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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. LEONEL MICHEL VARGAS, Defendant.	No: CR-13-6025-EFS GOVERMENT'S SUPPLEMENTAL BRIEFING ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE FROM VIDEO SURVEILLANCE POLE CAMERA

Plaintiff, United States of America, by and through Michael C. Ormsby, United States Attorney for the Eastern District of Washington, and Alexander C. Ekstrom, Assistant United States Attorney for the Eastern District of Washington, submits supplemental briefing as required by the Court (ECF No. 55), and responds to the submission of the Amicus Curiae (ECF No. 59), as follows:

I. SUMMARY OF ARGUMENT

The front yard is the face that a house presents to the world. This societal understanding and the resulting expectation is reflected in ordinances regarding its appearance and the convention of leaving the front, and some or all of the side yard, open to public view. It is confirmed by travel down any road, urban or rural. If we wish to opt out from the convention, we build an opaque fence, which many choose

for the back yard, but some do not, allowing that area as well to be viewed from the street. This is the accepted method we use to signal an expectation of privacy, and this the Defendant failed to do.

Warrantless visual surveillance of a residence is lawful. While the Defendant's chain-link fenced front and side yard are curtilage, under either the pure trespassory or *Katz*[1] reasonable expectation analysis, there was no search. There was no physical intrusion into a constitutionally protected space as a result of the installation and operation of a pole camera on a near-by utility pole. Further, the camera allowed law enforcement to observe the Defendant's activities in the front and side yard of his residence, not the interior of the residence itself. In the absence of physical intrusion or surveillance that defeated an attempt by the Defendant to prevent the observation of the front and side yard by the casual observer, such as the installation of a high and solid fence, none of which are present in this case, there is no search under The Fourth Amendment. *Jardines*[2] and *Jones*[3], both of which involved the physical intrusion upon a house and an effect, respectively, are no bar to this law enforcement technique. *Kyllo*[4], the only Supreme Court authority for the proposition that surveillance without physical intrusion can constitute a search, is also no bar. This type of camera is both in general public use and did not expose any details of the Defendant's home that "would previously have been unknowable without physical intrusion." In the end, the Defendant knowingly exposed his actions to the public in his front yard, so that under *Katz*, he has no reasonable expectation of privacy, regardless of where the activity occurred.

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[1] *Katz v. United States*, 389 U.S. 347 (1967).

[2] *Florida v. Jardines*, 133 S.Ct. 1409 (2013).

[3] *United States v. Jones*, 132 S.Ct. 945 (2012).

[4] *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001).

II. FACTS

The installation and use of the pole camera are detailed in the affidavit of Task Force Officer (TFO) Aaron Clem in support of the Criminal Complaint in this matter. (ECF No. 1). Attached thereto are screen shots which show the capabilities of the camera. (ECF No. 1, Attachment A). In response to an inquiry from Defense Counsel, the Government advises that the camera was installed on the facilities of the Franklin County Public Utility District with their prior permission. The Government attaches a map prepared by TFO Clem showing the subject residence in relation to both the camera and surrounding residences. *Attachment 1*.

III. ARGUMENT

A. *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038 (2001)

In *Kyllo,* writing for a five-Justice majority, Justice Scalia found that the use of a "thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home," constituted an illegal search of that residence. *Kyllo v. United States*, 533 U.S. 27, (2001). The Court held:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Id. at 40. As an initial matter, the Government would submit that resort to this test is unnecessary, in light of the Court's clear statements that visual surveillance, as opposed to thermal imaging, is lawful and does not require a warrant under *Katz*. *Id.* at 31 ("...the lawfulness of warrantless visual surveillance of a home has still been preserved."), *see also Id*. at 35, FN2 ("The police might, for example, learn how many people are in a particular house by setting up year round surveillance..."). This is the case because, under *Katz*, "What a person knowingly exposes to the public, even in

his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 347 (1967), *and see United States v. Wahchumwah*, 710 F.3d 862, 867 (9th Cir. 2013) (citing same)[5]. The Defendant was shooting in his front yard, across a public road, in plain view of any potential passer-by.

While not a necessary further step, the two-part test from *Kyllo*, re-affirmed just this year in *Jardines*, compels the conclusion that no search occurred in this case. First, remotely-operated cameras, with capabilities including but not limited to pan and zoom, are both cheap and plentiful. *See* www.dropcam.com/product (demonstrating capabilities, including zoom and night vision by way of infrared LED), www.dropcam.com/buy (showing prices), www.dropcam.com/features (showing product in operation, allowing visitors to site to use zoom function and access prior recording); *see also* www.belkin.com/us/Products/ home-automation/c/netcam (showing prices); www.bestbuy.com/site/lorex-live-sd9-4-channel-2-camera-indoor-outdoor-wireless-monitoring-system/8884259.p?id=1218931027447&skuId=8884259&ref=06&loc=01&ci_src=14110944&ci_sku=8884259&extensionType={adtype}:{network}&s_kwcid=PTC!pla!{keyword}!{matchtype}!{adwords_producttargetid}!{network}!{ifmobile:M}!{creative}&kpid=8884259&k_clickid=0aa6ead8-848e-cce8-caf8-000002539895&gclid= CPKHpbb9tbsCFU_NOgod3T8Aag (showing price and capabilities); www.bhphotovideo.com/bnh/controller/home?O=&sku=887946&Q=&is=REG&A=details (showing price, approximately $100, and capability, including pan and zoom). Devices with similar capabilities to the one at bar are clearly "in general public use" and are less expensive than a smart phone, a ubiquitous personal possession that itself possesses many of the

[5] Amicus filed a brief in support of Defendant in this matter as well. *Amicus Curiae Brief of Electronic Frontier Foundation in Support of Defendant-Appellant* (May 1, 2012), 2012 WL 1596487.

same capabilities. Upon failing to satisfy either part of the test, the inquiry ends. *Kyllo*, 533 U.S. at 40. Assuming arguendo satisfaction of the first part of the test, the second part is clearly not satisfied. The second part of the test is a property-based equivalency ("explor[ing] details of the home that would previously have been unknowable without physical intrusion"). *Id*. One asks whether the incorporeal "intrusion" reveals details that could previously have been gathered only through physical trespass upon the residence. As is made clear by the screen shots attached to the complaint, no details of the home were explored, simply what occurred in the front and side yard. (ECF No. 1, Attachment A).

This final point, the distinction in case law between an actual physical trespass upon the residence (or its *Kyllo* equivalent), and mere observation of the curtilage that occurred in this case, which is clearly still constitutional, is ignored by Amicus. *Amicus Brief* at 2, *citing Kyllo*, 533 U.S. at 33, and *citing United States v. Jones*, 132 S.Ct. at 949 (2013). As indicated above, there was no "effective trespass," to the curtilage, there was simply lawful visual surveillance of what was in plain-view upon the curtilage. *Id*.

B. *United States v. Jones*, 132 S.Ct. 945 (2012)

In *Jones*, again writing for a five-Justice majority, Justice Scalia concluded that the attachment of a GPS tracking device to that defendant's vehicle, in combination with its subsequent use to monitor the vehicle's location, constituted an illegal search of that vehicle. *United States v. Jones*, 132 S.Ct. 945, 954 (2012). The case was resolved under the pre-*Katz*, common-law trespass understanding of the Fourth Amendment. *Id*. at 949, and at 950 ("...Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation."). The trespassory nature of the violation was made clear by the Court:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information.

Id. at 949. As with *Jardines* below, the facts of this case are those of a physical entry upon a protected area, and thus do not address the facts currently before the court. However, as with *Jardines*, the opinion is important in clarifying the majority's current understanding of the Court's prior decisions. Citing to *Kyllo*, the opinion states, "[t]his Court has to date not deviated from the understanding that mere visual observation does not constitute a search." *Id*. at 953, *citing Kyllo*, 533 U.S. at 31-32. The opinion indicated that, on the question of the use of traditional surveillance of the defendant's vehicle for a four week period, including the potential for aerial assistance, "our cases suggested that such visual observation is constitutionally permissible." *Id*. at 953-954. The importance of these observations to the case at bar is clear. This case involved only visual observation, not of the residence, much less an aspect of any activity occurring inside the home, but rather of the easily observable front and side yards. While the observations were made via a camera, they were clearly "mere visual observations," and lasted approximately the same period of time as the Court's hypothetical as applied to a vehicle.

Amicus argues instead from the concurrences in *Jones*. *Amicus Brief* at 8-9, *citing Jones*. However, Justice Sotomayor's concurrence makes clear that "[w]hen the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case." *Jones*, 132 S.Ct. at 955 (Sotomayor, J., concurring). The portion of the concurrence that follows, which would be dicta were the opinion controlling, is aimed at the potential issues that may be raised in future cases by novel technology such as GPS monitoring of moving vehicles, and information disclosed to third parties by computer users, not the use of a comparatively ancient technology[6], the video camera. *Id*. at 954-957. As Justice

[6] The Government recognizes that technological advances have resulted in both a decrease in price and the footprint of video recording devices, including the examples

Sotomayor stated, "resolution of these difficult questions in this case is unnecessary." *Id*. at 957. In any event, the "aggregation" concern expressed from documenting the totality of an individual's travels in a vehicle are wholly different from what an individual, who declines to erect an opaque fence, thereby knowingly exposes to the world in a front or side yard that is clearly visible from the adjacent road.

Even Justice Alito's concurrence in the judgment, which sought to apply *Katz*, acknowledged the pitfalls of the *Katz* mode of analysis, including the importation of the fact finder's expectation of privacy, and the fact that dramatic technological change, "may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes[7]." *Id.* at 955 (Alito, J., concurring in judgment). Justice Alito, after discussing the legislative response to the issue of wiretapping, noted "[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative." *Id*. at 964. The

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listed above by the Government. However, this increased availability of a long-standing and widely used static device, used as it was here, is different in kind from the very recent deployment of GPS into a multitude of devices that are now regularly accompany individuals as they move about in public.

[7] While not necessary, in light of prior decisions regarding the propriety of visual observation, this Court could well find that, as a practical matter, given the ubiquity of cameras in modern society (including but not limited to video surveillance, both public and private, and portable cameras in phones, both smart and otherwise, Google Maps, and recently released technologies such as Google Glass) the reasonable expectation is that we are likely to be observed at any time, by any number of individuals or entities, and our actions may well be recorded when we are outside our residence. Whether this expectation is desirable is a separate (and arguably legislative) question from whether the expectation exists.

Government has argued that under the post-*Katz* analysis in *Kyllo* there was no search, and that *Jardines* reaffirms the non-*Katz* meaning of the *Jones* decision. That said, the Government would urge that this general caution is well taken.

C. *Florida v. Jardines*, 133 S.Ct. 1409 (2013)

In *Jardines*, again writing for a five-Justice majority, Justice Scalia concluded that officers' physical entry onto the curtilage of the defendant's residence with a narcotics detecting canine, and the resulting use of that canine to detect the odor of marijuana at the base of the front door, constituted an illegal search. *Florida v. Jardines*, 133 S.Ct. 1409, 1413, 1417-18 (2013). The decision was not based on a determination of a reasonable expectation of privacy under *Katz*, but rather "the Fourth Amendment's property-rights baseline," where the physical intrusion was sufficient to find a search. *Id*. at 1417. The opinion cited to *Jones* for the proposition that it was unnecessary to resort to a *Katz* analysis, "when the government gains evidence by physically intruding on constitutionally protected areas." *Id. citing United States v. Jones*, 132 S.Ct. 945, 951-52 (2012). Because the Supreme Court found officers exceeded the scope of their license while on the property, the search was unlawful. *Id*. Because the opinion explicitly disclaims conducting a *Katz* analysis, *Jardines* does not address the facts at bar. *Id*. ("Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*.") However, the opinion is important for its restatement of the meaning of *Jones* and *Kyllo*.

As indicated above, the opinion made clear that *Jones* was also a physical trespass case: it relied on the physical intrusion by officers in mounting the GPS tracker on that defendant's vehicle in finding that the resulting tracking was a search. *Id., citing Jones*, 132 S.Ct. at 950. The opinion also, in dismissing an argument by the State Attorney General and dissent, reaffirms the two-part test for an unlawful search

in the holding of *Kyllo*, a test which includes in its second part a property-based equivalency for what constitutes a search under a *Katz* analysis. *Id.*, *citing Kyllo v. United States*, 533 U.S. at 27 (2001). This is clear because of the following portion of the opinion:

> This argument is directed to our holding in [*Kyllo*], that surveillance of the home is a search where "the Government uses a device that is not in general public use" to "explore details of the home that would previously have been unknowable *without physical intrusion*."

Id., *citing Kyllo*, 533 U.S. at 40 (emphasis in original). As argued above, under that test, the use of pole camera in this case was not a search.

Amicus argues for a broad interpretation of *Jardines*, relying in part on *Silverman*, to argue that "the focus is not on technical trespass." *Amicus Brief* at 13, *citing Jardines* and *Silverman v. United States*, 365 U.S. 505, 512 (1961). In the first instance, the language cited is clearly that of a technical trespass. *Id.* ("enters" and "actual intrusion"). Furthermore, *Jardines* was a physical or technical trespass, and as previously indicated, the opinion make clear that the decision is grounded on that fact. *Jardines*, 133 S.Ct. at 1417 ("One virtue of the Fourth Amendment property-rights baseline is that it keeps the easy cases easy.") *Silverman* is a pre-*Katz* decision, and is again on its facts clearly a technical trespass, specifically an "unauthorized physical penetration into the premises occupied by the petitioners." *Silverman*, 365 U.S. at 506, 509 (1961). *Jardines* is distinguishable and is neither illustrative nor assistive in the resolution of this matter, other than emphasizing the property-based equivalency of *Kyllo*. Amicus' argument finds no support in either citation.

D. *LaFave, Search & Seizure*

Section 2.2 of Professor LaFave's treatise on search and seizure confirms the understanding above: that visual surveillance is not a search in the first instance.

LaFave, Search & Seizure: A Treatise on the Fourth Amendment (5th Edition) (Hereinafter *LaFave*), § 2.2(f), at pg. 4. The treatise states:

> In an earlier discussion, it was concluded that where police use binoculars to view from a distance public conduct that they could have viewed with the naked eye from closer proximity but for their desire not to reveal their surveillance, the use of the binoculars should not be deemed a search.

LaFave, § 2.2(f), at pg. 4[8], *above quote containing* FN 284, *referencing LaFave*, § 2.2(c), pg. 1, FN 106, *in turn referencing United States v. Lee*, 274 U.S. 559 (1927). That earlier section of the treatise makes clear that use of "unmanned cameras, so that there is no contemporary naked-eye observation," does not change the analysis: such photography is not a search. *LaFave*, § 2.2(c), at pg. 4, FN 141, *citing United States v. McIver*, 186 F.3d 1119, 1125 (9th Cir. 1999), *overruled on other grounds by*, *United States v. Jones*, 132 S.Ct. 945 (2012). *McIver*, being from this Circuit is instructive on this point, as it rejected:

> [T]he notion that the visual observation of the site became unconstitutional merely because law enforcement chose to use a more cost-effective "mechanical eye" to continue the surveillance.

McIver, 186 F.3d at 1125 (9th Cir. 1999), *citing United States v. Knotts*, 460 U.S. 276, 284 (1983) ("Insofar as respondent's complain appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now."). Certainly, there are limits, such as an object being "out of the line of normal sight from contiguous areas where [a] passerby or others might be," but that isn't the compliant of either the Defendant

[8] The pagination of the Treatise appears to vary depending on the program with which it is accessed, therefore the Government is including, where possible, the footnotes as a further reference.

or Amicus. *LaFave*, § 2.2(c), at pg. 2, *following* FN 134. It is clear from the facts of this case, in particular the fact that the chain-link fence was no barrier to viewing the activities in the yard, that the camera's placement provided no advantage over the view of available to a passerby other than more effective surveillance, which as indicated above is not a valid complaint. As the treatise explains:

> Perhaps the easiest situation with which to deal is that in which the incriminating conduct is seen out in the open, whether in a public place or on private property. It may sometimes be true that in this situation the defendant can honestly say that he had an actual expectation of privacy, at least in the sense that he was confident there was no one in such immediate proximity as to be able to detect the incriminating character of those objects or activities with the naked eye. But under *Katz* the expectation must be justified; it must be one, as Justice Harlan helpfully put it, "that society is prepared to recognize as 'reasonable.'"

LaFave, § 2.2(c), at pg. 2, *following* FN 118. This is the case at bar, an expectation that may have been actually held subjectively by the Defendant, but one which society is not prepared to recognize as reasonable. This is the same expectation that motivates the drunk driver to take the back roads home: his or her expectation that he will not be detected because there will be a lower concentration of officers on that route. This aspect of *Katz* defeats the Defendant's and Amicus's unsupported assertion of an increased rural expectation of privacy. *Memorandum of Defendant* at 8 ("The remote character[9] of the defendant's home is such that his expectation of privacy in his front yard is equally as reasonable as the back."); *Amicus Brief* at 3. ("...the house was in such an isolated area that it was reasonable for him to expect that not many people passing by would observe it..."). An open front yard, and in this case side yard, carries with it the same expectation of privacy, whether it is part of a house on a main thoroughfare, the only house on a cul-de-sac in a new housing development, or a

[9] In fact, as made clear through *Attachment 1*, the location, while rural, has many neighboring residences, including one as close as approximately 250 feet.

house on a country road. That is to say there is no expectation at all. It is the lack of solid fencing, not the geographic location that controls. Misplaced confidence that your actions in the open have gone unnoticed is not a reasonable expectation of privacy.

The treatise cited to recent authority from the Tenth Circuit that addressed essentially the same facts as the present case, and found that no search occurred. *LaFave*, § 2.2 (f), page 7, FN 312, *citing United States v. Jackson*, 213 F.3d 1269, 1276, 1281 (10th Cir. 2000), *judgment vacated on other grounds by*, 531 U.S. 1033 (2000). In *Jackson*, law enforcement installed video cameras "on tops of telephone poles overlooking [defendants residences]," with "zoom close enough to read a license plate," however the cameras could not view inside of the houses. *Jackson*, 213 F.3d at 1281. After commenting that, under *Katz*, what one knowing exposes to the public is not private, and finding that the cameras were "capable of observing only what any passerby would easily have been able to observe," the Court concluded:

> Jackson's rights under the Fourth Amendment were not implicated, and there was no need for the police officers to obtain a search warrant before installing and utilizing the video camera.

Id. at 1282. As argued above, neither *Jones* nor *Jardines* compel a different result. There is also no indication in this circuit that would auger for a different result. *See United States v. Brooks*, 911 F.Supp.2d 836 (D. Ariz., Nov. 28, 2012) (Warrantless installation and use of pole camera for video surveillance did not violate Fourth Amendment).

E. *Amicus Curiae*

Amicus asserts that the placement and utilization of the pole camera in this case was a search under the Fourth Amendment, requiring a warrant. *Amicus Brief* at 1. Two arguments are proffered. First is that there is a reasonable expectation of privacy to be free of video monitoring in a front yard visible to a passerby. *Id*. at 2. Second is

that the use[10] of the pole camera constitutes an effective trespass onto the curtilage. *Id*.

As to Amicus' first assertion, that the front and side yard are curtilage, it is clearly true under *Jardines*. *Amicus Brief* at 3. However, as argued above and in the Government's initial briefing, the status of the area is irrelevant to the determination of this case, under both *Katz*, as the activity was knowingly exposed[11], and under long-standing precedent that such surveillance is not a search in the first instance. Amicus then argues from *Nerber*. *Id*. at 4, *citing United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000). However, in *Nerber*, the Ninth Circuit suppressed hidden video surveillance, but did so because it found that drug dealers had a legitimate expectation of privacy in their hotel room after police informants left. *Nerber*, 222 F.3 at 603. As to the earlier surveillance, the Court concluded that "defendants had no reasonable expectation that they would be free from hidden video surveillance while the informants were in the room." *Id*. at 604.

Ciraolo, *Dow Chemical* and *Riley* are, of course, distinguishable on their facts, being fly-over cases. *Amicus Brief* at 5, *citing California v. Ciraolo*, 476 U.S. 207 (1986), *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), and *citing Florida*

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[10] Amicus uses slightly different language, however the Government understands this to be the argument.

[11] When Amicus concedes that the Defendant "did not have a fence surrounding his front yard," they are correct in that the south face of the property has an un-gated driveway that allows vehicle entrance into the front yard itself. *Government's Response*, ECF No. 48, *Attachment A* (Photo Titled "Michael Vargas residence from the pole"). There is not a fence completely surrounding the property. A chain link or wire mesh fence does span the east, or front face of the property, but it is clearly not a barrier to observation by either the camera or any passer-by.

v. Riley, 488 U.S. 445 (1989). Further none of these earlier cases undermine Justice Scalia's comments in, simply by way of example, *Kyllo*. *Kyllo*, 533 U.S. at 35, FN2 ("The police might, for example, learn how many people are in a particular house by setting up year round surveillance..."). Amicus' citations to a footnote in *Ciraolo*, and the District Court's decision in *Jones* are similarly inapposite and not controlling. *Amicus Brief* at 5-6, *citing Ciraolo*, *and citing Untied States v. Maynard*, 615 F.3d 544 (D.C.Cir. 2010).

Amicus next cites to *Gonzalez*. *Id*. at 6, *citing United States v. Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003). The quotation, from an opinion which found no violation in video recording in a mailroom, could mislead. *Id*. This is the case because, *Taketa*, the authority used by *Gomez* for the quotation (authority that is omitted by Amicus in its citation) is cited verbatim in the next paragraph as follows:

> However, "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy." *Taketa*, 923 F.2d at 677. Indeed, "[v]ideo taping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye." *Id*. (citations omitted)....we concluded the defendant had no objectively reasonable expectation of privacy that would preclude video surveillance of activities already visible to the public.

Gonzales, 328 F.3d at 548, *quoting United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991). Defendant's direct citation to *Taketa*, *Trujillo* and *Richards* are similarly unavailing: the cases are distinguishable because they all involved a trespass to the interior of a structure and the language quoted is dicta. *Amicus Brief* at 6-7, *citing Taketa* (installation of hidden video camera in ceiling of office), *citing Trujillo v. City of Ontario*, 428 F.Supp. 2d 1094 (C.D. Cal. 2006) (secret installation of video camera in locker room) and *Richards v. County of Los Angeles*, 775 F.Supp. 2d (C.D. Cal. 2011) (covert videotaping in dispatch room).

Shafter, offered by Amicus as similar to the case at bar, is also clearly distinguishable. *Amicus Brief* at 7, *citing Shafer v. City of Boulder*, 896 F.Supp. 2d 915 (D.Nev. 2012). The case involved an opaque-fenced back yard, not an open front yard. *Shafer*, 896 F.Supp. 2d at 929 (Back yard was "surrounded by a solid-paneled, four-to-five foot wooden fence. Further, Shafter made significant attempts to protect his backyard from observation from people passing by and from his neighbors"). Unlike the case at bar, the cameras in *Shafer* defeated a solid privacy fence, one to which the homeowner added plywood in an attempt to prevent being observed. *Id*. The cameras were also trained on the bathroom window, that presumably otherwise would have been shielded by the privacy fence. *Id*. Had the Defendant in this case built a solid fence, it would be a different matter, here he was shooting from his open front yard across a public road.

The Government has previously addressed Amicus' treatment of *Kyllo*, *Jones* and *Jardines* above. Amicus cites to cases that are limited on their facts to GPS location monitoring, and then confounds the overflight cases with simple ground based visual surveillance. *Amicus Brief* at 9-10. As indicated in prior briefing, Amicus misconstrues *Cuevas-Sanchez*. *Amicus Brief* at 11, *citing United States v. Cuevas–Sanchez*, 821 F.2d 248 (5th Cir.1987). In *Cuevas-Sanchez*, the police placed a camera on top of a power pole overlooking the defendant's solid ten-foot-high fence surrounding his back yard. The defendant had a reasonable expectation of privacy that would have been violated because the fence surrounded, and prevented a casual view of his curtilage. *Id*. at 251 and 251 FN1 (noting the presence of a 10-foot-high metal fence, as opposed to chain link fence elsewhere on property). Backyards are different from front yards, and even a backyard can be surveilled under appropriate circumstances. *United States v. Anderson-Bagshaw*, 509 Fed.Appx. 396 (6th Cir. 2012) (No Fourth Amendment violation in pole camera filming backyard from adjacent vacant lot, from utility pole). Because there was no search, Amicus' citation

to *Koyomejian* is also inapposite. *Amicus Brief* at 14, *citing United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1991) (en banc).

IV. CONCLUSION

Whether analyzed under *Katz*, *Kyllo*, *Jones* or *Jardines*, no reasonable expectation of privacy existed to be invaded and no search occurred. The Defendant's motion should be denied.

DATED this 20th day of December, 2013.

MICHAEL C. ORMSBY
United States Attorney

s/ Alexander C. Ekstrom
ALEXANDER C. EKSTROM
Assistant United States Attorney

I hereby certify that on December 20, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: John Matheson, Robert M. Seines (for Electronic Frontier Foundation), Hanni M. Fakhoury (for Electronic Frontier Foundation) , Jennifer Lynch (for Electronic Frontier Foundation).

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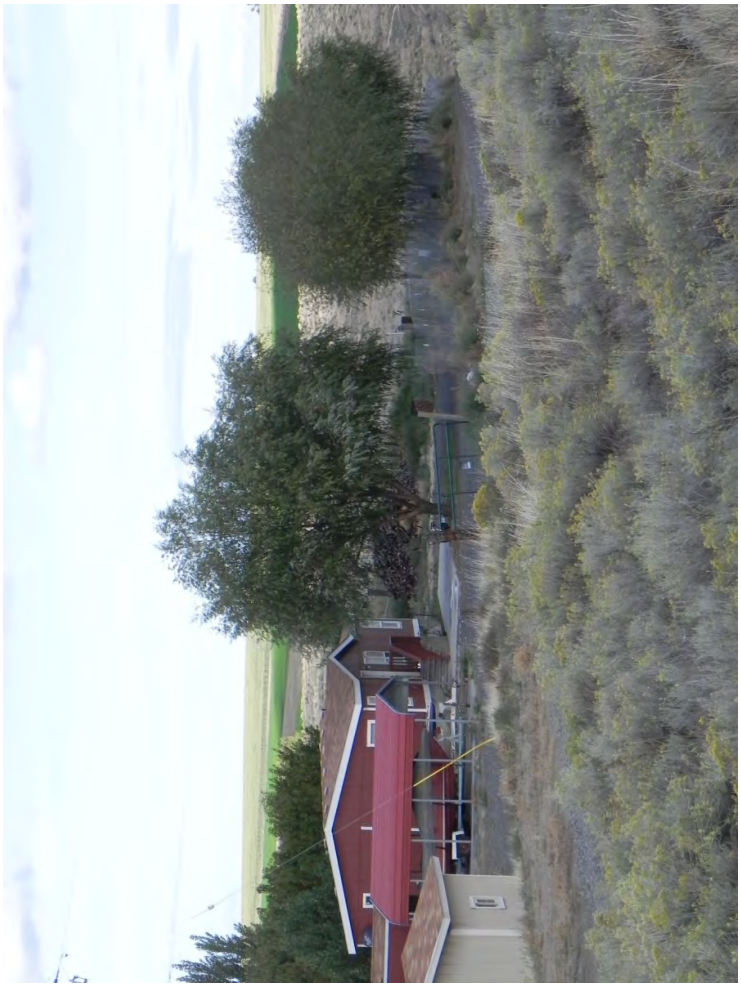
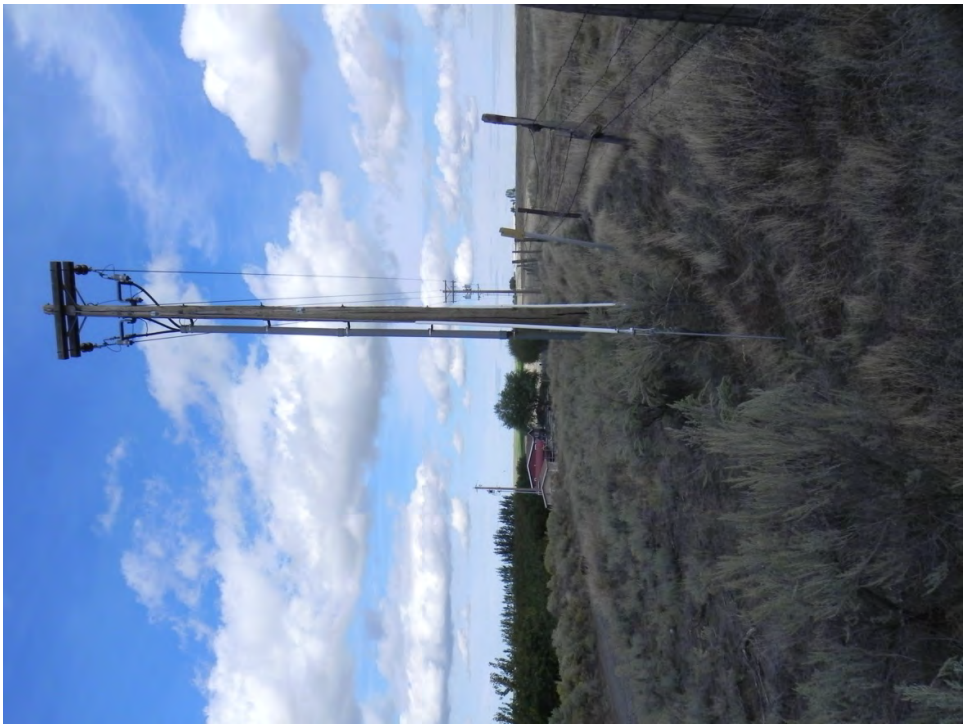
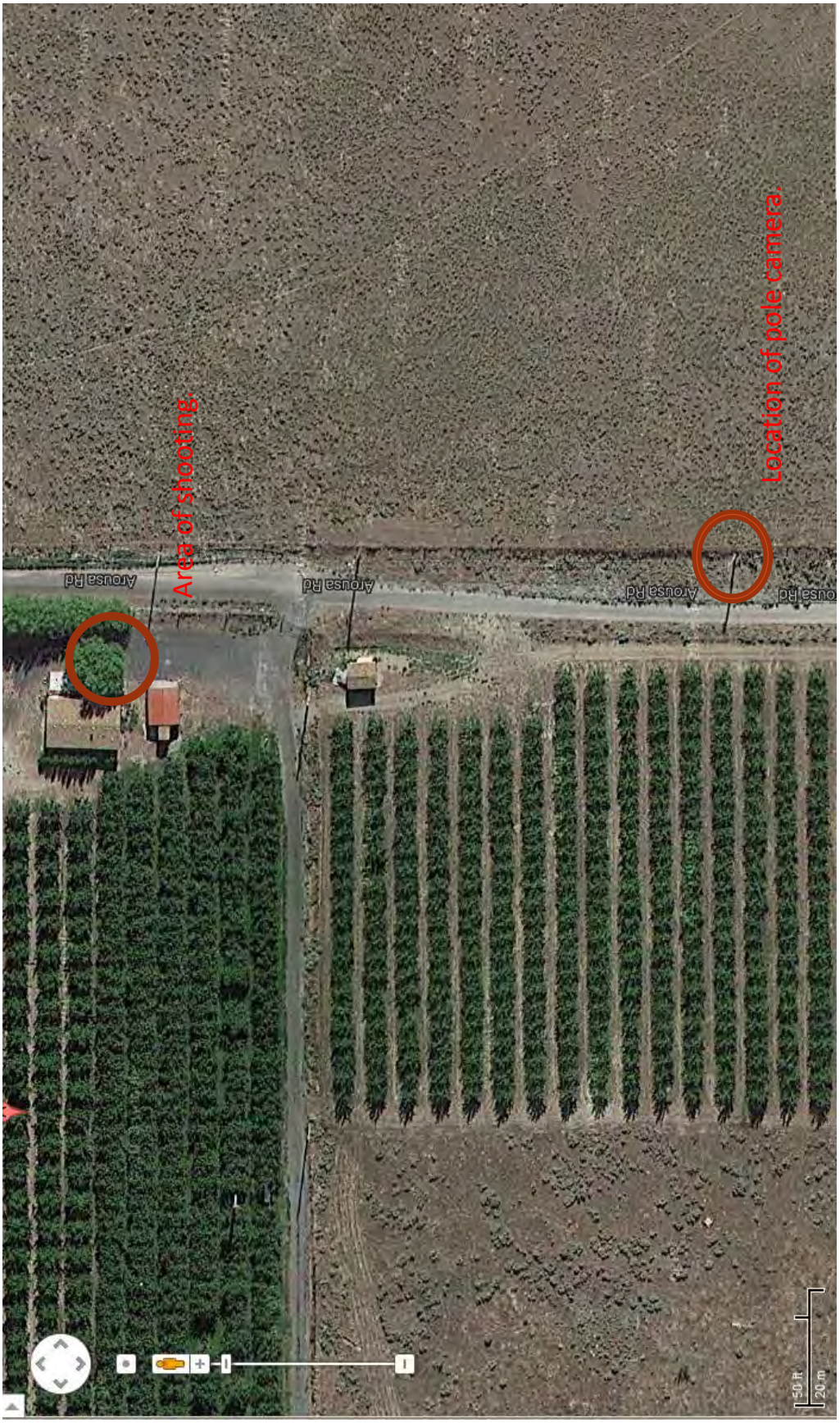
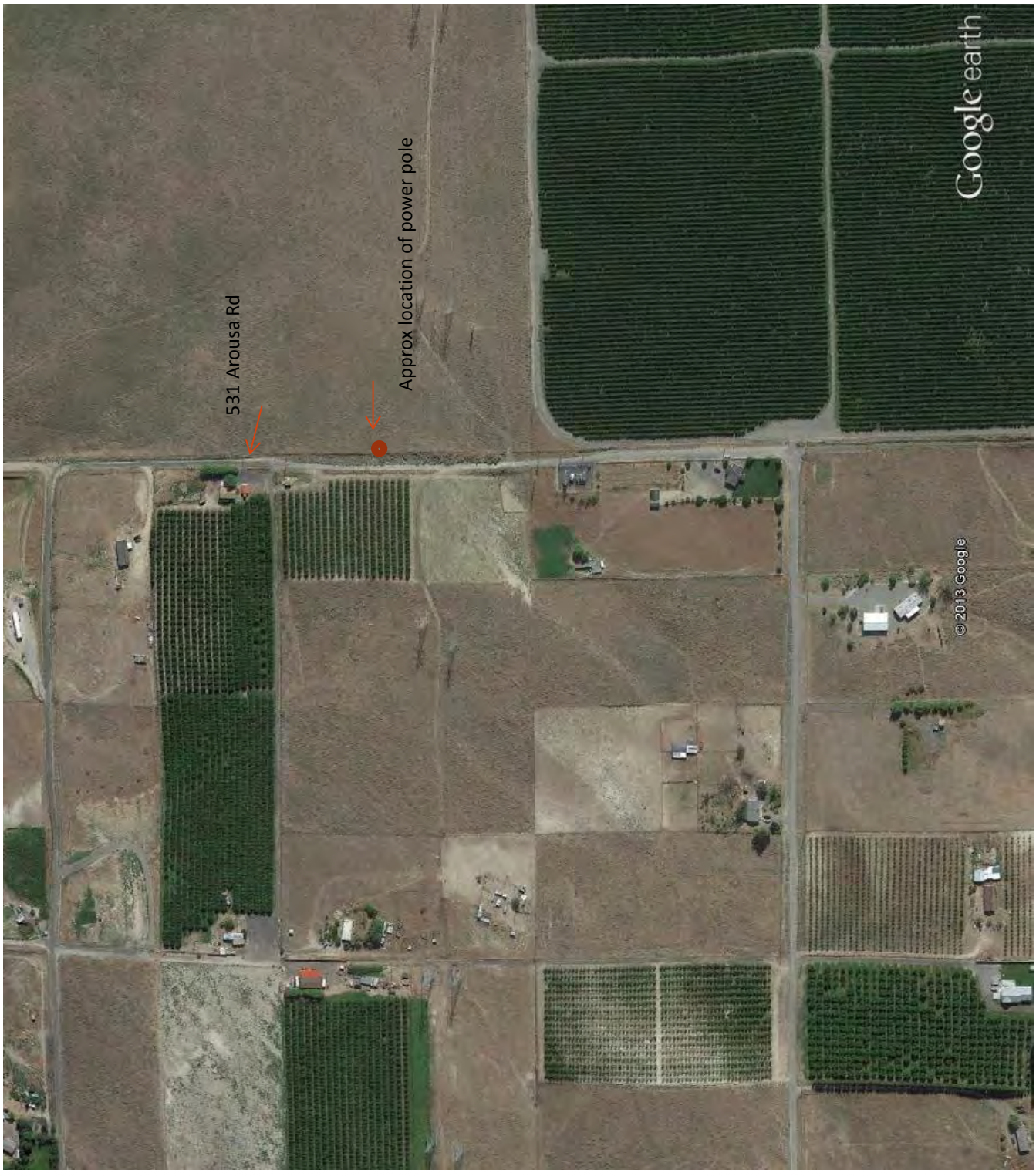


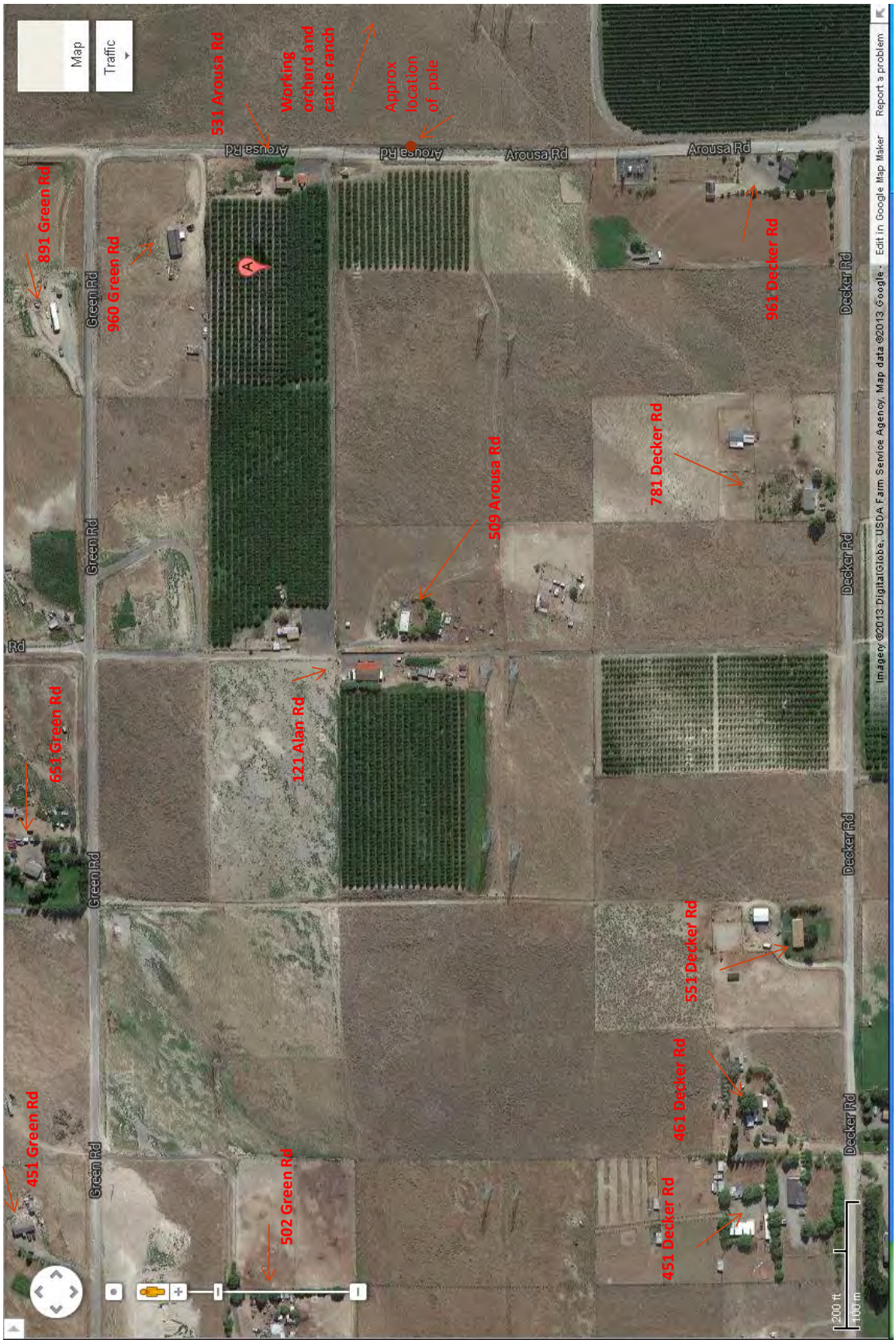
Michel Vargas residence from the pole.



View of pole with residence in background


Area of shooting.
Location of pole camera.
Arouse Rd
50 ft
20 m


531 Arousa Rd
Approx location of power pole
Google earth
© 2013 Google


Map
Traffic
531 Arousa Rd
Working orchard and cattle ranch
Approx location of pole
Arousa Rd
Arousa Rd
Arousa Rd
Arousa Rd
891 Green Rd
960 Green Rd
961 Decker Rd
Green Rd
Decker Rd
781 Decker Rd
509 Arousa Rd
121 Alan Rd
651 Green Rd
Green Rd
Decker Rd
551 Decker Rd
461 Decker Rd
451 Green Rd
Green Rd
Decker Rd
451 Decker Rd
502 Green Rd
200 ft
100 m
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Edit in Google Map Maker
Report a problem