure of which is essential to law enforcement or the protection of on-going investigations and persons' right to privacy. Therefore, in all cases the agency with proprietary interest will be immediately notified of a request for sharing or disclosure of that information from any agencies or parties outside of the participating agencies in the NCR LPR program.

11. All parties agree to assist and cooperate with any signatories in protecting information from harmful disclosure to the fullest extent of the law.

12. It is not the intention of this agreement to circumvent or obstruct existing open government and/or public information disclosure laws. Rather it is intended to ensure the protection of sensitive law enforcement information, information that has been designated as part of an active and ongoing investigative effort by any party, and other information as protected by applicable federal and state privacy laws.

CONFIDENTIALITY AND SECURITY OF INFORMATION

1. Information in an LPR Repository is confidential and is not subject to public disclosure, except as required by law. Only Authorized Users are allowed to view and use the information in an LPR Repository. Otherwise, the information shall be kept confidential.

2. An Authorized User who receives a request from a non-authorized requestor for information in an LPR Repository shall not release that information, but may refer the requestor to the Source Agency.

3. Agency Parties shall determine a schedule for record deletion and other edits in accordance with individual agency policies and legal requirements.

4. Each party will be responsible for designating those employees who have access to the regional LPR data. It should be remembered by each participating member that access to the information within the system should be on a strictly official, need-to-know basis, and that all information is law enforcement sensitive.

    a. Each party agrees to use the same degree of care in protecting information accessed under this MOU as it exercises with respect to its own sensitive information. Each party agrees to restrict access to such information to only those of its (and its governmental superiors) officers, employees,

detailees, agents, representatives, task force members, contractors/subcontractors, consultants, or advisors with an official "need to know" such information.

b. Each party agrees to take appropriate corrective administrative and/or disciplinary action, or refer possible violations of Virginia Code 52-8.3 to the Virginia Department of State Police, against any of its personnel who misuse the LPR data as if it were an abuse of their own sensitive information systems of records.

5. Each party is responsible for training those employees authorized to access the NCRnet regarding the use and dissemination of information obtained from the system. Specifically, employees should be given a clear understanding of the need to verify the reliability of the information with the contributing party before using the information for purposes such as preparing affidavits, or obtaining subpoenas and warrants, etc. Parties should also fully brief accessing employees about the proscriptions for using third party information.

PROPERTY

1. Any equipment purchased by the Metropolitan Washington Council of Governments and Arlington County, Virginia, using UASI funds to support this effort will remain the property of the agencies to which it was allocated. After expiration of any warranties the responsibility for the maintenance costs of the server will be the responsibility of the owner agency.

2. Ownership of all property purchased by parties other than those listed above will remain the property of the purchasing party. Each party accessing the NCRnet from the party's facility shall provide its own computer stations for its designated employees to have use and access to the agency's LPR server, which will allow them access to the NCRnet. The accessing party is responsible for configuring its server to conform to the NCRnet access requirements. Maintenance of the equipment purchased by the accessing party shall be the responsibility of that party.

RESTRICTIONS ON FUNDING

1. Unless otherwise provided herein or in a supplementary writing, each party shall bear its own costs in relation to this MOU. Even where a party has agreed (or later does agree) to assume a particular financial responsibility, the party's express written approval must be obtained before the incurring by another party of each expense associated with the responsibility. All obligations of and expenditures by the parties will be subject to their respective budgetary and fiscal processes and subject to availability of funds pursuant to all laws, regulations, and policies applicable thereto. The parties acknowledge that there is no intimation, promise, or guarantee that funds will be available in future years.

2. This MOU shall not be used to obligate or commit funds, or serve as the basis for the transfer of funds.

LIABILITY

1. Each Party is solely responsible for any and all claims brought against it (including without limitation, claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney's fees, disbursements and court costs).

2. Unless specifically addressed by the terms of this MOU (or other written agreement), the parties acknowledge that no party shall have any responsibility for the negligent or wrongful acts or omissions of the officers or employees of other parties to this agreement.

3. Agency Parties agree that Plate Scan and Hot List information consists of information assumed to be accurate. Agency Parties will participate in several testing sessions, to validate and ensure that its information is accurate. However, data inaccuracies can arise for multiple reasons (e.g., entry errors, misinterpretation, outdated data, etc.). It shall be the responsibility of the Agency Party requesting or using the data to confirm the accuracy of the information with the Source Agency before taking any enforcement-related action.

4. Each Agency Party shall determine the frequency with which its Hotlist Data will be refreshed. Since changes or additions to Hotlist Data do not get updated on a real-time basis, Agency Parties recognize that information may not always be timely and relevant. It shall be the responsibility of the requesting Agency Party to confirm the timeliness and relevance of the information with the Source Agency.

5. To the extent permitted by law, each Agency Party agrees to hold the other Agency Party harmless for any information in an LPR Repository, or any action taken as a result of that data, regardless of whether the data is accurate or not, or any time delay associated with changes, additions, or deletions to the information contributed. This hold harmless provision shall not apply to the willful misconduct or gross negligence of Source Agencies.

GOVERNANCE

1. The parties recognize that the success of this program requires close cooperation on the part of all parties. To this end, the system will be operated under a shared management concept in which the parties will be involved in formulating operating policies and procedures. The NCR LPR data sharing program Governance Board will consist of the head (or authorized designee) of each participating law

enforcement agency. The parties agree to comply with all future policies and procedures developed by this Governance Board.

2. Each voting member of the Governance Board shall have an equal vote and voice on all board decisions. Unless otherwise provided, Roberts Revised Rules of Order shall govern all procedural matters relating to the business of the Governance Board.

3. A chairperson shall be elected by its members, together with such other officers as a majority of the Board may determine. The chairperson, or any board member, may call sessions as necessary. For a meeting to occur a minimum of 51% of the membership must be present and a simple majority of those present shall be required for passage of any policy matters. A tie vote does not pass the matter. In emergency situations, the presiding officer may conduct a telephone or email poll of Board members to resolve any issues. The Governance Board may also establish any needed committees such as executive, technical, user, oversight, and legal.

4. Disagreements among the parties arising under or relating to this MOU shall be resolved only via consultation at the lowest practicable level by and between the affected parties and their sponsoring agencies (or ass otherwise may be provided under any separate governance procedures) and will not be referred to any court, or to any other person or entity for settlement. All unresolved matters would go before the Governance Board.

5. The Governance Board may establish additional procedures and rules for the governance of the NCR LPR program and in furtherance thereof may enter into one or more separate formal or informal agreements, provided that any such agreement does not conflict with the spirit, intent, or provisions of this MOU, and is sufficiently memorialized to meet the business purposes of the Governance Board (including adequately informing current and future parties). Such governance agreement(s) may, for instance address: organizational structure and control; executive management and administration; delegation of authority; operating policies, procedures rules, and practices; meetings, quorums, and voting procedures; audits; and sanctions (including involuntary termination of a party's participation in this MOU).

NO RIGHTS IN NON-PARTIES

1. This MOU is an agreement among the parties and is not intended, and should not be construed, to create or confer on any other person or entity any right or benefit, substantive or procedural, enforceable at law or otherwise against the Metropolitan Washington Council of Governments, the United States, District of Columbia, Virginia Department of State Police, a party, or any state, county, locality, or other sponsor under whose auspices a party is participating in the NCR LPR program or the officers, directors, employees, detailees, agents, representatives, contractors, subcontractors, consultants, advisors, successors, assigns or other agencies thereof.

P. EFFECTIVE DATE/DURATION

1. As among the original parties, this MOU shall become effective when the duly authorized representatives of each party have all signed it. For parties who are subsequently approved for admittance by the Governance Board, this MOU shall become effective when completed and signed by the joining party's duly authorized representative and countersigned by the duly authorized representatives of the NCR LPR program Governance Board.

2. This MOU shall remain in effect indefinitely from the effective date, unless otherwise terminated.

Q. MODIFICATIONS

1. This MOU may be modified upon the mutual written consent of the duly authorized representatives of all parties. However, the parties may, without the need of formal MOU modification, cooperatively address and resolve administrative, technical, and operational details relating to this MOU, provided that any such resolution: does not conflict with the spirit, intent, or provisions of this MOU; could not reasonable be viewed as particularly sensitive, controversial, or objectionable by one or more parties; and is sufficiently memorialized to meet the business purposes of NCR LPR program governance (including adequately informing current and future parties).

R. TERMINATION

1. This MOU may be terminated at any time by the mutual written agreement of the duly authorized representatives of all parties. A Party's duly authorized representative may also terminate the party's participation in the MOU upon written notice to all other parties of not less than 30 days. A party's participation may also be terminated involuntarily as provided in the applicable governance agreement.

2. As to information in the LPR data sharing program during a party's participation under this MOU, the rights, obligations, responsibilities, limitations, and other understandings with respect to the disclosure and use of such information shall survive any termination. This applies both as to a terminating party's information, and to the other parties' disclosure and use of a terminating party's information.

LEGAL REVIEW

It is the responsibility of each agency to review this MOU prior to executing it in order to ensure that it complies with all applicable laws, ordinances and policies specific to that agency.

EXECUTION OF AGREEMENT

By executing this agreement, each Party acknowledges that it has received a copy of this agreement, and will comply with its terms and conditions. The person executing this

Agreement certifies that the person is authorized by its Party to execute this Agreement and legally bind its Party to the terms herein. This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

Signature of Chief Executive Officer or Designee	Agency
Printed Name/Title of Above Individual	Date of Signature

Automated License Plate Recognition Grant Program

Program Requirements
(Attachment #1, 17 items)

1. Any agency accepting equipment provided under this grant will be responsible for having in place, prior to the receipt of ALPR's, a department SOP governing the proper use of the equipment. A copy of this SOP will be provided to the sub-grantee at or before the time of installation and kept on file with inventory records for audit purposes.

2. ALPR grant provided equipment is intended to be utilized within the National Capitol Region. Deployment of the equipment outside of the Region is prohibited, except in extenuating circumstances for a limited time. Participating agencies agree to abide by the terms and conditions of the grant.

3. Grant provided equipment is ***not*** intended to supplant existing equipment currently in use within the NCR, but to augment current resources.

4. A participating agency understands that the scope of the grant covers basic ALPR equipment, "standard" installation and mounting equipment, operating software, initial training, and a three year warranty agreement. All other costs, including custom or modified installation, storage and archiving equipment, air cards or power source connections, additional training or costs associated with moving the equipment to a new location or vehicle is the sole responsibility of the participating agency.

5. Recipient ***must*** provide, at their expense, a MDT/KDT or laptop (needed for use as a client user interface with the system) with sufficient capacity and configuration to operate the ALPR for each mobile unit provided under this grant. Fixed units must be connected to a working computer system capable of performing the same function as the MDT/KDT/laptop function for mobile units.

6. Recipient ***must*** have sufficient vehicles in their inventory as to have more vehicles than mobile ALPR's provided to that agency under this grant, and be able to make modifications to those vehicles, if necessary, to facilitate the installation of ALPR equipment.

7. At the conclusion of the grant provided warranty period (3 years from date of installation), the responsibility and costs for repair, maintenance, upgrades or other support for the ALPR will be the sole responsibility of the recipient agency.

8. Participating agencies must provide trained personnel to fully utilize grant provided equipment. Initial training will be provided by the vendor chosen and funded by this grant. Additional, recurrent or specialized training will be the responsibility of the recipient agency.

9. Permanent or fixed site installations may require additional costs to be borne by the receiving agency and may NOT be covered under this grant. Prior to accepting any equipment provided under this grant, an agency agrees to be responsible for ALL costs of installation NOT COVERED under this grant and agrees to make payment for those costs outside of the terms of this grant.

10. Grant provided ALPR's and all information obtained from their use will be utilized for law enforcement purposes only, and is to be governed by provisions of the grant, statute and agency policy.

11. The receiving agency will be responsible for having in place, prior to the receipt of ALPR's, the ability to download and utilize current NCIC hot list data.

12. Participating agencies agree that upon receipt of a "watch list hit" notification from the use of grant funded ALPR equipment, they will contact the Terrorist Screening Center with details of the "hit."

13. Additional equipment or labor needed to transmit data to a centralized repository over an IP or data network will be the sole responsibility of the recipient and is in no way provided for or covered under this grant. This includes all hardware, software and technical costs.

14. During the life of the grant, there will be no permanent reassignment of ALPR's by the recipient department to another agency or department following the initial distribution of equipment. If an agency no longer

wishes to utilize the equipment in accordance with these requirements, all grant provided equipment shall be returned to the original sub-grantee.

15. Specific data related to the effectiveness of grant supplied ALPR's will be provided to the sub-grantee as requested. A reporting template will be provided by the project manager which must be completed and returned to the sub-grantee on a monthly basis. This data may be used to show the effectiveness of the equipment or the grant itself and shall not include personal or information otherwise controlled by law, policy or statute.

16. Any data collected, stored, archived or maintained through the use of a grant supplied ALPR is the responsibility of the collecting agency. The scope of this grant does not address the collection of data through the use of grant supplied equipment or the use of the data itself.

17. Any agency participating in the 2008 UASI ALPR Grant project agrees to consider any request from a non-participating law enforcement agency within its jurisdictional boundaries for assistance with monitoring vehicle license plate data through the use of grant provided ALPR's.

From: Pagerie, Rex [Rex.Pagerie@fairfaxcounty.gov]
Sent: Thursday, May 07, 2015 9:07 AM
To: Blakley, Bob
CC: Hurlock, Jack
Subject: LPR - REVISED

Captain :
I talked to Major Hurlock today and went over these responses for PIO . I made the Majors revisions – can you please take a look before I send them to PIO ?
Thanks
REX

From: Pagerie, Rex
Sent: Thursday, May 07, 2015 6:35 AM
To: Hurlock, Jack
Subject: RE: LPR
Good Morning Major –
My numbers are 571-235-5248 or 571-221-4113
Rex

From: Hurlock, Jack
Sent: Wednesday, May 06, 2015 7:28 PM
To: Pagerie, Rex
Cc: Blakley, Bob
Subject: Re: LPR
Rex.
If you give me number to call you I can go thru things that need correcting. Either this evening or tomorrow morning is fine for me.

Sent from my iPhone

On May 6, 2015, at 7:19 PM, "Pagerie, Rex" <Rex.Pagerie@fairfaxcounty.gov> wrote:

> Major:
> PIO sent me these questions – I used some of the success emails you sent Kim – Is that OK?
> Can you please look over my response and see if it is ok to send to PIO.
> Thanks
> REX
>
> 1. **When we began using LPR ?–** Fairfax County starting ALPR use in 2004
> 2. **How many units do we have** – We have twenty six (26) ALPR units.
> 3. **How many are operational ?-** Out of the 26 ALPR units in operation, the number of units fluctuates as units are taken in and out of service for repairs. Each District Station is assigned three cruisers equipped with ALPR units. Only trained officers may operate the ALPR cars
> 4. **How long information is stored ?–** Our current data retention policy is 364 days.
> 5. **How is information is accessed- who can access? –** Our ALPR data is stored on a secure server and is queri through the ELSAG Operation Center (EOC) software.

EXHIBIT
tabbies
3

Only users that have been trained and vetted are granted access to the EOC. This group is mostly comprised of Detectives, Crime Analysts, and System Administrators. All queries are for Criminal Justice Purposes Only.

6. **Who can *operate the ALPR*** - Operation of the ALPR System shall only be performed by those authorized employees who have successfully completed the Fairfax County Police Department's approved training for ALPR devices. All operators shall receive training prior to using the ALPR System.
7. **Any significant cases our LPR system has helped us close-** I will follow-up with examples from the Capital Region.
8. **Anything else you think is pertinent?**

How do Automated License Plate Recognition (ALPR) Systems work?

Automated License Plate Recognition (ALPR) systems function to automatically capture an image of a vehicle and the vehicle's license plate, transform the plate image into alphanumeric characters using optical character recognition, compare the plate number acquired to a databases known as the "hot lists" of vehicles of interest to law enforcement, and then alert law enforcement officers when a vehicle of interest has been observed.

What is a lawful purpose?

The use of ALPR technology is intended as a tool for law enforcement to identify stolen license plates and vehicles or any vehicle identified as having a specific interest to law enforcement. It shall be the policy of the Fairfax County Police Department to use ALPR technology for law enforcement functions that will detect criminal activity and promote the health, safety and welfare of Fairfax County residents and visitors. This technology shall be used in a manner consistent with legal and constitutional limitations, privacy concerns and the highest ethical standards.

DOWNLOAD: Transfer of data from the Virginia State Police database consisting of license plate associated data.
HOT LIST: A "hot list" is a list of targeted license plate numbers and partial plate numbers that are uploaded to ALPR units on a daily basis.
UPLOAD: Transfer of data from ALPR units to storage on the ALPR server.
Each day the Virginia State Police generates a "hot list" containing all active stolen license plates and vehicles entered into NCIC/VCIN. This information is available to authorized law enforcement personnel via a secure Web site. The "hot list" is imported either automatically through a server or manually by the end user into the License Plate Reader System. Wanted vehicles may also be entered into the ALPR manually by the end user as circumstances dictate.

The ALPR scans license plates and compares them to data provided by the Virginia State Police. The ALPR software runs in the background of the MCT, and automatically alerts the police operator to a potential stolen vehicle or license plate. The ALPR maintains the date, time and location of each license plate it scans.

Does the ALPR system collect my personal identifying information?

The ALPR system does not contain personal identifying information associated with data collected through ALPR devices. The system only contains the data sets of license plate numbers, photos of the vehicles, and geospatial locations from where the images were captured. The ALPR does NOT capture any personal data. There is no connectivity in the ALPR system to the vehicle's registration information or the driver's license information of the owner. It is much like the information captured when a vehicle passes through a toll both – Photo of the license plate and a recorded location.

How accurate is the ALPR technology?

As ALPR technology is translating optical characters to digital data there is a small error rate in translation of alphanumeric characters that are similar in shape

Is my vehicle information shared with private sector companies?

No, the ALPR system is restricted to law enforcement personnel with a lawful purpose for using the system. ALPR information can be shared with other law enforcement agencies to assist with criminal justice related queries.

Does the ALPR system provide constant surveillance of my location?

No, the ALPR system only provides authorized law enforcement personnel with one moment in time and location where a vehicle was located to provide potential leads to support criminal investigations. This is much like a single blip on the radar of an air traffic controllers screen.

Can ALPR devices see into my vehicle and use facial recognition software?

Unlike red light cameras, ALPR devices do not have illumination to aid in identifying the driver or potential passengers of the vehicle. The purpose of the ALPR is to identify the vehicles license plate , not the occupants. If ambient lighting is sufficient or a subject is outside and near the vehicle their image may be captured. The ALPR system is not designed to be used with facial recognition.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HARRISON NEAL,	:	
Plaintiff,	:	
	:	
v.	:	
	:	**Case No. CL-2015-5902**
	:	
FAIRFAX COUNTY POLICE DEPARTMENT, et al.,	:	
Defendants.	:	

DEFENDANT FAIRFAX COUNTY POLICE DEPARTMENT'S RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Pursuant to Rule 4:8 of the Rules of the Supreme Court of Virginia, the Defendant, Fairfax County Police Department (FCPD), by Lieutenant Rex Pagerie, hereby responds to Plaintiff's First Set of Interrogatories to the FCPD.

1. Identify each and every person and agency involved in the collection, storage, access, use, and/or dissemination of information used, accessed, or collected by FCPD using ALPR technology and describe the nature of that person or agency's involvement.

ANSWER:

Objection to the extent that providing the address and phone number of every individual is overbroad and burdensome, and not likely to result in the discovery of admissible evidence. All individuals with access to the database are employed by the FCPD and can be located if necessary. The business address of every employee is 4100 Chain Bridge Road, Fairfax, Virginia 22030.

The list of approved Fairfax County LPR users is being provided in response to the Plaintiff's First Request for Production. The list of approved personnel that have access to the LPR database / EOC – Operations Center is also being provided in response to the Plaintiff's First Request for Production.

Each person who has access to the database or the operation of the ALPR equipment performs these functions in compliance with Department policy and for law enforcement purposes only. In addition to our own maintained LPR database, The Fairfax County Police Department has used a private LPR service in prior years to enhance criminal investigative abilities for

EXHIBIT 4

detectives. The private service (NVLS) is no longer used by the Fairfax County Police because of no further funding.

2. Identify each and every person and agency involved in creating policies, rules, and/or practices relating to ALPR technology and records obtained through use of ALPR technology for FCPD and describe the nature of that person or agency's involvement.

ANSWER:

Major Arthur Jack Hurlock, Captain Thomas Rogers and David Cobb created the ALPR Department Policy and practice. Major Hurlock received direction from the IACP when developing policy with Captain Rogers.
Major Hurlock is the Director of the ALPR program.
Captain T.J. Rogers was assigned to create a policy and procedure through research and best practices in 2009 or 2010.

Dave Cobb was involved as the Information Technology expert – Creating secure server connections and best practices for proper control over the connection and storage aspects of the program. He no longer works for the County.

3. Identify every current or former written policy, rule or practice of FCPD, whether in draft or final form, relating to the collection, storage, access, use, and/or dissemination of information collected using ALPR technology.

ANSWER:

The Department Standard Operating Procedure (SOP) 11-039 and previous drafts of this policy. In addition, the FCPD's practices concerning LPR are contained in our E-learning course and past power point presentations.

4. State whether any unwritten policies, rules, or practices relating to the collection, storage, access, use, and/or dissemination of data collected using ALPR technology have been or currently are used by the FCPD and if so, describe in detail each policy, rule, and/or practice.

ANSWER:

Personnel that have access to the LPR database comply with our current S.O.P and M.O.U. The only unwritten practices that may exist may be ALPR information gained from a private party such as NVLS to assist with locating a vehicle that is related to a police investigation or crime. Using a private data service is not a common practice but has been done in the event our database does not produce investigative leads for a specific investigation.
First- line supervisors often request officers to ensure they have their LPR equipment activated when responding to serious crime calls such as Burglaries, Malicious Wounding, Robbery and

more. This practice done in the hopes that a feeing suspects' vehicle may be captured to generate an investigative lead. This data can then later be used to query additional information.
In addition, a few employees maintain working relationships with neighboring jurisdictions. From time to time these agencies may call or email our agency requesting a query of our LPR database for a license plate associated with a crime or investigation. This is commonly done with more serious events such as homicide, amber alerts or abduction. Usually a request like this occurs when all investigative leads are exhausted or no other leads exist, many times it's a long shot, but sometimes it's a break the investigator has been looking for to solve a crime.

5. Identify each ALPR currently or formerly owned and/or used by the FCPD, and for each ALPR, state: (a) the serial number, name, or any other identifier, if any, used by the FCPD to identify each device; (b) the date of purchase or acquisition; (c) the source of funds used to purchase the device; (d) the dates, frequency, and length of time the ALPR has been deployed; and (e) locations where the ALPR has been used (including whether the device was mounted on a vehicle or at a stationary location) and the dates on which they were used at each location.

   ANSWER:

The FCPD objects to this interrogatory to the extent that it may compromise ongoing criminal investigations. This information is not likely to lead to the discovery of admissible evidence in this case. Without waiving this objection, the FCPD provides the following response:

An inventory list is being provided in response to the Plaintiff's First Request for Production. Each of our units were obtained through the Home Land Security Grant that was managed by Arlington County Police and is now managed by Metropolitan Police D.C. (James Manning).

Our Auto Theft members maintain three LPR units. However, the units are currently not operational and have been removed from service. This was done as a result of computer and service problems. No funding has been available to rectify the problems.
I believe we have 28 units and one mobile trailer unit. All units are mobile and not fixed. Two of the units are still boxed as they have not yet been deployed. Many of our units have not been operational for over a year. The Fairfax County LPR server is aging and is in need of repair and upgrade. This has hindered operations and efforts are continuously underway to maintain the program. In addition, when the Fairfax County Police Department introduced the Panasonic In Car Video equipment into the cruiser fleet, the camera software and Computer Docking Stations were not compatible with the LPR equipment. A decision was made to maintain the In Car Video program and let the LPR equipment remain non- operational. Over time we have developed a work-around to revitalize the LPR program. We are currently working on changing the computer docking stations and upgrading. Six LPR cars are currently fully operational. The Department does not fund the LPR program and we are dependent upon the NCR grant for repairs and equipment.

The length and frequency of use in the field cannot be measured – the units are on mobile vehicles that cover wide patrol areas around the county. We only retain data for 364 days and deriving statistics past this date are against policy and practice.

6. State whether the FCPD provides notice to owners or users of vehicles about collection, storage, or dissemination of information collected using ALPRs and if so, describe the notification procedure.

ANSWER:

No, the Fairfax County Police Department does not provide notice to owners or users of vehicles about collection, storage, or dissemination of information collected using ALPRs.
There is no way to determine the registration of a vehicle without submitting a query of the DMV VCIN data base. Absent a legitimate criminal justice purpose, this would not only violate our policy but Virginia law. Our Public Information Office has released general information in the past to educate the public in regard to our LPR program and data related privacy issues. This information is being provided in response to the Plaintiff's First Request for Production.
In addition, in September of 2010 Professor Cynthia Lum (Center for Evidence –Based Crime Policy, George Mason University) published a study that can be found by the public on the World Wide Web. This study details the collection and use of LPR collected data. Fairfax County participated in this study. This study is being provided in response to the Plaintiff's First Request for Production.

7. Identify any report available to the public for inspection that discloses the existence of the FCPD's ALPR information system, its development, and its operations, including details about the nature of the system, the purposes for which it is used, and its inventory listings.

ANSWER:

In September of 2010 Professor Cynthia Lum (Center for Evidence –Based Crime Policy, George Mason University) published a study that can be found by the public on the World Wide Web. This study details the LPR program and the Fairfax County Police Department participated in this study.
Our Public Information Office has released general information in the past to educate the public in regard to our LPR program and data related privacy issues. Patch news article and Connections Newspaper article.
All the LPR units in our Patrol fleet are mounted to the trunk of the police vehicle. The cameras are in plain view and well observed by the public. The public is aware of the program and it is not concealed in any way from the public.
ELSAG – our vender provides a very detailed overview of the capabilities and functions of the LPR camera system and the operation center that is used by the Fairfax County Police Department. This is a public website on the World Wide Web and open to examination.
LPR collected data is subject to FOIA requests under certain circumstances and has been provided to the public for inspection by request in the past.

8. Identify each and every ALPR database currently or formerly maintained and/or used by the FCPD and for each ALPR database and state: (a) the length of time records are currently stored and how long records have been stored in the past; (b) the number of records currently and formerly stored in the database; and (c) identify each and every person with access to the database.

ANSWER:

Objection to the extent that providing the address and phone number of every individual is overbroad and burdensome, and not likely to result in the discovery of admissible evidence. All individuals with access to the database are employed by the FCPD and can be located if necessary. The business address of every employee is 4100 Chain Bridge Road, Fairfax, Virginia 22030.

The Fairfax County Police Department uses a secure SQL server database to house all LPR collected information. This is the original server and has not been replaced. The database is run by the ELSAG EOC software and purges the database according to our S.O.P at 364 days. I periodically inspect the database to ensure the Department is in compliance with our policy. The list of approved personnel that have access to the LPR database / EOC – Operations Center is also being provided in response to the Plaintiff's First Request for Production.

As of October 7, 2015, there are 16,292 records in the system. The system does not allow a user to determine how many records have historically been maintained in the system.

The list of approved personnel that have access to the LPR database / EOC – Operations Center is also being provided in response to the Plaintiff's First Request for Production.

9. For every query that has been made to every database identified in Interrogatory 8, state: (a) the identity of the person who made the query, (b) the date of the query (c) the information queried, (d) the information retrieved, (e) the purpose for the query, and (f) the identity of any person or entity to whom the information was divulged.

ANSWER:

The current EOC software that is used by the Fairfax County Police does not provide this information. We do not have an existing method of auditing the "who, when and why" of users. The Fairfax County Police Department has regulations that govern the actions of employees and obedience to policy and general orders. All LPR use is for criminal justice purposes.

10. Identify every procedure by which the FCPD may use license plate information to obtain any "personal information" as that term is defined in Virginia Code § 2.2-3801, of any individual, including but not limited to any procedure for accessing information held or maintained by the Virginia Department of Motor Vehicles.

ANSWER:

A copy of our S.O. P that explains procedure as well as our E-Learning course for LPR is being provided with the response to the Plaintiff's First Request for Production.

11. For each procedure identified in Interrogatory 9, state: (a) the identity of every person authorized to use the procedure; (b) the purposes for which the procedure may be used; and (c) the information that may be obtained through the procedure.

ANSWER:

No procedure was identified in our response to Interrogatory No. 9.

12. Identify each person whom Defendant expects to call as an expert witness at the trial of this case, stating for each pursuant to Rule 4:1(b)(4)(A)(i), the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Additionally, please state: (a) the qualifications of the expert; (b) the compensation being paid to the expert; (c) publications by the expert within the last ten years; and (d) a listing of the cases in which the expert has testified in the preceding five years.

ANSWER:

The Defendant objects to this Interrogatory to the extent that it will be addressed in the Circuit Court's scheduling order, which will be entered at the scheduling conference and will provide the timeline for the disclosure of expert witness information. The FCPD has not developed any individuals who it currently intends to call as an expert witness.

Under penalty of perjury, I state that the foregoing answers are true and correct to the best of my knowledge and belief.

REX PAGERIE

STATE OF VIRGINIA;
COUNTY OF FAIRFAX, to-wit;

Subscribed, sworn, and acknowledged to before me on this 7th day of October, 2015, by Rex Pagerie, in person and with proof of true identity.

Notary Public

HOLLY L. SCHRECK
NOTARY PUBLIC
REG # 7556283
COMMISSION EXPIRES 12/31/2017
COMMONWEALTH OF VIRGINIA

Name: Holly L. Schreck

My Commission Expires: December 31, 2017
Registration Number: 7556283

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2015, a true copy of the foregoing document was sent via electronic mail and via courier to:

Rebecca K. Glenberg, Esquire (e-mail only)
Hope R. Amezquita, Esquire (e-mail only)
American Civil Liberties Union Foundation of Virginia, Inc.
701 East Franklin Street, Suite 1412
Richmond, Virginia 23219

Edward S. Rosenthal, Esquire
Rich Rosenthal Brincefield Mannitta Dzubin & Kroeger, LLP
201 North Union Street, Suite 230
Alexandria, Virginia 22314

Kimberly P. Baucom

From: Coulter, Douglas [Douglas.Coulter@fairfaxcounty.gov]
Sent: Monday, July 14, 2014 2:21 PM
To: Mandy Hartig; Cruse, Chris
CC: Blakley, Bob; Pagerie, Rex
Subject: RE: LPR Data Retention

All,

It does appear that the old information is being purged. The system does retain expired and deferred alarms so we will have to work out whose responsibility it will be to clean those out but everything appears ok at this time.

Thank you very much Mandy for your assistance.

Doug

PFC Doug Coulter
Fairfax County Police Department
Operations Technology Division
VA/NCR Communications Cache Team Member
Cell (571) 830-7410

From: Mandy Hartig [mailto:mandy.hartig@selex-es.us]
Sent: Monday, July 14, 2014 3:12 PM
To: Coulter, Douglas; Cruse, Chris
Cc: Blakley, Bob
Subject: RE: LPR Data Retention

Doug,

I don't have a direct line. Is now an okay time for me to call you?

Mandy Hartig
Technical Analyst
866-967-4900

From: Coulter, Douglas [mailto:Douglas.Coulter@fairfaxcounty.gov]
Sent: Monday, July 14, 2014 3:06 PM
To: Cruse, Chris; Mandy Hartig
Cc: Blakley, Bob
Subject: RE: LPR Data Retention

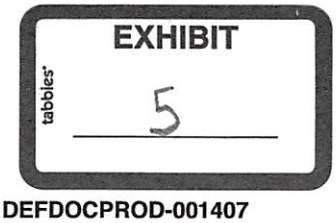
Mandy,

Please let me know when I can call you.

Doug

PFC Doug Coulter
Fairfax County Police Department
Operations Technology Division
VA/NCR Communications Cache Team Member
Cell (571) 830-7410

From: Cruse, Chris
Sent: Monday, July 14, 2014 2:56 PM
To: 'Mandy Hartig'; Coulter, Douglas
Cc: Blakley, Bob
Subject: RE: LPR Data Retention



I defer to Doug and Bob.

From: Mandy Hartig [mailto:mandy.hartig@selex-es.us]
Sent: Monday, July 14, 2014 2:52 PM
To: Cruse, Chris; Coulter, Douglas
Cc: Blakley, Bob
Subject: RE: LPR Data Retention

Doug and Chris,

How is your data retention working now? Is everything better?

Mandy Hartig
Technical Analyst
866-967-4900

From: Mandy Hartig
Sent: Tuesday, June 10, 2014 11:32 AM
To: 'Cruse, Chris'; Coulter, Douglas
Cc: Blakley, Bob
Subject: RE: LPR Data Retention

Doug,

That is an expired alarm. You will need to validate alarms for those to clear down.

Directions on how to do that are attached. The procedure that deletes out the old records runs every hour, so just to be safe, you should follow the attached procedure, and then wait two hours. Then, test again and see if you still have data beyond the retention period.

Please let me know either way. I'm keeping my ticket open.

Mandy Hartig
Technical Analyst
866-967-4900

From: Cruse, Chris [mailto:Chris.Cruse@fairfaxcounty.gov]
Sent: Tuesday, June 10, 2014 11:26 AM
To: Coulter, Douglas
Cc: Blakley, Bob; Mandy Hartig
Subject: RE: LPR Data Retention

Mandy,
Please advise. I'm available until noon.
-Chris C.

From: Coulter, Douglas
Sent: Tuesday, June 10, 2014 11:22 AM
To: Cruse, Chris
Cc: Blakley, Bob; 'mandy.hartig@elsag.com'
Subject: RE: LPR Data Retention

I think we still have an issue. I found some reads one of which is dated 01/03/2013. I attached the record.

PFC Doug Coulter
Fairfax County Police Department
Operations Technology Division
VA/NCR Communications Cache Team Member
Cell (571) 830-7410

From: Cruse, Chris
Sent: Tuesday, June 10, 2014 11:14 AM
To: Coulter, Douglas
Cc: Blakley, Bob; 'mandy.hartig@elsag.com'
Subject: RE: LPR Data Retention

Query executed successfully. Please test.

```
(0 row(s) affected)

(52454 row(s) affected)

(6 row(s) affected)

(0 row(s) affected)

(0 row(s) affected)

(8288344 row(s) affected)

(4151088 row(s) affected)

(1 row(s) affected)
```

From: Coulter, Douglas
Sent: Tuesday, June 10, 2014 11:09 AM
To: Cruse, Chris
Subject: RE: LPR Data Retention

Thank you Chris.

Doug

PFC Doug Coulter
Fairfax County Police Department
Operations Technology Division
VA/NCR Communications Cache Team Member
Cell (571) 830-7410

From: Cruse, Chris
Sent: Tuesday, June 10, 2014 11:08 AM
To: Coulter, Douglas; Blakley, Bob
Subject: RE: LPR Data Retention

Doug/Bob,
Looks like she was able to get in and correct the issue. The data retention value was set for 730 days. She set the value to 364. A SQL command is running that should purge the data. No telling how long that will take. Once that is completed I will let you know when to test. It's been running for 25 minutes so far. I ended the support call but another one can be set up if issues persist.
-Chris C.

From: Coulter, Douglas
Sent: Tuesday, June 10, 2014 10:40 AM
To: Blakley, Bob; Cruse, Chris
Subject: RE: LPR Data Retention

Absolutely.

PFC Doug Coulter
Fairfax County Police Department
Operations Technology Division

VA/NCR Communications Cache Team Member
Cell (571) 830-7410

From: Blakley, Bob
Sent: Tuesday, June 10, 2014 10:37 AM
To: Cruse, Chris
Cc: Coulter, Douglas
Subject: RE: LPR Data Retention

Doug,

Can you be ready for Chris when needed? ELSAG is supposed to be fixing the server right now and he may need you to validate that.

Bob

From: Cruse, Chris
Sent: Tuesday, June 10, 2014 10:36 AM
To: Blakley, Bob
Subject: Fwd: LPR Data Retention

The vendor is in the server. I recommend having someone be prepared to validate the system is working after the work is completed.

Begin forwarded message:

> **From:** Mandy Hartig <mandy.hartig@selex-es.us>
> **Date:** June 10, 2014, 10:23:55 AM EDT
> **To:** "Cruse, Chris" <Chris.Cruse@fairfaxcounty.gov>
> **Subject: RE: LPR Data Retention**
>
> Whenever you're ready, the site is logmein123.com, and the code is 158448.
>
> Mandy Hartig
> Technical Analyst
> 866-967-4900
>
> -----Original Message-----
> From: Cruse, Chris [mailto:Chris.Cruse@fairfaxcounty.gov]
> Sent: Tuesday, June 10, 2014 10:09 AM
> To: Mandy Hartig
> Subject: Re: LPR Data Retention
>
> It will be me.
>
> On Jun 10, 2014, at 10:02 AM, "Mandy Hartig" <mandy.hartig@selex-es.us<mailto:mandy.hartig@selex-es.us>> wrote:
>
> Chris,
>
> Did you ever hear back from the lieutenant? Who should I reach out to at 10:30?

Mandy Hartig
Technical Analyst
ELSAG North America, A Finmeccanica Company
205 H Creek Ridge Rd
Greensboro, NC 27406
(Phone) 866-967-4900
(Fax) 336-379-7164
www.elsag.com<http://www.elsag.com>

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THIS COMMUNICATION MAY CONTAIN CONFIDENTIAL AND/OR OTHERWISE PROPRIETARY MATERIAL and is thus for use only by the intended recipient. If you received this in error, please contact the sender and delete the e-mail and its attachments from all computers.

From:
Subject: FW: DICE - National License Plate Reader Program
Attachment(s): "LPR Success 2014-01-28 BMK2086 - Sex Offender.docx", "LPR Success 2014-02-11 374532 - 1900lbs.docx", "DICE_Handout2 (Revised 2014-05-08) (3).ppt", "LPR Success 2014-05-31 DDB5070 - $245K Currency.docx", "LPR Success 2014-05-30 EHH2414 - 28lbs Cocaine and 1 Arrest.docx"

From: Hill, Joe R.
Sent: Monday, June 16, 2014 4:14 PM
To: Hurlock, Jack
Subject: FW: DICE - National License Plate Reader Program

Jack,

Who is the lead on the LPR program now?

From: Huber, Paul F. [mailto:Paul.F.Huber@usdoj.gov]
Sent: Monday, June 16, 2014 3:39 PM
To: ceicher@cityofpleasantonca.gov; jepiscopo@sbcglobal.net; harlan.harris@houstonpolice.org; ghigdon@springfieldmo.gov; jason.herrman@myfloridacfo.com; ron_hickman@cd4.hctx.net
Cc: jelasky@edinamn.gov; emerson@villageofbeecher.org; Hill, Joe R.; timothy.humphreys@att.net; mike.hernandez@sanangelopolice.org; daniel.humphries@fortworthtexas.gov; mark.hunter@columbiasheriff.org; ehima@coronado.ca.us; christopher.greek@hill.af.mil; perickson@wilco.org; eremy.falls@fairfaxcounty.gov; mhill@gulfshoresal.gov; brian.herwerth@glastonbury-ct.gov; mgreenlee@pd.cityofsacramento.org; dharman@pwcgov.org; hammonds@cityofelyria.org; michael.fitzgerald@state.vt.us; lt.4sythe@gmail.com; david.gomez@nypd.org; fosterja@fcso.us; jfoster@cityofbrookpark.com; mfranklin@reynolds.edu; joseph.fredericksdorf@phila.gov; ilea74.34@gmail.com
Subject: FW: DICE - National License Plate Reader Program

Past 256 Members,

It was a pleasure to be one of your instructors during your recent tenure at the National Academy. I hope you all are doing well.

Attached are a few attachments that show how to obtain access to the **National License Plate Reader Program, (NLPR Program)** through a system that de-conflicts various state local, DEA, and other federal agency intelligence called **DICE (De-confliction and Information Coordination Endeavor) .** The items that can be de-conflicted include telephone numbers, direct connect PIN's, e-mail addresses as well as license plates The vetting is through the El Paso Intelligence Center (EPIC) via an online application at https://esp.usdoj.gov . Vetting can take up to 21 days but usually in completed in less than a week. (see attached info sheet and go-by).

If your department would also like training on this indices system, I am willing to travel and train; our preference is 30 law enforcement personnel as a minimum. As a vetted user of **DICE,** you have access to information on data gathered from over 500 current **License Plate Readers** throughout the US and along the SW border with the ability to place active alerts on targeted license plates with real time e-mails sent to you when your plate hits on a reader . Numerous seizures of drugs, monies and other criminal cases have been resolved through the NLPR Program. Learn how this investigational tool may be of assistance to your investigations and your agency as a whole. (See attachm a few of the many success stories). If your agency has an existing LPR program an

EXHIBIT
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interested in being part of DICE, please feel free to contact me.

If you have any questions-pls reference e-mail and telephone number below .

God Bless

Paul Huber
DEA Office of Special Intelligence
Paul.F.Huber@usdoj.gov
703-561-7623

Deconfliction & Information Coordination Endeavor (DICE)

National License Plate Reader Program (NLPRP)

Deployed in January 2010, **Deconfliction & Information Coordination Endeavor (DICE)** is a National De-Confliction tool for HIDTA, state, local, tribal and federal law enforcement use that is designed to exploit information from communication and related sources. Users with approved accounts will access the application over an Internet browser through a secure connection to DICE servers. DICE is operated and maintained by the DEA Office of Special Intelligence.

DICE provides real-time connectivity to de-confliction information of all DICE users throughout the United States.

De-Confliction Information Coordination Endeavor

Deconfliction Items Available on DICE

- Phone Numbers
- Push-To-Talk Numbers
- Email Addresses
- Financial Accounts
- License Plates
- URL/IP Addresses

DICE Deconfliction

- Tier One overlaps (DICE to DICE)
  - Instantly on screen
  - Emailed within seconds
- Tier Two overlaps (DICE to DARTS)
  - Near real-time
  - Emailed within minutes
  - Updated within DICE logs
- All emails sent for deconfliction include investigator contact information

HOW TO GET A DICE ACCOUNT

Go to https://esp.usdoj.gov and click on "Request Access." Fill out form, check "Dice" box and click "I Agree" at the bottom of the page.

The LPR applications are accessible within DICE.

No Software to install or cost to use

Help Desk (703) 561-7777 7:00 am to 6:00 pm EST

DICE and the National License Plate Reader Program

- **DICE** will check the **NLPRP** data repository for crossing information.
- **Vehicle crossing** information will be emailed to user with **thumbnails** of most **recent 20-30 crossings**
- **DICE Trinity Log** will show LPR results and link to photos
- **DICE user** may request **full PDF** of all photos of a selected crossing

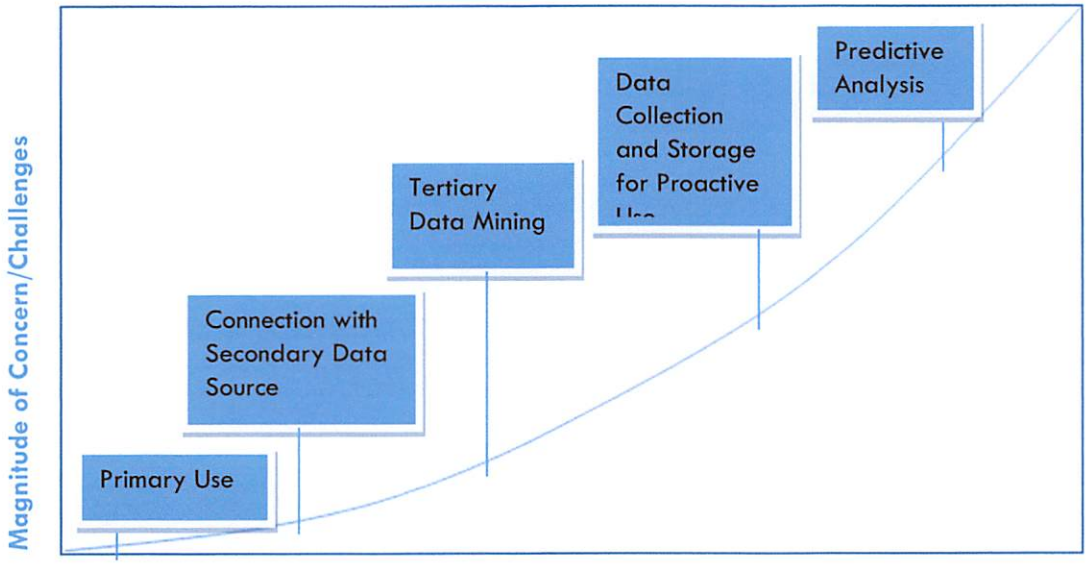
National License Plate Reader Program

System Highlights			Successes/Uses	
Deployment	Nationwide Camera System	Design	24,000+ Active Users	
Began 2008 on existing platform	Tactical Alert Functions Alerts within 15 Seconds	95 DEA Devices 474 non-DEA Devices	FY 2013 LPR assisted in the following:	
Dedicated Platform deployed 2010	Strategic Investigative Functions	471 Million Photos	Seizures of cocaine, heroin, marijuana, methamphetamine, firearms and U.S. currency	
Supports all Law Enforcement regardless of crime	Real-Time Data	104 Million Vehicle Photos 147 Million Plate Photos	Verified defendant statements	Sexual Offender Apprehended Sonoita, Arizona
Expanding partnerships	Expanding Camera Footprint	286,000 transactions per day	$655,000 seizure Indio, California	$4 Million and 1 kilo of Cocaine seizure Needles, California
Utilizes EPIC Watch for 24/7 User Support	Reads Multiple-Plates per Vehicle	All Amber Alerts automatically loaded	Located fugitives	$1.66 Million seizure Tubac, Arizona
Integrating Solar Power Solution for remote locations	Vendor Independent Data Format created for data ingestion	Tactical Alerts sent via email and text messages	Identifies routes and methods used to transport drugs and weapons	Identifies money transporters and their associates

deterrence and crime prevention) and distinct costs. Costs might include legal challenges or a reduction in the community's view of the police legitimacy. Since legal and legitimacy issues may be contingent upon the type of LPR use, potential benefits and costs need to be categorized in a way that can match uses with potential implications. As emphasized in Chapter 1, this step is all the more crucial because agencies are currently acquiring LPR units quickly and at a substantial per unit cost, and they are promulgating policy in a low-information environment. In this way, developing a continuum of uses for LPR can provide a tangible framework for aiding agencies as they consider adopting and deploying LPR readers. In the future, such a framework may also be used to advance rigorous testing of potential benefits and their associated costs, in terms of both finances and agency legitimacy.

Figure 1 presents one possible continuum of LPR use. Each category (or space on the continuum) represents a type of LPR use, as described below. As one moves farther to the right of the continuum, additional legal and legitimacy concerns may be raised by the uses of LPR located there. Moreover, the intensity of these concerns may increase exponentially as uses become more predictive in nature.

Figure 4.1. Continuum of LPR Uses



Points Along the Continuum

1) PRIMARY USE: AUTOTHEFT AND CARS OF INTEREST

This use of LPR involves an immediate check of a motorist's license plate in order to detect whether that vehicle or license plate has been stolen or whether the particular vehicle is

the subject of a search related to an investigation. We characterize this scenario as an "immediate" or "primary" use of LPR because existing data that already identifies stolen vehicles is accessed, and the data collected from the LPR reader need not be stored for any length of time in order to perform this function. Currently, this represents the most frequent use of license plate readers by law enforcement agencies, including the two departments examined in this study. In fact, according to our agency survey, 91.4% of agencies with LPR use the technology for this purpose. It also seems reasonable to hypothesize that this use might raise the least legal concerns or challenges to police legitimacy, although we test this hypothesis specifically in this chapter. Indeed, some law enforcement agencies have asserted that the technology merely automates a process that was previously (and legitimately) conducted manually by police officers—that of searching for or "calling in" stolen vehicles to discern if they are stolen (IACP, 2009, p. 12). In this view, LPR adoption simply renders this process more efficient and less costly, enhancing an already existing police service likely supported by the community.

However, the argument may also be made that the deployment of LPR represents more than simple automation or mere efficiency gains. Rather, the technology allows law enforcement to accomplish acts outside of human capabilities (Hubbard, 2008; Reiman 1995). For example, the use of LPR allows officers to check license plates when it might be too dark outside for the human eye to see, or it might allow officers to check license plates on the freeway when passing cars are going too fast for the human eye to register a license plate number (Hubbard, 2008; Stroud, 2006). The discussion of these points—and their potential legal and legitimacy implications—is conducted in greater detail in the "Review of Legal Issues" section of this chapter.

2) CONNECTION OF LPR DATA WITH A SECONDARY DATA SOURCE

We increase the complexity of LPR use when moving to the right of the continuum. The next likely use of LPR is the connection of scanned license plates to a secondary data source associated with those plates. This step on the continuum involves the linking of LPR data (for our purposes, the time, date, location of vehicle observation, and plate number)[28] with records from a state's Department of Motor Vehicles. Therefore, at this step in the continuum, information from the LPR readers is connected for the first time to the registered owner of the vehicle and then to a portion of that owner's motor vehicle record. Unpaid parking tickets, lack of insurance, and other traffic-related delinquencies might be

[28] In writing about LPR, some of the sources that we discovered have considered LPR systems that also record digital images of distinguishing vehicle features (such as damage to the vehicle or bumper stickers) or a digital image of the vehicle's driver and passengers (International Association of Chiefs of Police, 2009). It is important to note that these possibilities may raise additional legal or constitutional implications not explicitly discussed here. For example, a digital image of a driver's face alone might be considered personally identifiable information, so these types of pictures might require even more stringent protection of the stored images (IACP, 2009).

accessed. This connection may implicate issues of data and personal security for the individual involved and certainly raises questions about the need for stringent standards for data handling. In their report on privacy, the IACP compared data connected to a registered owner of a vehicle (step 2 on the continuum) with the collection of LPR data alone (step 1 on the continuum) and concluded that unconnected LPR data should not be considered "personally identifying information" (IACP, 2009, pp. 7–11). Since "a license plate number identifies a specific vehicle, not a specific person," the IACP concluded that the collection of license plate data alone does not rise to the level of personally identifying information (IACP, p. 10). However, even at space 1 on the continuum, the IACP noted the sensitive nature of this data and recommended that it be considered "For Official Use Only" (IACP, p. 11).

In contrast, at step 2 on the continuum, officers must access state DMV databases in order to link a vehicle to a registered owner and, therefore, an individual has been identified. Once this link has taken place, the information may be considered personally identifying (IACP, p. 8). Personally identifying information may also consist of multiple pieces of non-personal information to which one individual has access, for example, through different databases (IACP, p. 8). If these databases may be accessed by the same individual or if they are stored on the same system, these pieces of non-personal information may become the equivalent of personally identifiable information (IACP, pp. 8–9). Potential legal and legitimacy issues may increase if this data is stored for long periods of time (as discussed below).

Practically speaking, this step on the continuum also begins to implicate substantial issues of personal security for individuals in the community. Yet, it is currently a common police investigatory practice to access DMV data. Prior to LPR systems, manual approaches often required motor vehicle records to be accessed by the police in the investigation of traffic and other offenses. Red light and speeding cameras, as well as toll-booth violations, are some further examples of this type of use. These approaches, however, have not previously involved the storage of large amounts of data by police (as discussed below).

3) TERTIARY DATA MINING

This location on the continuum involves connecting LPR data with "tertiary" databases by using motor vehicle information to identify persons of interest. Again, this type of investigation was done by the police prior to LPR and commonly involved the police running a tag for the registered owner and then running the owner for the existence of an open warrant. LPR accelerates and automates this function.

LPR is not limited to checks for open warrants. Rather, the uses of license plate readers that fall into this category can vary widely. For example, data that might be uploaded into LPR systems include the license plates of vehicles owned by registered sex offenders, those delinquent on child support payments, recently released violent offenders, or individuals arrested for selling drugs around schools or public parks. An example of this type of use might be LPR patrol around schools and parks for parked vehicles of registered sex offenders or drug dealers. All of these LPR uses involve the connection of LPR data to other data sources through motor vehicle information but for law enforcement purposes unrelated to motor vehicles or vehicular enforcement.

Similar to the second stage of the continuum, however, this step does not necessitate prolonged data storage of LPR scans (although the criminal data accessed may have been stored for some time). Despite this, novel legitimacy issues may still arise because the police have departed from using LPRs for vehicle-related law enforcement, which may seem its most obvious use. These uses of the technology are conceptually distinct from the previous step on the continuum for this reason. Since LPR is not being used as a technological tool for traffic or vehicular enforcement at this space on the continuum, people could view these uses as promoting more generalized surveillance. We could hypothesize that these uses may heighten the likelihood that LPR adoption will impact police legitimacy, job approval, and police-community relations. However, this hypothesis remains untested.

Even within this category, different uses may evoke varying responses. For example, members of the community may view sex offenses as grave enough to warrant the use of LPR to prevent sex offenders from entering school zones. Yet, the community might not tolerate other uses where the perceived benefits are too few or the perceived intrusion into the personal lives of community members seems too great (for example, using LPR to detect parents who don't pay child support). Though some authors writing on this topic have suggested hypotheses about the likelihood that some uses might be accepted over others, the only true way to gain an indication of community sentiment is through rigorous testing of the type conducted in this study.

4) USING LPR UNITS FOR DATA COLLECTION AND STORAGE FOR PROACTIVE USE

This step on the continuum involves the long-term storage of data from LPR readers themselves (most frequently, the location, date, time, and vehicle license plate) and its preservation for investigative purposes. For example, when attempting to view the last known locations of a wanted suspect, information saved from a LPR reader might demonstrate that a suspect's vehicle traveled to a certain location. Alibis of suspects might

also be corroborated or challenged from the information captured by LPR units placed at toll roads or near locations where an individual claimed to be. Such information applies not only to suspects. In a recent case, an Alzheimer's patient was located with the help of a license plate reader, which had detected his vehicle at a particular location. However, some have argued that this type of data retention may also prejudice the investigatory process against an individual, since LPR information may be presumed to be correct even in instances when the data may be misleading. For example, if an LPR unit records the presence of a vehicle at a particular location, this does not mean that the registered owner of the vehicle or even a particular suspect was driving the vehicle at the time. It may also be difficult for an individual to combat an assumption that the data presents an accurate picture of daily activities, since individuals do not normally keep detailed records of their day-to-day routines.

The IACP has identified a need to "establish a set of guidelines, including standard criteria, to assist law enforcement agencies in their development of retention policies for LPR data" (IACP, 2009, p. 3). Currently, however, "there is no formula for determining how long data should be retained" (p. 3), and no court has examined the issue of LPR data retention as of the writing of this report. In addition to the development of data retention policies, the IACP has also called for police agencies using LPR to undertake "regular and systematic audits [to] help ensure that the quality of data contained in a LPR system remains high." (p. 4) These audits are required because saved LPR data may become the basis for investigations.

As mentioned previously, data storage raises even more serious potential for abuse through either hacking or misuse; as a result, rigorous testing of policy in this area of the continuum is critical. Moreover, members of the community may also hold very strong opinions regarding whether or not this information should be considered private and also if data of this type should be collected and maintained by the police. The survey-experiment discussed below provides evidence regarding one community's response to these questions.

5) PREDICTIVE ANALYSIS

While proactive use of stored LPR data might apply to ongoing investigations and searches for individuals or their alibis, LPR data may also be used for more predictive analysis, an extension of this proactive use. Predictive analysis involves the analysis of collected data to determine patterns of behavior and movements in order to anticipate and prevent crime. One example might be the decision to place LPR units at locations around an arena prior to a major event. Unusual vehicular activity or multiple hits of particular vehicles in front of a location may be found by analyzing the saved data. Proactive investigations might then be generated. Similar to #1–#4 above, vehicles might also be scanned for connection to other databases in order to anticipate problems for prevention purposes.

ALARM TYPES

- Class 1 – Stolen Vehicle
- Class 2 – Wanted or Missing Person
- Class 3 – Stolen Plate
- Class 4 – Suspended or Revoked Driver
- Class 5 – Scofflaw or Other

From: Hoyos, Sarah E.
Sent: Wednesday, November 03, 2010 2:02 PM
To: Hurlock, Jack
Subject: serial burglary - LPR assistance

Hi Jack,

Tom Joyce is with LexisNexis and has volunteered (free of charge) to run our LPR data through their database to see if any corresponding associations pop up in reference to the serial burglaries. I'm not sure if our policy covers that kind of data sharing but thought I'd pass it by you before we reach out to them for assistance.

Tom Joyce
(Ret.) Lieutenant NYPD
Director, Government Investigative Solutions
LexisNexis® Risk Solutions
Reed Elsevier Inc.
516-241-5056 Direct
206-238-2826 Fax
800-543-6862 Customer Service
thomas.joyce@lexisnexis.com

Sarah E. Hoyos
Crime Analysis Program Manager
Crime Analysis Unit - Patrol Bureau
Fairfax County Police Department
4100 Chain Bridge Road
Fairfax, Virginia 22030
703.246.7897 (P)
571.221.9063 (C)
703.385.3464 (F)
EMAIL: sarah.hoyos@fairfaxcounty.gov
CRIME MAPPING WEBSITE: http://www.fairfaxcounty.gov/gisapps/myneighborhood/

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HARRISON NEAL
Plaintiff/Complainant

versus

File No. CL-2015-5902

FAIRFAX COUNTY POLICE DEPARTMENT
Defendant/Respondent

ORDER

This matter came to be heard on the 28th day of August, 2015, on the Plaintiff/Defendant's motion Demurrer

Upon the matter presented to the Court at the hearing, it is hereby

ADJUDGED, ORDERED and DECREED as follows:

Defendants' demurrer is overruled. Defendants shall file an Answer to the complaint within 21 days of this date.

The reasons for this ruling are as stated in the transcript of the hearing and are incorporated herein.

Entered this 28th day of August, 2015.

JUDGE

Counsel for Plaintiff/Complainant

Objected to:

Counsel for Defendant/Respondent

No env. 9/2/15

Courtroom 5H

EXHIBIT

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - - - - - x

HARRISON NEAL, :

Plaintiff, :

-vs- : CL 2015-5902

FAIRFAX COUNTY POLICE DEPARTMENT, *et al.*, :

Defendants. :

- - - - - - - - - - - - - - - - - - -x

Courtroom 5H
Fairfax County Courthouse
Fairfax, Virginia
Friday, August 28, 2015

The above-entitled matter came on to be heard before the HONORABLE GRACE BURKE CARROLL, Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, 4110 Chain Bridge Road, Fifth Floor, Fairfax, Virginia, beginning at approximately 12:00 o'clock p.m.

APPEARANCES:

On Behalf of Plaintiff:

REBECCA GLENBERG, ESQUIRE
LEGAL DIRECTOR
AMERICAN CIVIL LIBERTIES UNION of VIRGINIA
701 E. Franklin Street
Suite 1412
Richmond, Virginia 23219

and

HOPE AMEZQUITA, ESQUIRE
STAFF ATTORNEY
AMERICAN CIVIL LIBERTIES UNION of VIRGINIA
701 E. Franklin Street
Suite 1412
Richmond, Virginia 23219

and

EDWARD S. ROSENTHAL, ESQUIRE
RICH ROSENTHAL BRINCEFIELD MANITTA
& KROEGER, LLP
201 North Union Street
Suite 230
Alexandria, Virginia 22314

On Behalf of the Defendants:

KIMBERLY P. BAUCOM, ESQUIRE
ASSISTANT COUNTY ATTORNEY
FOR THE COUNTY OF FAIRFAX
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035

* * * * *

P R O C E E D I N G S

(The court reporter was sworn.)

THE COURT: All right. Let's take up Harrison Neal versus Fairfax County Police Department, et al., CL 2015-5902 for the record.

MS. BAUCOM: Good afternoon, Your Honor, Kimberly Baucom. I'm here on behalf of both Chief Roessler and the Fairfax County Police Department.

THE COURT: Nice to see you, ma'am.

MS. BAUCOM: Nice to see you too. I'm sure Your Honor has read the briefs that were submitted in the case. I'll try not to repeat --

THE COURT: Very interesting issues that both parties have presented.

MS. BAUCOM: I agree. Thank you.

First, Your Honor, I would like to address the Plaintiff's allegation made in their opposition that the Defendants concede that they are in violation of the Data Collection and Dissemination Practices Act if Your Honor rules that the license plate numbers that are at issue here are deemed to be personal information.

The Fairfax County Police Department and Chief Roessler, in fact, do not concede that. We're bound by the constraints of the demurrer process here. We're simply alleging that, based on the facts that are alleged in the complaint, that Mr. Neal does not establish sufficiently that he is entitled to the relief that he's requesting.

If Your Honor denies the demurrer today and we continue in the discovery process, it is absolutely our intention to prove eventually to the Court that given a ruling that the license plate number of a vehicle is personal information of a citizen, that we are not in violation of the act. And so we do not concede that at all in this motion.

THE COURT: All right.

MS. BAUCOM: With regard to the substantive arguments in the Plaintiff's opposition, Your Honor, the authority that's cited by the Plaintiff in his opposition is not instructive to this case. The Plaintiff relies mostly on U.S. versus Jones to support an argument that the license plate numbers are personal information of an individual as defined by Virginia law.

However, the Jones case, as I'm sure Your Honor knows, is based on a 4th Amendment analysis whether officers committed an illegal search or seizure of a citizen by physically attaching a GPS tracking device to that person's vehicle and then tracking the vehicle's movement remotely. And that's not at all what we have in this case, Your Honor.

In this case, the Plaintiff's action is based on the allegation that the police department violated a state statute having no involvement with the 4th Amendment. We'd argue that Jones is simply not relevant to this case.

Furthermore, Your Honor, the allegation that the Plaintiffs make in their opposition that it is relevant that the State Police stopped their passive use of the LPR system after the Attorney General opinion was published while Fairfax County and other localities continued to maintain their passive systems, I would argue is of no legal consequence to this litigation either.

This allegation I think appears to be inaccurate given recent media attention that's been given to the state police department which actually used its passive system a couple of days ago to catch someone who had

killed two individuals on Interstate 66.

Regardless of whether it's accurate or not, Your Honor, not only is this fact not controlling legal authority in this Court, I would argue that there's an obvious practical explanation for why the State Police may have made that decision after the Attorney General opinion, that being that the Attorney General represents the State Police in civil litigation.

And so that if the Attorney General issued the opinion at the request of the State Police superintendent and then the State Police didn't follow advice of their own counsel would put them in an awkward position if they had been the defendants in a lawsuit instead of Fairfax County.

However, Your Honor, I don't believe that that information that's included in the complaint or in the opposition has any bearing on this legal analysis, has no legal consequence to this litigation.

Similarly, Your Honor, the argument and the opposition that it was common knowledge that the Attorney General had opined that the passive collection of the ALPR data was a violation of the act is also of no legal

consequence to this litigation. The fact that a Washington Post blogger blogged about it on the internet doesn't do anything to make that Attorney General opinion any more or less controlling over this Court than it would've been otherwise.

The bottom line here, Your Honor, is that the Attorney General's opinion, according to well settled case law, is entitled to due consideration by this Court, but it's not controlling authority on Your Honor.

In giving that opinion its due consideration, it's clear that the writer of the opinion began with the assumption that a license plate photo is the personal information of a citizen and proceeded from there in the opinion.

Your Honor, as outlined in our brief, that Attorney General opinion is based on a faulty assumption that the picture of a license plate is personal information because a law enforcement officer with credentials that allow them to search a separate second DMV controlled database would be able to take a license plate number from the LPR database, plug it into that separate system, and retrieve a name and other personal

information about an individual, even though the license plate number in the police department's LPR system is not indexed by name or by any identifying information.

THE COURT: But is stored for 360 days.

MS. BAUCOM: That is correct, Your Honor. The thing that is stored is what was attached to the Plaintiff's complaint, picture of the license plate, the date and time that the photo was taken, and the GPS coordinates of the license plate when the photo was taken. It's not indexed by the individual's name.

The Plaintiff's complaint adopts this assumption, which we argue is a faulty assumption, proceeds from there. Your Honor, that logic is faulty for several reasons, all of which are related to the principals of statutory construction.

The Plaintiff's argument on this point is that the existence of the separate DMV database is fatal to the police department's ALPR database because the act doesn't explicitly limit itself to addressing single information systems maintained by an agency. And so according to the Plaintiff, because the act does not state that it doesn't apply to multiple databases regardless of whether they're

within the control of the agency at issue, then it must apply.

Your Honor, we argue that this assertion is belied by the plain language of multiple sections of the act. Section 2.2-3801, which is the definition section, repeatedly the legislature makes mention of single information systems, and the definition of data subject addresses an individual about who personal information is indexed in an information system used in the singular.

The definition of information system means the total components and operations of a record keeping process. Again, singular.

The definition of personal information, Your Honor, also includes this limitation.

In 2.2-3803, which is the code section that governs agencies that maintain these systems, the first clause of that statute reads, "Any agency maintaining an information system that includes personal information shall do the following," again noted in the singular.

When compared with 2.2-3805, Your Honor, which is the only portion of the act that addresses information that may be housed in other separate information systems,

2.2-3805 states any agency maintaining an information system that disseminates statistical reports or research findings based on personal information drawn from its system or from other systems shall do a couple different things.

When read together, Your Honor, these sections of the act clarify that the legislature did not intend for an agency like a police department to be bound by what other outside agencies maintain in their information systems. When the legislature intended to place that requirement on an agency, it did in 2.2-3805 by explicitly including secondary databases in the language of that section.

Therefore, Your Honor, it's clear that the legislature only intended to restrict what agencies could do with their own information systems and not other's information systems.

The Plaintiff's second assertion is that the act clearly intended to include license plate numbers in its list of personal information because the use of the term "index" in the statute is meant to denote not just the existence of a data point in the agency's information

system, but that the word "index" means that anytime you can use that data point to search any database, if any database indexes the data point associated with a name, then it all becomes personal information relating back to the original database and the original data point.

According to the Plaintiff, because the DMV database indexes the Plaintiff's license plate number by his name, unlike the police department's database which does not, the police department's database is in violation of the act.

Your Honor, the term "index" is not defined in the act. Therefore, I would argue that we have to look at the plain meaning of the word to determine its meaning.

I have a printout from Black's Law Dictionary if Your Honor would like to see it, but I can let you know that Black's Law Dictionary defines the word "index" as an alphabetized listing of the topics or other items included in a single book or document or in a series of volumes usually found at the end of the book, et cetera.

(Ms. Baucom passed documents to the Court and counsel.)

Your Honor, the clear purpose of indexing

information so that an individual who is accessing a book or a volume of books, if you look at the Black's Law Dictionary, or if we even work that into today's technology including a database of information, can quickly locate something within that database. There would be no point in indexing information if one could find that information elsewhere in a separate database.

Again, all these terms relate to information systems in the singular. Nowhere can the Plaintiff point to any authority for its contention that the act indicates otherwise.

Your Honor, the impact of the Attorney General's opinion on this case is further diminished by the actions that were taken during the last legislative session by the General Assembly and then subsequently by the governor. Case law tells us that the Court today must presume that if the legislature amends a statute, it intends a substantive amendment to that statute.

And that argument applies to the consideration of the legislature's attempts to amend the act in the last session to specifically include license plate numbers within the definition of personal information.

The legislature's attempted amendments tell us two important things. The first is that it would have made a substantive change to the act by adding the term "license plate number" to the list of the types of data that are included in the definition of personal information.

The second is that it would have provided that law enforcement agencies could legally maintain that information in a passive database just as the Fairfax County Police Department is doing.

As to the first point, if we look at this in the perspective that we're required to consider, that the legislature tried to include license plate numbers in the definition of personal information, then we're required to assume that they intended a substantive change to the current law by doing that. In other words, prior to the amendment, license plate number was explicitly not included in the legislature's definition of personal information.

As to the second point, by imposing a time frame in which law enforcement agencies would be permitted to maintain license plate numbers in their information

system, the legislature clearly indicated its support for the agency's practice of capturing and maintaining that information in the database.

The fact that the time frame would have been shorter and the time frame in the police department's current policy is of no consequence to Your Honor's decision today because Mr. Neal's argument isn't that we kept a particular license plate number for too long, it's that we kept it at all. And he argues that we shouldn't have been able to do that.

When you add to this analysis the remarks of Governor McAuliffe in vetoing the proposed legislation, it becomes even more clear that no one in the state government agreed with the Attorney General's opinion that license plate numbers are personal information. If it had, they simply would have taken no action and they would have acquiesced in the Attorney General's opinion, but they didn't do that.

The governor clearly stated in his veto that the proposed amendment would for the first time add license plate numbers to the definition of personal information. And he cautioned the legislature in the veto to consider

that in addressing the veto next session, presumably, because of the practical implications of that change to state and local agencies if the definition of personal information were broadened in that manner for the first time.

Specifically he noted that it would be the first time in history that the government would simultaneously deem something to be an individual's personal information and require that every citizen who owns a vehicle display that personal information to the world by screwing it onto the front and back of their vehicles.

It's quite likely, Your Honor, that the General Assembly will make an effort again this legislative session to change this law. If they do, the police department will make sure that they're in compliance with the statute as they do now.

But, Your Honor, if the Court acts today to hold that the license plate number of the vehicle is personal information of an individual, you will be undertaking what is clearly a legislative function at this point in the place of the General Assembly.

At issue in this demurrer, Your Honor, is

whether Mr. Neal has sufficiently pled that the police department and Chief Roessler violated the act by taking and keeping this photo that's attached to the back of their complaint. (Indicating.)

This document, as I said earlier, captures the entirety of what the police department maintains in its ALPR information system related to that license plate number, A-D-D-C-A-R. I would note, Your Honor, in Mr. Neal's case, the system doesn't even note the state that the license plate belonged to. It only included the license plate number.

Your Honor, looking at this document, it doesn't tell us anything about Mr. Neal. In fact, the only reason we have to believe that this license plate number belongs to Mr. Neal or is assigned to a vehicle that's owned by Mr. Neal is that he asserts that in his complaint, and we need to take that as true at this point.

There's no independent way for the police department to ascertain in this case whether this license plate belongs to Mr. Neal because our internal ALPR database does not index the license plate number by anyone's name.

Your Honor, this photo does absolutely nothing to allow the police department to determine anything about Mr. Neal. It allows us to determine a very limited number of things about a vehicle or about a license plate but not who owns it, not who's driving it, absolutely nothing about an individual.

Therefore, Your Honor, our argument is that Mr. Neal has failed to sufficiently allege in his complaint that he's entitled to the relief that he requests. We would ask that the demurrer be granted today.

THE COURT: Thank you, ma'am.

MS. GLENBERG: Good afternoon, Your Honor. My name is Rebecca Glenberg and along with Ed Rosenthal and Hope Amezquita, I represent the Plaintiff.

THE COURT: Welcome.

MS. GLENBERG: The General Assembly passed the Government Data Collection and Dissemination Act to protect personal privacy. And the purpose of the statute is laid out in the Section 2.2-3800.

The General Assembly recognized that collecting personal information about individuals and maintaining and disseminating that information was a serious threat to

privacy and that that privacy was further threatened by the use of computers and sophisticated information technology that could even, to a greater degree, collect information, store it in very large databases, and aggregate them to combine to find out very personal information about individuals.

And the ALPR system that we are challenging here falls directly within those concerns. With this system, the police department can go back over the period of a year and determine where a vehicle, and by implication a vehicle's owner, has been at particular dates and times. That is often very personal information. It may lead to divulging a person's medical status, or religion, or political activities.

It is true that the photograph that is attached to our complaint and that Ms. Baucom held up is not particularly meaningful to people in this room, but it is meaningful to the Fairfax County Police Department, otherwise, they wouldn't collect it and store it in a database. It's meaningful for them because it is connected to a wide array of other information to which they have ready access.

I want to point out that we are not challenging all uses of this technology. What we're challenging is the use of the technology that directly implicates those privacy interests that the General Assembly was trying to address, so that collection of everybody's data, the storage of everybody's data, and the maintaining of that data for a year.

And not -- we are not challenging the use of ALPR technology in real time to apprehend a known suspect whose license plate is known and whose license plate is fed into the ALPR so that police officers know if a police car has seen that vehicle now, today.

That's what happened a few days ago, the incident that Ms. Baucom referred to. And that's not the type of use of the technology that we are challenging here today.

With respect to the definition of personal information, there are many ways in which the ALPR data fits within that definition. First of all, I would like to remind the Court that what we are looking at when we look at an ALPR record is not just a photograph of the license plate. The device converts the photograph into

digital information that can be easily queried and searched.

Furthermore, we're not just looking at a number, we're looking at a number that is paired with a location, a time, and a date. And this record taken together is personal information as defined in the statute.

The statute includes within personal information all information that describes, locates, or indexes anything about an individual, anything. Certainly his vehicle ownership may be one of those anythings.

And what ALPR records reveal to us is that a person's vehicle was, in a certain time and at a certain place, viewed by the device. And that certainly is information about an individual.

Additionally, the license plate number itself falls directly within the description of a specifically listed agency assigned identification number. It is a number that is assigned to every individual that owned the car by the agency and --

THE COURT: So the numbers are assigned to the individuals?

MS. GLENBERG: The numbers are assigned to the

vehicles, and the vehicles are indexed to the other information about the individual who owns the car, so driver's license, date of birth, Social Security number.

Index -- and I did not look it up in the dictionary before coming here -- but my understanding of the plain language of that term is that a index is a piece of information, whether it is a word or a string of numbers, that allows you to look up and find other information.

And that is what the police department does with license plates. That's why they have them and that's why they want to continue to maintain this database. If this information were meaningless, they would have no reason to maintain a database. It's meaningful because it's indexed to other information and in that sense is very much like other identification numbers such as Social Security numbers and indeed, even like personal characteristics like fingerprints in that when we look at someone's fingerprints, they're meaningless to us until we're able to link them to a person's identity, a person's name. And that is why fingerprints are useful.

In addition to fitting the definition because it

describes, locates, or indexes something, anything about an individual and that it is a agency issued identification number, ALPR data also meets the definition because personal information includes information that can be used to infer information about an individual, including that person's presence, and presence is specifically mentioned in the statute, his presence at an organization or activity or admission to an institution.

So while it may not be the case that the person who owns the car is the one driving it to the political rally, it's the fact that the car is at that political rally absolutely gives rise to an inference that that person is there with the vehicle.

So all of these elements of the definition of personal information support the Attorney General's conclusion that ALPR data falls into this definition.

The County's other argument is that even if this is personal information, the police department does not maintain a personal information system as that term is defined in the statute. And this is also incorrect for a number of reasons.

First of all, the data act does not only

regulate information systems. It also regulates the collection of information regardless of whether it is later stored in information systems. So while Ms. Baucom pointed to Section 2.2-3803 which specifically gives instructions to agencies that maintain personal information systems, I would direct the Court to 2.2-3806 which only talks about agencies maintaining personal information and does not limit those requirements to a personal information system, whatever that might be.

Clearly, the General Assembly knew how to give directions about maintaining information systems and it did so when it intended to. And in those instances where they did not directly regulate information systems but only regulated information, we need to assume that that was purposeful.

Nonetheless, putting that aside, the ALPR system does meet the definition of an information system. First, the database itself is an information system because the information system needs only to contain personal information and the name, personal number, or other identifying particulars of a data subject, does not require the actual name.

So there's not a need for a name in order for something to be an information system. There only needs to be personal information and identifying particulars which, as I've explained, does include a license plate number which, again, is not just a number but is a location and a time and a place.

Second of all, the term "information system" is very broad, and the County has given no statutory basis for the contention that it only applies to a single database within a single agency. Indeed, it's a very broad definition that encompasses the total components and operations of a record keeping process.

Again, if it was meant to be a single database, the General Assembly could've said database. If it intended it to be a record keeping process within a single agency, it could have said that. Instead, it opted for very broad language that a system of maintaining information generally and all of its components is an information system.

The Attorney General's opinion, which reaches the same conclusions that we do on the interpretation of a statute, is the only authoritative construction of the

statute that we have available to us. Courts have not interpreted the statute as it applies here. And so the AG's opinion is entitled to a certain amount of weight, and that weight is not belied by the activity in the General Assembly this past session.

Certainly, it is typical for the General Assembly to amend a statute because they don't like an Attorney General's interpretation of it. It's also quite typical for a General Assembly to amend a statute because there appears to be confusion about its ambiguity and they want to set the record straight.

And in this case, there is good reason to believe that that is what is going on. If what the General Assembly wanted to do was to add ALPRs to a statute that did not already encompass them, it could have accepted the governor's suggested amendments which did that but would have allowed the agencies to keep the information for longer than the General Assembly had wanted or that is allowed in the existing data act.

But what they preferred to do instead was to reject the governor's statute -- or the governor's amendments to keep the statute as it was which, you know,

provides greater protection to individuals and greater privacy in their license plate numbers and locations.

Additionally, another reason not to assume that the General Assembly thought it was making a -- thought it was adding ALPR information to a statute that did not already contain it, the statutory proposed bill would have done more things than that. So the statutory -- the proposed statute would have allowed agencies to keep ALPR data for seven days unlike other personal data that cannot be kept at all.

So rather than thinking that the General Assembly was amending the statute to add ALPR data, it is at least as plausible that the General Assembly was amending the statute to include the seven day exception, and in the course of doing so, clarified that ALPRs are covered by the statute.

In any event, there is no clear evidence or evidence at all that the General Assembly added or attempted to add ALPR to the statute because it did not think it was already covered. And, therefore, the Court should give considerable weight to the Attorney General opinion which, again, is the only authoritative

construction and the construction that carries out the purposes of the act to protect individuals from government collection of large amount of personal data from which personal, private information may be inferred or discovered.

Thank you, Your Honor.

THE COURT: Ms. Baucom, do you have any rebuttal?

MS. BAUCOM: Just briefly, please, Your Honor.

Your Honor, the attempted legislative changes that occurred last legislative session don't have to provide us with the legislature's reasoning behind attempting to amend the act. Case law provides us with that.

And what case law says about that is that we are to presume that if the legislature attempts that change, it's because they are making a substantive change to the act, to the legislation.

Your Honor hit the nail on the head. The license plate number is assigned not to an individual, it's assigned to a vehicle. If we put, without the legislature's help, the term "license place number" within

the definition of personal information, it will be the only data point of information that is listed in that definition that is not a number that is assigned to an individual. Social Security number, agency issued identification, driver's license number; all of those numbers are numbers that are assigned to an individual citizen and no other citizen.

A license plate number is assigned to a vehicle. Yes, that vehicle is owned by a citizen or by multiple citizens, but the number does not tell us anything about that citizen.

THE COURT: Well, then why do they collect the data?

MS. BAUCOM: The collection of the data occurs for a law enforcement purpose. As a perfect example, the State Police case that happened two days ago. I disagree that they weren't using a passive system. That information is collected so that, in the situation that happened two days ago, a state trooper receives a license plate number that's associated with a vehicle that was on the scene of a double homicide, plugs that --

THE COURT: Was the vehicle on the scene or was

the individual that owned the vehicle on the scene?

MS. BAUCOM: The vehicle was on the scene. It's interesting that Your Honor brings up that distinction. I think it's an important distinction to make. I actually have the article if Your Honor would like to see it.

(Ms. Baucom passed a document to the Court and counsel.)

Because the interesting thing that's pointed out in the article which relates to the state trooper who actually found the vehicle or saw the vehicle, had plugged the license plate number into her cruiser, received information from their passive system, meaning, you know, just the database, the lists of license plate numbers that have come into the field of that camera, and she realized that that license plate number had been captured by her camera, I think she said five minutes -- less than three minutes earlier.

In the one, two, three, fourth full paragraph, the quote from the trooper answers Your Honor's question. "'With the information coming through, I knew I had the vehicle,' Neff, an eleven year State Police veteran said in a news conference Wednesday afternoon. 'I was not sure

if it was the gentleman at all.'"

This information gives us zero information about citizens, Your Honor. It give us information about the vehicle. The state trooper used that information to direct her attention to a particular vehicle, and when she found that vehicle, this gentleman apparently committed suicide while he was still in the vehicle and crashed the car. And that was when they realized that it was the person who had been captured on video killing two other people.

But this information is maintained for a legitimate law enforcement purpose. And if our demurrer gets denied and we go into the discovery process, then it is going to be on the police department to prove to Your Honor or to prove to a jury that there is a legitimate law enforcement purpose for capturing this information.

But this is what's happening every day. We are using this information to capture people who are wanted not because the information is particular to that person, but because it's a piece of evidence in a case that is attached to a vehicle.

And if we're looking for a vehicle for purposes

like this, then we continue our investigation knowing that 'that vehicle just passed my camera three minutes ago. It's probably up the road. I should go look for it.' It tells us nothing about the individual.

THE COURT: There is no doubt in this Court's mind that the ALPR system is an excellent police tool. But that's not the question before me. The question before me is whether or not by law the Plaintiffs have pled a case by which -- a matter which the Court can consider.

And without making factual determinations in this case, the Court does note that the statutory construction under 2.2-38 and the definition of personal information, 2.2-3801, states it's included but not limited to.

And although a vehicle, the license plate, has a number attached to it, by virtue of the link to the data bank to DMV tells you who that vehicle belongs to.

And the reality of the situation is that this Court finds that that is personal information, that it's pled, the facts are pled sufficiently enough to keep it within 2.2-3801 and that the information system as defined

under that statute, that it is an information system as well with the data points and components and operations of a record keeping process. Otherwise, what would be the point of holding that information?

But, therefore, I will deny the Defendant's demurrer. But I want to commend both parties on their very interesting and well pled positions. If you all could prepare an order.

MS. BAUCOM: Thank you, Your Honor.

MS. GLENBERG: Yes, Your Honor.

THE COURT: Thank you.

* * * * *

(Whereupon, at approximately 12:48 o'clock p.m., the hearing in the above-entitled matter was concluded.)

* * * * *

CERTIFICATE OF REPORTER

I, COURTNEY SEBASTIAN, a Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceeding to the best of my ability which were thereafter reduced to typewriting under my direction, that the foregoing is a true record of said proceedings taken to the best of my ability; that I am neither counsel for, related to, nor employed by any of the parties of the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

_____

COURTNEY SEBASTIAN
Verbatim Reporter

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2016, I served a true and correct copy of the foregoing Memorandum by electronic mail and by first class mail, postage prepaid, to the following:

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